No. 127318

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. JUAN VILLAREAL, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-18-1817 There on Appeal from the Circuit Court of Cook County, Illinois, Nos. 12 CR 13785 & 11 CR 1862501 The Honorable Angela Munari Petrone, Judge Presiding.

BRIEF OF RESPONDENT-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

Petitioner pleaded guilty to unlawful possession of a firearm by a street gang member under 720 ILCS 5/24-1.8(a)(1). He appeals from the appellate court's judgment affirming the circuit court's summary denial of postconviction relief with respect to that conviction. No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

Under 720 ILCS 5/24-1.8(a)(1), street gang members may not possess a firearm and firearm ammunition in public without a valid Firearm Owner's Identification (FOID) Card. The issues presented are:

1. Whether section 24-1.8(a)(1)'s definition of street gang membership is sufficiently clear to comport with procedural due process.

2. Whether section 24-1.8(a)(1)'s prohibition against street gang members possessing a firearm and firearm ammunition in public without a valid FOID Card comports with substantive due process because it is rationally related to the statute's purpose of protecting the public from gang-related gun violence.

3. Whether section 24-1.8(a)(1) comports with the Eighth Amendment because its prohibition against the public possession of a firearm and firearm ammunition without a valid FOID Card by a street gang member does not punish the mere status of being a street gang member.

JURISDICTION

On September 29, 2021, this Court allowed petitioner's petition for leave to appeal. Accordingly, this Court has jurisdiction under Supreme Court Rules 315 and 612(b).

STATUTES INVOLVED

Section 24-1.8 of the Criminal Code 1961[1] provides in relevant part:

> **Unlawful possession of a firearm by a street gang member.**
>
> (a) A person commits unlawful possession of a firearm by a street gang member when he or she knowingly:
>
> (1) possesses, carries, or conceals on or about his or her person a firearm and firearm ammunition while on any street, road, alley, gangway, sidewalk, or any other lands, except while inside his or her own abode or inside his or her fixed place of business, and has not been issued a currently valid Firearm Owner's Identification Card and is a member of a street gang[.]
>
> * * *
>
> (b) Unlawful possession of a firearm by a street gang member is a Class 2 felony for which the person, if sentenced to a term of imprisonment, shall be sentenced to no less than 3 years and no more than 10 years. . . .
>
> (c) For the purposes of this Section:
>
> "Street gang" or "gang" has the meaning ascribed to it in Section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act [740 ILCS 147/10].

[1] Section 24-1.8 remains substantively unchanged in the Criminal Code of 2012.

> "Street gang member" or "gang member" has the meaning ascribed to it in Section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act [740 ILCS 147/10].

720 ILCS 5/24-1.8.

Section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act defines "street gang" or "gang" as

> any combination, confederation, alliance, network, conspiracy, understanding, or other similar conjoining, in law or fact, of 3 or more persons with an established hierarchy that, through its membership or through the agency of any member engages in a course or pattern of criminal activity.

740 ILCS 147/10.

Section 10 defines "course or pattern of criminal activity" as

> 2 or more gang-related criminal offenses committed in whole or in part within this State when:
>
> (1) at least one such offense was committed after the effective date of this Act;
>
> (2) both offenses were committed within 5 years of each other; and
>
> (3) at least one offense involved the solicitation to commit, conspiracy to commit, attempt to commit, or commission of any offense defines as a felony or forcible felony under the Criminal Code of 1961 [720 ILCS 5/1-1 *et seq*.].
>
> "Course or pattern of criminal activity" also means one or more acts of criminal defacement of property under Section 21-1.3 of the Criminal Code of 1961 [720 ILCS 5/21-1.3], if the defacement includes a sign or symbol intended to identify the streetgang.

Id.

Section 10 defines "gang-related" as

> any criminal activity, enterprise, pursuit, or undertaking directed by, ordered by, authorized by, consented to, agreed to,

requested by, acquiesced in, or ratified by any gang leader, officer, or governing or policy-making person or authority, or by any agent, representative, or deputy of such officer, person, or authority:

(1) with the intent to increase the gang's size, membership, prestige, dominance, or control in any geographical area; or

(2) with the intent to provide the gang with any advantage in, or any control or dominance over any criminal market sector, including but not limited to, the manufacture, delivery, or sale of controlled substances or cannabis; arson or arson-for-hire; traffic in stolen property or stolen credit cards; traffic in prostitution, obscenity, or pornography, or that involves robbery, burglary, or theft; or

(3) with the intent to exact revenge or retribution for the gang of any member of the gang; or

(4) with the intent to obstruct justice, or intimidate or eliminate any witness against the gang or any member of the gang; or

(5) with the intent to otherwise directly or indirectly cause any benefit, aggrandizement, gain, profit or other advantage whatsoever to or for the gang, its reputation, influence, or membership.

Id.

Section 10 defines "streetgang member" or "gang member" as

any person who actually and in fact belongs to a gang, and any person who knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a course or pattern of gang-related criminal activity, whether in a preparatory, executory, or cover-up phase of any activity, or who knowingly performs, aids, or abets any such activity.

Id.

STATEMENT OF FACTS

In November 2011, petitioner was charged in Case No. 11 CR 1862501 with, among other offenses, *see* C20-29, unlawful possession of a firearm by a street gang member in violation of 720 ILCS 5/24-1.8(a)(1) for knowingly possessing a firearm and firearm ammunition without having been issued a valid FOID Card and while a member of a street gang, C19.[2] The circuit court released petitioner on bond and, four months later, he was arrested for shooting at someone from the window of a moving car, Sup. R12-13, and charged in Case No. 12 CR 1378501 with attempted first degree murder, aggravated discharge of a firearm, defacing identification marks of a firearm, and aggravated unlawful use of a weapon (AUUW), C37; R63.

In April 2014, petitioner entered negotiated guilty pleas in both cases. Sup. R5-6. Under the plea agreements, he pleaded guilty to one count of unlawful possession of a firearm by a street gang member in Case No. 11 CR 1862501 and one count of aggravated discharge of a firearm in Case No. 12 CR 1378501 in exchange for dismissal of the remaining charges and the prosecution's recommendation of consecutive four- and eight-year prison terms, respectively. *Id.* After the circuit court admonished petitioner and

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[2] Citations to the common law record appear as "C__," to the report of proceedings as "R__," to the supplemental report of proceedings as "Sup. R__," to petitioner's brief as "Pet. Br. __," to petitioner's appendix as "A__," and to petitioner's petition for leave to appeal as "PLA __." Citations to petitioner's opening brief in the appellate court and the People's appellee's brief in the appellate court appear as "Pet. App. Br. __" and "Peo. App. Br.__," respectively.

determined that his pleas and waivers of his rights to jury trials and pre-sentence investigation reports were knowing and voluntary, Sup. R7-11, it considered the stipulated factual bases for the charges, Sup. R11-13.

With respect to the charge of unlawful possession of a firearm by a street gang member, petitioner stipulated that, in October 2011, police stopped his car based on reports that it was involved in a neighborhood shooting. Sup. R12. Inside the car, petitioner, who had neither a driver's license nor a FOID Card, possessed a loaded handgun. *Id.* Petitioner further stipulated that he was "a member of the Satan's Disciples from 24th and Washtenaw." *Id.* With respect to the 2012 charge of aggravated discharge of a firearm, petitioner stipulated that, while riding as a passenger in a car driven by his codefendant, Oscar Montes, he fired a gun out the window at someone. *Id.*

The circuit court accepted petitioner's guilty pleas and imposed the agreed-upon sentences. Sup. R14-15. Petitioner neither moved to withdraw his guilty pleas nor appealed.

Four years later, in April 2018, petitioner filed a "petition for post-judgment relief" pursuant to 735 ILCS 5/2-1401, arguing that he could not be required to serve a term of mandatory supervised release upon the completion of his prison terms. C66-90. The circuit court construed the pleading as a postconviction petition, *see* R60, and denied it as untimely and patently without merit, R63-67; C98-100.

Petitioner appealed, A23, and the appellate court affirmed. *People v. Villareal*, 2021 IL App (1st) 181817, ¶ 30. Petitioner argued in his opening brief that section 24-1.8(a)(1) violates the Eighth Amendment because it punishes the status of being a street gang member. *Id.* ¶ 11. On its own motion, the appellate court ordered supplemental briefing on the applicability of two cases from other jurisdictions that neither party had cited in their briefs: *State v. O.C.*, 748 So. 2d 945 (Fla. 1999), and *State v. Bonds*, 502 S.W.3d 118 (Tenn. Crim. App. 2016). *Id.* ¶ 8 n.1; *see* Def. App. Br. 1-10; Peo. App. Br. 1-10. Relying on those cases, petitioner argued in his supplemental brief that section 24-1.8(a)(1) also violates substantive due process. *Id.* ¶¶ 2 n.1, 24.

The appellate majority rejected petitioner's Eighth Amendment claim because section 24-1.8(a)(1) does not impose criminal liability based on status alone, but instead for the act of public possession of a firearm without a FOID Card, *id.* ¶ 17, and rejected petitioner's substantive due process claim as forfeited because he did not raise it in his opening brief, *id.* ¶¶ 26-28. The dissent would have held that section 24-1.8(a)(1) is unconstitutional under *O.C.* and *Bonds* because it punishes unlawful firearm possession more harshly if committed by a street gang member without requiring that the offender's unlawful firearm possession be related to his gang membership. *Id.* ¶¶ 33-35, 44 (Walker, J., dissenting).

STANDARD OF REVIEW

Whether a statute is constitutional is a question of law that this Court reviews de novo. *People v. Coty*, 2020 IL 123972, ¶ 22 (reviewing Eighth Amendment challenge de novo); *People v. Plank*, 2018 IL 122202, ¶ 10 (reviewing vagueness challenge de novo); *People v. Hollins*, 2012 IL 112754, ¶ 13 (reviewing substantive due process challenge de novo).

ARGUMENT

Section 24-1.8(a)(1) prohibits the possession of firearms and firearm ammunition in public without a valid FOID Card by a street gang member, whom it defines as a person who makes himself available to a street gang to act as an instrument through which it may commit its crimes. Petitioner raises three facial challenges to this prohibition, all of which focus on the element of street gang membership, and all of which are meritless. First, the statute's definition of "street gang member" is not unconstitutionally vague on its face because it allows a person of ordinary intelligence to know whether he is a street gang member and provides an objective standard to govern law enforcement. Second, section 24-1.8(a)(1) comports with substantive due process because its prohibition against street gang members being unlawfully armed in public is rationally related to its purpose of protecting the public from gang-related gun violence. And third, section 24-1.8(a)(1) comports with the Eighth Amendment because it does not prohibit an involuntary status alone; rather, it prohibits voluntary acts — possession of firearms and

firearm ammunition — in combination with the status of street gang membership, which is not involuntary by its nature.

I. Section 24-1.8(a)(1) Comports with Procedural and Substantive Due Process.[3]

Because "[a]ll statutes carry a strong presumption of constitutionality," *People v. Mosley*, 2015 IL 115872, ¶ 22, a party who challenges the constitutionality of a statute bears the "heavy burden" of "clearly establish[ing]" its invalidity," *People v. Rizzo*, 2016 IL 118599, ¶ 23 (internal quotation marks omitted). Courts, in turn, "have a duty to uphold the constitutionality of a statute whenever reasonably possible, resolving any doubts in favor of the statute's validity." *Id.*

To determine whether section 24-1.8(a)(1)'s prohibition against unlawful possession of a firearm and firearm ammunition by a street gang member is constitutional, the Court must first construe the statutory language, for "[a] court cannot determine whether a statute reaches too far without first knowing what the statute covers." *People v. Minnis*, 2016 IL 119563, ¶ 25; *see Wilson v. Cnty. of Cook*, 2012 IL 112026, ¶ 24. This Court's "primary objective in construing a statute is to ascertain and give effect to the intent of the legislature." *People v. Boyce*, 2015 IL 117108, ¶ 15. "The most

[3] Although petitioner did not raise his vagueness or substantive due process claims in the circuit court, did not raise his vagueness claim (or properly raise his substantive due process claim) in the appellate court, and did not raise either claim in his petition for leave to appeal, this Court has held that facial challenges to the constitutionality of a statute may be raised at any time. *See People v. Price*, 2016 IL 118613, ¶ 51.

reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning," which the Court construes in light of "the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another." *Id.*

A. Section 24-1.8(a)(1) prohibits the public possession of a firearm and firearm ammunition without a FOID Card by agents of organized crime.

Section 24-1.8(a)(1) prohibits knowing possession of a firearm and firearm ammunition in public without a valid FOID Card if one is a street gang member. 720 ILCS 5/24-1.8(a)(1). Because section 24-1.8(a)(1) adopts the definitions of the terms "street gang" and "street gang member" provided in section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act, 720 ILCS 5/24-1.8(c); *see* 740 ILCS 147/10, construing section 24-1.8(a)(1) requires a construction of those definitions, *see People v. Murray*, 2019 IL 123289, ¶ 24.

1. Under section 24-1.8(a)(1), a "street gang" is a group that engages in organized crime.

Under section 24-1.8, a "street gang" or "gang" is "any combination, confederation, alliance, network, conspiracy, understanding, or other similar conjoining, in law or in fact of 3 or more persons with an established hierarchy" — that is, a hierarchical organization comprised of three or more people — "that, through its membership or through the agency of any member, engages in a course or pattern of criminal activity." 740 ILCS

147/10. A "course or pattern of criminal activity" is defined in relevant part as "2 or more gang-related criminal offenses." *Id.* In turn, a criminal offense is "gang-related" if it meets two statutory criteria. First, the offense must be committed at the behest of a superior in the organizational hierarchy, having been "directed by, ordered by, authorized by, consented to, agreed to, requested by, acquiesced in, or ratified by any gang leader, officer, or governing or policy-making person or authority, or by any agent, representative, or deputy of any such officer, person, or authority." *Id.* Second, the offense must have been directed by that superior "with the intent to" advance one of five organizational interests: (1) "increas[ing] the gang's size, membership, prestige, dominance, or control in any geographical area"; (2) "provid[ing] the gang with any advantage in, or any control or dominance over any criminal market sector"; (3) "exact[ing] revenge or retribution for the gang or any member of the gang"; (4) "obstruct[ing] justice, or intimidat[ing] or eliminat[ing] any witness against the gang or any member of the gang"; or (5) "otherwise directly or indirectly caus[ing] any benefit, aggrandizement, gain, profit or other advantage whatsoever to or for the gang, its reputation, influence, or membership." *Id.*

Thus, for the purposes of section 24-1.8(a)(1), a street gang is a hierarchical organization that advances its organizational interests by committing crimes through its members. *See id.* Because this definition turns on a criminal organization's structure, it excludes some groups that

might be thought of as "gangs" in other contexts. For example, sociologists may describe "gangs" that "eschew[ ] the traditional vertical command structures" in favor of "horizontally organized, neighborhood-based cliques that have little or no formal leadership structure." *The Fracturing of Gangs and Violence in Chicago: A Research-Based Reorientation of Violence Prevention and Intervention Policy*, Great Cities Institute, University of Illinois at Chicago 1, 8 (Jan. 2019), *available at* https://greatcities.uic.edu/wp-content/uploads/2019/01/The_Fracturing_of_Gangs_and_Violence_in_Chicago.pdf (last visited Aug. 15, 2022). But such a group is not a gang under section 24-1.8(a)(1) because it lacks the hierarchical structure that the statute requires. *See* 740 ILCS 147/10 (statutory "gang" requires "an established hierarchy"). In other words, street gangs under section 24-1.8(a)(1) are not just any violent group that may be thought of colloquially as a "gang," but groups that engage in organized crime. *See Black's Law Dictionary* 1133 (8th ed. 2004) (defining "organized crime" as "[w]idespread criminal activities that are coordinated and controlled through a central syndicate" and "[p]ersons involved in these criminal activities").

2. Under section 24-1.8(a)(1), a "street gang member" is someone who participates in organized crime.

A person is a "street gang member" or "gang member" under section 24-1.8(a)(1) if he satisfies one of two statutory definitions. First, a person is a street gang member if he "actually and in fact belongs to a gang." 740 ILCS 147/10. Second, a person is a street gang member if he "knowingly acts in the

capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a course or pattern of gang-related criminal activity, whether in a preparatory, executory, or cover-up phase of any activity, or who knowingly performs, aids, or abets any such activity." *Id.* Because the terms that make up these two definitions are not themselves statutorily defined (other than "gang," *see supra* § I.A.1), they are given their common meaning, which can be derived from dictionary definitions. *People v. Comage*, 241 Ill. 2d 139, 144 (2011).

The first definition of gang member — a person who "actually and in fact belongs to a gang" — defines gang members as people who hold an allegiance to the gang, such that they make themselves available to act on its behalf. For a person to "belong" to a gang, he must be "attached or bound (as to a person, group, or organization) by birth, allegiance, residence, or dependency." *Webster's Third New International Dictionary* 201 (1993) (defining "belong"). A person therefore does not "belong" to a gang merely because he is connected to it by birth or geography, such as by having a family member in the gang or living in territory controlled by the gang; he must himself hold an allegiance to the gang. *See id.* (to "belong" to a group is to be "bound" to it); *id.* at 260 (defining "bound" as "under legal or moral restraint or obligation: obliged"). Thus, a person "actually and in fact belongs to a gang" if he is loyal to the gang, such that he holds himself

subject to the gang's organizational hierarchy and therefore makes himself available to commit crimes on the gang's behalf.

The second definition of street gang member defines gang members as people who, regardless of whether they hold any personal loyalty to a gang, participate in the commission of crimes on a gang's behalf. Under this second definition, a person is a gang member if he "knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a course or pattern of gang-related criminal activity, whether in a preparatory, executory, or cover-up phase of any activity, or who knowingly performs, aids, or abets any such activity." 740 ILCS 147/10. In short, a person is a gang member for the purposes of section 24-1.8(a)(1) if he has participated on more than one occasion in the commission of crimes on the gang's behalf, thereby demonstrating that he stands ready to commit such crimes again.

Together, the two definitions define a street gang member as a person who makes himself available to a street gang as an instrument through which it may commit its crimes, either because he actually belongs to the gang, such that he holds himself available to commit crimes on its behalf, or because he has demonstrated his availability to commit crimes on the gang's behalf by participating in such crimes in the past. Because this definition does not turn on street gangs' own internal membership criteria, it allows the General Assembly to target the instruments of gang-related crime regardless

of a particular gang's efforts to shield its agents from liability by characterizing them as recruits, associates, or independent contractors rather than official members. For example, people whom a gang may classify as "wannabees (a.k.a. peewees or juniors)" who are "not technically within the gang" still fall squarely within the statutory definition of street gang member if they are "infatuated with the gang" (*i.e.*, are loyal to the gang) and "act the role" (*i.e.*, participate in the commission of crimes on the gang's behalf). *See* David S. Rutkowski, *A Coercion Defense for the Streetgang Criminal: Plugging the Moral Gap in Existing Law*, 10 Notre Dame J.L. Ethics & Pub. Pol'y 137, 150-51 (1996); *Czech v. Melvin*, No. 14 C 2012, 2017 U.S. Dist. LEXIS 42981, at *4 (N.D. Ill. Mar. 24, 2017) (person who provided gang member with gun to attack rival gang members was "considered a 'pee wee' in the Maniac Latin Disciples because he was too young to be a full member" and "earned 'stars' by performing tasks for older gang members, such as holding guns for them"). In other words, section 24-1.8 defines street gang members by their functional relationship to a street gang's criminal activity rather than their label. *Cf. Lake v. Neal*, 585 F.3d 1059, 1059 (7th Cir. 2009) ("The *Duck Test* holds that if it walks like a duck, swims like a duck, and quacks like a duck, it's a duck.").

B. Section 24-1.8(a)(1)'s definition of street gang member is not unconstitutionally vague on its face.

A criminal statute is unconstitutionally vague under the due process clauses of the United States and Illinois Constitutions only if its terms are so

ill-defined that they fail to "provide individuals of ordinary intelligence a reasonable opportunity to know what is prohibited" or "law enforcement with reasonable standards to avoid arbitrary or discriminatory enforcement." *People v. Plank*, 2018 IL 122202, ¶ 12; *see also United States v. Williams*, 553 U.S. 285, 304 (2008). When considering a vagueness challenge, a court considers the statutory language in light of the legislative objective and the harm that the statute is designed to prevent. *People v. Greco*, 204 Ill. 2d 400, 416 (2003). And because petitioner challenges section 24-1.8(a)(1) as unconstitutionally vague on its face, *see* Pet. Br. 39-40, his challenge fails unless the statute "'is impermissibly vague in all of its applications,'" *People v. Austin*, 2019 IL 123910, ¶ 112 (quoting *Village of Hoffman Estates*, 455 U.S. 489, 494-95 (1982)), meaning that "there is no set of circumstances under which the statute would be valid," *In re M.A.*, 2015 IL 118049, ¶ 39.

The definition of "street gang member" used in section 24-1.8(a)(1) is not unconstitutionally vague. A street gang is statutorily defined as a hierarchical criminal organization that commit crimes through its members, *see supra* § I.A.1, and street gang members are defined as people who make themselves available to act as a gang's criminal instruments, because they either hold an allegiance to a gang or have demonstrated such availability by actually participating in crimes on the gang's behalf, *see supra* § I.A.2.

1. A person of ordinary intelligence can understand whether he "actually and in fact belongs to a gang."

The first definition of street gang member — "anyone who actually and in fact belongs to a gang," 740 ILCS 147/10 — is clear. A person "actually and in fact belongs to a gang" if he holds an allegiance to a gang, such that he is available to commit crimes its behalf. *See supra* § I.A.2. That a person of ordinary intelligence can understand whether he is a street gang member under this definition is evidenced by the fact that countless defendants have been able to identify themselves without difficulty as members of various gangs over the years. *See*, *e.g.*, *People v. Clark*, 2022 IL App (1st) 192448, ¶ 5 (defendant "admitted that he was a member of the Dog Pound street gang"); *People v. Gillespie*, 407 Ill. App. 3d 113, 116 (1st Dist. 2010) (defendant "admitted that he was a member of the Gangster Disciples street gang"); *People v. Alvarez*, 344 Ill. App. 3d 179, 191 (1st Dist. 2003) (defendant "testified that he was a member of the Bishops street gang"); *People v. Quiroz*, 257 Ill. App. 3d 576, 581 (1st Dist. 1993) (defendant "testified that he was a member of the street gang, the Satan Disciples"). Indeed, petitioner himself stipulated that he is "a member of the Satan's Disciples from 24th and Washtenaw." Sup. R12; *see Greco*, 204 Ill. 2d at 416 ("[D]efendant cannot contend that [a statute] is vague on its face if the provision clearly applies to him."). Because there are circumstances in which a person of ordinary intelligence (including petitioner) can identify himself as a street gang

member under section 24-1.8(a)(1), petitioner's facial vagueness challenge fails.

Petitioner's arguments that it is unclear whether a person "actually in fact belongs to a gang" rest on his misapprehension that this definition turns on subjective judgment rather than objective fact. *See* Pet. Br. 41. Whether a person "actually and in fact belongs to a gang" — in that he "actually and in fact" holds an allegiance to the gang, *see supra* § I.A.2 — is, by its plain language, an objective inquiry. A person does not "actually and in fact" belong to a gang merely because, due to family, geography, or his own false pretenses, he might *appear* to hold an allegiance to a gang or others might *think* that he holds an allegiance to a gang; he must *in reality* hold allegiance to a gang. *See Webster's Third New International Dictionary* 22 (defining "actually" as "in act or in fact: really"), 813 (defining "in fact" as "in truth: actually, really"); *see also id.* at 22 (defining "actual" as "existing in fact or reality," as "contrasted with *ideal* and *hypothetical*" and "distinguished from *apparent* and *nominal*").

Because section 24-1.8(a)(1) provides an objective definition of gang membership, *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), is inapposite. *See* Pet. Br. 29, 40-41, 43. The statute at issue there prohibited the status of being a "gangster," which it defined as anyone who was "known to be a member of a gang consisting of two or more persons," where neither "member" nor "gang" was defined. *Lanzetta*, 306 U.S. at 452-53. *Lanzetta*

recognized the wholly undefined terms "gang" and "member" as unconstitutionally vague, *id.* at 453-57, and also noted that the phrase "known to be a member" was particularly ambiguous because "[t]here immediately arises the doubt whether actual or putative association is meant," or, "[i]f reputed membership is enough, . . . whether that reputation must be general or extend only to some persons." *Id.* at 458. But the terms "street gang" and "street gang member" employed by section 24-1.8(a)(1) are statutorily defined, and those statutory definitions provide an objective standard of gang membership that does not turn on whether one is "known to be a member" to some indeterminate set of other people.

Application of section 24-1.8(a)(1)'s objective standard also resolves all of the hypotheticals that petitioner offers to illustrate the supposed lack of clarity. If a person actually holds an allegiance to a gang, then he is a member of the gang for the purposes of section 24-1.8(a)(1), regardless of whether "the gang leadership or other members have . . . accepted him as one of their own" or instead consider him a recruit, affiliate, or wannabe. Pet. Br. 41. Conversely, if a person does *not* actually hold an allegiance to a gang, then he does *not* "belong" to the gang, no matter how much the spurned "gang leadership repeatedly identifies [him] as belonging to the gang." *Id.* And if a person once held an allegiance to a gang but no longer does, then he is no longer a member of the gang for the purposes of section 24-1.8(a)(1),

regardless of whether he withdrew through the gang's own formal withdrawal procedures.

At bottom, petitioner's hypotheticals concern how the People can *prove* that a person "actually and in fact belongs to a gang," and not how a person can *know* that he "actually and in fact belongs to a gang." The fact that a person identifies himself as a member of a gang or is known to others as a member of a gang is circumstantial evidence that he is loyal to the gang, just as evidence that he has not formally withdrawn from a gang is circumstantial evidence that he remains loyal to the gang. But under section 24-1.8(a)(1), the fact that must be proven is that the person is loyal to the gang, such that he holds himself available to act as its criminal instrument; disagreements about whether he is a "member" of the gang in any other sense are relevant only as circumstantial evidence of that fact.

Petitioner's argument concerning inaccurate gang identifications in police databases fails for the same reason. Pet. Br. 42. Petitioner argues that a person of ordinary intelligence cannot know if he "actually and in fact belongs to a gang" because a police database entry identifying him as a gang member may be unreliable evidence of his membership. *See id.* ("Such identification by the police does not withstand scrutiny under the vagueness doctrine as constituting proof of the 'conduct' of belonging to a gang."). But a person who does not hold an allegiance to a gang does not actually and in fact

belong to a gang, no matter how much the gang leadership, police, or anyone else may believe otherwise.

Moreover, a statutorily defined element is not vague simply because a particular type of evidence may be insufficient to prove it. *See Williams*, 553 U.S. at 306 ("What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."). Section 24-1.8(a)(1)'s otherwise clear prohibition against unlawful firearm possession by street gang members is not vague because police databases sometimes inaccurately identify people as gang members any more than the prohibition against driving without a valid license is vague because police databases sometimes inaccurately identify valid driver's licenses as revoked. *See* 625 ILCS 5/6-101. Evidentiary sufficiency is irrelevant to statutory clarity.

Similarly irrelevant is the fact that a person may not have "notice" that police think he is a gang member based on an inaccurate database entry. *See* Pet. Br. 42. Whether a person holds an allegiance to a gang is a fact that is within his personal knowledge. *Cf. Williams*, 553 U.S. at 306 ("Whether someone held a belief or intent is a true-or-false determination, not a subjective judgment[.]"). If he holds such allegiance, then he knows that he is a member of a street gang under section 24-1.8(a)(1); whether a police

database accurately reflects that membership is irrelevant, as is whether the person is aware of the database's accuracy or inaccuracy.

2. A person of ordinary intelligence can understand whether he "voluntarily associates himself with a course or pattern of gang-related criminal activity."

The second definition of "street gang member" is also clear. A person "knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a course or pattern of gang-related criminal activity, whether in a preparatory, executory, or cover-up phase of any activity, or who knowingly performs, aids, or abets any such activity," 740 ILCS 147/10, if he knowingly participates in more than one crime on behalf of the gang, *see supra* § I.A.2. This definition clearly applies whenever a person knowingly participates in two gang-related crimes. For example, petitioner's codefendant in the 2012 case, Montes, would clearly be a member of the Satan's Disciples of 24th and Washtenaw under this definition if he previously helped petitioner commit another crime for that gang. According to the factual basis to which Montes stipulated when pleading guilty to aggravated discharge of a firearm, R32, petitioner told Montes, "let's go find a King," meaning that they should find and shoot a member of the Latin Kings, R37-38. The two then drove around until they found a victim, and petitioner opened fire. R37. If that was the second gang-related offense that Montes helped petitioner commit, then Montes would be a street gang member because he would be "legally accountable for," have "voluntarily associate[d] himself with," or "knowingly perform[ed], aid[ed], or

abet[ed]" a "course or pattern of gang-related criminal activity . . . in a preparatory, executory, or cover-up phase of any activity." 740 ILCS 147/10. Regardless of whether Montes participated in the crimes because he hoped to gain membership in the gang, sought some benefit from the gang, or simply wanted to help petitioner carry out his gang's missions out of friendship, he would be a street gang member for the purposes of section 24-1.8(a)(1) because he had demonstrated his availability to participate in crimes on the gang's behalf.

Petitioner's asserted confusion about whether a person "voluntarily associates himself with" gang-related crimes by commenting approvingly about them or socializing with their perpetrators rests on an acontextual reading of the term. Pet. Br. 42-43. The definition of street gang member, like many statutory definitions, is "stated in [a] string[ ] of closely related and overlapping terms, to plug loopholes," and so it is an error "to pick out of the dictionary, for each statutory term, a definition remote from that of the other terms." *United States v. Costello*, 666 F.3d 1040, 1046 (7th Cir. 2012); *see Williams*, 553 U.S. at 294 ("[T]he commonsense canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the neighboring words with which it is associated."). Here, the term "voluntarily associates [one]self with" appears alongside "knowingly acts in the capacity of an agent for or accessory to," "is legally accountable for," and "knowingly performs, aids, or abets." 740 ILCS 147/10. Read in this context, the verb "to associate"

clearly means "to join often in a loose relationship as a partner, fellow worker, colleague, friend, companion, or ally," such that one knowingly associates oneself in a course or pattern of gang-related criminal activity if one joins in that activity as a partner or ally. *Webster's Third New International Dictionary* 132 (defining the transitive verb "associate"). Petitioner's proposed examples of "associating" with a course of gang-related criminal activity — "liking" a post about gang-related criminal activity on social media or lying about being having committed such activity, Pet. Br. 43 — rely on a different, contextually inappropriate definition of "associate": "to join or connect in any of various intangible or unspecified ways (as general mental, legendary, or historical relationship, in unspecified causal relationship, or in unspecified professional or scholarly relationship)," *Webster's Third New International Dictionary* 132. A person who lies about committing gang-related criminal activity may "associate himself with" that activity in this sense, inasmuch as he has drawn a connection between himself and the activity in the minds of others, but he has not associated himself with the activity under the statutory definition because he has not actually joined in the activity as a partner or ally.

3. Section 24-1.8(a)(1)'s definition of street gang member does not encourage arbitrary and discriminatory enforcement.

Petitioner argues that section 24-1.8(a)(1)'s definition of "street gang member" encourages arbitrary and discriminatory enforcement because it is discriminatorily enforced against gang members of color rather than white

gang members. Pet. Br. 45-46. But discriminatory enforcement of a statute against some offenders does not suggest that the statute is vague, for even the most clearly drafted statute is subject to discriminatory enforcement by unscrupulous officials; rather, it suggests that enforcement decisions are made in violation of the Equal Protection Clause. *See Whren v. United States*, 517 U.S. 806, 813 (1996) ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause[.]").

Stated another way, a statute is not unconstitutionally vague because it is discriminatorily enforced, but because its terms are so ill-defined that they "authorize and even encourage" arbitrary and discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). For example, the gang loitering ordinance at issue in *Morales* was unconstitutionally vague because it criminalized refusing to disperse when ordered by an officer who "reasonably believed" that a "criminal street gang member" was "loitering." *Id.* at 445-46. Because the ordinance defined loitering as "to remain in any one place with no apparent purpose" and did not define "criminal street gang member" at all, it provided police with absolute discretion to decide what constituted loitering and who was a gang member. *Id.* at 457; *see* Joel. D. Berg, Note, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 Chi.-Kent L. Rev 461, 465-67 (1993) (quoting in its entirety Chicago Mun. Code § 8-4-015 (1992), which did not define

"criminal street gang member"). But as explained above, *see supra* § I.B, the statutory definition of "street gang member" — people who hold an allegiance to a gang and people who participate in the commission of crimes on behalf of the gang — is not vague because it defines street gang members using objective criteria that constrain law enforcement.

Nor does the fact that the Chicago Police Department has directed officers to use a list of objective criteria when determining probable cause to believe someone is a street gang member suggest any lack of clarity in the statutory definition. *See* Pet. Br. 47-48. The Chicago Police Department's Special Order S10-02-03 provides that probable cause to believe that a person is a street gang member must be substantiated by factors tied to the ways in which gang members communicate to the outside world that they hold allegiance to a gang. *See* Chicago Police Dep't Special Order S10-02-03 § II(B), *available at* http://directives.chicagopolice.org/#directive/public/6652 (last visited Aug. 15, 2022). These factors include "the individual's admission of membership" and "the wearing of distinctive emblems, tattoos, or similar markings indicative of a specific street gang," provided that "such emblems, tattoos, or similar markings would not reasonably be expected to be displayed by any individual except a member of that specific criminal street gang" and that "[m]embership may not be established solely because an individual is wearing clothing available for sale to the general public." *Id.* That police can assemble a list of objective criteria that would lead a reasonable person to

believe that someone "actually and in fact belongs to a gang" does not suggest that the statutory definition is so vague that it encourages police to rely on subjective judgment. To the contrary, it shows that the definition is specific enough for police to enforce the law based on objective, observable facts.

Moreover, it is unclear how police would arbitrarily or discriminatorily enforce section 24-1.8(a)(1) based any lack of clarity in its definition of "street gang member." After all, it is not gang membership that provides probable cause to arrest, but gang membership in combination with the otherwise unlawful public possession of a firearm without a valid FOID Card, which is itself a felony. *See* 720 ILCS 5/24-1.6(a)(1), (a)(3)(C). Thus, if a police officer determines that a person unlawfully possesses a firearm in public without a valid FOID Card, then the officer has probable cause to arrest that person regardless of whether there is probable cause to believe he is a street gang member. As a practical matter, gang membership is likely irrelevant to an officer's decision to arrest for a felony weapons offense.

In sum, section 24-1.8(a)(1)'s definition of "street gang members" — people who hold an allegiance to a gang, such that they make themselves available to commit crimes on its behalf, or who actually participate in committing crimes on its behalf, regardless of their reasons — is not vague because it allows a person of ordinary intelligence to know whether he is a street gang member and provides an objective standard to govern law enforcement.

C. Section 24-1.8(a)(1) comports with substantive due process because prohibiting street gang members from unlawfully possessing firearms and firearm ammunition in public is rationally related to the legislative purpose of protecting the public from gang-related gun violence.

As petitioner concedes, section 24-1.8(a)(1) does not implicate a fundamental right, Pet. Br. 28, and so it comports with substantive due process if it satisfies the rational-basis test, *Hollins*, 2012 IL 112754, ¶ 15. A statute satisfies this test if it "bears a reasonable relationship to a public interest to be served, and the means adopted are a reasonable method of accomplishing the desired objective." *People v. Adams*, 144 Ill. 2d 381, 390 (1991). The means adopted to serve a public interest are unreasonable if they "punish[ ] a significant amount of wholly innocent conduct not related to the statute's purpose." *People v. Madrigal*, 241 Ill. 2d 463, 473 (2011). Conduct is "innocent" if it is "not germane to the harm identified by the legislature, in that the conduct [i]s wholly unrelated to the legislature's purpose in enacting the law." *Hollins*, 2012 IL 112754, ¶ 28 (citing *Madrigal*, 241 Ill. 2d at 473).

When criminal liability for an offense is contingent on an element of associational status — here, street gang membership — that status also must be rationally related to the harm that the legislature sought to prevent. *See Adams*, 144 Ill. 2d at 390; *Scales v. United States*, 367 U.S. 203, 224-25 (1961) (because "guilt is personal," associational status cannot be punished unless "the relationship of that status . . . to other concededly criminal conduct" is "sufficiently substantial"). In addition to being rationally related to the harm that the General Assembly sought to prevent, an associational status must be

defined so that all who share it are rationally related to the harm, lest criminal liability be imposed for passive association that falls within the statutory prohibition but entails no risk of the relevant harm. *Scales*, 367 U.S. at 224-25.

Because the rational-basis test turns on the relationship between a statutory prohibition and its purpose, the first step is to identify that purpose. The purpose of section 24-1.8(a)(1)'s prohibition against the public possession of a firearm without a valid FOID Card by street gang members is to protect the public from the risk of gang-related gun violence. *See* 96th Ill. Gen. Assem., Senate Proceedings, Oct. 29, 2009, at 152 (statements of Sen. Munoz) ("The purpose of this legislation is to protect innocent citizens[ ] [in] public areas by severely and justly punishing those individuals who are prone to cause violence in public areas — gang members."); *id.* at 159 (statements of Sen. Millner) (statute is to "help put an end to some of the street gang violence that we're . . . seeing plaguing our State every day"). Thus, the question under the rational-basis test is whether prohibiting street gang members from possessing firearms in public without a FOID Card, and subjecting them to an enhanced penalty for such possession, is rationally related to protecting the public from gang-related gun violence.

Section 24-1.8(a)(1) survives rational-basis scrutiny because prohibiting the public possession of firearms without a FOID Card by street gang members is rationally related to the statute's purpose of protecting the

public from gang-related gun violence. The public possession of a firearm without a FOID Card by anyone poses the risk of gun violence, but that risk is greatly increased when the person who possesses the firearm is a member of a street gang who, by definition, serves as the instrument through which a street gang commits its crimes and therefore poses a risk of gun violence not only on his own behalf, but on the gang's as well.

1. Prohibiting public possession of firearms and firearm ammunition without a valid FOID Card is rationally related to protecting the public from gun violence.

All gun violence, gang-related or otherwise, is committed by people who possess both firearms and firearm ammunition. The public possession of a firearm "creates a volatile situation vulnerable to spontaneous lethal aggression in the event of road rage or any other disagreement or dispute," *People v. Marin*, 342 Ill. App. 3d 716, 727-28 (1st Dist. 2003), and the risk of gun violence is still greater if the person who possesses the firearm is not constitutionally fit to do so due to prior criminal convictions or mental illness. To protect the public against this risk, the General Assembly limited public possession of firearms to people who obtain FOID Cards, thereby establishing their fitness to possess firearms. *See* 430 ILCS 65/1 (FOID Card requirement intended "to promote the health, safety and welfare of the public" by "provid[ing] a system of identifying persons who are unfit to acquire or possess firearms"); *People v. Taylor*, 2013 IL App (1st) 110166, ¶¶ 30-31 (prohibition of public firearm possession without a FOID Card is "to protect

the public from individuals carrying firearms who should not be permitted to do so" because they "present a higher than average risk of misusing a gun"). Because the General Assembly reasonably determined that public possession of a firearm without a valid FOID Card poses a risk of gun violence, prohibiting such possession is rationally related to protecting the public from gun violence of all kinds.

2. Prohibiting street gang members in particular from possessing firearms and firearm ammunition in public is rationally related to protecting the public from the specific risk of gang-related gun violence.

Street gang membership is rationally related to the risk of gang-related gun violence because unlawfully armed gang members pose a greater risk of gun violence than unlawfully armed non-gang members. Specifically, street gang members pose a greater risk of gun violence because, in addition to the risk of personally-motivated gun violence posed by any unlawfully armed person, street gang members pose an additional risk of organizationally-motivated gun violence: gang-related gun violence. And *all* street gang members pose this heightened risk of gun violence if unlawfully armed because street gang members are statutorily defined as people who stand ready to commit crimes on behalf of street gangs. *See supra* § I.A. Accordingly, any unlawfully armed street gang member poses the threat of gang-related gun violence.

a. Street gang membership is rationally related to the risk of gang-related gun violence.

Just as there is no question that gun violence is committed by people armed with firearms and firearm ammunition, there is no question that gang-related gun violence is committed by gang members armed with firearms and firearm ammunition. Petitioner nonetheless argues that prohibiting street gang members in particular from unlawfully possessing firearms is not rationally related to preventing gang-related gun violence unless their unlawful possession of firearms is related to their street gang membership beyond the fact that it is committed by street gang members. Pet. Br. 35-39. But petitioner is mistaken.

To be sure, one way that gang membership may be rationally related to the harm that the legislature seeks to prevent is if gang membership *causes* someone to engage in conduct that imposes the harm. In other words, if the harm would not occur *at all* but for the offender's gang membership, then gang membership is rationally related to the harm. This relationship is targeted by statutes that require a person to have engaged in criminal activity in furtherance of a gang's interests or because he is a gang member. *See*, *e.g.*, 720 ILCS 5/12-6.2(a)(1) (intimidation becomes aggravated offense if committed "in furtherance of the activities of an organized gang or because of the person's membership in or allegiance to an organized gang"); 720 ILCS 5/33A-3(c-5) (armed violence carries greater penalty if "the offense was related to the activities of an organized gang").

But gang membership also may be rationally related to the harm that the legislature seeks to prevent if membership renders particular criminal activity either more harmful or more likely to cause the harm than it would be if committed by a non-gang member. *Cf. People v. P.H.*, 145 Ill. 2d 209, 231-32 (1991) (holding that "gang transfer" provision that provides for "increasing the likelihood of criminal prosecution and sentencing" for juvenile gang members was "aimed at decreasing the level of gang violence in our society" and thus "reasonably related to a legitimate governmental interest"); *United States v. Turner*, 104 F.3d 1180, 1185 (9th Cir. 1997) ("[T]he distribution of cocaine by gang members inclined to violence makes the distribution more heinous and more dangerous than the single sale of cocaine by individuals."). Street gang membership is rationally related to the harm that section 24-1.8(a)(1) seeks to prevent — the risk of gang-related gun violence — in this way because unlawful possession of a firearm without a FOID Card poses a greater risk of gun violence, and gang-related gun violence in particular, when committed by a street gang member due to the fact of gang membership alone.

Unlawfully armed street gang members pose a greater risk of gun violence to the public than unlawfully armed non-gang members due entirely to their status as street gang members. Whereas any unlawfully armed person poses a risk of engaging in gun violence for his own personal reasons, an unlawfully armed street gang member poses an additional risk of gun

violence on behalf of his criminal organization, either by his own initiative or at the gang's direction. *Cf. Callanan v. United States*, 364 U.S. 587, 593 (1961) ("[C]ollective criminal agreement — partnership in crime — presents a greater potential threat to the public than individual delicts."). For example, where an unlawfully armed non-gang member might walk past a stranger without incident, an unlawfully armed gang member might believe that stranger to be a member of a rival gang and open fire based on his perception of their rival gang affiliations. *See* R37-38 (petitioner directed his codefendant to drive around looking for rival gang members to shoot). This heightened risk of gang-related gun violence is the same regardless of whether an individual gang member's reasons for unlawfully possessing a firearm at a given moment happen to be related to his gang membership.

In addition to posing a threat of engaging in gun violence on a gang's behalf on his own initiative, an unlawfully armed gang member poses a threat of engaging in gun violence at the gang's direction. *See*, *e.g.*, *People v. Jackson*, 357 Ill. App. 3d 313, 329 (1st Dist. 2005) (defendant drew his firearm and shot at victims on orders from his gang superior). But a direction to take *any* action on behalf of the gang, from selling narcotics to spray-painting property to simply standing on a particular corner to communicate the gang's presence in the area, creates the potential for lethal violence if the gang member who is directed to take the action happens to be unlawfully armed. *See* 720 ILCS 5/33A-1(a)(1) ("The use of a dangerous

weapon in the commission of a felony poses a much greater threat to the public health, safety, and general welfare, than when a weapon is not used in the commission of the offense."); *cf. Callanan*, 364 U.S. at 593-94 ("Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed," such that danger "is not confined to the substantive offense which is the immediate aim of the enterprise."). This risk is unaffected by the gang member's individual reasons for being unlawfully armed when he receives his marching orders. The source of the harm that the General Assembly sought to prevent — the risk of gang-related gun violence — is the fact that the person who unlawfully possesses a firearm is a gang member.

The General Assembly also rationally determined that street gang members require a greater deterrent against unlawful firearm possession than non-gang members. *Compare* 720 ILCS 5/24-1.6(a)(1), (a)(3)(C), (d)(1) (Class 4 felony penalty for public firearm possession without a FOID Card) *with* 720 ILCS 5/24-1.8(b) (Class 2 felony penalty for same if by a street gang member). Street gang members are subject to greater pressure to unlawfully possess — and use — a firearm than non-gang members. Gang members may face pressure within the gang to unlawfully arm themselves so that they may better serve the gang's criminal interests. Gang members also may feel external pressure to unlawfully arm themselves due to the risk of encountering a hostile member of a rival gang on the street. Accordingly, the

General Assembly reasonably determined that a greater deterrent against unlawful firearm possession was warranted to counter the greater motivations for such possession.

Unlawful firearm possession is therefore materially distinguishable from other offenses that pose no additional risk of harm if committed by gang members in ways or for reasons that are unrelated to their gang membership. For example, the Arizona Supreme Court found that the offense of threatening someone with injury is not by its nature more dangerous simply because it is committed by a gang member because "[a] non-gang member's threat is indistinguishable from that of a gang member if the threat is not bolstered — or connected — by gang membership." *State v. Arevalo*, 470 P.3d 644, 649-50 (Ariz. 2020). Similarly, offenses like stealing from a vending machine, 720 ILCS 5/16-5; driving on a suspended license, 625 ILCS 5/6-303; or abandoning one's pet cat, 510 ILCS 70/3.01(b), are no more dangerous if committed by gang members than by non-gang members, and so statutes that universally impose greater penalties on *any* offense if committed by a gang member are not rationally related to any legislative purpose of reducing gang-related crime. *See State v. O.C.*, 748 So. 2d 945, 950 (Fla. 1999) (statute imposing greater penalties for all offenses if committed by gang members violated substantive due process "because the statute punishes gang membership without requiring any nexus between the criminal activity and gang membership" and so "lacks a rational relationship to the legislative goal

of reducing gang violence or activity"); *see also State v. Bonds*, 502 S.W.3d 118, 156-57 (Tenn. Crim. App. 2016) (statute imposing greater penalties for all offenses if committed by gang members violated substantive due process because it "advance[d] only the objective of harsher treatment of criminal offenders who also happen to be members of a criminal gang"). But unlawful possession of a firearm by its nature is more dangerous if committed by a street gang member due to the fact of his gang membership alone, and is therefore rationally related to the legislative purpose of preventing gang-related gun violence, regardless of whether a street gang member's individual reasons for possessing a firearm at a given moment happen to be gang-related.

b. All street gang members pose a threat of gang-related gun violence if unlawfully armed because street gang members are, by definition, people who make themselves available to commit crimes on behalf of street gangs.

Because the basis for punishing unlawful firearm possession more severely if committed by a street gang member is the member's availability to engage in criminal activity on behalf of the gang, *see supra* § I.C.2.a, substantive due process requires that membership be defined to exclude "nominal" or "passive" membership, consisting of "the mere voluntary listing of a person's name on the [gang's] rolls," *Scales*, 367 U.S. at 222. Membership of that sort does not connote any participation or willingness to participate in the organization's criminal activity, "doing nothing more than

signify [one's] assent to [the criminal organization's] purposes and activities" and "providing . . . only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing." *Id.* at 227. Rather, membership in a criminal organization is sufficiently related to the organization's criminal enterprise if it is "active," meaning that it entails either a "commitment on the part of [the member] to act in furtherance of that enterprise" or actually acting to further the enterprise. *See id.* at 227-28.

Street gang membership under section 24-1.8(a)(1) is limited to active membership because it represents either a commitment to undertake criminal actions on behalf of a gang or a history of taking such actions. *Id.* at 223 (statute need not require that membership be "active" as "a discrete element of a crime" if it is "an inherent quality of the membership element"). A street gang is statutorily defined as a criminal organization that advances its organizational interests by committing crimes "through its membership." 740 ILCS 147/10; *see supra* § I.A.1. Street gang members are correspondingly defined as instruments through which a street gang commits its crimes. If a person is a street gang member because he "actually and in fact belongs to a gang," 740 ILCS 147/10, then he holds an allegiance to the gang and stands ready to carry out its criminal directives, *see supra* § I.A.2. And if a person is a street gang member because he "knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates

himself with a course or pattern of gang-related criminal activity," 740 ILCS 147/10, then the person has already acted as the gang's criminal instrument.

Thus, the statutory definition of street gang member necessarily entails active membership in a criminal organization. To the extent that "actually and in fact belong[ing] to a gang" could support another, broader construction that includes passive or nominal membership and thereby renders section 24-1.8(a)(1) unconstitutional, that construction must be rejected. *Rizzo*, 2016 IL 118599, ¶ 23 (courts "have a duty to uphold the constitutionality of a statute whenever reasonably possible, resolving any doubts in favor of the statute's validity"); *see Scales*, 367 U.S. at 224 (declining to construe statute in way that would render it unconstitutional "in light of the courts' traditional avoidance of constructions of dubious constitutionality and in light of their role in construing the purpose of a statute"); 96th Ill. Gen. Assem., Senate Proceedings, Oct. 29, 2009, at 158-59 (statements of Sen. Millner) (explaining that statutory definition of gang member requires that one be "actively engaged in the criminal enterprise").

Petitioner's reliance on *O.C.* and *Bonds* is therefore misplaced because, in addition to addressing statutes that imposed greater penalties for *all* offenses if committed by gang members rather than specific offenses that were either motivated or rendered more dangerous by gang membership, *O.C.*, 748 So. 2d at 949; *Bonds*, 502 S.W.3d at 156-57, the Florida and Tennessee statutes did not define gang membership as requiring active

membership. Pet. Br. 37-39. Rather, a person would be a gang member under the Florida and Tennessee statutory definitions if he lived in gang territory, looked like a gang member, and hung out with gang members or was identified as a gang member by an informant, regardless of whether he participated in crimes on the gang's behalf or held himself ready to do so. *See O.C.*, 748 So.2d at 947 n.1 (Florida statute defined gang member as someone who meets two of eight criteria, which included criteria such as "'[r]esid[ing] in or frequent[ing] a particular criminal street gang's area and adopt[ing] their style of dress, their use of hand signs, or their tattoos, and associat[ing] with known criminal street gang members,'" being "identified as a criminal gang member by a documented reliable informant," and "'[h]a[ving] been stopped in the company of known criminal street gang members four or more times'") (quoting Fla. Stat. § 874.03(2) (1999)); *Bonds*, 502 S.W.3d at 147 (Tennessee statute defined gang members as someone who meets two of seven criteria, which included criteria such as "'[r]esid[ing] in or frequent[ing] a particular criminal gang's area, adopt[ing] their style or dress, their use of hand signs or their tattoos and associates with known gang members'" and being "'identified as a criminal gang member by a documented reliable informant'" (quoting Tenn. Code Ann. § 40-35-121(a)(2) (2012)). In contrast, section 24-1.8(a)(1)'s definition of street gang member as someone who participates in crimes on behalf of a gang or stands ready to do so requires active membership.

Contrary to petitioner's assertion, Pet. Br. 34, section 24-1.8(a)(1) also requires that a street gang member know that the street gang engages in criminal activity, Pet. Br. 33-34. By its plain language, section 24-1.8(a)(1) requires that a person both knowingly possess the firearm and knowingly be a member of a street gang. 720 ILCS 5/24-1.8(a)(1); *see* 720 ILCS 5/4-3(b) ("If the statute defining an offense prescribed a particular mental state with respect to the offense as a whole, without distinguishing among the elements thereof, the prescribed mental state applies to each such element."). This is necessary because even if one is an active member of a criminal organization, one may not be punished based on that membership unless one is aware that the organization to which one has bound oneself engages in criminal activity. *Scales*, 392 U.S. at 228. Thus, if a person who "actually and in fact belongs to a gang" somehow does not know that the organization to which he belongs is one that, "through its membership or the agency of any member engages in a course or pattern of criminal activity," 740 ILCS 147/10, then he cannot be convicted under section 24-1.8(a)(1) for his unlawful possession of a firearm and firearm ammunition.

Petitioner argues that section 24-1.8(a)(1) violates substantive due process because it does not require that a street gang member, in addition to knowingly possessing a firearm and firearm ammunition in public without a FOID Card, have the specific intent to further the street gang's criminal aims. Pet. Br. 30-32. But substantive due process requires a specific intent

to further an organization's criminal aims only if a statute prohibits membership in a criminal organization alone, without any actus reus. *See Scales*, 367 U.S. at 220-22 (prohibition against membership in an organization that advocates violent overthrow of government without any actus reus required specific intent to violently overthrow the government to comport with substantive due process). When, as here, a statute prohibits membership in a criminal organization in combination with conduct, then the conduct need not be committed with the specific intent to further the organization's criminal purposes. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010) (statute that punishes association with a criminal organization in combination with an act and therefore "does not criminalize mere membership" need not require any specific intent to further the organization's criminal activity to comport with substantive due process).

Petitioner's reliance on *People v. Gardeley*, 927 P.2d 713 (Cal. 1996), and *State v. Woodbridge*, 791 N.E.2d 1035 (Ohio Ct. App. 2003), is misplaced, because neither case held that gang membership is not active under *Scales* when combined with an act unless the act is committed with the specific intent to further the gang's interests. *See* Pet. Br. 31-32. *Gardeley* did not concern a substantive due process challenge at all, and the passage petitioner cites holds that a California statute that imposed greater penalties for criminal conduct if committed "for the benefit of, at the direction of, or in association with" a statutorily defined "criminal street gang" was not

unconstitutionally vague. *See* 927 P.2d at 724-25. Indeed, when the California Supreme Court later addressed a substantive due process challenge to a statute that imposed greater penalties for criminal conduct committed by gang members without requiring that the conduct be gang-related, the court upheld the statute under *Scales*. *People v. Albillar*, 244 P.3d 1062, 1068, 1069-70 (Cal. 2010) (statute that prohibited gang members from committing any criminal conduct "exceed[ed] the due process requirement" under *Scales* when it required active membership and knowledge of the gang's criminal activity, but did *not* require that the criminal conduct committed by the defendant itself be gang-related).

Similarly, *Woodbridge* did not hold that a prohibition against a gang member engaging in criminal conduct violates substantive due process unless the conduct must be committed with the specific intent to further a gang's interests. *Woodbridge* concerned vagueness and First Amendment overbreadth challenges to a statute that prohibited a person who "actively participates in a criminal gang with knowledge that the criminal gang engages in or has engaged in a pattern of criminal gang activity" from "purposely promot[ing], further[ing], or assist[ing] any criminal conduct" or "engage in any act that constitutes criminal conduct." 791 N.E.2d at 1039. *Woodbridge* held that the terms "criminal gang" and "pattern of criminal gang activity" were not unconstitutionally vague, *id.* at 1040, and that the statute was not overbroad under the First Amendment because it "explicitly

punishes conduct, not association," *id.* at 1041. *Woodbridge* did not hold that a statute that prohibits conduct if committed by a gang member violates substantive due process unless it requires specific intent. Nor, as petitioner suggests, Pet. Br. 32, did *Rodriguez v. State* hold that a statute that includes elements of both gang membership and conduct must require that conduct be committed with the specific intent to advance the gang's interests to comport with substantive due process. *See* 671 S.E.2d 497, 501 (Ga. 2009), (upholding statute that required criminal conduct be committed with specific intent to further street gang's interests as "requir[ing] gang participation by the defendant which is active by any measure," but not holding that absence of specific intent would render the statute unconstitutional).

Because section 24-1.8(a)(1) prohibits the unlawful possession of a firearm and firearm ammunition if one is an active member of a street gang and knows that the street gang engages in criminal activity, it comports with substantive due process. *See Albillar*, 244 P.3d at 1068, 1069-70.

II. Section 24-1.8(a)(1) Comports with the Eighth Amendment.

The Eighth Amendment prohibits punishing a person based solely on his involuntary status. *Robinson v. California*, 370 U.S. 660, 666-67 (1962). The United States Supreme Court established this principle in *Robinson*, where it declared unconstitutional a statute that criminalized the "the 'status' of narcotic addiction." *Id.* at 666. *Robinson* held that because addiction is constitutionally indistinguishable from a mental illness or disease in that it "may be contracted innocently or involuntarily," "a state law

which imprisons a person thus afflicted as a criminal, even though he has never . . . been guilty of any irregular behavior there, inflicts a cruel and unusual punishment." *Id.* at 666-67.

In *Powell v. Texas*, the Court clarified that a statute does not violate the Eighth Amendment under *Robinson* if it does not punish "mere status" but instead requires at least one voluntary act. 392 U.S. 514, 532 (1968) (plurality opinion); *id.* at 549-50 (White, J., concurring in the judgment). In *Powell*, the defendant argued that a statute that criminalized public intoxication unconstitutionally punished his status as a chronic alcoholic. *Id.* at 516, 532 (plurality opinion). The *Powell* Court held that an offense comports with *Robinson* if it requires a voluntary act, which in the case of the Texas prohibition against public intoxication was either being intoxicated or being in public. *Id.* at 532 (plurality opinion); *id.* at 549-50 (White, J., concurring in the judgment).[4]

[4] The controlling opinion of in *Powell* is Justice White's single-justice concurrence, which provides the narrowest ground for the judgment. *See Marks v. United States*, 430 U.S. 188, 193 (1977). The four-justice plurality concluded that the Texas statute did not violate the Eighth Amendment because it punished "behavior" rather than "mere status" and would not have required that the behavior be voluntary (in the sense that it not be the product of "irresistible compulsion" due to a condition like alcoholism). *Powell*, 392 U.S. at 532, 535-36 (plurality opinion). Justice White concurred in the judgment on a narrower ground: that the statute comported with the Eighth Amendment because required at least one element — either being intoxicated or being in public — that was a volitional act. *Id.* at 549 (White, J., concurring in the judgment).

A. Section 24-1.8(a)(1) comports with the Eighth Amendment because it prohibits a voluntary act, not the status of street gang membership alone.

Like the statute upheld in *Powell*, section 24-1.8(a)(1) requires a voluntary act and does not criminalize an involuntary status alone. A person cannot be convicted under section 24-1.8(a)(1) simply for being a street gang member. Rather, to violate section 24-1.8(a)(1), one must commit the voluntary act of possessing a firearm in public without a valid FOID Card while *also* being a member of a street gang. 720 ILCS 5/24-1.8(a)(1). Because section 24-1.8(a)(1) defines an offense that requires a voluntary act, not just an involuntary status, it is not facially unconstitutional under the Eighth Amendment. *Powell*, 392 U.S. at 532 (plurality opinion); *id.* at 549-50 (White, J., concurring in the judgment); *see People v. Nettles*, 34 Ill. 2d 52, 56 (1966) (statute comports with Eighth Amendment unless it "involve[s] no voluntary act").

Petitioner concedes that section 24-1.8(a)(1) requires a voluntary act, Pet. Br. 19, but argues that *Robinson* should be extended to prohibit using a person's involuntary status as a basis for imposing a greater penalty for the voluntary act of possessing a firearm and firearm ammunition without a valid FOID Card than the act would carry if committed by non-gang members. Pet. Br. 11, 19-20. But this Court may not extend *Robinson* beyond the limits that the United States Supreme Court imposed in *Powell*. *See Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) (State may not interpret federal constitution to provide greater protection than that provided by the

United States Supreme Court). Nor does the Supreme Court's other Eighth Amendment jurisprudence prohibit the General Assembly from providing a greater penalty for an act when committed by an offender whose status it determines renders either the act more harmful to society or the offender less susceptible to deterrence. To the contrary, the Supreme Court's Eighth Amendment jurisprudence permits distinctions between offenders based on statuses that alone could not be criminalized under *Robinson*. *See Rummel v. Estelle*, 445 U.S. 263, 284 (1980) (Eighth Amendment permits greater penalties for crimes based on offender's criminal history).

Petitioner's proposed Eighth Amendment rule against "expos[ing] a defendant to a greater criminal penalty . . . based solely on . . . a status that, by itself, is not a crime," Pet. Br. 11, would effectively bar legislatures from determining that certain criminal acts warrant a greater penalty when committed by offenders with particular statuses. For example, the General Assembly determined that a person who smuggles cannabis into a prison commits a Class 3 felony, 720 ILCS 5/31A-1.1(a), (d)(2), while the same offense committed by a person who is a prison employee is a Class 2 felony, 720 ILCS 5/31A-1.2(a), (e)(1). Under petitioner's proposed rule, by providing a greater penalty for prison employees who smuggle cannabis into prisons, the General Assembly unconstitutionally criminalized the status of being employed by the Department of Corrections. By that same reasoning, the General Assembly also criminalized the status of being over 18 years old by

providing greater penalties for crimes committed by adults,[5] criminalized the status of being a parent by providing greater penalties for crimes committed by family members,[6] and criminalized the status of being a felon by providing greater penalties for recidivists.[7] But this is not the case; the Eighth Amendment permits legislative determinations that certain conduct is more harmful or otherwise warrants a greater deterrent based on the offender's aggravating status, regardless of whether the status alone could be prohibited. *See Rummel*, 445 U.S. at 284. Petitioner's assertion that providing a greater deterrent for offenders deemed more dangerous or more resistant to deterrence means "the statute was never intended to punish any actual personal conduct, but merely to enhance liability for those that the legislature believe[s] might be more prone to committing criminal acts," Pet. Br. 20, mistakes the means by which section 24-1.8(a)(1) accomplishes its legislative purpose for the purpose itself. Here, imposing greater penalties

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[5] *See*, *e.g.*, 720 ILCS 5/9-1(b-5); 720 ILCS 5/10-2(b); 720 ILCS 5/10-5.1(a), (b), (g); *see also* 730 ILCS 5/5-4.5-105(b) (granting sentencing courts discretion not to apply otherwise applicable sentencing enhancements where defendants were under 18 at the time of their offenses but not for older offenders); 730 ILCS 5/5-4.5-115(b) (providing parole eligibility after 20 years for all offenders who were under 21 at the time of their offenses but not for older offenders).

[6] *See*, *e.g.*, 720 ILCS 5/9-3(f) (involuntary manslaughter or reckless homicide by a family member is Class 2 felony rather than Class 3 felon); 720 ILCS 5/12-3.2 (battery by family member is Class 4 felony rather than Class A misdemeanor).

[7] *See*, *e.g.*, 720 ILCS 5/10-2(b); 720 ILCS 5/10-5.1 (g)(3), (4); 720 ILCS 5/11-1.20(b)(1)(C); 720 ILCS 5/11-14.2(b); 720 ILCS 5/12-3.3(b); 720 ILCS 5/24-1.6(d)(1); 720 ILCS 570/408(a).

for street gang members who unlawfully possess firearms in public is the means by which section 24-1.8(a)(1) furthers its legislative purpose of preventing gang-related gun violence.

Indeed, an offender's status may serve as the basis not only to impose greater penalties for criminal acts, but to create criminal liability for acts that otherwise carry no liability at all. *See Powell*, 392 U.S. at 550 (White, J. concurring in the judgment) (person with epilepsy could not be punished for the condition but could be punished for driving). A wide array of criminal statutes reflect legislative determinations that certain acts, though not alone a basis for criminal liability, become so when committed by people with certain statuses such as being a certain age,[8] a family member,[9] a

[8] *See*, *e.g.*, 720 ILCS 5/10-5.1 (luring a child); 720 ILCS 5/10-2(b) (aggravated kidnapping); 720 ILCS 5/11-1.20(a)(3) (criminal sexual assault); 720 ILCS 5/11-1.30(b) (aggravated sexual assault); 720 ILCS 5/11-1.40(a) (predatory criminal sexual assault of a child); 720 ILCS 5/11-1.50(b), (c) (criminal sexual abuse); 720 ILCS 5/11-1.60(c) (aggravated criminal sexual abuse); 720 ILCS 5/11-6 (indecent solicitation of a child); 720 ILCS 5/11-6.6 (solicitation to meet a child); 720 ILCS 5/11-9.1B(b) (failure to report sexual abuse of a child); 720 ILCS 5/12-3.05(b) (aggravated battery); 720 ILCS 5/24-1.6(a)(3)(I) (AUUW for possession of firearms if under 21 years old).

[9] *See*, *e.g.*, 720 ILCS 5/10-10 (prohibiting failure to report death or disappearance of a child under the age of 13 if the offender is the child's parent, legal guardian, or caretaker); 720 ILCS 5/11-1.20(a)(3) (prohibiting sexual penetration of someone under 18 if the offender is the victim's family member); 720 ILCS 5/11-1.60(b) (prohibiting sexual contact with someone under 18 if the offender is the victim's family member); 720 ILCS 5/11-11 (prohibiting sexual penetration of someone if the offender is a particular kind of family member);

government employee,[10] or a convicted sex offender,[11] even though those statuses are not themselves criminal. The quintessential example of this kind of offense is unlawful possession of a firearm by a felon, *see* 720 ILCS 5/24-1.1; the government may neither ban the possession of firearms nor criminalize the status of being a felon, yet there is no constitutional impediment to prohibiting a felon from possessing a firearm. *See United States v. Jester*, 139 F.3d 1168, 1170 (7th Cir. 1998) (rejecting Eighth Amendment challenge to prohibition against possession of firearms by felons because "status is one — but not the only — precondition of a [felon in possession] violation"). And the Criminal Code is full of other examples. A person may legally engage in consensual sexual conduct with an adult who is serving a term of probation and a person may legally be a probation officer, yet a person who is a probation officer commits a Class 3 felony by engaging in sexual conduct with a person serving probation under the officer's supervision. *See* 720 ILCS 5/11-9.2(b). Similarly, a person is free to accept money in exchange for supporting a piece of legislation, yet a person who is a

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[10] *See*, *e.g.*, 720 ILCS 5/11-9.2 (custodial sexual misconduct only if offender is employee of the penal system, treatment facility, or law enforcement agency where the victim is in custody); 720 ILCS 5/11-9.5(b)(1) (sexual misconduct with a person with a disability only if the offender is an employee of the DHS facility where the victim is in custody); 720 ILCS 5/33-3 (various acts are felonies if committed by public officers or employees).

[11] *See*, *e.g.*, 720 ILCS 5/11-9.3 (sex offenders prohibited from being present within school zone by child sex offender); 720 ILCS 5/11-9.4-1 (child sex offenders prohibited from being present in public parks); *see also* 730 ILCS 150/10 (sex offenders prohibited from not registering various information with local law enforcement).

member of the General Assembly commits a Class 3 felony by doing so. *See* 720 ILCS 5/33-8.

Therefore, *City of Chicago v. Youkhana* was incorrect in holding that a criminal prohibition violates the Eighth Amendment if it prohibits conduct only if committed by offenders with a particular status, such that "is not the conduct, but the status" that triggered criminal liability. 277 Ill. App. 3d 101, 113 (1st Dist. 1995); *see* Pet. Br. 12-13. Because the Eighth Amendment prohibits only crimes that rest on a person's status alone, not crimes that include such status as an element, legislatures are free to distinguish between more and less dangerous types of offenders and target conduct that warrants criminal liability only if committed by people with certain statuses. *See Jester*, 139 F.3d at 1170 (rejecting argument that under *Robinson* "the Government cannot impose punishment when status is even one element of the offense").

B. To the extent that *Robinson* applies to statutes that prohibit an act in combination with a status, section 24-1.8(a)(1) is constitutional because unlawful public firearm possession is not a proxy for an involuntary status.

Petitioner argues that section 24-1.8(a)(1)'s prohibition against unlawfully possessing a firearm if one is a street gang member violates the Eighth Amendment under *Robinson* because the status of being a street gang member is involuntary. Pet. 13-18. But street gang membership is not an involuntary status under the Eighth Amendment. And even if it were, an offense that includes an element of voluntary conduct is not unconstitutional

simply because it also includes an involuntary status. *See Jester*, 139 F.3d at 1170. Indeed, dozens of offenses prohibit an act or carry a greater penalty if committed by people with a status that they cannot change, such as their age, familial relationship to the victim, or criminal history. *See supra* p. 48 n.5, n.6 & n.7.

Rather, an offense that includes both act and status elements is facially unconstitutional under *Robinson* only if the distinction between the two elements is illusory, such that the offense effectively punishes an involuntary status alone. As Justice White explained in his concurrence in *Powell*, an offense that prohibits an act might be unconstitutional under *Robinson* as applied to people with a particular involuntary status if the act so necessarily follows from that status as to be itself involuntary and therefore a mere proxy for that status. *See Powell*, 392 U.S. at 551-52 (White, J., concurring in the judgment). For example, the Texas prohibition against being intoxicated in public might be unconstitutional as applied to a defendant who was both an alcoholic and homeless if he established that he could not avoid being intoxicated because of his alcoholism and could not avoid being in public because of his homelessness, such that, for him, neither of the prohibited acts — being intoxicated or being in public — was voluntary. *Id.* If that were the case, then punishing that defendant for being intoxicated in public would be punishing him for alcoholism and homelessness "under a different name." *Id.* at 548, 551.

By the same reasoning, if street gang membership were *always* involuntary and possessing a firearm and firearm ammunition in public without a valid FOID Card *always* followed so inescapably from street gang membership that it were merely a proxy for that involuntary status, then section 24-1.8(a)(1)'s prohibition against unlawful firearm possession by a street gang member would be facially unconstitutional under *Robinson* as effectively criminalizing the involuntary status of street gang membership alone. But petitioner fails to establish either that street gang membership is involuntary in the sense required under *Robinson* or that public possession of firearms and firearm ammunition without a FOID Card is a proxy for gang membership.

First, petitioner fails to establish that street gang membership is involuntary. *Robinson* held that a law that punishes a person afflicted by "an illness which may be contracted innocently or involuntarily" based on their status of being afflicted alone violates the Eighth Amendment. 370 U.S. at 667; *see id.* at 666-67 (addiction falls within the "same category" of statuses as "be[ing] mentally ill, or a leper, or . . . afflicted with a venereal disease"); *see Powell*, 392 U.S. at 548-49 (White, J., concurring in the judgment) (describing addiction as constitutionally equivalent to "being sick with flu or epilepsy"). In other words, under *Robinson*, a status may not be criminalized under the Eighth Amendment if the person afflicted with the status cannot

change it; a person must have no alternative, rather than no better alternative.

Street gang membership is not involuntary in this sense. Studies "suggest[ ] that many decisions to join gangs derive from rational decision making," motivated by factors such economic opportunities, excitement, status, emotional support, and sex. Rutkowski, *supra*, at 151. Nor, as petitioner asserts, do all gangs compel their members to remain members on pain of "great harm or death." Pet. Br. 17. Rather, "in some gangs, failing to satisfy the gang's membership requirements will lead to a loss of honor and status as a member," while in others "one need only resign or disassociate quietly from the group." Rutkowski, *supra*, at 163.

To be sure, many people decide to become or remain street gang members — that is, to hold an allegiance to a gang or participate in crimes on behalf of a gang, *see supra* § I.A.2 — due to social and economic pressures that make street gang membership appear to be the best of poor available options. *See* Rutkowski, *supra*, at 52 (people may join gangs to gain protection from "perceived or threatened violence" from family, bullies, or others at "home, in school, or simply on the streets"); Katherine Kizer, *Behind the Guise of Gang Membership: Ending the Unjust Criminalization*, 5 DePaul J. for Soc. Just. 333, 344-345 (2012) (in one housing project where economic prospects were limited to very low-paying manual labor or petty crime, people joined gangs "to obtain some sort of economic security" because

"selling drugs in certain neighborhoods provided 'easy money'"). But that does not render street gang membership involuntary under the Eighth Amendment.

Drawing the line at which a person ceases to have moral agency and becomes an object controlled by social or economic forces is not a question of constitutional law but a question of policy for the General Assembly. The General Assembly has decided that a person is not morally culpable for committing an offense if compelled by reasonable fear of imminent death or great bodily harm, 720 ILCS 5/7-11; justified by the necessity of avoiding greater injury, 720 ILCS 5/7-13; or insane, 720 ILCS 5/6-2(a). Thus, if a person's status as a statutory street gang member is involuntary in the sense that he was compelled to assume or retain it on threat of imminent death or great bodily harm, then he has a compulsion defense to a charge brought under section 24-1.8(a)(1). *See* 720 ILCS 5/7-11. But the General Assembly decided not to excuse a person from criminal liability for committing offenses under the more attenuated influence of social or economic forces.[12] These decisions "involve[ ] balancing and rebalancing over time complex and oft-competing ideas about 'social policy' and 'moral culpability,'" examining "ideas of free will and responsibility," and making "hard choices among

[12] Of course, a defendant who could not offer social or economic pressures as a defense to conviction is free to argue at sentencing that such factors mitigate his culpability and warrant a lesser penalty. *See* 730 ILCS 5/5-5-3.1(a)(4), (5).

values." *Kahler v. Kansas*, 140 S. Ct. 1021, 1028, 1037 (2020) (quoting *Powell*, 392 U.S. at 538, 545, 548 (Black, J., concurring)). Accordingly, they are "a project for state governance, not constitutional law." *Id.* at 1037. The Eighth Amendment therefore provides no basis to reject the General Assembly's policy judgment that the social and economic pressures to become a street gang member are insufficient to render membership involuntary unless they rise to the level of statutory compulsion or necessity.

Although petitioner relies on *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992), for the proposition that a statute is facially unconstitutional if it includes status as an element, *see* Pet. Br. 17-18, *Pottinger* concerned neither a facial Eighth Amendment challenge nor a statute that expressly included status as an element.[13] Rather, *Pottinger*

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[13] Petitioner also cites *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D.N.C. 1969), *vacated*, *Goodman v. Wheeler*, 401 U.S. 987 (1971), and *Headley v. Selkowitz*, 171 So.2d 368 (Fla. 1965), but neither is relevant to his Eighth Amendment argument that an offense that prohibits a voluntary act is nonetheless unconstitutional if it includes an involuntary status as an element. In addition to being vacated by the United States Supreme Court, *Wheeler* is inapposite; *Wheeler* found a North Carolina vagrancy statute facially unconstitutional under *Robinson* because the statutory definition of vagrant — unemployed people who were poor or lacked visible means of support such that they appeared to be poor, "[p]rofessional gamblers living in idleness," and "inmates of bawdy-houses," *Wheeler*, 306 F. Supp. at 59 n.1 — did not involve any act at all, *id.* at 62, 64. And *Headley* did not concern the Eighth Amendment, but instead held that a Miami disorderly conduct ordinance that prohibited people from "loitering . . . without any known lawful means for support, or without being able to give a satisfactory account of themselves" was unconstitutionally vague. 171 So. 2d at 369-70. *Headley*'s dicta that "[p]ersons should not be charged with vagrancy unless it is clear that they are vagrants of their own volition and choice" merely restates *Robinson*'s holding that an involuntary status alone may not be criminalized.

addressed a class action as-applied challenge raised by homeless people in Miami against ordinances and statutes that prohibited eating, sleeping, "or performing other essential, life-sustaining activities in any public place at any time." 810 F. Supp. at 1561.[14] After hearing evidence at trial, *Pottinger* found that the class members were involuntarily homeless because they "literally ha[d] no place to go." *Id.* at 1559. *Pottinger* therefore held that the challenged ordinances and statutes violated the Eighth Amendment as applied to the homeless class members for whom "resisting the need to eat sleep or engage in other life-sustaining activities [wa]s impossible" and "[a]voiding public places while engaging in [such] activities [wa]s also impossible." *Id.* at 1565. *Pottinger* does not support petitioner's facial Eighth Amendment challenge because he fails to show that it is impossible for street gang members to avoid being members or possessing firearms and firearm ammunition in public without a valid FOID Card.

Even if petitioner could show that street gang membership is involuntary under *Robinson*, he cannot show that the act of possessing a firearm and firearm ammunition in public without a valid FOID Card is a proxy for street gang membership, such that prohibiting such possession is prohibiting street gang membership under a different name. Being a street

[14] Petitioner does not raise an as-applied challenge to section 24-18(a)(1), *see* Pet. Br. 7, nor could he; he waived any as-applied Eighth Amendment challenge by entering a fully negotiated guilty plea. *People v. Jones*, 2021 IL 126432, ¶ 20.

gang member does not inevitably entail possessing a firearm and firearm ammunition in public without a FOID Card; a street gang member can readily avoid such possession by either applying for and obtaining a FOID Card before possessing a firearm in public or refraining from possessing a firearm in public. After all, being a gang member does not disqualify a person from obtaining a FOID Card. *See* 430 ILCS 65/8 (FOID Card shall be issued to applicants unless they are found to have a disqualifying condition from a list that does not include street gang membership).

Thus, petitioner fails to establish that street gang membership and the public possession of a firearm and firearm ammunition without a FOID Card are involuntary, such that section 24-1.8(a)(1)'s prohibition against the possession of a firearm in public without a FOID Card by a street gang member constitutes a facially unconstitutional prohibition of an involuntary status without any voluntary act.

CONCLUSION

This Court should affirm the judgment of the appellate court.

August 15, 2022

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RULE 341(c) 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 containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 14,810 words.

/s/ Joshua M. Schneider
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PROOF OF FILING AND SERVICE

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 August 15, 2022, the foregoing **Brief of Respondent-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, which provided service to the following parties:

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