No. 122202

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. JOHN W. PLANK, Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of the Sixth Judicial Circuit, Douglas County, Illinois No. 16 CF 101 The Honorable Richard L. Broch, Chief Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ARGUMENT

I. The Statutory Definition of "Low-Speed Gas Bicycle" Is Not Unconstitutionally Vague.

It is difficult to imagine statutory language that is *less* vague than the exceedingly precise definition of "low-speed gas bicycle" at issue here: "[a] 2 or 3-wheeled device with fully operable pedals and a gasoline motor of less than one horsepower, whose maximum speed on a paved level surface, when powered solely by such a motor while ridden by an operator who weighs 170 pounds, is less than 20 miles per hour." 625 ILCS 5/1-140.15. That definition may be complex, but it cannot be deemed vague. To the contrary, it supplies a clear and objective standard that "give[s] the person of ordinary intelligence a reasonable opportunity to know" whether a motorized bicycle is a "low-speed gas bicycle" and "provide[s] explicit standards" for police and courts to apply that leaves no room for arbitrary or discriminatory enforcement based on subjective judgments. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

A. Defendant continues to misconstrue the plain meaning of the statutory definition's maximum-speed component.

Defendant argued below that the statutory definition's maximum-speed component is unconstitutionally vague because its reference to a 170-pound rider provides "no way" for a person who does not weigh 170 pounds to

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"ascertain how fast [he] could travel on a low[-]speed gas bicycle." C16.[1] The People's opening brief explained that this view confused two distinct concepts: (1) how fast may one operate a "low-speed gas bicycle" on public roads, and (2) how to determine whether a motorized bicycle *is* a "low-speed gas bicycle." The first question is answered not by section 1-140.15, but by section 11-1516, which provides that "[a] person may not operate a . . . low-speed gas bicycle at a speed greater than 20 miles per hour upon any highway, street, or roadway." 625 ILCS 5/11-1516(b). Section 1-140.15, on the other hand, provides the standard for classifying a motorized bicycle as either a "motor vehicle" or a "low-speed gas bicycle" based on (among other things) its objectively ascertainable maximum speed under defined conditions, rather than its actual speed at any particular time.

Contrary to defendant's contention, this construction of the maximum-speed component does not "disregard the weight component of the statutory definition," Def. Br. 7, any more than it disregards the definition's "paved level surface" or " powered solely by [its] motor" language. What it does is

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[1] The common law record is cited as "C__," and the report of proceedings is cited as "R__." The People's opening brief is cited as "Peo. Br. __," and defendant's brief is cited as "Def. Br. __."

The trial court appeared to hold that the statutory definition's horsepower component and the maximum-speed component's reference to a "paved level surface" also were unconstitutionally vague, but defendant has not defended the trial court's judgment on those grounds. The People's opening brief explained why neither of these aspects of the statutory definition is vague. *See* Peo. Br. 22-23, 27-28.

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recognize that the statutory definition supplies a bicycle-by-bicycle — rather than a rider-by-rider or ride-by-ride — standard for determining whether a motorized bicycle qualifies as a "low-speed gas bicycle." In other words, if a motorized bicycle satisfies section 1-140.15's criteria, then it is a "low-speed gas bicycle," whether a 100-pound person is riding it uphill at 10 miles per hour while pedaling, or a 300-pound person is riding it downhill at 30 miles per hour without pedaling.[2]

B. A statutory standard is not impermissibly vague merely because it may be difficult to apply.

Tellingly, defendant identifies no decision striking down statutory language even remotely comparable to the maximum-speed component under the void-for-vagueness doctrine. Nor does he make any attempt to demonstrate that the maximum-speed component is at all similar to the types of statutory provisions that have been found void for vagueness. *See, e.g.*, *Morales v. City of Chicago*, 527 U.S. 41, 47 (1999) (ordinance authorizing police to order dispersal of persons "loitering," defined as "remain[ing] in any

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[2] There are sound reasons why the General Assembly would have opted to classify motorized bicycles in this manner. If a motorized bicycle qualifies as a "low-speed gas bicycle," and thus not a "motor vehicle," not only may a person operate it without a driver's license, but it may be operated without registration or insurance. *See* 625 ILCS 5/3-401(a); 625 ILCS 5/3-402(A); 625 ILCS 5/7-601(a). It would be difficult to administer a system where the requirement to register and insure a motorized bicycle — or any other vehicle — depended on who happened to be riding it at any particular moment. And it would be downright impossible to determine whether a person who is in possession of a stolen motorized bicycle has committed the offense of possessing a stolen motor vehicle, *cf. People v. Frazier*, 2016 IL App (1st) 140911, ¶¶ 13-17, if the motorized bicycle's classification depended on the weight of a particular rider.

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one place with no apparent purpose"); *Kolender v. Lawson*, 461 U.S. 352, 355-56 (1983) (statute requiring person, upon request, to provide police with "credible and reliable" identification); *Smith v. Goguen*, 415 U.S. 566, 568-69 (1974) (statute prohibiting person from treating United States flag "contemptuously"); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (ordinance prohibiting three or more people from assembling on any sidewalk and "there conduct[ing] themselves in a manner annoying to persons passing by"). As the People's opening brief explained, *see* Peo. Br. 16-17, provisions such as these are vague because they provide no determinate standard for citizens or law enforcement to apply, but instead require either "wholly subjective judgments," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010), or provide "no standard of conduct . . . at all," *Coates*, 402 U.S. at 614. The maximum-speed component, in contrast, contains no such indeterminacy: in all cases, whether a motorized bicycle's maximum speed under the statutorily defined conditions is less than 20 miles per hour "is a true-or-false determination, not a subjective judgment." *United States v. Williams*, 553 U.S. 285, 306 (2008).

Defendant thus argues not that the maximum-speed component is imprecise, subjective, or indeterminate, but that its objective standard is not "easily applicable." Def. Br. 6. But he ignores the principle, discussed in the People's opening brief, *see* Peo. Br. 17-21, that a statute is not vague merely because it requires a person to conduct an investigation or make certain

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inquiries before he can determine whether his proposed conduct meets the statute's clearly defined, objective standard. That is why, for instance, in *People v. Bartlow*, 2014 IL 115152, ¶¶ 45, 49, this Court held that a "highly detailed and specific" statutory standard was not unconstitutionally vague merely because it required those subject to its provisions to take "inconvenient" steps to acquire information "in the exclusive control" of others before they could determine whether the standard applied to them. Similarly, the Washington Supreme Court rejected a vagueness challenge to a statute that enhanced the penalty for drug-related offenses committed within 1,000 feet of a school bus stop, even though the locations of such stops were not marked and could only be determined by taking affirmative investigatory steps that it was "unrealistic" to expect of drug dealers. *State v. Coria*, 839 P.2d 890, 896-97 (Wash. 1992). Defendant addresses neither of these decisions nor the proposition they illustrate.

Instead, defendant appears to suggest that he simply misunderstood how to determine whether a motorized bicycle is a "low-speed gas bicycle" under the statutory definition. *See* Def. Br. 5 (asserting that he "purchased the vehicle at issue in this case . . . because, as someone whose license was revoked, he knows that he may not operate motor vehicles"). But "[t]he general rule that ignorance of the law . . . is no defense to criminal prosecution is deeply rooted in the American legal system," *Cheek v. United States*, 498 U.S. 192, 199 (1991), and defendant offers no reason to set it aside

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here. Thus, whether defendant was "attempting to comply with the law," Def. Br. 6, is immaterial if he did not, in fact, comply with it. *See People v. Jackson*, 2013 IL 113986, ¶ 23 (operating a motor vehicle without a license is an absolute liability offense).[3]

Nevertheless, it is worth noting that defendant does not describe any steps that he took to ascertain whether the motorized bicycle he purchased (or assembled himself) met the statutory definition of "low-speed gas bicycle." *See* Peo. Br. 22 (suggesting that defendant could have contacted the manufacturer or distributor, consulted a mechanic, or tested the bicycle himself under conditions that simulated a 170-pound rider). Before taking his motorized bicycle on the road despite the revocation of his driver's license, defendant bore the burden of "insur[ing] that his actions d[id] not fall outside the legal limits." *United States v. Powell*, 423 U.S. 87, 92 (1975). There is no evidence that he made any attempt to ensure his compliance with the law, even though the statutory definition's clear and objective standard gave him a "reasonable opportunity" to do so. *Grayned*, 408 U.S. at 108.

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[3] Contrary to defendant's related contention, the statutory definition does not "allow[ ] for the punishment of individuals who . . . were in compliance with . . . the law." Def. Br. 6. Defendant discusses the story of Chas Burns, who was convicted of operating a motor vehicle while his license was revoked, but he fails to note that the appellate court vacated that conviction after concluding that the State had failed to prove beyond a reasonable doubt that Burns's homemade moped was a "motor vehicle" rather than a "low-speed gas bicycle." *See People v. Burns*, 2012 IL App (4th) 110593-U. *Burns* thus illustrates the United States Supreme Court's admonition that the "fact that close cases can be envisioned" under a statute "is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Williams*, 553 U.S. at 305-06.

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C. The statutory definition's objective standard does not authorize or encourage arbitrary or discriminatory enforcement.

Defendant maintains that the People failed to address separately whether the statutory definition authorizes or encourages arbitrary or discriminatory enforcement. Def. Br. 9. But the void-for-vagueness doctrine's fair-notice and arbitrary-enforcement concerns, while "discrete," are "connected." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *see also Hill v. Colorado*, 530 U.S. 703, 733 (2000) (concluding that law did not encourage arbitrary enforcement "[f]or the same reason" that it provided fair notice). The People's opening brief repeatedly explained that, because the statutory definition employs a clear and objective standard for determining whether a motorized bicycle is a "low-speed gas bicycle," it provides fair notice to citizens *and* does not authorize or encourage arbitrary or discriminatory enforcement. *See* Peo. Br. 16, 22, 24.

Under the statutory standard, whether a motorized bicycle is a "low-speed gas bicycle" is "a true-or-false determination, not a subjective judgment." *Williams*, 553 U.S. at 306. That determination is made based on an assessment of the motorized bicycle's physical characteristics and its objectively ascertainable capabilities under defined conditions. Unlike the types of statutory language that the United States Supreme Court has found vague, *see supra* pp. 3-4, the statutory definition at issue here does not "vest[ ] virtually complete discretion in the hands of the police to determine

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whether" a motorized bicycle is a low-speed gas bicycle, *Kolender*, 461 U.S. at 358, nor does it "allow[ ] policemen, prosecutors, and juries to pursue their personal predilections," *Smith*, 415 U.S. at 575, or resolve cases "on an ad hoc and subjective basis," *Grayned*, 408 U.S. at 109. The determination of whether a motorized bicycle has two or three wheels, fully operable pedals, a motor of less than one horsepower, and a maximum speed of less than 20 miles per hour under the statutorily defined conditions does not place "vast discretion," *Morales*, 527 U.S. at 61, or "unfettered discretion," *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1972), in the hands of police.

Defendant contends that the statutory definition "encourages arbitrary and discriminatory enforcement because it requires law enforcement agents to ascertain" whether a motorized bicycle is a low-speed gas bicycle based on "a superficial inspection of riders and their bicycles." Def. Br. 10. To be sure, under this statute and others, officers often must rely on their senses and observations in making enforcement decisions. "As always, enforcement requires the exercise of some degree of police judgment." *Grayned*, 408 U.S. at 114. What matters for purposes of the void-for-vagueness doctrine, however, is not that some level of police judgment is involved, but that the General Assembly "has made the basic policy choices," *id.*, and, in doing so, has "establish[ed] minimal guidelines to govern law enforcement," *Kolender*, 461 U.S. at 358 (internal quotation marks omitted). The statutory standard for defining low-speed gas bicycles does not require or permit law

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enforcement officers to make "untethered, subjective judgments" in enforcing the law, *Humanitarian Law Project*, 561 U.S. at 21, nor does it allow them "to pursue their personal predilections," *Smith*, 415 U.S. at 575.[4]

Defendant also contends that apparent confusion by the officer who stopped him as to how to define a "low-speed gas bicycle" demonstrates that the statutory definition encourages arbitrary enforcement. *See* Def. Br. 8-9. But a statute is not "constitutionally infirm simply because a particular police officer's subjective opinion about the law turns out to be incorrect." *First Vagabonds Church of God v. City of Orlando, Fla.*, 610 F.3d 1274, 1288 (11th Cir. 2010), *reh'g en banc granted and opinion vacated*, 616 F.3d 1229 (11th Cir.), *and opinion reinstated in relevant part*, 638 F.3d 756, 763 (11th Cir. 2011) (reinstating portion of panel opinion addressing vagueness question); *see also State v. Wofford*, 34 S.W.3d 671, 681 (Tex. App. 2000) ("The fact that certain law enforcement personnel may have misinterpreted a statute does not necessarily render it impermissibly vague nor does it establish that the statute encourages arbitrary and erratic arrests."). Rather, a statutory provision is unconstitutionally vague when its language itself is

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[4] As the People's opening brief noted, *see* Peo. Br. 15 n.8, the trial court found that the officer's observations supplied probable cause to believe that defendant's motorized bicycle was not a "low-speed gas bicycle," and that defendant had therefore illegally operated a motor vehicle while his driver's license was revoked. *See* R14. Without addressing this finding directly, defendant suggests that it "fail[ed] to take into consideration the fact that [defendant's observed speed of 26 miles per hour] may [have been] generated through pedaling." Def. Br. 10. But the officer testified at the preliminary hearing that he observed defendant traveling 26 miles per hour, on a flat stretch of road, *without pedaling*. *See* R7, 9-11.

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"so standardless that it authorizes or encourages seriously discriminatory enforcement." *Humanitarian Law Project*, 561 U.S. at 18.

II. At the Very Least, Defendant Cannot Show that the Statutory Definition Is Vague as Applied to Him.

This Court should reverse the trial court's judgment because the statutory definition of "low-speed gas bicycle" is not vague under any circumstances. But even if the Court concludes otherwise, it should reverse the trial court's judgment and remand for consideration of whether the statutory definition is vague as applied to defendant.

Defendant is correct to note, *see* Def. Br. 11-12, that *Johnson v. United States*, 135 S. Ct. 2551 (2015), undermines the People's alternative argument, *see* Peo. Br. 24-29, that the statutory definition of "low-speed gas bicycle" cannot be held facially unconstitutional unless it is vague in all of its applications. But that does not mean that defendant's vagueness challenge may be divorced from the facts of his case. "*Johnson* did not change the rule that a defendant whose conduct is clearly prohibited cannot be the one making [the vagueness] challenge." *United States v. Westbrooks*, 858 F.3d 317, 325 (5th Cir. 2017); *see also United States v. Bramer*, 832 F.3d 908, 909 (8th Cir. 2016) ("Though [the defendant] need not prove that [the statute] is vague in all its applications, our case law still requires him to show that the statute is vague as applied to his particular conduct."). In other words, *Johnson* did not disturb the "well established" rule that "vagueness challenges to statutes which do not involve First Amendment freedoms must

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be examined in light of the facts of the case at hand," *United States v. Mazurie*, 419 U.S. 544, 550 (1975), because a defendant "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others," *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).[5]

That means that even if defendant were correct that the statutory definition of "low-speed gas bicycle" is vague as applied to persons who do not weigh 170 pounds — and, as discussed above and in the People's opening brief, he is not — he could prevail on his vagueness challenge only by showing that the definition is vague as applied to him. But no such showing is possible on this record because the trial court did not conduct an evidentiary hearing on defendant's motion to dismiss or make any findings of fact. *See People v. Rizzo*, 2016 IL 118599, ¶ 26 ("A court is not capable of making an 'as applied' determination of unconstitutionality when there has been no evidentiary hearing and no findings of fact.") (internal quotation marks omitted).

As the People's opening brief explained, *see* Peo. Br. 29-30, if the evidence shows that defendant weighed 170 pounds (as his driver's license indicated) and was traveling 26 miles per hour, on a flat stretch of road,

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[5] Even if the exception for cases involving First Amendment freedoms extends more broadly to any "constitutionally protected rights," *Morales*, 527 U.S. at 55 (plurality opinion), defendant has never suggested that he has a constitutionally protected right to operate a motorized bicycle without a valid driver's license.

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without pedaling (as the officer testified at the preliminary hearing), then even under defendant's mistaken construction, the statutory definition of "low-speed gas bicycle" would clearly exclude his motorized bicycle. Likewise, the statutory definition would not be vague as applied to defendant, regardless of how much he weighed or how fast he was traveling, if the evidence shows that his motorized bicycle lacked fully operable pedals or had a motor of one horsepower or more; in either case, his motorized bicycle would clearly fall outside the definition of a "low-speed gas bicycle," regardless of whether it satisfied the definition's maximum-speed component.

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CONCLUSION

For these reasons and those set forth in the People's opening brief, this Court should reverse the judgment of the circuit court and remand for further proceedings.

January 24, 2018

Respectfully submitted,

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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) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is thirteen pages.

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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 January 24, 2018, the **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses of the persons named below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail 13 copies of the **Reply Brief of Plaintiff-Appellant People of the State of Illinois** to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

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