No. 127584

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. JODON COLLINS, Defendant-Appellee.	)))))))))))	Appeal from the Appellate Court of Illinois, First District, No. 1-18-1746 There on Appeal from the Circuit Court of Cook County, Illinois, Criminal Division, No. 18 CR 825 The Honorable Charles P. Burns, Judge Presiding.

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

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ARGUMENT

Defendant does not dispute that, pursuant to 50 ILCS 706/10-30, a body camera recording is properly admitted at a criminal trial where relevant and not otherwise barred by evidentiary rules. And he concedes that the video portion of the recording, along with some of the audio, was properly admitted, arguing only that certain statements on the audio recording should have been redacted. *See infra* Part I. However, the circuit court did not abuse its discretion in admitting the entire recording from Hernandez's body camera, because the recording contained no inadmissible hearsay statements. *See infra* Section I. Moreover, any error in admitting the entire recording without redaction would have been harmless. *See infra* Section III.

I. Defendant Agrees that the Visual Portion of the Recording and Some of the Audio Portion Were Properly Admitted.

Defendant agrees that the visual component of the recording was admissible here, Def. Br. 16-17 n.2, as were audio components of the recording that were unquestionably not hearsay, such as Officer Hernandez's instructions to defendant, *see* Def. Br. 17 n.3.[1]

Consequently, the parties agree that parts of the appellate court's opinion are wrong. Although defendant claims that the appellate court did not actually hold that the visual portion of the recording was barred, Def. Br.

[1] "Peo. Br.," "Def. Br.," and "DA" refer to the People's opening brief, defendant's brief, and defendant's appendix, respectively.

16 n.2, the appellate court reasoned that admission of the body camera recording was harmful error because "the video . . . is of the type [of evidence] to easily overpersuade," for it "depicts a chase at night, with frenetic movements caused by the camera's attachment to Hernandez's body" and shows police vehicles using searchlights and four officers arresting defendant, *People v. Collins*, 2020 IL App (1st) 181746, ¶¶ 36-37. The appellate court asserted that "there was no nonhearsay purpose to admitting the video" and thus "the nature of the video turns more prejudicial than probative." *Id.* ¶ 37. But the video was not hearsay in any respect, and so its admission could *only* serve a nonhearsay purpose. *See* Peo. Br. 13-15. Accordingly, this Court should make clear that the visual portion of the recording was properly admitted.[2]

The audio portion is also generally admissible, subject only to limited redactions. The General Assembly intended for police body cameras to "provide impartial evidence and documentation to settle disputes," 50 ILCS 706/10-5, and for recordings to "be used as evidence in any . . . judicial[ ] . . . proceeding," 50 ILCS 706/10-30. In accordance with this statutory language,

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[2] In limited circumstances, evidentiary rules might bar visual components of a recording, such as where the probative value of the evidence is outweighed by the risk of unfair prejudice. *See* Ill. R. Evid. 403 (courts must balance probative value against risk of unfair prejudice); *Morgan v. State*, 838 S.E.2d 878, 893-98 (Ga. 2020) (court erred by admitting visual footage of officer attempting to revive murdered infant because minimal probative value was outweighed by risk of unfair prejudice).

courts should proceed from the premise that relevant body camera recordings are admissible, and redact only those portions that the rules of evidence require to be excluded. *See* Ill. R. Evid. 402 ("All relevant evidence is admissible, except as otherwise provided by law."). Defendant concedes that portions of the audio recording, including Hernandez's statements to defendant, were admissible, and challenges only isolated statements by Hernandez. *See* Def. Br. 17 & n.3. Thus, the question before this Court is whether the rules of hearsay required that those statements be redacted from the generally admissible body camera recording.

II. No Redactions Were Required Because Hernandez's Recorded Statements Were Not Barred as Hearsay.

The statements of Hernandez recorded on his body camera were not barred as hearsay, and therefore the circuit court did not abuse its discretion by admitting the entire recording.

Contrary to defendant's claim, the People do not contend that the body camera statute "usurp[s] the rules of evidence," Def. Br. 20, or that no statement recorded by a body camera can ever constitute hearsay. A court "may" admit body camera recordings, 50 ILCS 706/10-30, and, in exercising that discretion, may preclude both the People and defendants alike from introducing portions of body camera recordings that violate principles of admissibility, *compare People v. Andrade*, 2021 IL App (2d) 190797-U, ¶¶ 23-34 (circuit court properly rejected defendant's request to introduce irrelevant and cumulative evidence of victim's and defendant's behavior and statements

captured on body camera recording) (at DA69-70), *with People v. Winston*, 2021 IL App (4th) 190288-U, ¶ 5 (People conceded that defendant's statements recorded by body camera, obtained in violation of *Miranda v. Arizona*, should be excluded) (at DA86).[3]

To be sure, in some cases body camera recordings might contain hearsay statements that should be redacted.[4] For example, the inculpatory statement of a non-testifying occurrence witness — the type of statement at issue in *People v. Jura*, 352 Ill. App. 3d 1080 (1st Dist. 2004) — might constitute improper hearsay. But the appellate court's and defendant's reliance on *Jura* to find error here is misplaced, for that case is plainly distinguishable. *See Collins*, 2020 IL App (1st) 181746, ¶¶ 31-36; Def. Br. 28-33. There, testifying officers conveyed that a non-testifying eyewitness described a shooting suspect in terms that matched defendant's description. *Jura*, 352 Ill. App. 3d 1082-84. Whether that type of witness statement

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[3] To the extent the People's PLA argued that the rules of evidence have no application to body camera recordings, the People do not press that argument here.

[4] A *recording* is not, itself, hearsay. *See, e.g.*, *People v. Hughes*, 2013 IL App (1st) 110237, ¶ 65 (characterizing recording device as "mechanical eavesdropper"). Thus, statements that do not meet the definition of hearsay are not transformed into hearsay by virtue of being recorded. *See People v. Theis*, 2011 IL App (2d) 091080, ¶¶ 31-33 (officer's recorded statements to defendant in course of videotaped interrogation were not hearsay). Nevertheless, a statement on a recording may constitute hearsay, and defendant correctly asserts that the act of recording does not render it admissible. *See* Def. Br. 24 (emphasizing that "[t]here is no 'recording exception' to the hearsay rule").

should be redacted from a body camera recording is a closer question, not presented here.

Rather, this case presents the question of whether a testifying police officer's *own* statements — directly pertinent to his criminal investigation, recorded on his body camera in the course of that investigation, about the immediate recovery of evidence — are hearsay. As set forth in the People's opening brief, Hernandez's recorded statements, to the extent they arguably contained assertions of fact that could be subject to the bar against hearsay if offered for their truth, were properly admitted because (1) they served the nonhearsay purpose of explaining the course of the investigation (in real time), *see* Peo. Br. 17-19; and (2) they qualified as excited utterances, *see* Peo. Br. 20-22. Defendant's brief fails to demonstrate otherwise.[5]

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[5] This Court should decide these issues and not reject the People's arguments as forfeited, as defendant urges, *see* Def. Br. 15-16, 28, 33. The People asserted in their appellate brief (as they did in the trial court, R264) that the excited utterance exception applied. *See* Peo. App. Ct. Br. 24 ("under this Court's analysis in [*People v. Abram*, 2016 IL App (1st) 132785, ¶¶ 71-75], the statements may have been admissible as excited utterances"). And the People's present arguments are fairly encompassed within the question presented in their PLA. *See People v. Brown*, 2020 IL 125203, ¶¶ 31-32 (court will consider issues that are "inextricably intertwined" with question on which Court granted review). The People's PLA argued, in part, that the appellate court erred because Hernandez's statements were not barred as hearsay, and this Court therefore should consider the People's theories as to why the hearsay bar does not apply. *See 1010 Lake Shore Ass'n v. Deutsche Bank Nat'l Trust Co.*, 2015 IL 118372, ¶ 18 ("The court only requires parties to preserve issues or claims for appeal. They are not required to limit their arguments in this court to the same ones made in the trial and appellate courts."). Moreover, even if specific arguments are not included in a PLA, this Court has discretion to consider them. *Brown*, 2020 IL 125203, ¶ 31.

A. Hernandez's isolated statements that conveyed assertions of fact were admissible for a nonhearsay purpose.

Hernandez's challenged statements, which were transmitted over the police radio, communicated that defendant had discarded a gun, described its location, and requested other officers' assistance in recovering it. *See* Def. Br. 3-4, 17 (listing statements),

The majority of the statements were commands. Defendant objects to the statements "Joel, go back to the lot"; "go back to where it started"; and "Get to that lot dude, hurry up." *See id.* But, as noted in the People's opening brief, a command is not hearsay, and defendant neither disputes that principle nor attempts to distinguish the People's cited cases. *See* Peo. Br. 16 (citing *People v. Price*, 2021 IL App (4th) 190043, ¶ 139; *People v. Saulsberry*, 2021 IL App (2d) 181027, ¶ 81; *People v. Sorrels*, 389 Ill. App. 3d 547, 553 (4th Dist. 2009)). The significance of a command lies in the fact of its occurrence and its effect on a listener, rather than its substance.

Indeed, the same evidence was described through live testimony, confirming that it was nonhearsay: both officers described Hernandez's commands to Lopez in testimony that defendant either failed to challenge or introduced as part of his case-in-chief. *See* R189-90 (Hernandez testifying that he talked to Lopez over the radio and "g[a]ve instructions to [him] to go to the empty lot where everything . . . started"); R339-40 (Lopez answering "yes" when defense counsel asks (1) whether he was "in radio communication

with Officer Hernandez" and (2) "does he tell you to go back to the lot where it started?"). The fact that these nonhearsay commands were recorded by a body camera did not transform them into hearsay statements and so they did not need to be redacted from the recording.

Defendant asserts that these commands should be deemed hearsay because they communicated "the 'truth' that [defendant] dropped something" in the parking lot. Def. Br. 32. This claim is inconsistent with his reliance on these same commands (and Lopez's resulting search) as evidence that he did *not* discard a firearm. But in any event, a statement commanding a person to go to a location differs from a statement explaining the reason for that request. Other statements by Hernandez *did* convey his reason for sending his partner to the parking lot — Hernandez explained that defendant "dropped a pistol right there in the middle of the lot where we started," *see* Def. Br. 17 (quoting recording) — but only the explanation of why Hernandez issued the commands, and not the commands themselves, arguably constitutes hearsay.

However, those remaining statements about the reason for Hernandez's nonhearsay commands were admissible for a nonhearsay purpose because they provided necessary context for understanding those commands and described the course of the ongoing investigation. *See People v. Williams*, 181 Ill. 2d 297, 313 (1998) (statement may be introduced to "show[ ] the course of a police investigation where such testimony is

necessary to fully explain the State's case to the trier of fact"). Defendant's argument that Hernandez's recorded statements cannot be admitted on this basis because they were not strictly necessary to the jury's understanding of the investigation effectively advocates a rule that contemporaneous statements on a body camera recording that provide context for a search are inadmissible to show the course of investigation if they are duplicative of the officer's in-court testimony. Def. Br. 28-29.

This Court should reject defendant's proposed rule. Requiring redactions of duplicative contemporaneous statements under an overly broad conception of the hearsay rule would make body camera evidence more difficult for juries to follow and deprive them of the "impartial" and reliable evidence about police investigations provided by body cameras, undercutting a central purpose of the body camera statute, 50 ILCS 706/10-5. Such redactions would not serve the purpose for which courts have restricted course-of-investigation evidence, which is to prevent the jury from learning new, prejudicial information that the defendant has no opportunity to test through cross-examination. *See* Peo. Br. 18-19. Defendant's cases in which courts criticized the admission of evidence to show the course of an investigation uniformly involved prejudicial statements of non-testifying witnesses that were not duplicated by other, plainly admissible evidence. *See People v. Ochoa*, 2017 IL App (1st) 140204, ¶ 52 (testimony suggesting that codefendants implicated defendant was improper); *Jura*, 352 Ill. App. 3d at

1082-84 (testimony providing description given by non-testifying eyewitness was improper); *People v. Armstead*, 322 Ill. App. 3d 1, 12-13 (1st Dist. 2001) (testimony that eyewitness identified defendant as shooter was improper); *People v. Sample*, 326 Ill. App. 3d 914, 920-24 (1st Dist. 2001) (testimony suggesting that two codefendants had implicated defendant was improper); *People v. Edgecombe*, 317 Ill. App. 3d 615, 626-27 (1st Dist. 2000) (testimony about substance of radio call concerning defendant's flight from traffic stop was improper); *People v. Warlick*, 302 Ill. App. 3d 595, 600-01 (1st Dist. 1998) (testimony that officer received report of "burglary in progress," where burglary was disputed, was improper); *People v. Singletary*, 273 Ill. App. 3d 1076, 1081-86 (1st Dist. 1995) (testimony about statements of confidential informant was improper); *People v. Cameron*, 189 Ill. App. 3d 998, 1003-05 (1st Dist. 1989) (same).

The concerns that motivate restrictions on the use of such potentially prejudicial testimony for the nonhearsay purpose of showing the course of an investigation are not present here, and the reasoning of these cases does not compel the redaction of a testifying officer's own contemporaneous statements recorded by his body camera. It is well-established that it is not prejudicial to admit an officer's statements recorded by his body camera when those statements merely duplicate the officer's properly admitted trial testimony. *See infra* Section III. Requiring redactions to body camera recordings to

remove such non-prejudicial but important contextual evidence would be unwarranted.

In arguing that the recorded statements here were not used solely for a nonhearsay purpose, defendant relies on (1) the absence of a limiting instruction to the jury, Def. Br. 29, 32; and (2) the prosecutor's closing argument, Def. Br. 31-33. But a jury instruction is required only if requested, *see People v. Williams*, 233 Ill. App. 3d 1005, 1017 (1st Dist. 1992), and no such instruction was requested here. And the prosecutor's closing argument, viewed in its full context, properly urged the jury to consider that the contemporaneous body camera evidence corroborated Hernandez's account at trial — emphasizing, for example, that he immediately went to the parking lot and recovered a gun after detaining defendant. R359-64. The prosecutor did not urge the jury to rely on statements on the recording that were not otherwise duplicated in live testimony as direct, substantive proof of defendant's guilt. *Cf. Ochoa,* 2017 IL App (1st) 140204, ¶ 54 (testimony regarding codefendants' statements was not properly offered as evidence of course of investigation where prosecutor alluded in closing argument to fact that codefendants had implicated defendant, which was not otherwise in evidence).

Therefore, the circuit court's admission of the audio portion of the recording, all of which served a proper nonhearsay purpose, provides no basis to reverse defendant's conviction.

B. Hernandez's statements, made in the ongoing excitement of searching for a loaded gun discarded in a public place immediately following a foot chase, qualified as excited utterances.

Even if the People had relied on Hernandez's recorded statements for a hearsay purpose, such arguments were not improper because the statements qualified as excited utterances, which are admissible for the truth of the matter asserted. Contrary to defendant's arguments, the statements were admissible as excited utterances because Hernandez made them under "sufficiently startling" circumstances and with an "absence of time to fabricate" their substance. *People v. Lerma*, 2016 IL 118496, ¶ 5 n.1.

Defendant first argues that the ongoing danger posed by a discarded gun was insufficiently startling given Hernandez's training and experience as a law enforcement officer, Def. Br. 33, 36-37, but the mere fact that a witness is a trained police officer does not preclude application of the excited utterance exception, *see People v. Abram*, 2016 IL App (1st) 132785, ¶ 75. Although an officer's training may prepare him to deal with potentially deadly situations, it does not make those situations any less surprising when they arise. Other circumstances confirm that Hernandez's training did not prevent him from experiencing the "stress of excitement" caused by the startling circumstances. Ill. R. Evid. 803(2). For example, Hernandez made the statements about the gun in an excited tone and conveyed a sense of urgency in its immediate recovery. *See Abram*, 2016 IL App (1st) 132785,

¶ 74 (court may consider declarant's tone of voice in determining whether statement was excited utterance).

Furthermore, contrary to defendant's assertion, the statements were made while the danger was ongoing and without time to fabricate. Although Hernandez had arrested defendant, officers still lacked control of the loaded weapon that defendant had discarded. Hernandez's challenged statements related solely to that danger, describing the gun and requesting that other officers assist him in immediately locating it. The excitement aroused by this danger had not dissipated in these bare moments following a foot chase through the dark, and so Hernandez's statements that defendant had just discarded a gun in a parking lot that needed to be immediately recovered qualified as excited utterances.

III. Any Error in Admitting Hernandez's Cumulative Statements on the Recording Was Harmless.

Even if certain statements on the body camera recording should have been redacted as hearsay, the appellate court erred in reversing defendant's conviction because any error in failing to redact them was harmless.

Although defendant asserts that the People must demonstrate that the error was "harmless beyond a reasonable doubt," Def. Br. 37, that standard applies only to constitutional errors. Where the admission of evidence violates evidentiary rules and not the Constitution, the standard is instead whether "there is a reasonable probability that the trier of fact would have acquitted defendant absent the error." *People v. Hauck*, 2022 IL App (2d)

191111, ¶ 55 (citing *In re E.H.*, 224 Ill. 2d 172, 180-81 (2006) (distinguishing harmlessness standards that govern constitutional and non-constitutional errors)); *see also, e.g., People v. Ruiz*, 2019 IL App (1st) 152157, ¶ 43 (applying "reasonable probability" standard to erroneous admission of hearsay).

Here, Hernandez's recorded statements were harmless because they duplicated Hernandez's live testimony. *See Abram*, 2016 IL App (1st) 132785, ¶ 76. Indeed, two unpublished cases submitted by defendant confirm that admission of hearsay statements on a body camera recording is harmless if those statements are cumulative of an officer's live testimony. *See People v. Norris*, 2022 IL App (1st) 200375-U, ¶ 35 (trial counsel's failure to object to alleged hearsay statements on body camera recording was not prejudicial because "[a]ll of the information being challenged was also established through the live testimony of" the officers who wore the cameras) (at DA80); *Winston*, 2021 IL App (4th) 190288-U, ¶ 24 (declining to decide whether officer's statements on body camera recording constituted improper hearsay because they "were merely cumulative and duplicative of the deputy's live testimony and there is no reasonable probability that their admission affected the outcome of defendant's trial") (at DA92-93).

Even though, as defendant emphasizes, s*ee* Def. Br. 42, presentation of cumulative evidence will necessarily result in repetition, it is well-established that the admission of evidence is harmless if it was cumulative, *see People v.*

Barner, 2015 IL 116949, ¶ 78 (even where hearsay was admitted in violation of Confrontation Clause, its admission was harmless beyond a reasonable doubt because it was cumulative); *In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008) (same). And cumulative evidence is harmless even if it "bolstered or corroborated" a key witness's testimony. *Hauck*, 2022 IL App (2d) 191111, ¶ 59. Defendant cites an exception to this principle for statements "used to bolster a witness's credibility" in response to cross-examination, Def. Br. 38, but that that exception is limited to circumstances where prior consistent statements are used "to bolster the sagging credibility of a witness" whose credibility is crucial. *People v. Simon*, 139 Ill. App. 3d 21, 34 (1st Dist. 1985) (improper admission of victim's prior consistent statement following impeachment was not harmless); *see also People v. Randolph*, 2014 IL App (1st) 113624, ¶ 21 (improper admission of details from police report to bolster officer's testimony following effective cross-examination on report was not harmless); *People v. Johnson*, 2012 IL App (1st) 091730, ¶¶ 57-65 (improper admission of witness's prior consistent statements to police to bolster credibility following cross-examination not harmless). That exception is inapplicable here; the body camera recording was not introduced to rehabilitate Hernandez's credibility in response to damaging cross-examination, but as part of the People's case in chief, alongside Hernandez's credible testimony on the same points. Thus, any error in admitting the recording was harmless, even if, because it was cumulative to Hernandez's

testimony, it necessarily corroborated that testimony. *Hauck*, 2022 IL App (2d) 191111, ¶ 59.

Defendant's claim that admission of the unredacted recording contained hearsay statements that were *not* duplicative of trial testimony fails. Specifically, defendant argues that the body camera audio conveyed the substance of Hernandez's statements to Lopez in greater detail than Hernandez's testimony. Def. Br. 42. Hernandez's commands to Lopez, even if repeated, were not hearsay, s*ee* discussion *supra* p. 6, and therefore their admission does not constitute error, much less prejudicial error. Additionally, defendant overlooks that he introduced these same commands through Lopez's testimony. Lopez testified that Hernandez told him to go back to the lot where the chase started, and that he then began searching for, but could not find, a gun. R339-40. Defendant introduced this evidence because he perceived it to be helpful, relying on the substance of Hernandez's statements to Lopez to argue that Hernandez's testimony was either incredible or mistaken because Lopez could not find the gun where Hernandez told him to look for it. R368-70. Defendant cannot now argue that statements he introduced and relied on for his own benefit constituted prejudicial hearsay that warrants a new trial. *See, e.g.*, *People v. Negrete*, 258 Ill. App. 3d 27, 30 (1st Dist. 1994) ("A defendant who introduces evidence, even though it may be improper, cannot complain about its admission.").

The only arguable hearsay statements for purposes of assessing harmless error were Hernandez's factual assertions that defendant dropped a black pistol in the middle of the parking lot. *See* Peo. Br. 16. And those statements were plainly duplicative of Hernandez's trial testimony that he saw defendant discard a black gun while he chased defendant through the parking lot. Defendant has no argument that statements on the recording gave the jury any information that it had not already heard. The relevant statements that were purportedly admitted in error were duplicative of indisputably properly admitted evidence and therefore harmless.

The foundation of the People's case against defendant was Hernandez's compelling trial testimony, and there is no reasonable probability that the jury would have rejected that testimony had the duplicative recorded statements been redacted from the body camera evidence. Contrary to defendant's assertion, Hernandez's testimony that he saw defendant discard a black gun was not wholly uncorroborated. *See* Def. Br. 39. Critically, it was corroborated by the recovery of a black handgun at the location where Hernandez saw defendant discard a black handgun; the visual portion of the body camera recording, which defendant admits was admissible, plainly showed Hernandez, immediately after defendant's arrest, walk directly to a location in a parking lot and find the handgun on the ground, Peo. Exh. 3 at 3:55-5:07, and the recovered gun was admitted into evidence at trial, Peo. Exh. 1; R199-203.

And because defendant (like the appellate court) conflates the visual component of the recording with the audio component, he overstates the extent to which the prosecutor relied on purportedly improper hearsay statements in the audio portion of the recording in closing argument. Much of the argument quoted in defendant's brief, Def. Br. 39-41, emphasizes the extent to which Hernandez's testimony that he saw defendant discard a gun were corroborated by his *actions*, which were captured on the video. *See* R360 (emphasizing that video showed Hernandez "[going] to where the gun was dropped, where he saw the defendant drop the gun"); R362 ("[w]hen he gets to this location what does he recover? A black in color pistol sitting right where he saw it dropped"); *id.* ("more importantly if he didn't see it dropped at that location how was he able to go back to exactly where the spot was where the gun was recovered?"). Because the visual portion of the recording was indisputably admissible, as defendant admits, this argument was indisputably proper, and so cannot form the basis for finding prejudice.

To the extent that the prosecutor also referenced statements in the audio portion of the recording that should have been redacted, those limited references were harmless. In sum, there is no reasonable probability that the jury would have acquitted defendant had Hernandez's statements about defendant discarding a black gun been redacted from the body camera recording, given Hernandez's live testimony that he saw defendant discard the black gun at a particular spot and then recovered the black gun at that

same spot, the video depicting Hernandez's immediate recovery following defendant's arrest of the black gun at the spot he described, and the physical evidence of the black gun that Hernandez recovered.

Therefore, the appellate court erred in reversing defendant's conviction.

CONCLUSION

This Court should reverse the appellate court's judgment and remand for consideration of defendant's remaining claims on appeal.

September 22, 2022

Respectfully submitted,

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RULE 341(c) CERTIFICATE

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(c) certificate of compliance, and the certificate of service, is 18 pages.

/s Erin M. O'Connell
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CERTIFICATE 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 September 22, 2022, the foregoing **Reply Brief of Plaintiff-Appellant 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 automatically served notice on counsel at the email address below:

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