No. 126978

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. KEVIN SROGA, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-17-1992 There on Appeal from the Circuit Court of the Cook County, Illinois, No. 12-247418 The Honorable Diann K. Marsalek, Judge Presiding.

BRIEF OF RESPONDENT-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

JOSHUA M. SCHNEIDER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-7123
eserve.criminalappeals@ilag.gov

Counsel for Respondent-Appellee
People of the State of Illinois

ORAL ARGUMENT REQUESTED

E-FILED
12/17/2021 2:54 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS

Page(s)

NATURE OF THE ACTION 1

ISSUES PRESENTED FOR REVIEW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF FACTS 3

ARGUMENT 5

POINTS AND AUTHORITIES

I. The Penalty for an Offense Under Section 4-104(a)(4) Does Not Violate the Proportionate Penalties Clause Under the Identical Elements Test. 5

People v. Blair, 2013 IL 114122 5

People v. Hauschild, 226 Ill. 2d 63 (2007) 5

People v. Sharpe, 216 Ill. 2d 481 (2005) 5

People v. Ligon, 2016 IL 118023 ..... 5, 8

People v. Mandic, 325 Ill. App. 3d 544 (2d Dist. 2001) 6

720 ILCS 5/4-1 6

720 ILCS 5/4-3(a) 6

625 ILCS 5/4-104(a)(4) 6

625 ILCS 5/3-703 6

People v. O'Brien, 197 Ill. 2d 88 (2001) 7

People v. Gean, 143 Ill. 2d 281 (1991) 7

People v. Molnar, 222 Ill. 2d 495 (2006) 7

720 ILCS 5/4-9 7

720 ILCS 5/4-3(b) 7

People v. McCarty, 223 Ill. 2d 109 (2006) 7, 8

Knolls Condo. Ass'n v. Harms, 202 Ill. 2d 450 (2002) 7

People v. Deleon, 2020 IL 124744 8

Barragan v. Casco Design Corp., 216 Ill. 2d 435 (2005) 8

People v. Bailey, 167 Ill. 2d 210 (1995) 8

People v. Bochenek, 2021 IL 125889 8

In re Samantha V., 234 Ill. 2d 359 (2009) 9

People v. Artis, 232 Ill. 2d 156 (2009) 9

People v. Lee, 213 Ill. 2d 218 (2004) 9

A. The General Assembly intended that the Class A misdemeanor or Class 4 felony offense of displaying an unauthorized license plate under section 4-104(a)(4) require a knowing mental state. 10

625 ILCS 5/4-104(b)(3) 10

730 ILCS 5/5-4.5-55(a) 10

730 ILCS 5/5-4.5-55(e) 10

730 ILCS 5/5-4.5-45(a) 10

730 ILCS 5/5-4.5-45(e) 10

730 ILCS 5/5-4.5-50(b) 10

People v. Nunn, 77 Ill. 2d 243 (1979) 11

People v. Gean, 143 Ill. 2d 281 (1991) 11

People v. Valley Steel Prods. Co., 71 Ill. 2d 408 (1978) 11

B. The General Assembly intended that the Class C misdemeanor of displaying an unauthorized license plate under section 3-703 be an absolute liability offense. 11

625 ILCS 5/4-104(a)(4) 11

625 ILCS 5/3-703 ..... *passim*

People v. O'Brien, 197 Ill. 2d 88 (2001) 11-12, 12, 13

625 ILCS 5/3-707 12

In re K.C., 186 Ill. 2d 542 (1999) 12

People v. Molnar, 222 Ill. 2d 495 (2006) 12

People v. Gean, 143 Ill. 2d 281 (1991) 13

People v. Sevilla, 132 Ill. 2d 113 (1989) 13

730 ILCS 5/5-4.5-65(a) 13

730 ILCS 5/5-4.5-65(e) 13

730 ILCS 5/5-4.5-85(b)(3) 13

720 ILCS 5/4-9 13

Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/lend (last visited Dec. 17, 2022) 16

Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/permit (last visited Dec. 17, 2022) 16

People v. Maness, 191 Ill. 2d 478 (2000) 16

People v. Madrigal, 241 Ill. 2d 463 (2011) 17

C. In the alternative, the General Assembly intended that the Class C misdemeanor of displaying an unauthorized license plate under section 3-703 require a reckless mental state. 18

720 ILCS 5/4-3(b) 18

720 ILCS 5/4-6 18

In re Veronica C., 239 Ill. 2d 134 (2010) 18 n.3

1010 Lake Shore Ass'n v. Deutsche Bank Nat'l Trust Co., 2015 IL 118372 ..... 18 n.3

JPMorgan Chase Bank, N.A. v. Earth Foods, Inc., 238 Ill. 2d 455 (2010) 18 n.3

People v. Anderson, 148 Ill. 2d 15 (1992) 19

In re Samantha V., 234 Ill. 2d 359 (2009) 19

People v. Molnar, 222 Ill. 2d 495 (2006) 19

People v. Deleon, 2020 IL 124744 19

People v. Ligon, 2016 IL 118023 19

720 ILCS 5/4-6 20

625 ILCS 5/3-703 20

People v. Hollins, 2012 IL 112754 20

II. In the Alternative, If Sections 4-104(a)(4) and 3-703 Provide Different Penalties for the Same Offense, Then the Proper Remedy Is to Vacate the Greater Penalty and Impose the Lesser Penalty. 20

People v. Curry, 178 Ill. 2d 509 (1997) 20

United States v. Morrison, 449 U.S. 361 (1981) 20-21

People v. J.H., 136 Ill. 2d 1 (1990) 21

Ill. Const. 1970, art. I, § 11 21

People v. Christy, 139 Ill. 2d 172 (1990) 21

People v. Sharpe, 216 Ill. 2d 481 (2005) 21, 22

People v. Blair, 2013 IL 114122 21

People v. Ligon, 2016 IL 118023 22

People v. Clark, 2019 IL 122891 22

People v. Simmons, 145 Ill. 2d 264 (1991) 22

People v. Hauschild, 226 Ill. 2d 63 (2007) 22

A. The *Christy* remedy is consistent with the nature of an identical elements proportionality violation and gives effect to the legislature's intent. 23

People v. Clemons, 2012 IL 107821 23

People v. Sharpe, 216 Ill. 2d 481 (2005) 23

People v. Christy, 139 Ill. 2d 172 (1990) 23, 26

Ill. S. Ct. Rule 615(b)(3) 23, 24, 26

People v. Blair, 2013 IL 114122 23

People v. Rowell, 229 Ill. 2d 82 (2008) 24

People v. Kennebrew, 2013 IL 113998 ..... 24, 25

People v. Knaff, 196 Ill. 2d 460 (2001) 24

720 ILCS 5/2-9 25

People v. Miller, 238 Ill. 2d 161 (2010) 25 n.4

B. The *Hauschild* remedy is inconsistent with the nature of an identical elements proportionality violation, unnecessarily infringes on the legislature's authority to set the penalties for crimes, and is unworkable in practice. 26

People v. Hauschild, 226 Ill. 2d 63 (2007) 26, 27

People v. Christy, 139 Ill. 2d 172 (1990) 27

People v. Beard, 287 Ill. App. 3d 935 (1st Dist. 1997) 28 n.5

People v. Sharpe, 216 Ill. 2d 481 (2005) 28

1. The *Hauschild* remedy is inconsistent with the nature of an identical elements proportionality violation because it is taken from inapposite authority. 29

a. The *Hauschild* remedy rests on doctrinally inapposite authority concerning the general remedy for injuries suffered under statutes that are void *ab initio.* 29

People v. Gersch, 135 Ill. 2d 384 (1990) 29, 30

People v. Hauschild, 226 Ill. 2d 63 (2007) 29, 30, 31

People v. Pizano, 347 Ill. App. 3d 128 (2004) 30, 31

People v. Harvey, 366 Ill. App. 3d 119 (1st Dist. 2006) 30, 31

People v. Sharpe, 216 Ill. 2d 481 (2005) 30

People v. Hampton, 363 Ill. App. 3d 293 (1st. Dist. 2006) 31

People v. Blair, 2013 IL 114122 ..... 31, 32

People v. Holmes, 2017 IL 120407 32

People v. Carrera, 203 Ill. 2d 1 (2002) 32

b. *Hauschild*'s remedy rests on procedurally inapposite authority concerning pretrial challenges to charging instruments. 33

People v. Lewis, 175 Ill. 2d 412 (1996) 33, 34

People v. Hauschild, 226 Ill. 2d 63 (2007) 33, 37

People v. Rowell, 229 Ill. 2d 82 (2008) 33, 35, 36

People v. Mandic, 325 Ill. App. 3d 544 (2d Dist. 2001) 34

720 ILCS 5/4-1 34

720 ILCS 5/4-3(a) 34

People v. Christy, 139 Ill. 2d 172 (1990) 34

People v. Carey, 2018 IL 121371 34

People v. Pujoue, 61 Ill. 2d 335 (1975) 34

People v. Thingvold, 145 Ill. 2d 441 (1991) 35

People v. Tellez-Valencia, 188 Ill. 2d 523 (1999) 35, 36 n.6

Ill. S. Ct. Rule 615(b)(3) 36

People v. Clemons, 2012 IL 107821 ..... 35, 37, 38

People v. Kennebrew, 2013 IL 113998 36

2. The *Hauschild* remedy unnecessarily infringes on the legislature's authority to set the penalties for crimes. 38

People v. Sharpe, 216 Ill. 2d 481 (2005) 38, 39, 40

People v. Lee, 167 Ill. 2d 140 (1995) 38

People v. Blair, 2013 IL 114122 ..... 39, 40

People v. Hauschild, 226 Ill. 2d 63 (2007) 39

People v. Clark, 2019 IL 122891 40

People v. Christy, 139 Ill. 2d 172 (1990) 40

People v. Lewis, 175 Ill. 2d 412 (1996) 40

3. The *Hauschild* remedy is unworkable in practice and leads to absurd results. 40

People v. Novak, 163 Ill. 2d 93 (1994) 41

People v. Blair, 2013 IL 114122 42

People v. Sharpe, 216 Ill. 2d 481 (2005) 42, 44

People v. Christy, 139 Ill. 2d 172 (1990) 42

People v. Hauschild, 226 Ill. 2d 63 (2007) 42

People v. Clemons, 2012 IL 107821 43

CONCLUSION 45

CERTIFICATION

PROOF OF SERVICE

NATURE OF THE ACTION

Petitioner Kevin Sroga appeals from the appellate court's judgment affirming the circuit court's dismissal of his petition for relief from judgment. A4.[1] No issue is raised on the pleadings.[2]

ISSUES PRESENTED FOR REVIEW

1. Whether the Class A misdemeanor penalty for an offense under 625 ILCS 5/4-104(a)(4) comports with the proportionate penalties clause of the Illinois Constitution because the offense has different elements than the offense for which 625 ILCS 5/3-703 provides a Class C misdemeanor penalty.

2. Whether the proper remedy when the legislature has provided two different penalties for a single offense and a defendant receives the greater of the two penalties is to vacate the greater penalty and impose the lesser penalty.

---

[1] Citations to the common law record appear as "C__," to the report of proceedings as "R__," to petitioner's opening brief as "Pet. Br.__," and to petitioner's appendix as "A__." Citations to the supplemental record volumes adopt the citation convention applied in those volumes, with citations to the first volume appearing as "Sup R__," to the second volume as "Sup2 C__," to the third volume as "Sup3 R__," and so on.

[2] Although petitioner asserts that there is an issue concerning the sufficiency of the petition for relief from judgment, *see* Pet. Br. 1, there is not because the first time he raised the claim at issue here was in the appellate court, *see* A5.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612. On May 26, 2021, this Court allowed petitioner's petition for leave to appeal.

STATUTES INVOLVED

At the time of petitioner's offense, section 4-104 of the Illinois Vehicle Code provided in relevant part:

> **Section 4-401. Offenses relating to possession of titles and registration.**
>
> (a) It is a violation of this Chapter for:
>
> * * *
>
> (4) A person to display or affix to a vehicle any certificate of title, manufacturers statement of origin, salvage certificate, junking certificate, display certificate, temporary registration permit, registration card, license plate or registration sticker not authorized by law for use on such vehicle.
>
> * * *
>
> (b) Sentence:
>
> * * *
>
> (3) A person convicted of a violation of . . . subsection 4 . . . of paragraph (a) of this Section is guilty of a Class A misdemeanor and upon a second or subsequent conviction of such a violation is guilty of a Class 4 felony.

625 ILCS 54-104 (2012).

At the time of petitioner's offense, section 3-703 of the Illinois Vehicle Code provided in relevant part:

> **Section 3-703. Improper use of evidences of registration or certificate of title.**
>
> No person shall lend to another any certificate of title, registration card, registration plate, registration sticker, special plate or permit or other evidences of proper registration issued to him if the person desiring to borrow the same would not be entitled to the use thereof, nor shall any person knowingly permit the use of any of the same by one not entitled thereto, nor shall any person display upon a vehicle any registration card, registration sticker, registration plate or other evidences of proper registration not issued for such vehicle or not otherwise lawfully used thereon under this Code. No person shall duplicate, alter or attempt to reproduce in any manner a registration plate or registration sticker issued under this Code. No person shall make fraudulent use of evidences of registration or certificates of title issued erroneously by the Secretary of State. No person shall manufacture, advertise, distribute or sell any certificate of title, registration card, registration plate, registration sticker, special plate or permit or other evidences of proper registration which purports to have been issued under this Code. The Secretary of State may request the Attorney General to seek a restraining order in the circuit court against any person who violates this Section by advertising such fraudulent items. Any violation of this Section is a Class C misdemeanor.

625 ILCS 5/3-703 (2012).

STATEMENT OF FACTS

The People charged petitioner with displaying an unauthorized license plate in violation of 625 ILCS 5/4-104(a)(4), C9, which is a Class A misdemeanor for a first offense, 625 ILCS 5/4-104(b)(3).

The trial evidence showed that on October 21, 2012, two Chicago police officers saw an unoccupied Ford Crown Victoria parked on the sidewalk. Sup4 R304. When they ran the Ford's license plate through the vehicle information database, they discovered that the plate was registered to a

different car: a Saturn. Sup4 R305-06. Petitioner then arrived at the scene and said that he owned the Ford. Sup4 R309. The officers told him that false plates were affixed to the Ford, and petitioner responded, "You got me on the plates." Sup4 R309-10. Subsequent investigation revealed that petitioner owned both the Ford and the Saturn. Sup4 R311-12.

The jury found petitioner guilty, Sup4 R399-402, and petitioner moved for a new trial on the ground, among others, that section 4-104(a)(4) was inapplicable to his conduct because he owned the car on which the unauthorized license plates were displayed, C61-64; Sup4 R435-36. Petitioner argued that his conduct instead fell under section 3-703. C64-65; Sup4 R435. The trial court denied the motion, Sup4 R453, and sentenced petitioner to serve 12 months of probation and pay a $500 fine, Sup4 R466; petitioner did not appeal.

About two years later, in October 2016, petitioner filed a pro se petition for relief from judgment under 735 ILCS 5/2-1401, *see* R48; Sup2 C99-105, claiming that section 4-104(a)(4) was inapplicable to his conduct because he owned both the Ford and the license plates affixed to it, Sup2 C101-102. Petitioner again argued that he should have been charged under section 3-703. Sup2 C102. The trial court granted the People's motion to dismiss the petition. R127.

On appeal, petitioner argued for the first time that the Class A misdemeanor penalty for displaying an unauthorized license plate under

section 4-104(a)(4) violates the proportionate penalties clause because section 3-703 imposes a lesser Class C penalty for an offense with identical elements. A5. The appellate court affirmed, holding that the two offenses did not have identical elements because "section 4-104(a)(4) contains an implied mental state of knowledge whereas the pertinent prohibition in section 3-703 is an absolute liability offense." A20.

ARGUMENT

I. The Penalty for an Offense Under Section 4-104(a)(4) Does Not Violate the Proportionate Penalties Clause Under the Identical Elements Test.

"A proportionate penalties violation, under the identical elements test, occurs when 'two offenses have identical elements but disparate sentences,'" *People v. Blair*, 2013 IL 114122, ¶ 32 (quoting *People v. Hauschild*, 226 Ill. 2d 63, 85 (2007)), for "[i]f the legislature determines that the exact same elements merit two different penalties, then one of these penalties has not been set in accordance with the seriousness of the offense," *People v. Sharpe*, 216 Ill. 2d 481, 522 (2005). Accordingly, when "identical offenses do not yield identical penalties," the greater of the two penalties is held to be unconstitutionally disproportionate. *People v. Ligon*, 2016 IL 118023, ¶ 11. Whether two statutes impose different penalties for a single offense in violation of the proportionate penalties clause is a question of law that this Court reviews de novo. *Id.*

Petitioner claims that section 4-104(a)(4) violates the proportionate penalties clause because the offense for which it provides a Class A

misdemeanor penalty is identical to the offense for which section 3-703 provides a Class C misdemeanor penalty. Pet. Br. 23-24. For the offenses under sections 4-104(a)(4) and 3-703 to have identical elements, they must prohibit engaging in the same conduct with the same mental state, for unless intended by the legislature as an absolute liability offense, an offense consists of both a prohibited act and a culpable mental state. *See People v. Mandic*, 325 Ill. App. 3d 544, 547 (2d Dist. 2001) ("The common law recognizes that a crime requires both *actus reus*, a guilty act, and *mens rea*, a guilty mind[.]"); *see also* 720 ILCS 5/4-1 ("A material element of every offense is a voluntary act[.]"); 720 ILCS 5/4-3(a) ("A person is not guilty of an offense, other than an offense which involves absolute liability, unless . . . he acts while having one of the mental states described in Sections 4-4 through 4-7."). The parties agree that sections 4-104(a)(4) and 3-703 proscribe the same act: displaying an unauthorized license plate. *See* Pet. Br. 9; *compare* 625 ILCS 5/4-104(a)(4) (providing that it is an offense to "display . . . any . . . license plate . . . not authorized by law for use on such vehicle") *with* 625 ILCS 5/3-703 (providing that it is an offense to "display upon a vehicle any . . . registration plate . . . not issued for such vehicle or not otherwise lawfully used thereon"). But neither statute specifies a mental state for its prohibitions against displaying an unauthorized license plate, *see* 625 ILCS 5/4-104(a)(4); 625 ILCS 5/3-703, and so this Court must construe the statutes to determine which, if any, mental state the General Assembly intended and, by extension, whether the

statutes have identical elements. *See People v. O'Brien*, 197 Ill. 2d 88, 92 (2001); *People v. Gean*, 143 Ill. 2d 281, 288 (1991).

When construing sections 4-104(a)(4) and 3-703 to determine the mental state required under each, "this [C]ourt's primary objective is to ascertain and give effect to the intent of the legislature." *People v. Molnar*, 222 Ill. 2d 495, 518 (2006); *O'Brien*, 197 Ill. 2d at 90. And, "absent a clear indication that the legislature intended to impose absolute liability, or an important public policy favoring absolute liability," the Court presumes that the legislature intended any offense punishable by incarceration or a fine of more than $1,000 to require a culpable mental state, *Molnar*, 222 Ill. 2d at 519; *see* 720 ILCS 5/4-9, and construes the statute that defines the offense to determine whether that mental state is intent, knowledge, or recklessness, 720 ILCS 5/4-3(b); *Gean*, 143 Ill. 2d at 288.

Settled rules of statutory construction also require that "all the provisions of a statute must be viewed as a whole," *People v. McCarty*, 223 Ill. 2d 109, 133 (2006), and "[s]tatutes relating to the same subject must be compared and construed with reference to each other so that effect may be given to all of the provisions of each if possible," *Knolls Condo. Ass'n v. Harms*, 202 Ill. 2d 450, 459 (2002); *see Molnar*, 222 Ill. 2d at 519. This means that "'[w]here two statutes are allegedly in conflict, [the] [C]ourt has a duty to interpret the statutes in a manner that avoids an inconsistency and gives effect to both statutes, where such an interpretation is reasonably possible.'"

People v. Deleon, 2020 IL 124744, ¶ 45 (quoting *Barragan v. Casco Design Corp.*, 216 Ill. 2d 435, 441-42 (2005)); *see McCarty*, 223 Ill. 2d at 133 ("Under the doctrine of *in pari materia*, two statutes dealing with the same subject will be considered with reference to one another to give them harmonious effect."). And, because "an interpretation that renders a statute valid is always presumed to have been intended by the legislature," *People v. Bailey*, 167 Ill. 2d 210, 225 (1995), the Court "begin[s] with the presumption that the statute is constitutional," *Ligon*, 2016 IL 118023, ¶ 11, and, "if reasonably possible, . . . must construe the statute so as to affirm its constitutionality," *id.*; *see People v. Bochenek*, 2021 IL 125889, ¶ 10 ("If it is reasonably possible to construe the statute in a way that preserves its constitutionality, [the Court] must do so.").

Thus, to prevail on his claim that section 4-104(a)(4) is unconstitutional because it defines the same offense as section 3-703 but provides a greater penalty for that offense, Pet. Br. 24, petitioner must show that there is no way to reasonably construe sections 4-104(a)(4) and 3-703 as requiring different mental states, thereby avoiding the alleged disproportionality and preserving the constitutionality of section 4-104(a)(4). *See Bochenek*, 2021 IL 125889, ¶ 10; *Deleon*, 2020 IL 124744, ¶ 45. In other words, petitioner must identify something in the language or history of the statutes that *compels* the Court to construe them as requiring the same mental state.

Petitioner fails to bear this burden because sections 4-104(a)(4) and 3-703 can be reasonably construed as defining different offenses that involve the same act but different mental states. Although the General Assembly did not specify which mental state is required for a display of an unauthorized license plate under each statute, it clearly communicated its intent that a more culpable mental state be required under section 4-104(a)(4) than under section 3-703 when it provided a greater penalty for an offense under the former than under the latter. As this Court has repeatedly observed, "common sense dictates that the legislature would prescribe greater punishment for the offense it deems more serious." *See*, *e.g.*, *In re Samantha V.*, 234 Ill. 2d 359, 379 (2009) (citing *People v. Artis*, 232 Ill. 2d 156, 170 (2009), and *People v. Lee*, 213 Ill. 2d 218, 228 (2004)). And common sense similarly dictates that, all else being equal, the legislature deems an act committed with a more culpable mental state to be a more serious offense than the same act committed with a less culpable mental state. *Cf. Artis*, 232 Ill. 2d at 170-71 (where legislature imposes the same penalty for two offenses, the offense requiring the more culpable mental state is the more serious offense for one-act, one-crime purposes).

Because the General Assembly demonstrated through the penalties attached to the display of an unauthorized plate in violation of sections 4-104(a)(4) and 3-703 that it intended a violation of section 40104(a)(4) to be a more serious offense than a violation of section 3-703 but did not specify the

applicable mental states, all this Court need do is determine which relatively more culpable mental state the General Assembly intended for the more serious offense under section 4-104(a)(4) and which relatively less culpable mental state it intended for the less serious offense under section 3-703. Review of the two statutes reveals that knowledge is the appropriate mental state for section 4-104(a)(4) and that the General Assembly intended section 3-703 to impose absolute liability. In the alternative, if the Court does not conclude that the General Assembly intended to impose absolute liability under section 3-703, then recklessness is the appropriate mental state for an offense under that section.

A. The General Assembly intended that the Class A misdemeanor or Class 4 felony offense of displaying an unauthorized license plate under section 4-104(a)(4) require a knowing mental state.

The parties agree, *see* Pet. Br. 14, that, given the relatively severe Class A misdemeanor penalty for a first violation of section 4-104(a)(4) and the Class 4 felony penalty for any successive violation, the General Assembly intended that an offense under section 4-104(a)(4) be committed with a knowing mental state. A first violation of section 4-104(a)(4) is a Class A misdemeanor and a successive violation is Class 4 felony, 625 ILCS 5/4-104(b)(3), meaning that a first violation is punishable by imprisonment up to 364 days and a fine of up to $2,500, 730 ILCS 5/5-4.5-55(a), (e), and a successive violation by imprisonment between one and three years and a fine of up to $25,000, 730 ILCS 5/5-4.5-45(a), (e); 730 ILCS 5/5-4.5-50(b). Because

a Class A misdemeanor penalty is substantial, *People v. Nunn*, 77 Ill. 2d 243, 249 (1979), and a Class 4 felony penalty even more so, *see Gean*, 143 Ill. 2d at 288, it would be unreasonable to construe section 4-104(a)(4) as intended to "'subject a person to a long term of imprisonment for an offense he might commit unknowingly'" where the General Assembly has not clearly indicated such intent, *id.* at 287 (quoting *People v. Valley Steel Prods. Co.*, 71 Ill. 2d 408, 425 (1978)). Therefore, a construction of section 4-104(a)(4) that requires a knowing mental state reasonably reflects the culpability that the legislature intended when it provided Class A misdemeanor and Class 4 felony penalties. *See id.* at 288-89 (construing Class 4 felonies offense under sections 4-104(a)(1) and 4-104(a)(2) as requiring knowing mental state).

B. The General Assembly intended that the Class C misdemeanor of displaying an unauthorized license plate under section 3-703 be an absolute liability offense.

Through its plain language, section 3-703 evinces the legislature's intent to impose absolute liability for the display of an authorized license plate. Unlike section 4-104(a)(4), which provides that "[i]t is a violation" for a person to display an unauthorized plate, 625 ILCS 5/4-104(a)(4), section 3-703 instead provides that "[n]o person shall" engage in various conduct, "nor shall any person display upon a vehicle any . . . registration plate . . . not issued for such vehicle or not otherwise lawfully used thereon," 625 ILCS 5/3-703. As this Court found in *O'Brien*, this negative mandatory formulation of an offense — that "'no person shall'" engage in particular conduct, *O'Brien*,

197 Ill. 2d at 92 (quoting 625 ILCS 5/3-707) — "could not be clearer": it "unquestionably provides for absolute liability." *Id.* at 92.

Moreover, because "chapter 3, article VII, of the [Vehicle Code] is replete with penal statutes containing a culpable mental state," the legislature's "omission of a culpable mental state" for this particular violation of section 3-703 "'indicates that different results were intended.'" *Id.* at 94-95 (quoting *In re K.C.*, 186 Ill. 2d 542, 550 (1999)). Similarly, section 3-703's provision of a culpable mental state for one of the other offenses defined in that same section — "knowingly permit[ting] the use of [evidence of registration] by one not entitled thereto," 625 ILCS 5/3-703 — while omitting any mental state for the offense of displaying an unauthorized license plate, demonstrates the legislative intent to impose absolute liability for such displays. *See Molnar*, 222 Ill. 2d at 521 (presuming that "by specifically including a culpable mental state within the same statutory section, the legislature's omission of a culpable mental state [elsewhere in the section] indicates that different results were intended"). To hold that section 3-703 "implicitly requires proof of a culpable mental state, the specific knowledge requirements of [other statutes in chapter 3, article VII]" and of the other offense within section 3-703 itself would have to be "'meaningless surplusage,'" *O'Brien*, 197 Ill. 2d at 94 (quoting *K.C.*, 186 Ill. 2d at 550).

Also "weigh[ing] heavily in favor of a legislative purpose to impose absolute liability" is the "relatively minor penalty" provided for a violation of

section 3-703. *Id.* at 93. "The possible punishment which can be imposed for a violation of a statute is an important factor in determining whether it is an absolute liability offense," and "'where the punishment is great, it is less likely that the legislature intended to create an absolute liability offense.'" *Gean*, 143 Ill. 2d at 287 (quoting *People v. Sevilla* 132 Ill. 2d 113, 122 (1989)). But just as a severe penalty for an offense makes it "'less likely that the legislature intended to create an absolute liability offense,'" *id.* (quoting *Sevilla* 132 Ill. 2d at 122), "[t]he converse also is true," *O'Brien*, 197 Ill. 2d at 94. "Where, as here, the penalty is not so severe, the likelihood of a legislative intent to impose absolute liability is enhanced." *Id.* Section 3-703 provides only a Class C misdemeanor penalty, 625 ILCS 5/3-703, which is defined as imprisonment of no more than 30 days and a fine of no more than $1,500, 730 ILCS 5/5-4.5-65(a), (e). This is the most lenient penalty possible before a crime becomes a petty offense and the rebuttable presumption against absolute liability ceases to apply altogether. *See* 730 ILCS 5/5-4.5-85(b)(3); 720 ILCS 5/4-9. Although the relative leniency of a Class C misdemeanor penalty does not weigh so heavily in favor a legislative intent to impose absolute liability as did the even more lenient business offense penalty at issue in *O'Brien*, it nonetheless supports the conclusion that the legislature intended to impose absolute liability.

Petitioner disagrees with *O'Brien* and notes that it did not cite any authority in support of its determination that the plain language of the

statute at issue showed the legislature's intent to impose absolute liability. Pet. Br. 16. But *O'Brien*'s determination that the statute's language clearly communicated an intent to impose absolute liability is not unreasonable simply because it rested on the language of the statute. Nor can petitioner distinguish *O'Brien* on the ground that section 3-703 is phrased as a negative "prohibition," providing that "[n]o person shall" display an unauthorized license plate, Pet. Br. 17 (quoting 625 ILCS 5/3-703), for the statute at issue in *O'Brien* was phrased identically, providing that "[n]o person shall" operate a motor vehicle without insurance coverage, and *O'Brien* found this language "could not be clearer" in communicating the legislative intent to impose absolute liability. 197 Ill. 2d at 93.

And though petitioner argues that it is "incorrect[]" to look to other statutes in the Vehicle Code to interpret the significance of the legislature's omission of a mental state for displaying an unauthorized license plate under section 3-703, Pet. Br. 22, it is reasonable to consider the legislature's language elsewhere in the Vehicle Code when construing the significance of section 3-703's language. *See O'Brien*, 197 Ill. 2d at 94-95. Petitioner also discounts the significance of the legislature's provision of mental states in other sections of the Vehicle Code because some of them, like section 3-703, define more than one offense and provide mental states for only some of the offenses they define. Pet. Br. 21. But he does not explain how this demonstrates that the legislature's provision of mental states for some

offenses but not others does not reflect a decision about when and when not to impose absolute liability. If anything, the fact that the legislature consistently demonstrates the deliberate use of mental states even within individual statutes in the Vehicle Code supports the inference that the omission of a mental state is evidence of an intent to impose absolute liability.

Petitioner also argues that the legislature's provision of a mental state for one of section 3-703's offenses — "knowingly permit[ting] the use of [evidence of registration] by one not entitled thereto," 625 ILCS 5/3-703 — cannot demonstrate an intent to impose absolute liability for section 3-703's offenses without mental states because it leads to the "absurd result" of absolute liability for the offense of lending one's evidence of registration to a person who is not entitled to use it. Pet. Br. 18-19. But this is not an absurd result at all. The purpose of section 3-703 is to prevent the improper use of evidence of registration by providing criminal sanctions to deter such use or to deter behaviors likely to result in such use. *See* 625 ILCS 5/3-703 ("Improper use of evidences of registration or certificate of title."). One way of preventing the improper use of evidence of registration is to prevent it from getting into the hands of people who are not entitled to use it in the first place. Accordingly, section 3-703 imposes absolute liability for lending one's evidence of registration to another if that person turns out not to be entitled to use it. *See id.* Because one cannot accidentally lend something to another

— lending is an action defined by the lender's intent, *see Merriam-Webster Dictionary,* https://www.merriam-webster.com/dictionary/lend (last visited Dec. 17, 2022) (defining "lend" as "to give for a temporary use on condition that the same or its equivalent will be returned") — absolute liability prevents evidence of registration from ending up in the hands of those not entitled to use it by deterring people from lending their evidence of registration to others.

The General Assembly did not similarly impose absolute liability for permitting the use of one's evidence of registration by a person who is not entitled to use it because "permitting" is not necessarily limited by the actor's intent. Although "permit" *can* mean "to consent to expressly or formally," *Merriam-Webster Dictionary,* https://www.merriam-webster.com/dictionary/permit (last visited Dec. 17, 2022), it can also mean "to make possible," *id.*, and the latter definition would result in a statute that is potentially unconstitutionally vague. *See People v. Maness*, 191 Ill. 2d 478, 483-84 (2000) (statute is unconstitutionally vague if it does not allow a person of ordinary intelligence to distinguish between lawful and unlawful conduct). For example, if one were criminally liable simply for making it possible for another person to use one's evidence of registration, then one might be liable for failing to take adequate measures to prevent people from gaining access to such evidence. People of ordinary intelligence could not know what preventative measures they must take to secure their evidence of registration

from unauthorized use; one might be criminally liable for permitting the use of one's license plate or registration documents by parking on the street at night or by failing to hide one's documents well enough from incorrigible roommates. The breadth of absolute liability for "permitting" use of one's evidence of registration could also violate due process by criminalizing a substantial amount of conduct that is wholly unrelated to the purpose of section 3-703. *See People v. Madrigal*, 241 Ill. 2d 463, 472-73 (2011) (a statute violates due process when it "punishes a significant amount of wholly innocent conduct not related to the statute's purpose").

It is thus not surprising, and certainly not absurd, that the legislature limited the scope of the offense of permitting the use of one's evidence of registration by a person who is not entitled to use it to prohibit only knowingly permitting such use. But no such limitation was necessary to preserve the constitutionality of section 3-703's prohibition against displaying a license plate on a car for which it was not issued or upon which it otherwise cannot lawfully be used. Contrary to petitioner's assertion, Pet. Br. 17, no display of an unauthorized license plate is "innocent," in the sense of being "wholly unrelated to the legislature's purpose in enacting" the prohibition against displaying unauthorized license plates, for any such display falls squarely within the improper use of evidence of registration that the legislature sought to deter by enacting section 3-703. Petitioner provides only one example of alleged "innocent conduct" — someone who owns two

cars and mistakenly puts the license plate for one car on the other — but that conduct still results in a vehicle that cannot be accurately identified by its license plate, and therefore that act of putting the wrong license plate on a car is still related to the legislature's purpose in enacting section 3-703.

C. In the alternative, the General Assembly intended that the Class C misdemeanor of displaying an unauthorized plate under section 3-703 require a reckless mental state.

If there is insufficient evidence of the legislature's intent that section 3-703 impose absolute liability for displaying an unauthorized license plate, then the appropriate mental state for that offense under section 3-703 would be recklessness, not knowledge.[3] There is no bar to construing section 3-703 to require a reckless mental state; the General Assembly expressly authorized the Court to do so, *see* 720 ILCS 5/4-3(b) (providing recklessness as applicable mental state where no mental state is specified and offense is not absolute liability offense); 720 ILCS 5/4-6, and section 3-703's Class C misdemeanor penalty is not unreasonably severe for reckless conduct, *see*

---

[3] The People did not forfeit this alternate construction of section 3-703 by not raising it in the appellate court because an appellee may raise any argument to affirm that is supported by the record. *See In re Veronica C.*, 239 Ill. 2d 134, 150-51 (2010); *see also 1010 Lake Shore Ass'n v. Deutsche Bank Nat'l Trust Co.*, 2015 IL 118372, ¶ 18 ("This 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 or appellate courts."). Moreover, the alternate construction is merely an application of the canons of statutory construction and therefore cannot be forfeited. *See JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 462 (2010) (explaining that "[c]anons of statutory construction cannot be forfeited because they are not arguments" but "principles that guide this court's construction of statutes" that "are utilized in every statutory construction case whether a party raises them or not").

People v. Anderson, 148 Ill. 2d 15, 24 (1992) (finding that legislature intended recklessness as mental state for Class B misdemeanor offense that did not specify any mental state). And construing section 3-703 to require a reckless mental state avoids any conflict between sections 3-703 and 4-104(a)(4); under this construction, the two statutes simply define different offenses, with section 3-703 prohibiting the reckless display of an unauthorized license plate and section 4-104(a)(4) prohibiting the knowing display of an unauthorized license plate. Construing section 3-703 to require a reckless mental state is also consistent with the relative severity of the penalties that the legislature provided for violations of the two statutes, for it results in section 3-703 providing a lesser penalty for a display of an unauthorized plate committed with the less culpable mental state. *See Samantha V.*, 234 Ill. 2d at 379. Therefore, if the Court does not construe section 3-703 as imposing absolute liability, it should construe it to require a reckless mental state because that construction gives effect to the legislature's intent, avoids any conflict between sections 3-703 and 4-104(a)(4), and preserves the constitutionality of section 4-104(a)(4). *See Molnar*, 222 Ill. 2d at 518; *Deleon*, 2020 IL 124744, ¶ 45; *Ligon*, 2016 IL 118023, ¶ 11.

Petitioner argues that section 3-703 must require a knowing mental state to avoid criminalizing "innocent conduct," Pet. Br. 22-23, but a reckless mental state accomplishes the same goal without creating a conflict between sections 3-703 and 4-104(a)(4) and rendering the penalty provided under

section 4-104(a)(4) unconstitutional. A person acts recklessly if he or she "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, . . . and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation." 720 ILCS 5/4-6. Prohibiting a person from displaying a license plate on a vehicle with reckless disregard for whether the plate is "not issued for such vehicle or not otherwise lawfully used thereon," 625 ILCS 5/3-703, does not criminalize any "innocent conduct" because it does not criminalize any conduct that is "wholly unrelated to the legislature's purpose in enacting the law." *People v. Hollins*, 2012 IL 112754, ¶ 28. Imposing criminal liability for displaying an unauthorized license plate with reckless disregard to the legality of such display is rationally tailored to the legislative purpose of preventing the improper use of evidence of registration, which prevents law enforcement and others from accurately identifying vehicles on the road.

II. In the Alternative, If Sections 4-104(a)(4) and 3-703 Provide Different Penalties for the Same Offense, Then the Proper Remedy Is to Vacate the Greater Penalty and Impose the Lesser Penalty.

The proper remedy for an identical elements proportionality violation, like the proper remedy for any other constitutional violation, "is the one best 'tailored to the injury suffered from the constitutional violation [which does] not unnecessarily infringe on competing interests.'" *People v. Curry*, 178 Ill. 2d 509, 537 (1997) (quoting and altering *United States v. Morrison*, 449 U.S.

361, 364 (1981)); *see*, *e.g.*, *People v. J.H.*, 136 Ill. 2d 1, 12-13 (1990) (considering nature of injury from constitutional violation to determine proper remedy for that violation). Therefore, determination of the proper remedy for an identical elements proportionality violation requires consideration of the nature of the identical elements test, the nature of the injury caused by a violation of the proportionate penalties clause under that test, and the other interests involved.

Because the proportionate penalties clause requires that "[a]ll penalties shall be determined . . . according to the seriousness of the offense," Ill. Const. 1970, art. I, § 11, "common sense and sound logic" dictate that when the legislature purports to create two different offenses but in fact merely codifies a single offense in two different statutes, the penalties for the offense under both statutes should "be identical," *People v. Christy*, 139 Ill. 2d 172, 181 (1990), for "[i]f the legislature determines that the exact same elements merit two different penalties, then one of these penalties has not been set in accordance with the seriousness of the offense," *Sharpe*, 216 Ill. 2d at 522. Where the legislature provides two different penalties for the same offense, the lesser of the two penalties is deemed the proportionate penalty and the greater of the two is therefore disproportionate and "will be found to violate the proportionate penalties clause." *Blair*, 2013 IL 114122, ¶ 32; *see Sharpe*, 216 Ill. 2d at 504 (citing *Christy*, 139 Ill. 2d at 181) (greater of two penalties provided by legislature for same offense cannot stand).

Thus, the injury suffered from an identical elements proportionality violation is not that the defendant was held criminally liable for conduct that was beyond the legislature's authority to prohibit or received a penalty that was inherently beyond the legislature's authority to provide, but that the defendant received the greater of the two penalties that the legislature provided for his offense. *See Ligon*, 2016 IL 118023, ¶ 11 ("where identical offenses do not yield identical penalties, this court has held that the penalties were unconstitutionally disproportionate and the greater penalty could not stand"). For example, here there is no question that the General Assembly acted within its constitutional authority to criminalize the display of an unauthorized license plate. *See*, *e.g.*, *People v. Clark*, 2019 IL 122891, ¶ 22 (legislature "'has the power to declare and define conduct constituting a crime and to determine the nature and extent of punishment for it.'") (quoting *People v. Simmons*, 145 Ill. 2d 264, 269 (1991)). Nor is there any question that the General Assembly had the constitutional authority to punish the display of an unauthorized license plate as any class of misdemeanor, including as a Class A or Class C misdemeanor. *See Sharpe*, 216 Ill. 2d at 487 (legislature's "discretion in setting criminal penalties is broad"). But under the identical elements test, the General Assembly may not punish the single offense of displaying an unauthorized license plate as *both* a Class A *and* a Class C misdemeanor. *See Hauschild*, 226 Ill. 2d at 86-87. And so, if that is what the current versions of sections 4-104(a)(4) and 3-703 do, *but see*

supra § I, then petitioner's Class A misdemeanor sentence for displaying an unauthorized license plate under section 4-104(a)(4) violates the proportionate penalties clause under the identical elements test and must be remedied.

A. The *Christy* remedy is consistent with the nature of an identical elements proportionality violation and gives effect to the legislature's intent.

In *Christy*, where this Court first established the identical elements test, *People v. Clemons*, 2012 IL 107821, ¶ 44; *Sharpe*, 216 Ill. 2d at 503, the remedy provided for a defendant who received the greater of two penalties that the legislature provided for a single offense was to "vacate[] the defendant's conviction and sentence for [the offense that carried the greater penalty] and remand[] the cause for sentencing on the identical, uncharged offense . . . , which, at that time, carried a lesser penalty," *Clemons*, 2012 IL 107821, ¶ 59 (citing *Christy*, 139 Ill. 2d at 174, 181); *see* Ill. S. Ct. Rule 615(b)(3). This remedy of vacating the greater of two penalties provided by the legislature and replacing it with the lesser of the two penalties is narrowly tailored to the "unique nature of an identical elements proportionality violation," *Blair*, 2013 IL 114122, ¶ 31, and accomplishes "the fundamental goal of the identical elements test," which is "to guarantee that identical criminal offenses have identical sentencing ranges," *Clemons*, 2012 IL 107821, ¶ 70 (Kilbride, J., specially concurring). The *Christy* remedy also avoids unnecessarily infringing on the legislature's authority to set the penalties for crimes by giving effect to the General Assembly's intent that a

defendant who commits a particular offense at a particular time receive one of the two penalties that the General Assembly provided for the commission of that offense at that time.

The *Christy* remedy of replacing the disproportionate penalty with the proportionate penalty also fits squarely within the appellate court's remedial authority under Supreme Court Rule 615(b)(3). *See* Ill. S. Ct. Rule 615(b)(3) ("On appeal the reviewing court may . . . reduce the degree of the offense of which the appellant was convicted[.]"). "It is well established that a defendant may be convicted of an offense not expressly included in the charging instrument if that offense is a lesser-included offense of the crime expressly charged," *People v. Rowell*, 229 Ill. 2d 82, 97 (2008), and "Rule 615(b)(3) provides the appellate court with broad authority to reduce the degree of a defendant's conviction, even when the lesser offense is not charged and the State did not request an instruction on the lesser offense at trial," *People v. Kennebrew*, 2013 IL 113998, ¶ 25; *see People v. Knaff*, 196 Ill. 2d 460, 477-78 (2001) ("state and federal appellate courts have long exercised the power to reverse a conviction while at the same time ordering the entry of a judgment on a lesser-included offense").

Therefore, the appellate court has authority to remedy an identical elements proportionality violation by reducing a defendant's conviction under the statute providing the greater penalty to a conviction for the uncharged identical offense under the statute providing the lesser penalty and

remanding for resentencing to that lesser penalty because, if the offenses under both statutes are identical, then the offense bearing the lesser penalty is a lesser-included offense of the offense bearing the greater penalty. Under the "charging instrument approach," which reviewing courts "appl[y] when determining whether an uncharged offense is a lesser-included offense of a charged offense," *Kennebrew*, 2013 IL 113998, ¶ 32, "an offense is a lesser-included offense . . . if every element of the uncharged offense is contained in the indictment," *id.* ¶ 34. If the offenses established under two statutes have identical elements but bear different penalties, then the offense bearing the lesser penalty is necessarily a lesser-included offense of the offense bearing the greater penalty because no charging instrument that alleges all elements of the offense bearing the greater penalty could fail to allege every element of the identical offense bearing the lesser penalty. *See id.*; *see also* 720 ILCS 5/2-9 (defining "included offense" as "an offense which . . . [i]s established by proof of *the same* or less than all of the facts . . . than that which is required to establish the commission of the offense charged") (emphasis added).[4]

[4] Indeed, if two offenses have identical elements, then the offense bearing the lesser penalty is a lesser-included offense of the offense bearing the greater penalty under any standard, even the "abstract elements approach," which is "the strictest approach in the sense that it is formulaic and rigid and considers solely theoretical or practical impossibility," such that one offense is a lesser-included offense of another only if it is "impossible to commit the greater offense without necessarily committing the lesser offense." *People v. Miller*, 238 Ill. 2d 161, 166 (2010) (internal quotations omitted). If two offenses have identical elements, then by definition one cannot commit one without necessarily committing the other.

In sum, when the legislature has provided two different penalties for a single offense, such that greater one is disproportionate and cannot be imposed, then the proper penalty for that offense is the lesser one, and the remedy for a defendant who was properly found guilty of committing the offense but improperly received the greater penalty is to vacate the greater penalty and impose the lesser penalty. Here, if sections 4-104(a)(4) and 3-703 impose different penalties for the same offense, then petitioner's injury is his Class A misdemeanor penalty for displaying an unauthorized license plate where the General Assembly has provided that the proportionate penalty for that offense is a Class C misdemeanor penalty. Therefore, the proper remedy is to reduce petitioner's Class A misdemeanor conviction to a Class C misdemeanor conviction and remand for resentencing. *See Christy*, 139 Ill. 2d at 174, 181; Ill. S. Ct. Rule 615(b)(3).

B. The *Hauschild* remedy is inconsistent with the nature of an identical elements proportionality violation, unnecessarily infringes on the legislature's authority to set the penalties for crimes, and is unworkable in practice.

Petitioner argues that under *Hauschild* the proper remedy is not to replace the greater penalty with the lesser penalty, but instead to impose either a third penalty or no penalty at all. Pet. Br. 24-27. *Hauschild* considered two statutes that each established the same offense with the same elements: armed robbery while armed with a firearm and armed violence predicated on robbery with a category I or category II weapon. 226 Ill. 2d at 86. Because the armed robbery statute imposed a greater penalty than the

armed violence statute — 21 to 45 years in prison versus 15 to 30 years — *Hauschild* held that the greater penalty provided under the armed robbery statute violated the proportionate penalties clause. *Id.* at 86-87.

But *Haushild* did not remedy this violation as the Court had in *Christy*, by remanding for resentencing on the identical, uncharged offense carrying the lesser of the two penalties. *See Christy*, 139 Ill. 2d at 174, 181. Instead, without acknowledging that it was departing from *Christy*, *Hauschild* held that "the proper remedy is to remand for resentencing in accordance with the statute as it existed prior to the amendment" that rendered its penalty unconstitutional, 226 Ill. 2d at 88-89, and thus remanded for resentencing under the prior version of armed robbery statute, which carried a penalty of 6 to 30 years, *id.* at 91-92. In other words, *Hauschild* held that when the legislature provides two different penalties for the same offense, *neither* penalty may be imposed, even though only the greater of the two is unconstitutional. Rather, the only penalty that may be imposed is the penalty provided under the prior version of the invalidated statute, which is the only penalty of the three possible choices that the legislature found *not* to be appropriate for the offense at the time of commission.

Petitioner argues that because no prior version of section 4-104(b)(3) — the penalty provision for a violation of section 4-104(a)(4) — provided a penalty for displaying an unauthorized license plate that was not also greater

than the Class C misdemeanor penalty provided by section 3-703, the remedy under *Hauschild* is to vacate his conviction for displaying an unauthorized license plate altogether and impose no penalty at all. Pet. Br. 25-26.[5] Petitioner is correct that this remedy is consistent with *Hauschild*, but this aspect of *Hauschild* should be overruled because it is inconsistent with the nature of an identical elements proportionality violation, unnecessarily thwarts the legislature's intent, and has proven unworkable in practice, leading to absurd results.

Overruling prior decisions implicates the principle of *stare decisis*, which favors the stability of the law and requires special justification for departures from prior decisions. *Sharpe*, 216 Ill.2d at 519. But "good cause to depart from *stare decisis* exists when governing decisions are unworkable or are badly reasoned." *Id.* at 520. In particular, overruling prior law is warranted where an unworkable, poorly reasoned rule risks running afoul of separation of powers principles. *Id.* at 521. Therefore, this Court should

[5] Petitioner cites *People v. Beard*, 287 Ill. App. 3d 935 (1st Dist. 1997), for the proposition that "the only remedy is to reverse [his] conviction," Pet. Br. 26, but *Beard* provides no guidance here. In *Beard*, the defendant was convicted under *each* of two statutes that provided different penalties for offenses with identical elements, and so the appellate court vacated his conviction and sentence for the offense under the statute providing the greater penalty. 287 Ill. App. 3d at 936-37, 938. In effect, *Beard* addressed a variation of the one-act, one-crime problem, under which the greater rather than the lesser offense was vacated due to the identical elements proportionality violation. But here, petitioner was convicted only of the offense under section 4-104(a)(4), and so the question is not whether to vacate that conviction and leave a conviction under section 3-703 in place, but whether to reduce that conviction to a conviction under section 3-703.

overrule *Hauschild*'s holding regarding the remedy for an identical elements proportionality violation and return to the remedy originally provided in *Christy*.

1. The *Hauschild* remedy is inconsistent with the nature of an identical elements proportionality violation because it is taken from inapposite authority.

Hauschild's remedy is inconsistent with the nature of an identical elements proportionality violation because it derives from decisions concerning either the inapplicable void *ab initio* doctrine or procedurally distinct pretrial challenges to a charging instrument, both of which involve different standards and different remedies than post-trial sentencing challenges.

a. The *Hauschild* remedy rests on doctrinally inapposite authority concerning the general remedy for injuries suffered under statutes that are void *ab initio*.

First, *Hauschild*'s remedy is inconsistent with the nature of the injury suffered from an identical elements proportionality violation because it is taken from doctrinally inapposite precedent. *Hauschild* cited *People v. Gersch*, 135 Ill. 2d 384 (1990), for the general proposition that when a statute is declared unconstitutional, it is void *ab initio* and therefore has no effect. *See Hauschild*, 226 Ill. 2d at 89 (citing *Gersch*, 135 Ill. 2d at 390). *Gersch* did not concern the identical elements test or even the proportionate penalties clause more broadly, however, but instead considered the remedy for a conviction obtained through a jury trial conducted pursuant to a statutory

amendment that purported to allow the prosecution to demand a jury trial in violation of a defendant's right to waive a jury trial. 135 Ill. 2d at 386. *Gersch* held that the decision declaring the statute unconstitutional applied retroactively to invalidate the defendant's conviction because "'[w]hen a statute is held unconstitutional in its entirety, it is void *ab* initio" and "as though no law had ever been passed," such that "[t]he effect of enacting [the] unconstitutional amendment to [the] statute [wa]s to leave [the] law in force as it was before the adoption of the amendment." *Id.* at 399 (internal quotation marks omitted).

Similarly, the two appellate cases that *Hauschild* cited for its remedy — *People v. Pizano*, 347 Ill. App. 3d 128 (1st Dist. 2004), and *People v. Harvey*, 366 Ill. App. 3d 119 (1st Dist. 2006), *see Hauschild*, 226 Ill. 2d at 88-89 — simply relied on *Gersch* without analyzing whether or how the void *ab initio* doctrine applies to the proportionate penalties clause in general or an identical elements proportionality violation in particular. *Pizano* merely quoted a single sentence from *Gersch*'s explanation of the void *ab initio* doctrine before concluding that the remedy for a violation of the proportionate penalties clause under the cross-comparison test (which this Court abandoned two years before *Hauschild*, *see Sharpe*, 216 Ill. 2d at 519) was resentencing under the prior version of the invalidated penalty provision. *Pizano*, 347 Ill. App. 3d at 136. And *Harvey*, which *Hauschild* cited for the proposition that the remedy for an identical elements proportionality

violation is resentencing under the prior version of the statute providing the greater of the two penalties, *see Hauschild*, 226 Ill. 2d at 88 (citing *Harvey*, 366 Ill. App. 3d at 134), simply adopted that remedy without analysis from *People v. Hampton*, 363 Ill. App. 3d 293 (1st Dist. 2006), *see Harvey*, 366 Ill. App. 3d at 134 (citing *Hampton*, 363 Ill. App. 3d at 310), which in turn adopted the remedy without analysis from *Pizano*, *see Hampton*, 363 Ill. App. 3d at 310 (citing *Pizano*, 347 Ill. App. 3d at 136). Neither *Harvey* nor *Hampton* acknowledged or explained their departure from the remedy provided for an identical elements proportionality violation by this Court in *Christy*. *See Harvey*, 366 Ill. App. 3d at 134; *Hampton*, 363 Ill. App. 3d at 310. Nor did *Hauschild* acknowledge its departure from the *Christy* remedy or consider the applicability of the general remedy for injuries suffered under statutes that were void *ab initio* to injuries suffered from identical elements proportionality violations. *See Hauschild*, 226 Ill. 2d at 88-89.

Hauschild's reliance on *Gersch* and appellate court cases following *Gersch* was misplaced. The general remedy for an injury suffered under a statute that was void *ab initio* does not apply to an identical elements proportionality violation because the invalidity of a statutory penalty under the identical elements test is not due to the statute's voidness *ab initio*. A statute is *void ab initio* only if it "was constitutionally infirm from the moment of its enactment," *Blair*, 2013 IL 114122, ¶ 30, because the legislature lacked either the substantive or procedural power to enact it. *See*

People v. Holmes, 2017 IL 120407, ¶ 18 ("'[t]he void *ab initio* doctrine applies equally to legislative acts which are unconstitutional because they violate substantive constitutional guarantees [citation] and those that are unconstitutional because they are adopted in violation of the single subject clause of our constitution [citation]") (quoting and altering *People v. Carrera*, 203 Ill. 2d 1, 14-15 (2002)). But a penalty that is disproportionate under the identical elements test is not unconstitutional because the legislature lacked the substantive authority to impose it or enacted the statute that carried it in a procedurally improper manner. Rather, "unlike other constitutional violations which are based on the manner in which a single statute operates, an identical elements proportionality violation arises out of the relationship between two statutes — the challenged statute, and the comparison statute with which the challenged statute is out of proportion." *Blair*, 2013 IL 114122, ¶ 32.

Thus, a statute that provides a particular penalty for a particular offense may be perfectly constitutional when it is enacted and remain so for years, until a second statute is enacted that provides a lesser penalty for the same offense. *Id.* ("Although only the statute with the greater penalty will be found to violate the proportionate penalties clause, that violation is entirely dependent on the existence of the comparison statute, *i.e.*, the statute with identical elements but a lesser penalty.") (citation omitted). Therefore, the remedy for injuries suffered under statutes that are void *ab initio* and

therefore could never have had any effect does not reflect the unique nature of an identical elements proportionality violation and the resulting injury.

b. *Hauschild*'s remedy rests on procedurally inapposite authority concerning pretrial challenges to charging instruments.

Hauschild's remedy is also inconsistent with the nature of the injury suffered from an identical elements proportionality violation because it relies on the procedurally inapposite *People v. Lewis*, 175 Ill. 2d 412 (1996). *See Hauschild*, 226 Ill. 2d at 87-88 (citing and quoting *Lewis*, 175 Ill. 2d at 422). *Lewis* concerned the proper disposition of a defendant's pretrial motion to dismiss a count of armed violence on the ground that the penalty for the offense under the armed violence statute was greater than the penalty for the identical offense under the armed robbery statute. *Lewis*, 175 Ill. 2d at 414-15. But pretrial challenges to charging instruments are governed by different standards and remedied differently than post-trial challenges to sentences.

When a defendant challenges a charging instrument before trial, the "proper remedy" for any failure of the instrument to "strictly comply with the pleading requirements of section 113-3" is dismissal. *Rowell*, 229 Ill. 2d at 93. Accordingly, when the defendant in *Lewis* challenged the charging instrument for improperly citing to the armed violence statute rather than to the armed robbery statute, which provided the lesser penalty for the identical offense, *Lewis* affirmed the trial court's dismissal of the armed violence count because "the State's Attorney had no authority to charge that offense" where "the mandatory minimum penalty for armed violence violates the

proportionate penalty clause." *Lewis*, 175 Ill. 2d at 423. That is to say, the State's Attorney was free to charge the offense — the prohibited act and the applicable mental state defined by both the armed violence and armed robbery statutes, *see Mandic*, 325 Ill. App. 3d at 547; 720 ILCS 5/4-1; 720 ILCS 5/4-3(a) — but not under the armed violence statute carrying the greater of the two penalties that the legislature provided. *See Lewis*, 175 Ill. 2d at 423 (explaining that "the State [wa]s not precluded from proceeding against [the] defendant on the armed robbery charge").

By contrast, an identical elements challenge raised on appeal is not a challenge to the charging instrument, but to the penalty imposed. That is why *Christy* remedied the identical elements proportionality violation by addressing the unconstitutional penalty, vacating the greater penalty and imposing the lesser one. *See* 139 Ill. 2d at 174, 181. If an identical elements challenge raised on appeal were a challenge to the charging instrument, then a defendant could never prevail on such a challenge because a defendant could never show prejudice from the charging instrument's citation to the wrong penalty provision. "[T]he sufficiency of a charging instrument attacked for the first time on appeal is not determined by strict compliance with the statute but rather 'by a different standard,'" *People v. Carey*, 2018 IL 121371, ¶ 22 (quoting *People v. Pujoue*, 61 Ill. 2d 335, 339 (1975)), under which the conviction must be vacated only if "'the defect in the information or indictment prejudiced the defendant in preparing his offense,'" *id.* (quoting

People v. Thingvold, 145 Ill. 2d 441, 448 (1991)); *see Rowell*, 229 Ill. 2d at 93 ("When an indictment or information is attacked for the first time posttrial, . . . case law and statute require a defendant to show that he was prejudiced in the preparation of his defense."). Thus, had the defendant in *Lewis* challenged the sufficiency of the charging instrument for the first time on appeal, his challenge would have failed; the charging instrument's citation to the statute providing the greater penalty for the offense rather than the statute providing the lesser penalty was irrelevant to his defense because if the offenses were truly identical, then the defense would be the same regardless of which statute the offense was charged under.

For that reason, petitioner's reliance on *People v. Tellez-Valencia*, 188 Ill. 2d 523 (1999), is misplaced. Petitioner cites *Tellez-Valencia* to argue that a charging instrument cannot be amended on appeal to correct an improper statutory citation. Pet. Br. 27 (citing *Tellez-Valencia*, 188 Ill. 2d at 526). But *Christy*'s remedy of vacating the greater penalty and imposing the lesser penalty is not an amendment of the charging instrument, but an exercise of reviewing courts' remedial authority to reduce the degree of the offense of conviction. *See* Ill. S. Ct. Rule 615(b)(3). Moreover, *Tellez-Valencia* is distinguishable because it held that a citation to a statute that was void *ab initio* under the single subject rule constituted a substantive, rather than formal defect, and so could not be remedied by amendment on appeal. *See* 188 Ill. 2d at 525, 527-28. In contrast, an identical elements proportionality

violation is not a problem of voidness *ab initio* but of the particular relationship between two statutes, which may or may not exist at the time of one of the statute's enactment. *See supra* p. 32.[6]

Petitioner's reliance on *Clemons* is similarly misplaced. Petitioner argues that *Clemons* rejected *Christy*'s remedy of vacating the greater penalty and imposing the lesser penalty because the defendant was not charged under the statute carrying the lesser penalty. Pet Br. 26-27 (citing *Clemons*, 2012 IL 107821, ¶¶ 57-58). But *Clemons* did not hold that a defendant's conviction on appeal cannot be reduced to a conviction for a lesser uncharged offense; Illinois law is clear that the appellate court has the authority to do that. *See Rowell*, 229 Ill. 2d at 97; *Kennebrew*, 2013 IL 113998, ¶ 25; Ill. S. Ct. Rule 615(b)(3). Rather, *Clemons* addressed whether, once *Hauschild* had already been applied to an identical elements

[6] In addition, the dissent persuasively explained that the majority opinion "exalts form over substance in holding the defects of the charging instruments to be substantive rather than formal." *Tellez-Valencia*, 188 Ill. 2d at 530 (Rathje, J., dissenting). The statute that was enacted in violation of the single subject rule did not create a new offense, but simply moved an existing offense under a subsection of the aggravated criminal sexual assault statute to its own separate statute. *Id.* at 529-30. Because the move was invalid due to the single subject violation, the offense remained under the aggravated criminal assault statute, but before the statute was declared unconstitutional, the defendant was charged with the offense under a charging instrument that cited to the new, invalid statute and convicted. *Id.* at 532-33. As the dissent noted, the result of the majority's opinion was a rule that "[i]f the State carelessly and mistakenly cites a statute that does not exist, the defect is formal and does not warrant reversal," but "if the State through no fault of its own cites a statute that does not exist, the defect is substantive and requires reversal." *Id.* at 533.

proportionality violation, *Christy*'s remedy was appropriate. *Clemons* concerned the same identical elements proportionality violation as *Hauschild*: an offense that carried a 21-to-45-year sentence under the armed robbery statute but a 15-to-30-year sentence under the armed violence statute. *See Clemons*, 2012 IL 107821, ¶ 12; *Hauschild*, 226 Ill. 2d at 86-87. *Hauschild* held that the remedy for this identical elements proportionality violation was to vacate the armed robbery penalty of 21 to 45 years and resentence the defendant under the prior version of the armed robbery statute, which carried a penalty of 6 to 30 years. *Hauschild*, 226 Ill. 2d at 88-89, 91-92. In *Clemons*, the People argued that the proper remedy was the *Christy* remedy: to vacate the greater penalty of 21 to 45 years under the armed robbery statute and impose the lesser penalty of 15 to 30 years under the armed violence statute. *See Clemons*, 2012 IL 107821, ¶ 57.

But *Clemons* did not address whether *Christy* should apply instead of *Hauschild*; instead, it addressed whether *Christy* could be applied *after* applying *Hauschild*. *See id.* ¶ 58. *Clemons* reasoned that because the defendant was entitled under *Hauschild* to resentencing under the prior version of the armed robbery statute, which carried a penalty of 6 to 30 years, it would be improper to resentence him to the 15-to-30-year penalty under the armed violence statute because although that penalty was the lesser of the two penalties that the legislature provided for the offense when the defendant committed it, it was greater than the penalty previously provided

for the offense under the prior version of the armed robbery statute. *Id.* *Clemons* therefore rejected *Christy*'s remedy because "the State cite[d] no authority for the proposition that the charging instrument may be modified on appeal so that the State may proceed under a different statute that imposes a more severe penalty." *Id.* But the 15-to-30-year penalty under the armed violence statute was only the "more severe penalty" because *Clemons* had already applied *Hauschild* to find that the defendant was entitled to resentencing to the 6-to-30-year penalty. Had *Clemons* instead applied *Christy*, there would be no impediment to reducing the defendant's armed robbery conviction to an armed violence conviction and remanding for resentencing on the uncharged lesser offense.

2. The *Hauschild* remedy unnecessarily infringes on the legislature's authority to set the penalties for crimes.

As this Court has consistently recognized, "the nature, character, and extent of penalties are matters almost wholly legislative, and the courts have jurisdiction to interfere with legislation on the subject only where the penalty is manifestly in excess of the very broad and general constitutional limitation invoked." *Sharpe*, 216 Ill. 2d at 490-91 (internal quotations omitted). Thus, this Court has historically been reluctant to invalidate the legislature's assessment of penalties. *Id.*; *People v. Lee*, 167 Ill. 2d 140, 145 (1995) (courts should be reluctant to invalidate penalties because "institutionally, the legislature is more aware than the courts of the evils confronting our society and more capable of gauging the seriousness of various offenses"). Under

these principles, when the General Assembly provides two penalties for a single offense, the greater of which is disproportionate under the identical elements test, *see Blair*, 2013 IL 114122, ¶ 32; *see Sharpe*, 216 Ill. 2d at 504, but the lesser of which is not, logic dictates that the proper penalty for the offense is the lesser of the two penalties.

Yet under *Hauschild*, when the General Assembly provides two different penalties for an offense, *neither* may be imposed. Rather, if the charging instrument cited the statute carrying the greater of the two penalties, then the only penalty that may be imposed is the penalty under the prior version of that statute, even though that is the only penalty of the three options that the General Assembly determined was *not* appropriate for the offense at the time of commission. *See Hauschild*, 226 Ill. 2d at 88-89. And, as petitioner notes, Pet Br. 25-26, if there is no prior version of the statute carrying the greater penalty when the offense was committed that provides a penalty that is not also greater than the lesser penalty at the time of commission, then no penalty may be imposed at all.

Where the General Assembly has plainly stated its intent that defendants who commit a particular offense at a particular time receive one of two penalties, *Hauschild*'s remedy for the improper imposition of the greater of those penalties, which bars imposition of the lesser penalty and sometimes allows defendants to evade any penalty at all, unnecessarily infringes on the legislature's power to define crimes and set the penalties for

them. *See Clark*, 2019 IL 122891, ¶ 22; *Sharpe*, 216 Ill. 2d at 487. *Hauschild*'s infringement on the legislature's authority to set penalties is particularly unnecessary given the "unique nature of an identical elements proportionality violation." *Blair*, 2013 IL 114122, ¶ 31. Just as the relationship between the two statutes providing different penalties for the same offense provides the legislature with "more options . . . should it wish to remedy the constitutional violation and revive the statute" providing the greater penalty, *id.* ¶ 32, it provides courts with more ways to effect the legislature's intent than looking to a prior version of a statute. Courts can, as this Court did in *Christy*, give effect to the legislature's intent that a defendant who commits a particular offense at a particular time receive one of two penalties by vacating the greater of the two penalties and imposing the lesser. *See Christy*, 139 Ill. 2d at 174, 181. *Christy*'s remedy thus creates "no risk of the court acting as a 'superlegislature' or substituting its judgment for that of the legislature," because "[t]he court merely considers two different penalties given to two identical offenses by the same legislative body." *Sharpe*, 216 Ill. 2d at 505 (citing *Lewis*, 175 Ill. 2d at 421-22).

3. The *Hauschild* remedy is unworkable in practice and leads to absurd results.

Hauschild's remedy of resentencing a defendant under the prior version of the statute that, at the time of his offense, carried the greater of the two penalties is unworkable and leads to absurd results. The remedy depends on the existence of a prior version of the statute that can be

constitutionally applied to the defendant, and often there will be no such statute. For example, sometimes the prior version of the statute will define an offense with different elements than the statute under which the defendant was charged and convicted, so that the offense under the prior statute is not a lesser-included offense. In that case, the defendant was not charged with that prior offense, had no opportunity to defend against it, and was not found guilty of it, and so cannot be convicted of the offense. *See People v. Novak*, 163 Ill. 2d 93, 105 (1994) (one cannot be convicted of an uncharged offense unless it is a lesser-included offense of a charged offense).

Other times, there will be no prior version of the statute providing a penalty that is not also disproportionate as compared to the lesser of the two penalties provided when the offense was committed. This may lead to the absurd result of defendants who were convicted of an offense for which the legislature provided two penalties avoiding any criminal liability. As petitioner argues, Pet. Br. 25-26, if a defendant who received the greater of the two penalties that the legislature provided for his offense can only be sentenced under a prior version of the statute providing that greater penalty, then he cannot be sentenced at all if there is no prior version of the statute that does not also impose a greater penalty than the lesser of the two penalties provided for the offense at the time of commission. The remedy for a disproportionate penalty should not be to not only vacate the penalty, but

also absolve the defendant of criminal liability entirely, as though the conduct itself were beyond the legislature's authority to prohibit.

Finally, *Hauschild*'s remedy for an identical elements proportionality violation can lead to the absurd result of *both* penalties provided by the legislature being rendered unconstitutionally disproportionate, even though only "the greater penalty will be found to violate the proportionate penalties clause" under the identical elements test. *Blair*, 2013 IL 114122, ¶ 32; *see Sharpe*, 216 Ill. 2d at 504 (citing *Christy*, 139 Ill. 2d at 181) (greater of two penalties provided by legislature for same offense cannot stand). Indeed, *Hauschild* itself led to just that result.

Hauschild held that the 21-to-45-year penalty under the 2001 armed robbery statute was disproportionate because it was greater than the 15-to-30-year penalty provided for the identical offense under the 2001 armed violence statute. 226 Ill. 2d at 86-87. But rather than reduce the conviction for armed robbery to a conviction for armed violence, thereby replacing the greater of the two penalties with the lesser one, *see Christy*, 139 Ill. 2d at 174, 181, *Hauschild* held that the operative penalty for defendants convicted of armed robbery in 2001 was the 6-to-30-year penalty under the prior version of the armed robbery statute. *Hauschild*, 226 Ill. 2d at 88-89. As a result, *both* penalties that the legislature provided were rendered unconstitutional — the 2001 armed robbery penalty was unconstitutional because it was greater than the 2001 armed violence penalty, and the 2001 armed violence

penalty was unconstitutional because it was greater than the prior armed robbery penalty. *See Clemons*, 2012 IL 107821, ¶ 48.

Clemons acknowledged applying *Hauschild*'s remedy for an identical elements proportionality violation appeared to create a new identical elements proportionality violation, but declined to reconsider the remedy because an intervening legislative enactment had "eliminate[d] any overlap between armed robbery and armed violence," "relatively few cases [we]re still pending which arose during the period of time that the statutes overlapped," and most of those defendants "likely would have been prosecuted under [the armed robbery] statute, not the armed violence statute," so that "[t]he probability that the defendants in any of these cases could argue that the sentence for armed violence violates the proportionate penalties clause is exceedingly low." *Id.* ¶ 49. But the remedy for an identical elements proportionality violation should not depend on the occurrence of a confluence of events to avoid absurd results. Had the legislature not amended the statutes when it did or had a prosecutor elected to charge a defendant in 2001 with armed violence rather than armed robbery and that defendant appealed, then the courts would have been compelled to invalidate the 2001 armed violence statute as an unintended byproduct of the *Hauschild* remedy's invalidation of the 2001 armed robbery statute.

* * *

In sum, *Hauschild*'s remedy is based on "questionable citation[s]" to inapposite authority and unsupported by any analysis of the unique nature of an identical elements proportionality violation, unnecessarily infringes on the legislature's authority to define crimes and set the penalties for them, and is unworkable in practice, leading to absurd results. *See Sharpe*, 216 Ill. 2d at 520-21. Therefore, there is good cause to overrule *Hauschild*'s holding regarding the proper remedy for an identical elements proportionality violation and return to the remedy that the Court provided in *Christy*. *See id.*

CONCLUSION

For these reasons, the People of the State of Illinois respectfully request that this Court affirm the judgment of the appellate court.

December 17, 2021

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

JOSHUA M. SCHNEIDER
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-3565
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellee
People of the State of Illinois

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 45 pages.

/s/ Joshua M. Schneider
JOSHUA M. SCHNEIDER
Assistant Attorney General

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 December 17, 2021, 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 serviced the person named below at the following registered email address:

Adrienne N. River
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 North LaSalle Street, 24th Floor
Chicago, Illinois 60601
1stdistrict.eserve@osad.state.il.us

/s/ Joshua M. Schneider
JOSHUA M. SCHNEIDER
Assistant Attorney General