No. 128123

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ANDREW RAMIREZ, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-19-1392. There on appeal from the Circuit Court of Cook County, Illinois, No. 18 CR 7591. Honorable Timothy Joseph Joyce, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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E-FILED
1/17/2023 1:22 PM
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ARGUMENT

I. This Court should reverse outright Andrew Ramirez's conviction for possession of a defaced firearm because the prosecution failed to prove beyond a reasonable doubt that Andrew knew the serial number on the recovered Benelli shotgun was defaced.

A. Section 24-5(b)'s implied *mens rea* of knowledge applies to the statute's defacement element.

Andrew Ramirez's sufficiency-of-the-evidence claim turns on how section 24-5(b) of the Criminal Code (720 ILCS 5/24-5(b) (2018)) is construed. The parties agree that section 24-5(b) is not an absolute liability crime and that defacement is an element of the offense. (Op. Br. 13-23; St. Br. 7, 8, 11, 24, 25) They also agree that the evidence sufficed to prove that Andrew constructively possessed the shotgun, and that the firearm was defaced. (Op. Br. 33-34; St. Br. 26-27)

What remains in dispute is whether the prosecution had to prove that Andrew knew the recovered shotgun was defaced. (Op. Br. 23-33; St. Br. 8-26). The prosecution contends that section 24-5(b)'s implied mental state of knowledge does not apply to the offense's defacement element. (St. Br. 8-26) This is incorrect.

The prosecution's construction cannot be squared with its acknowledgment that section 24-5(b) is not an absolute liability offense. This is the same logical flaw the *Stanley* line of cases makes. *See People v. Lee*, 2019 IL App (1st) 162563, ¶ 84 (Ellis, J., specially concurring) ("as *Stanley* construed the defacement statute, it still imposes absolute liability, even though that is precisely the result that *Stanley* (correctly) set out to avoid"). Both common law and Illinois statutory law presume that a *mens rea* be required for every element of an offense. (Op. Br. 13-19, 23-38); *see also Reihaf v. United States*, 488 U.S. ----, 139 S. Ct. 2191, 2196-97 (2019); 720 ILCS 5/3-4(b).

And the principle of constitutional avoidance favors Andrew's construction of section 24-5(b). *See People v. Deleon*, 2020 IL 124744, ¶ 6. In the first-amendment context, the Supreme Court interpreted a statute to require *mens rea* for an element that served as "the crucial element separating legal innocence from wrongful conduct" because there was a significant argument "dispens[ing] with any *mens rea* requirement" for that element would be "inconsistent with the Constitution." *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72-73 (1994) (in federal statute penalizing anyone who knowingly transports or receives videos involving the use of a minor engaged in sexually explicit conduct, Court held the term "knowingly" modified the "use of a minor" element to uphold the statute's constitutionality).

That logic applies equally when interpreting a statute raising second-amendment concerns. *See New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. ----, 142 S. Ct. 2111, 2156 (2022) (right to bear arms is not a " 'second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees' ") (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010)). Applying section 24-5(b)'s implied *mens rea* to the defacement element avoids the likely unconstitutional possibility of punishing innocent actors who inadvertently stray into criminal conduct while exercising their fundamental constitutional right to bear arms for self-defense. (Op. Br. 21-22); *Lee*, 2019 IL App (1st) 162563, ¶¶ 87-92 (Ellis, J., specially concurring) (citing *People v. Gean*, 143 Ill. 2d 281, 286-89 (1991)).

The prosecution offers a host of counterarguments, but each is meritless.

1. *Section 24-5(b) is not intended as a regulatory or public welfare statute because firearms possession is not an unusually dangerous activity under the law.*

The prosecution contends that section 24-5(b) is a regulatory statute designed to protect the public welfare. (St. Br. 19-21) To be sure, "regulatory measure[s] in the interest of the public safety" for "highly dangerous" activities are generally intended to be exempted from ordinary *mens rea* requirements. *United States v. Freed*, 401 U.S. 601, 609 (1971) (applying exception to statute regulating hand grenades); *accord United States v. Balint*, 258 U.S. 250, 251-52 (1922) (applying exception to statute regulating narcotics).

But section 24-5(b) is not such a statute because possessing firearms generally – including defaced firearms – is not a "highly dangerous" activity. In this context, "dangerous" has a distinct legal meaning that is narrower than its common definition. *Staples v. United States*, 511 U.S. 600, 611-12 (1994). "Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation." *Id.* at 611. In America's tradition of private firearms ownership, protected by the second amendment, firearms are commonplace and generally available. *Staples*, for instance, held that registration requirements for machineguns were not intended as a regulatory statute that could dispense with *mens rea*, even when the firearm involved was an AR-15-style rifle, "the civilian version of the military's M-16 rifle." *Id.* at 603. "Guns in general are not 'deleterious devices or products or obnoxious waste materials[]' that put their owners on notice that they stand 'in responsible relation to a public danger.'" *Id.* at 610-11 (quoting *United States v. Int'l Materials & Chem. Corp.*, 402 U.S. 558, 565 (1971), and *United States v. Dotterweich*, 320

U.S. 277, 281 (1943)).

The Supreme Court has distinguished firearms generally from particular – and rarer – " 'highly dangerous offensive weapons' " such as hand grenades, which carry no tradition of lawful private ownership in the United States. *Staples,* 511 U.S. at 608-10 (quoting *Freed*, 401 U.S. at 609). As *Freed* observed, "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Freed*, 401 U.S. at 609. By contrast, our nation has a long tradition of widespread lawful gun ownership by private individuals. *Staples*, 511 U.S. at 610, 613-14. Consequently, *Staples* rejected the government's suggestion that one could assume that owning a gun is not an innocent act and, with it, the argument that an implied *mens rea* of knowledge applied only to the possession element of the offense. *Id*. at 608-19 (holding the offense required proof that the possessor knew of the characteristic that subjected the firearm to federal registration).

The distinction *Staples* makes between firearms generally and particular unusual firearms without a tradition of private ownership also explains why the prosecution's reliance on *People v. Ivy*, 133 Ill. App. 3d 647 (5th Dist. 1985), and *People v. Wright*, 140 Ill. App. 3d 576 (1st Dist. 1986), is misplaced. (St. Br. 15, 19) *Ivy* and *Wright* involved "sawed-off" shotguns, not defaced firearms. *Ivy*, 133 Ill. App. 3d at 652; *Wright*, 140 Ill. App. 3d at 580-81. *Staples* likened sawed-off shotguns to hand grenades and artillery – weaponry traditionally considered "quasi-suspect" when owned by individuals. *Staples*, 511 U.S. at 611-12. The statute at issue in *Ivy* and *Wright* prohibits not only short-barreled shotguns but machineguns, grenades, artillery projectiles, black-powder bombs, and Molotov cocktails. *Wright*, 140 Ill. App. 3d at 581 (quoting Ill. Rev. Stat. 1983, ch. 38, ¶ 24-1(a)(7)).

Defaced firearms are also qualitatively different from sawed-off shotguns and the other unusual weapons described above. "While a short-barreled shotgun is dangerous and unusual in that its concealability fosters its use in illicit activity, it is also dangerous and unusual because of its heightened capability to cause damage." *United States v. Marzzarella*, 614 F. 3d 85, 95 (3d Dist. 2010) (citing *United States v. Amos*, 501 F. 3d 524, 532 (6th Cir. 2007) (McKeague, J., dissenting), and *United States v. Upton*, 512 F. 3d 394, 404 (7th Cir. 2008)). Indeed, what makes a sawed-off shotgun " 'useful for only violence against another person' " is its "'combination of low, somewhat indiscriminate accuracy, large destructive power, and . . . ability to conceal.' " *Marzzarella*, 614 F. 3d at 95 (quoting *Amos*, 501 F. 3d at 532 (McKeague, J., dissenting)). "An unmarked firearm, on the other hand, is no more damaging than a marked firearm." *Marzzarella*, 614 F. 3d at 95.

The prosecution counters that possession of a defaced firearm is "never" innocent, and that a firearm's defaced characteristic is always "readily apparent." (St. Br. 20, 21) It offers no support for either contention, both of which are incorrect, as explained in Andrew's opening brief, which the prosecution ignores. (Op. Br. 28-29); Ill. S. Ct. R. 341 (h), (i). Rather than disregarding the potential for the prosecution's proposed construction of section 24-5(b) to impose felony liability for an unknowing transgression committed while engaged in otherwise-lawful – and constitutionally protected – behavior, the more prudent approach is to take "particular care . . . to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'" *Staples*, 511 U.S. at 610 (quoting *Liparota v. United States*, 471 U.S. 419, 426 (1985)). Doing so would also avoid possible concerns with the constitutionality of section 24-5(b).

(Op. Br. 11, 19, 21); *see X-Citement Video*, 513 U.S. at 72-73; *Lee*, 2019 IL App (1st) 162563, ¶¶ 77, 96 (Ellis, J., specially concurring).

2. *Section 24-5(b)'s defacement element does not create an aggravated version of another offense, but instead separates criminal conduct from constitutionally protected conduct.*

Andrew's opening brief explained that *Stanley*'s construction of section 24-5(b) relieves the prosecution of the burden to prove every element of the offense beyond a reasonable doubt, which runs afoul of due process. (Op. Br. 23) The prosecution disagrees, citing *People v. Douglas*, 381 Ill. App. 3d 1067, 1073 (2d Dist. 2008), and *People v. Nunn*, 77 Ill. 2d 243, 252 (1979). (St. Br. 24-25) The prosecution's reliance on those authorities is misplaced, as those cases deal with attendant-circumstance elements of statutes that serve to create an aggravated version of an offense that is already criminal even absent that circumstance. *Douglas*, 381 Ill. App. 3d at 1073 (addressing 720 ILCS 5/12-14.1(a)(1), elevating criminal sexual assault to predatory criminal sexual assault of a child); *Nunn*, 77 Ill. 2d at 252 (addressing Ill. Rev. Stat. 1975, ch. 95 ½, ¶ 11-401(a), elevating leaving the scene of an accident involving vehicle damage to leaving the scene of an accident involving death or personal injury). Because these attendant-circumstance elements only create an aggravated version of an offense that is already criminal conduct, there is no risk that failing to require *mens rea* for the element could cause an otherwise innocent actor to commit a felony. *Cf. Lee*, 2019 IL App (1st) 162563, ¶¶ 93-96 (Ellis, J., specially concurring).

Each case also involved additional concerns not present here. *Douglas* acknowledged a longstanding exception to the *mens rea* rule for sex offenses where the victim's age was an element of proof; that exception does not apply here. *Douglas*,

381 Ill. App. 3d at 1082 (quoting *Morrisette v. United States*, 342 U.S. 246, 251 n. 8 (1952)). And *Nunn* feared that requiring *mens rea* for the circumstances of death or injury in a car accident would create an insurmountable obstacle to prosecutors sustaining their burden of proof. *Nunn*, 77 Ill. 2d at 252. With section 24-5(b), prosecutors can use circumstantial evidence to prove a defendant's knowledge of a firearm's defacement, as is frequently done to prove possession of a firearm. *E.g.*, *People v. Smith*, 2015 IL App (1st) 132176, ¶ 26 (observing that constructive possession of a firearm "is typically proved entirely through circumstantial evidence" and knowledge is "usually established by circumstantial evidence because it is rarely shown by direct proof"); *Commonwealth v. Hill*, 210 A. 3d 1104, 1112, 1114-15 (Pa. Super. Ct. 2019) (relying on both direct and circumstantial evidence to hold evidence was sufficient to prove defendant knew the firearm he possessed was defaced).

3. *The canons of construction the prosecution relies upon are unpersuasive within the context of interpreting section 24-5(b).*

The prosecution also invokes several canons of statutory interpretation as support for its proposed construction of section 24-5(b). (St. Br. 11-17) This line of argument fails as well.

For instance, the prosecution notes that violating section 24-5(a) is a Class 2 felony, while violating section 24-5(b) is a Class 3. (St. Br. 13) But this does not demonstrate clear intent by the legislature to make section 24-5(b)'s defacement element devoid of a *mens rea*, as section 24-5(a) addresses the more serious act of creating – rather than merely possessing – a defaced firearm. (St. Br. 13) The prosecution cites no authority that meaningfully advances a contrary conclusion. The prosecution merely cites one-act, one-crime rule appeals, not statutory-

construction cases that required this Court to determine whether an implied *mens rea* modified all elements of an offense. (St. Br. 13); *People v. Artis*, 232 Ill. 2d 156, 159 (2009); *In re Samantha V.*, 234 Ill. 2d 359, 362 (2009).

The prosecution's reliance on the maxim of *expressio unius est exclusio alterius* is no more convincing here. The prosecution points out that section 24-5(a) expressly includes a mental state, while section 24-5(b) does not, and argues that this shows the legislature made a deliberate choice to omit a *mens rea* for section 24-5(b)'s defacement element. (St. Br. 12-13) In support, the prosecution cites *People v. Molnar*, 222 Ill. 2d 495, 521 (2006), and *People v. Grever*, 353 Ill. App. 3d 736, 758-59 (2d Dist. 2004). (St. Br. 12-13) Neither case advances the prosecution's position because in both cases, the equivalent of a *mens rea* requirement was supplied by other features of the relevant statutes, thereby mitigating concerns that innocent actors would inadvertently commit criminal acts.

Molnar held that under section 10 of the Sex Offender Registration Act, a registrant's failure to notify law enforcement of an address change is an absolute liability offense. *Molnar*, 222 Ill. 2d at 520-23. This Court concluded the statute separated wrongful from innocent conduct by requiring that defendants receive notice of their obligations to register, with those notice requirements "built into" section 10's definition of failing to register *Id*. at 523. Section 24-5(b) contains no similar notice requirements to alleviate concerns that innocent conduct may result in a person committing a Class 3 felony. *See* 720 ILCS 5/24-5(b).

Similarly, *Grever* dealt with a statute structured to prevent felony punishment of innocent conduct even without an explicit *mens rea* for some elements of the offense. *Grever*, 353 Ill. App. 3d at 758-60. *Grever* interpreted section 33-3(a) of the official misconduct statute, which criminalizes a public official's intentional

or reckless failure to perform any mandatory duty as required by law. *Id*. at 757. Section 33-3(a) expressly included a *mens rea* at the beginning of the subsection's text; in dispute was whether that mental state modified the attendant-circumstance element that the official's act be required by law. *Id*. at 758. The appellate court said no and concluded that the legislature clearly intended to impose absolute liability as to that element. *Id*. at 758-60. But the court emphasized that the statute prevented inadvertent conduct from creating criminal liability because proof of the defendant's knowledge of the circumstances giving rise to his legal duty was essential to proving the intentional or reckless failure to act. *Id*. at 759. Thus, had the prosecution in *Grever* failed to prove that defendant, a township supervisor, knew he was indebted to the township for his mother-in-law's care at a county nursing home, it would not have been able to prove the alleged mental state of intent regarding his omission. *Id*. That, in turn, would have allowed him to present an affirmative defense of ignorance or mistake. *Id*. By contrast, section 24-5(b) provides no similar insulation from criminal liability for innocent actors.

In a related vein, the prosecution notes that statutes criminalizing possession of a stolen firearm (720 ILCS 5/24-3.8), a vehicle with a defaced VIN (625 ILCS 5/4-103(a)(4)), and a sawed-off shotgun (720 ILCS 5/24-1(a)(7)) all include an express *mens rea* requirement. (St. Br. 14-15) But contrary to the prosecution's suggestion, this is not proof of clear legislative intent to require no *mens rea* for section 24-5(b)'s defacement element. (St. Br. 14-15) Andrew has already explained why the sawed-off shotgun statute is distinguishable. As for the other two statutes, their inclusion of express mental state requirements for their attendant-circumstance elements is of little value in interpreting section 24-5(b). Under *Gean*, the question to resolve is whether the possessor's knowledge of the firearm's defaced status is what

separates innocent conduct from criminal conduct. *Gean*, 143 Ill. 2d at 286-88. As Andrew has already established, the answer to that question is yes. (Op. Br. 22-33) And as previously discussed in this brief, applying the implied *mens rea* in section 24-5(b) to the defacement element avoids placing the statute's constitutionality into doubt.

Last, the prosecution's suggestion to invoke the canon of legislative acquiescence is unwise here. (St. Br. 16-17) While the legislature's failure to amend a statute after a judicial interpretation may suggest agreement with the construction, it is not conclusive. *People v. Foster*, 99 Ill. 2d 48, 55 (1983); *accord People v. Perry*, 224 Ill. 2d 312, 331 (2007) (canon of legislative acquiescence "is merely a jurisprudential principle; it is not a rule of law"). Indeed, absent any additional indication that a ruling has drawn the legislature's specific attention, legislative inaction can be a "weak reed on which to base a determination of the drafters' intent." *People v. Marker*, 233 Ill. 2d 158, 175 (2009); *accord Donajkowski v. Alpena Power Co.*, 596 N.W. 2d 574, 581-83 (Mich. 1999) (enumerating "myriad" hypothetical reasons for a "Legislature's failure to correct an erroneous judicial decision").

Here, only the appellate court has construed section 24-5(b); this Court has never "authoritatively construed" the provision. *People v. Williams*, 149 Ill. 2d 467, 479 (1992) (quoting *Bell v. S. Cook Cty. Mosquito Abatement Dist.* 3 Ill. 2d 353, 356 (1954)); *see also Int'l Ass'n of Fire Fighters, Local 50 v. City of Peoria,* 2022 IL 127040, ¶ 17 (quoting *Vill. of Vernon Hills v. Heelan*, 2015 IL 118170, ¶ 19) ("[A]fter this [C]ourt has construed a statute, that construction becomes, in effect, a part of the statute and any change in interpretation can be effected by the [G]eneral [A]ssembly if it desires so to do."). Moreover, as Andrew has shown,

there are compelling reasons to overrule *Stanley* and its progeny. (Op. Br. 19-33) *Stanley*'s reasoning is fundamentally flawed, holding not only that the prosecution need not prove a possessor's knowledge of the firearm's defacement, but that defacement does not even qualify as an element of the offense. (Op. Br. 19-20) Whatever the correct interpretation of section 24-5(b) is, *Stanley* is clearly incorrect. *See Blount v. Stroud*, 232 Ill. 2d 302, 325 (2009) ("Where the meaning of the statute is unambiguous, we will give little weight to the fact that the legislature did not amend the statute after appellate opinions interpreting the same.").

Most importantly, *Stanley* and its progeny put innocent lawful firearm owners at risk for being convicted as felons. (Op. Br. 33) As noted above and in Andrew's opening brief, it is highly likely that such a scheme would be unconstitutional, and "the General Assembly cannot acquiesce to a construction that is at odds with the [C]onstitution." *Maddux v. Blagojevich*, 233 Ill. 2d 508, 516 (2009).

B. Because the evidence was insufficient to prove that Andrew knew the Benelli shotgun was defaced, this Court should reverse his conviction outright.

The prosecution claims that even if it had to prove Andrew knew the shotgun was defaced, the evidence was sufficient because Officer Adolofo Bolanos's testimony and body camera recording show that the shotgun was "clearly and obviously" defaced. (St. Br. 7, 27-28) But Bolanos never testified about where specifically the serial number was scratched off, the body camera footage does not show him identifying the location of the defacement, and the parties did not stipulate about the defacement's location. (Op. Br. 34); (R. 88)

The prosecution also contends, incorrectly, that this Court should review Andrew's sufficiency argument for harmless error. (St. Br. 27-28) While Issue II of Andrew's opening brief raises a trial-error issue, Issue I does not. (Op. Br.

10-45) Thus, harmless-error analysis is irrelevant because sufficiency claims employ the analysis of *Jackson v. Virginia*. (Op. Br. 11) Yet even if this Court reviews for harmlessness, the result would still favor Andrew because the evidence of his knowledge of the defacement was not overwhelming. (Op. Br. 38-39; St. Br. 28)

Nor should the remedy for Issue I be remand for a new trial. (St. Br. 29-30) Issue I seeks a reversal due to insufficient evidence, and where a reviewing court has concluded that the trial evidence was insufficient to prove every element of the offense beyond a reasonable doubt, that finding acts as an acquittal, and double jeopardy bars retrial. *Burks v. United States*, 437 U.S. 1, 5, 17-18 (1978).

The prosecution's reliance on *People v. Casler*, 2020 IL 125117, ¶ 65, is misplaced. (St. Br. 29) Unlike *Casler*, this is not a case where the trial court prohibited the parties from presenting evidence of a required element of proof. *See Casler*, 2020 IL 125117, ¶¶ 62-64 (retrial granted in obstruction of justice prosecution where trial court barred evidence of a material impediment, which was an essential element of the charged offense). True, the trial court misapprehended the elements of proof when rendering its verdict; that is the basis for Andrew's separate trial-error claim in Issue II of his opening brief. (Op. Br. 36-45) But at trial, nothing precluded the prosecution from presenting evidence establishing that Andrew knew the Benelli shotgun was defaced. Because the evidence was insufficient to convict, this Court should reverse his conviction outright.

II. Alternatively, this Court should reverse Andrew's conviction and remand for a new trial because the trial court, in finding Andrew guilty, misapprehended the law and erroneously believed the prosecution was not required to prove beyond a reasonable doubt that he knew the firearm was defaced.

Issue II of Andrew's opening brief showed that even if the evidence was sufficient to convict, he is entitled to a new trial because the trial court

misapprehended the elements of the charged offense. (Op. Br. 36-45) The prosecution offers no response to this argument and has forfeited any opportunity to do so; Andrew thus rests on his opening brief. (St. Br. 8-37); Ill. S. Ct. R. 341(h), (i).

III. If this Court chooses to address the issue, section 24-5(b) violates the second amendment.

Andrew's opening brief presented a sufficiency claim that turned on a question of statutory construction; he did not challenge the statute's constitutionality. That argument rested on the premise that, under existing second-amendment jurisprudence, a state could craft a constitutional statute prohibiting the possession of defaced firearms. Indeed, Andrew invoked the doctrine of constitutional avoidance, arguing that requiring a defendant's knowledge of the firearm's defaced status was necessary to ensure – and did ensure – that the regulation comported with the second amendment and due process clause. (Op. Br. 10-33)

But after Andrew filed his opening brief, the Supreme Court decided *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ----, 142 S. Ct. 2111 (2022). *Bruen* invalidated the state of New York's proper-cause requirement for obtaining an unrestricted license to carry a concealed firearm, holding that the regulation violated law-abiding citizens' right to keep and bear arms. *Bruen*, 142 S. Ct. at 2156. In doing so, the Supreme Court clarified the test for assessing the constitutionality of firearms regulations and eliminated "means-ends" scrutiny from the analysis. *Id*. at 2129-30. The Court held that challenges to a state's firearms-possession restrictions must be assessed only against the text, history, and tradition surrounding the second amendment. *Id*.

The prosecution filed its brief after *Bruen* was decided and asks this Court to determine whether the second amendment protects the right to possess a defaced

firearm. (St. Br. 2, 30-37) There is no need to do so. But should this Court accept that invitation, the prosecution has failed to prove that section 24-5(b) is constitutional under *Bruen*.

A. Section 24-5(b) regulates individual conduct that the plain text of the second amendment protects.

Under *Bruen*, courts first examine whether the second amendment's plain text covers an individual's conduct. *Bruen*, 142 S. Ct. at 2126. That textual analysis focuses on the " 'normal and ordinary meaning' " of the amendment's language. *Id*. at 2127 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576-77, 578 (2008)). The second amendment provides that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amend. II.

The plain text of the second amendment protects the conduct prohibited by section 24-5(b). The right to bear arms applies to "the people." *Id*. As used in the second amendment, that term refers to "all members of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580.

The Supreme Court construes "the people" to mean "law-abiding citizens." *Bruen*, 142 S. Ct. at 2122, 2131, 2133, 2134, 2138, 2150, 2155. As *Heller* noted, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Heller*, 554 U.S. at 626. But section 24-5(b) criminalizes possession of a defaced weapon by any person, not a subset of individuals who have historically fallen outside the second amendment's conception of "the people," such as convicted felons or the mentally ill. *See* 720 ILCS 5/24-5(b).

The plain text also covers the individual conduct regulated by section 24-5(b). The second amendment protects the keeping and bearing of arms. U.S. Const.

amend. II. More specifically, the text "'guarantee[s] the individual right to possess and carry weapons in case of confrontation.'" *Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 592). Section 24-5(b) regulates conduct within the ambit of the second amendment's coverage because the statute places restrictions on firearms possession. 720 ILCS 5/24-5(b); *cf. United States v. Price*, No. 2:22-cr-00097, --- F. 3d ----, 2022 WL 6968457, at *3 (S.D. W. Va. Oct. 12, 2022) (holding that the federal possession of a defaced firearm statute – 18 U.S.C. § 922(k) – regulates conduct that "falls squarely within the Second Amendment's plain text").

The prosecution contends that the plain text of the second amendment does not apply to section 24-5(b), asserting that defaced firearms do not qualify as "arms." (St. Br. 33-34) The prosecution points to *Heller*'s pronouncement that the second amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." (St. Br. 33-34); *Heller*, 554 U.S. at 625. As persuasive authority, the prosecution also cites *United States v. Holton*, No. 3:21-CR-0482-B, --- F. Supp. 3d ----, 2022 WL 16701935 (N. D. Tex. Nov. 3, 2022), which held that 18 U.S.C. § 922(k) does not infringe on constitutionally protected conduct. (St. Br. 34) The prosecution's logic has multiple problems.

For instance, as Andrew explained in Issue I of this reply brief, sawed-off shotguns are qualitatively different than defaced firearms. That discussion applies with equal force here. *See also Price*, 2022 WL 6968457 at *6 ("I can find no authority for the idea that a firearm without a serial number would meet the historical definition of a dangerous or unusual firearm.").

Additionally, the prosecution's argument relies on the incorrect premise that under section 24-5(b), firearms are "defaced" only when "they are untraceable

by law enforcement." (St. Br. 33) Under section 24-5(b) a firearm is defaced when its serial number has been "changed, altered, removed or obliterated." 720 ILCS 5/24-5(b). Certainly a firearm is untraceable when its serial number has been removed or obliterated. But that is not necessarily so when the serial number has been changed or altered. Arguably, a firearm's serial number could become changed or altered through ordinary wear-and-tear, yet the weapon could remain traceable. Nevertheless, section 24-5(b) makes possessing such a firearm a crime.

Relatedly, while defaced firearms undeniably have value to those pursuing criminal objectives, law-abiding citizens can find themselves in possession of a firearm that is "defaced" under section 24-5(b) for entirely innocent reasons. This was the central point of Andrew's statutory construction argument in Issue I, and the prosecution has overlooked that point. (St. Br. 8-26, 30-37)

B. Section 24-5(b) is inconsistent with the nation's history and tradition of regulating firearms.

Under *Bruen*, the government bears the burden of rebutting the presumption that the second amendment's plain text protects the individual's conduct. *Bruen*, 142 S. Ct. at 2129-30. The government meets that burden by demonstrating that the challenged regulation comports with our country's historical tradition of firearms regulation. *Id*. The prosecution has failed to meet that burden here. (St. Br. 30-37)

A regulation is unconstitutional if it confronts a longstanding social problem that the founding generation either addressed through different means or chose not to address at all. *Bruen*, 142 S. Ct. at 2131; *Price*, 2022 WL 6968457 at *4. If the challenged regulation addresses "unprecedented societal concerns or dramatic technological changes," then courts must reason by analogy and determine whether a "relevantly similar" historical regulation existed at the time of the second

amendment's ratification. *Bruen*, 142 S. Ct. at 2132. Answering that question requires considering "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id*. at 2132-33.

The relevant historical time period for this analysis is the time of the founding and the ratification of the second amendment. *Id*. at 2136; *see also Price*, 2022 WL 6968457 at *4 ("[T]he crux of the historical inquiry is to determine the understanding of the right at the time it was enshrined in the Constitution.").

Serial numbers were not required on firearms when the second amendment was ratified in 1791; they did not appear on firearms until after the Civil War. *Price*, 2022 WL 6968457 at *5 (citing Thomas Henshaw, *The History of Winchester Firearms, 1866-1992* ix (6th ed. 1993), and National Parks Service, *Firearm Serial Numbers*[1]). Federal requirements for serial numbers did not appear until the 1930s, and were limited to firearms such as short-barreled rifles and machine guns. *Price*, 2022 WL 6968457 at *5. Another 30 years passed until the federal Gun Control Act of 1968 required serial numbers on all firearms manufactured and imported in the United States. *Id*. Congress did not criminalize possession of defaced firearms until 1990. *Id*. Illinois did not begin regulating defaced firearms until 1961, and did not outlaw possession of defaced firearms until 2004. (St. Br. 9-11)

Section 24-5 of the Criminal Code contains no express statement of legislative purpose, but legislatures nationwide have outlawed the creation or possession of defaced firearms to help law enforcement solve crimes by tracing the owner and source of recovered weapons. *E.g., United States v. Marzzarella*, 614 F. 3d 85, 98 (3d Cir. 2010) (describing the legislative purpose behind the analogous

[1] nps.gov/spar/learn/historyculture/firearm-serial-numbers.htm [https://perma.cc/P7V3-BQB2].

federal statute, 18 U.S.C. § 922(k)). Solving crime is not a novel social problem. *See Price*, 2022 WL 6968457 at *5 (finding it "difficult to imagine" that the societal problems of crime and assisting law enforcement in solving crime "did not exist at the founding"). And there can be no question that in 1791, no laws required firearms to have serial numbers, or prohibited possessing weapons with defaced serial numbers. Thus, the societal problem addressed by section 24-5(b) existed at the time of the founding but was not dealt with via similar means. This is "relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 142 S. Ct. at 2130. Nor has the prosecution met its burden of showing that section 24-5(b) addresses an "unprecedented" societal problem or "dramatic technological change" that has a similarly relevant historical analogue from the time of the founding. (St. Br. 30-37); *Bruen*, 142 S. Ct. at 2132-33.

The prosecution's argument rests most heavily upon scholarship that has documented laws enacted by 18th-century colonial and state governments to inspect firearms at mandatory musters. (St. Br. 35-37) (citing Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Contemp. Prob. 55 (2017); Meg Penrose, *A Return to the States' Rights Model: Amending the Constitution's Most Controversial and Misunderstood Provision*, 46 Conn. L. Rev. 1463 (2014); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487 (2004); Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownershp, 1607-1794*, 16 Law & Hist. Rev. 567 (1998)). These laws do not qualify as "relevantly similar" historical regulations, *Bruen*, 142 S. Ct. at 2132, as they were militia regulations that served an altogether different purpose than section 24-5(b).

The founding generation lived in a world with no standing national army

or professionalized police forces. Local militias filled those roles, so colonial and state laws required militia members to possess firearms and ammunition. *See* Penrose, *supra*, at 1483 n. 89, 1484, 1496, 1511; Cornell & DeDino, *supra*, at 498, 509; Spitzer, *supra*, at 75; Bellesiles, *supra*, at 580. The mandatory musters, weapons registrations, and inspections ensured that militiamen complied with their legal obligation to bear arms. Cornell & DeDino, *supra*, at 509-10; Bellesiles, *supra*, at 582-83. Thus, unlike section 24-5(b), those inspection and registration laws did not restrict firearms possession.

The prosecution also notes that colonial and state governments in the founding era restricted the commercial sale of firearms. (St. Br. 36) This analogy is misplaced. Section 24-5(b) regulates only the possession of firearms, 720 ILCS 5/24-5(b), while other statutes regulate the sale of firearms. *E.g.* 68/5-15(a)-(c) (2023) (certification of licensure required for commercial firearms sales); 720 ILCS 5/24-3(A) (2023) (prohibiting unlawful sale or delivery of firearms).

Similarly, the prosecution fails to analogize section 24-5(b) to statutes imposing taxes on firearm ownership. (St. Br. 36) Section 24-5(b) imposes no tax on firearm ownership; it simply prohibits possessing defaced firearms. 720 ILCS 5/24-5(b). Moreover, as the prosecution concedes, the statutes it relies upon were not enacted until more than 65 years after the ratification of the second amendment. (St. Br. 36); Spitzer, *supra*, at 76-77 (discussing statutes enacted by North Carolina in 1856 and 1858, Georgia in 1866, and Mississippi in 1867). This is well outside the relevant time period for inquiry. *See Bruen*, 142 S. Ct. at 2136.

Consequently, the prosecution has not met its burden of identifying an American tradition justifying section 24-5(b)'s restriction on the right to bear arms. Thus, under *Bruen*, the statute violates the second amendment. This conclusion

is supported by at least one other published decision to date concerning the constitutionality of statutes criminalizing the possession of defaced firearms. *See Price*, 2022 WL 6968457 at **2-6 (holding that under *Bruen*, 18 U.S.C. § 922(k) violates the second amendment); *but see Holton*, 2022 WL 16701935 at **1-5 (applying *Bruen* and holding § 922(k) to be constitutional). Should this Court hold section 24-5(b) unconstitutional, Andrew's conviction should be reversed outright.

CONCLUSION

For the foregoing reasons, Andrew Ramirez, Defendant-Appellant, respectfully requests that this Court reverse outright his conviction for possession of a defaced firearm under Issue I. Alternatively, Andrew asks this Court to reverse and remand for a new trial under Issue II. And if this Court considers the constitutionality of the section 24-5(b), Andrew asks this Court to hold the statute unconstitutional and reverse outright his conviction under Issue III.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 20 pages.

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No. 128123

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ANDREW RAMIREZ, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-19-1392. There on appeal from the Circuit Court of Cook County, Illinois , No. 18 CR 7591. Honorable Timothy Joseph Joyce, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On January 17, 2023, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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