No. 127318

IN THE

SUPREME COURT OF ILLINOIS

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

REPLY BRIEF FOR PETITIONER-APPELLANT

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ARGUMENT

The statute setting forth the offense of unlawful possession of a firearm by a streetgang member, 720 ILCS 5/24-1.8(a)(1), constitutes cruel and unusual punishment, violates substantive due process, and is unconstitutionally vague, rendering it facially unconstitutional under the Eighth and Fourteenth Amendments of the Constitution.

In Petitioner-Appellant's opening brief, he raised facial constitutional challenges to the unlawful possession of a firearm by a streetgang member ("UPF / streetgang member") statute. See 720 ILCS 5/24-1.8(a)(1) (2011). The UPF / streetgang member statute, which punishes FOID-less firearm possession with an enhanced penalty for gang members, derives its content from the definitions of "streetgang" and "streetgang member" in the Illinois Streetgang Terrorism Omnibus Prevention ("ISTOP") Act. See 740 ILCS 147/10 (2011). The State responds to Appellant's arguments about the statute by urging far narrower interpretations of "streetgang" and "streetgang member" than the statutory language supports, or than prosecutors and law enforcement officers have used in practice. Thus, much of the dispute between the parties' positions in this case centers around how these statutory terms should reasonably be construed, and who the statute sweeps into its ambit. Appellant maintains that the statute, as written, applies to gang members who maintain only a passive or non-criminal association with the gang, criminalizing a defendant's mere status as a gang member, failing rational basis review, and failing to give notice to the public or guidance to law enforcement and prosecutors, in violation of the Eighth and Fourteenth Amendments. U.S. Const. amends. VIII, XIV.

A. In an effort to cure the constitutional defects in the UPF / streetgang member statute, the State, in its interpretation of "streetgang" and "streetgang member, reads into the statute limitations and qualifiers that do not actually appear in the statutory language.

As both parties have acknowledged, understanding the arguments raised in this case requires an examination of the statutory definitions of "streetgang member" and "streetgang." The ISTOP Act defines "streetgang member" as:

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

740 ILCS 147/10 (2011). Thus, gang membership is defined broadly, as: 1) any person who "actually and in fact" belongs to a gang; or 2) any person who voluntarily associates himself in some fashion with a specifically defined course or pattern of criminal gang activity, even if that person does not officially belong to the gang. A "gang" or "streetgang," in turn, has its own statutory definition in the ISTOP Act:

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

Id. The parties differ markedly in their interpretation of these statutory terms.

1. The definition of a "streetgang"

The State asserts that the UPF / streetgang member statute ensures "that a streetgang member know that the street gang engages in criminal activity" because, the State reasons, the statute "requires that a person . . . knowingly be a member of a street gang." (St. Br., p. 41) Yet, as Justice Walker astutely noted in his dissent below, because of the way that "streetgang" is statutorily defined, "proof that the group qualifies as a street gang does not entail proof that an individual knew of the group's criminal activities." *People v. Villareal*, 2021 IL App (1st) 181817¶ 34 (J. Walker, dissenting). The statutory definition of "streetgang" requires only that *any* member of the group, not *each* member of the group, comprised of three or more persons with an established hierarchy, need engage in a course or pattern of criminal activity to qualify under the definition. Neither does the statutory language contain any requirement that the members of the group that have *not* engaged in any criminal activities have any intent or willingness to participate in or promote criminal activities by the gang or by fellow gang members. Notably,

this leaves open the possibility that some members, while belonging to the group, may nevertheless be unassociated with the group's criminal element and may have no intent to participate in or promote criminal activities in any way. It means that some members may be completely unaware of criminal activities by current members, even if they might know of a course or pattern of criminal activity that members of the group committed in decades past to qualify the group as a gang.

Many gang members do join gangs for purely non-criminal reasons, as Appellant argued in his opening brief. For example, some youths may join a gang for social reasons or to connect with or avoid being shunned by the other young people who live in their neighborhood. Some youths may join a gang because it affords them protection from harassment by rival gang members as they walk to school or in their neighborhood. Some may join because the gang affords them sibling-like or parental-like kinship or affection and / or attachment that they may not receive at home. Not all, or even most, of these individuals need have any intent to participate in or promote any criminal activities for the group to qualify as a streetgang, and many of them do not have such intent. See Jenna Marie Stupar, *Gangsta's Paradise? How Chicago's Antigang Loitering Ordinance Punishes Status Instead of Behavior*, 64 DePaul L. Rev. 945, 954 (2015) (citing *This American Life: Harper High School, Part One*, WBEZ (Feb. 5, 2013), *available at* http://www.thisamericanlife.org/radio-archives/episode/487/transcript) (Assistant principal in 2013 at Harper High School, in Chicago's Englewood neighborhood, estimated that less than 10 percent of the gang members in that area were actually involved in any criminal activity).

The State characterizes a "streetgang" as a group that engages in organized crime, which consists of "[w]idespread criminal activities that are coordinated and controlled through a central syndicate." (St. Br., p. 12) (citations omitted). Thus, the State reasons, modern gangs, with their "horizontally organized, neighborhood-based cliques that have little or no formal

leadership structure" would not be considered gangs under the UPF / streetgang member statute or the ISTOP Act. (St. Br., p. 12) (citations omitted). However, the statutory language defining a streetgang, by its plain and ordinary language, is much broader than the State suggests. *See People v. Whitney*, 188 Ill.2d 91, 97 (1999) (statutory language should be given its plain and ordinary meaning). While the language of the statute requires the group to have some sort of hierarchy, there is nothing that requires "widespread criminal activities" or a high level of "coordina[tion] and control[ ] through a central syndicate." (St. Br., p. 12) (citations omitted). This Court should decline to read such requirements or limitations into the statutory definition of "streetgang." See *People ex. rel. Birkett v. Dockery*, 235 Ill.2d 73, 81 (2009) (A court, in construing a statute, may not read into it exceptions or limitations that are not there); *In re Michelle J.*, 209 Ill.2d 428, 437 (2004) (same). In fact, per the statute's language, a group could qualify as a gang even if it were quite a loose structure, and could conceivably apply to the more fragmented and decentralized gangs of today, and not only to the more centrally and formally organized gangs of decades past

2. The definition of "streetgang member"

As with its interpretation of "streetgang," the State urges an interpretation of "streetgang member" that would require this Court to read into the statute requirements and limitations that are not in the statutory language. This Court should reject the State's interpretation. See *People ex. rel. Birkett v. Dockery*, 235 Ill.2d 73, 81 (2009) (A court, in construing a statute, may not read into it exceptions or limitations that are not there); *In re Michelle J.*, 209 Ill.2d 428, 437 (2004) (same).

A gang member is statutorily defined as "any person who actually and in fact belongs to a gang." 740 ILCS 147/10. According to the State, to "belong" to a gang means that person "makes himself available to commit crimes on the gang's behalf." (St. Br., p. 14) The State

cites the dictionary definition of "belong" as: "attached or bound (as to a person, group or organization) by birth, allegiance, residence or dependence." (St. Br., p. 13, citing *Webster's Third New International Dictionary* 201 (1993)). From this, the State concludes: to "belong" to a gang, one must hold an "allegiance" to the gang, "such that he holds himself subject to the gang's organizational hierarchy and therefore makes himself available to commit crimes on the gang's behalf." (St. Br., pp. 13-14) Yet, "bound in allegiance" is not the primary or common meaning of the word "belong." Rather, this is a little-used definition that does not appear in most well-known dictionaries.

The first definition entry for "belong" in Dictionary.com is "to be in the relation of a member, adherent, inhabitant, etc." See "belong," Dictionary.com, https://www.dictionary.com/browse/belong (last accessed August 19, 2022). The second definition is "to have the proper qualifications, especially social qualifications, to be a member of a group." *Id.* The State's definition of "bound in allegiance" does not appear in this dictionary. *Id.*

The first definition entry of "belong" in the MacMillian Online Dictionary is "to be in the right place." See "belong," https://www.macmilliandictionary.com/us/dictionary/american/belong (last accessed August 19, 2022). The second definition is "to feel happy and comfortable in a particular place or with a particular group of people." *Id*. The State's definition of "belong" as "bound in allegiance" does not appear in this dictionary. *Id.*

The first definition entry of "belong" in the Oxford Online Dictionary is "to be in the right or suitable place." https://www.oxfordlearnersdictionaries.com/us/definition/american_english/belong (last accessed August 19, 2022). The second definition is "to feel comfortable or happy in a particular situation or with a particular group of people." *Id*. The State's definition of "belong" as "bound in allegiance" does not appear in this dictionary. *Id.*

The first definition entry of "belong" in the American Heritage Online Dictionary is

"to be proper, appropriate or suitable," or "to be in an appropriate situation or environment." https://www.ahdictionary.com/word/search.html?q=belong (last accessed August 19, 2022). The second entry is "to be a member of a group, such as a club" or "to fit into a group naturally." *Id*. The State's definition of "bound in allegiance" does not appear in this dictionary. *Id.*

Lastly, in the Merriam-Webster Online Dictionary, first definition entry of "belong" is "to be suitable, appropriate or advantageous," or "to be in a proper situation." See "belong," https://www.meriam-webster.com/dictionary/belong (last accessed August 19, 2022). The second entry for"belong" contains several alternative definitions, one of which is "to be attached or bound by birth, allegiance or dependency," and another of which is "to be a member of a club, organization or set." *Id*.

Thus, the most common and well-known definitions of the word "belong" are "to be in the right or proper place," or "to be a member of," or "to feel happy and comfortable with a particular group of people." The first definition of being in the right or proper place makes little sense in the context of "any person who actually and in fact belongs to a gang." See 740 ILCS 170/10. In this context, the plain and ordinary meaning of "belong" is "to be a member of," or "to feel happy and comfortable with a particular group of people." In essence, the plain and ordinary meaning of "belong" in this context is to be a member of, or to be a part of, a group of people. To be "bound in allegiance" is not a commonly-used or understood meaning of "belong." This Court should ascribe the commonly understood and plain meaning of this statutory language, defining "belong," as most people understand it, meaning simply, to be a member of or to be a part of a group. *People v. Whitney*, 188 Ill.2d 91, 97 (1999) (statutory language should be given its plain and ordinary meaning). Such definition does not signify any willingness to commit crimes and does not speak to the intent, reason, or objective one may have in becoming a member.

However, even if one were to use the State's definition of "belong" as meaning "bound in allegiance" to the gang, it does not follow that one "bound in allegiance" to the gang is willing to go so far as to commit crimes for the gang. As argued *supra*, people join gangs for different reasons, some purely social and non-criminal, and may have varying levels of "allegiance" or commitment to a group of which they consider themselves a part. For example, one may join a neighborhood book club and attend monthly meetings to drink wine and socialize with other neighbors without ever having read the club's book selections. Another member may read every book. Both members may have varying levels of commitment or allegiance to the group's literary objectives; yet both would "belong" and consider themselves members. Similarly, gang membership, like many other kinds of membership, can have a purely "social belonging" component for some, and the statutory definition of gang membership does not discriminate between those who belong only socially and those who belong with a criminal purpose. The statute does not specify what kind of "belonging" qualifies you as a member. It does not use any qualifier at all, encompassing all kinds of "belonging."

Contrary to the State's claim, the statutory text does not restrict membership only to those who belong with a criminal objective. There is nothing inherent in the dictionary definition of "belong" that would indicate a willingness to commit crimes, or speak to one's level of commitment, or one's objective or intent in joining a group. And, as explained *supra*, the restriction to members who only have a criminal objective cannot be inferred from the way "streetgang" is defined either. The statutory definition of "streetgang" requires only that *any* member of a group, and not *each* member of a group, with a shared hierarchy, need engage in a course or pattern of criminal activity to qualify the group as a gang. This means that some members, while belonging to the group, may be unassociated with or unaware of the group's criminal element, or may have no intent to participate in the group's criminal element.

In short, when construing the definition of "streetgang member," the State's reading of "any person who actually and in fact belongs to a gang" as one who "makes himself available to commit crimes on the gang's behalf" is not a fair or reasonable reading of the statutory language based on the plain and ordinary meaning of the text. (St. Br., p. 14) Instead, the State asks this Court to read into the statutory definition of streetgang member a restriction or limitation to those who "actually and in fact belong[ ] to a gang" *with a willingness or intent to commit crimes for the gang or with fellow gang members*. Yet, this text does not appear in the statutory definition, and this Court should be unwilling to rewrite the statute by reading into it a non-existent restricting clause. See *People v. Carpenter*, 228 Ill.2d 250, 270-271 (2008), quoting *People v. Wright*, 194 Ill.2d 1, 29-30 (2000) ("[C]ourts may not rewrite statutes to make them consistent with the court's idea of orderliness and public policy. . . Instead, we h[o]ld that these statutes [a]re invalid."). See *People ex. rel. Birkett v. Dockery*, 235 Ill.2d 73, 81 (2009) (A court, in construing a statute, may not read into it exceptions or limitations that are not there).

A gang member is also statutorily defined as "any person who knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a course or pattern of gang-related criminal activity, whether in a preparatory, executory, or cover-up phase of any activity, or who knowingly performs, aids, or abets any such." 740 ILCS 147/10. The State interprets this to mean any person who "knowingly participates in two gang-related crimes." (St. Br., p. 22) In support of its interpretation, the State cites the dictionary definition of "to associate" as "to join often in a loose relationship as a partner, fellow worker, colleague, friend, companion or ally." (St. Br., p. 24, citing *Webster's Third New International Dictionary*, 132) The State concludes that to voluntarily associate oneself with a pattern of gang-related criminal activity means that one has "actually joined in the activity as a partner or ally." (St. Br., p. 24)

Yet, voluntarily associating oneself with criminal activity may fall short of actually

participating in it or accountability attaching. Accepting the State's definition of "to associate," a "loose" allyship could conceivably encompass an action as attenuated from the offense as endorsing a criminal act on social media by "liking" a post about the offense, or making laudatory comments publicizing the offense or praising its perpetrators. By the State's own dictionary definition, to voluntarily "associate" with a crime could mean a very peripheral or "loose" allyship which merely expresses support and approval rather than "actually join[ing] in the activity." (St. Br., p. 24) The State's suggestion that the definition of gang membership only applies to those who have fully and "actually joined" in the offenses is not supported by the plain and ordinary meaning of the statutory language and should be rejected by this Court.

B. The UPF / streetgang member statute violates due process by failing to give sufficient notice of what conduct is prohibited and by failing to adequately guide the discretion of law enforcement and prosecutors.

The State argues that the UPF / streetgang member statute gives fair notice to the public and provides guidelines to law enforcement; thus, the State contends, the statute is not unconstitutionally vague. See U.S. Const. amends. See VIII, XIV; See also *City of Chicago v. Morales*, 527 U.S. 41, 56-57 (1999). However, the State's arguments are premised on an incorrect reading of the statutory definition of "streetgang member."

1. Adequate notice of what conduct is prohibited

The State properly recites the standard for a vagueness challenge: whether the statute fails to "provide individuals of ordinary intelligence a reasonable opportunity to know what is prohibited" or "law enforcement with reasonable standards to avoid arbitrary or discriminatory enforcement." (State's Br., p. 16, citing *People v. Plank*, 2018 IL 122202, ¶ 12).With respect to whether the statute provides adequate notice of what conduct is prohibited, the State argues, "A person 'actually and in fact belongs to a gang' if he holds an allegiance to a gang, such that he is available to commit crimes on its behalf." (St. Br., p. 17) Thus, the State argues, "[b]ecause these are circumstances in which a person of ordinary intelligence (including petitioner)

can identify himself as a street gang member under section 24-1.8(a)(1), petitioner's facial vagueness challenge fails." (St. Br., pp. 17-18)

Yet, as Appellant argued *supra*, in section A, interpreting "belonging" to a gang as being available or willing to commit crimes for the gang is simply not a reasonable interpretation of the statutory definition of "streetgang member." The statute defining gang membership does not distinguish between those who belong only socially and those who belong with a criminal purpose. The statute is entirely silent on what kind of belonging qualifies you as a member, and the text appears to encompass all kinds of "belonging." Moreover, as demonstrated by Appellant's citation to multiple dictionary definitions *supra*, there is nothing inherent in the dictionary definition of "belong" that would indicate a willingness to commit crimes or speaks to one's objective in joining a group. And, as explained *supra*, the restriction to members who only have a criminal objective cannot be inferred from the way "streetgang" is defined because the statutory definition of "streetgang" requires only that *any* member of the group, and not *each* member of the group, engage in criminal activities. Thus, some members of the group may be unassociated with or unaware of the group's criminal element. In short, the statute does not make clear what kind of "allegiance" or commitment triggers the "belonging" requirement and whether a purely social and non-criminal commitment will suffice. This does not provide clear or precise notice to the public as to what it means to "belong" to a gang or exactly what kind of conduct is prohibited.

The same problems exist in interpreting the statutory definition of who "voluntarily associates himself with a course or pattern of gang-related criminal activity." See 740 ILCS 147/10. In support of its argument, the State cites the dictionary definition of "to associate" as "to join often in a loose relationship as a partner, fellow worker, colleague, friend, companion or ally." (St. Br., p. 24, citing *Webster's Third New International Dictionary*, 132) From this, the State concludes that to voluntarily associate oneself with a pattern of gang-related criminal

activity means that one has "actually joined in the activity as a partner or ally." (St. Br., p. 24) Yet, as Appellant argued *supra* in section A, accepting the State's definition, a "loose" allyship could conceivably encompass an action as attenuated from the offense as endorsing a criminal act on social media by "liking" a post about the offense, or making laudatory comments publicizing the offense or praising its perpetrators. There is nothing inherent in the dictionary definition of "associate" used by the State that would exclude a more peripheral or "loose" act of allyship such as merely expressing support and approval for a gang crime rather than "actually join[ing] in the activity." (St. Br., p. 24) The State's suggestion that the definition of gang membership only applies to those who have fully and "actually joined" in the offenses is not supported by the plain and ordinary meaning of the statute. Instead, the language is broad and imprecise, and it is unclear what minimal level of "association" triggers the statute, failing to give adequate notice to the public as to what conduct is prohibited.

As in *Lanzetta*, the UPF / streetgang member statute "fails to indicate what constitutes membership or how one may join a 'gang.'" *Lanzetta v. State of New Jersey*, 306 U.S. 451, 458 (1939). The State asserts that *Lanzetta* is distinguishable because in that case, "neither 'member' nor 'gang' was [statutorily] defined." (St. Br., p. 18) However, in the UPF / streetgang member statute, the statutory definition of "streetgang member" is so broad and unclear as to essentially be a standard-less standard. For example, to define a streetgang member as anyone who "belongs" to a gang, when the dictionary definition of "belong" is to be a member or part of a group, results in mere tautology. The statutory definition of "voluntarily associat[ing]" oneself with a course or pattern of criminal activity is similarly broad and ambiguous, when that association can range anywhere from a very peripheral connection to the crime, to more express or direct participation. Therefore, as in *Lanzetta*, the definition of "streetgang member" in the UPF / streetgang member statute is "so vague, indefinite and uncertain" as to violate due process. *Lanzetta* , 306 U.S. at 458.

2. Arbitrary and discriminatory enforcement

The State argues that the UPF / streetgang member statute "is not vague because it defines gang members using objective criteria that constrain law enforcement." (St. Br., p. 26) In fact, as Appellant has explained, the definition of streetgang member applicable here is so indefinite and broad as to provide insufficient standards to guide the discretion of law enforcement. In *City of Chicago v. Morales*, the State noted that the gang loitering ordinance at issue in that case was unconstitutionally vague in part because "it provided police with absolute discretion to decide . . . who was a gang member." (St. Br., p. 25, citing *City of Chicago v. Morales*, 527 U.S. 41, 57 (1999). The UPF / streetgang member statute suffers from the same defect. It provides police with absolute discretion to decide who "belongs" to a gang, or in other words, who is a member of or a part of a gang.

Although the State insists that the streetgang member definition in the ISTOP Act is a clear and objective standard, it is easy to see what an unworkable and unhelpful standard it has been in practice, based on the inconsistent, discriminatory, inaccurate and over-inclusive manner in which the police have identified and designated individuals as gang members relying on this standard. See *Follow-Up Inquiry on CPD's "Gang Database*," City of Chicago Office of Inspector General (March 31, 2021) https://igchicago.org/wp-content/uploads/2021/03/OIG-Follow-Up-Inquiry-on-the-Chicago-Police-Departments-Gang-Database.pdf, pp. 5-6 (noting that in April of 2019, the City of Chicago Office of Inspector General published a report finding several problems with the Chicago Police Department's ("CPD") practices concerning its gang database, including that gang designations were often inaccurate, outdated, or otherwise faulty. The 2021 follow-up report found that these problems have persisted, and little progress has been made to address them); See also *Review of the Gang Database*, City of Chicago Office of Inspector General (April 11, 2019) https://igchicago.org/wp-content/uploads/2019/04/OIG-CPD-Gang-Database-Review.pdf, p. 16 (noting that CPD members report that gang designations

may be based on as little as the fact that an individual is "in the company of" other individuals designated as gang members and have acknowledged to the inspector general that their "criteria for identifying gang membership may be over-inclusive."); see also *Review of the Gang Database*, City of Chicago Office of Inspector General (April 11, 2019) https://igchicago.org/wp-content/uploads/2019/04/OIG-CPD-Gang-Database-Review.pdf, p. 4. (CPD makes gang designations and arrests in what appears to be a racially discriminatory way: "OIG's analysis of Gang Arrest Card data found that Black, African American, and Latinx persons comprise 95% of the 134,242 individuals designated as gang members during arrest, and are designated at both younger and older ages as well as issued more Gang Arrest Cards per person than White gang designees."). All of these problems that the city inspector general has documented with the way that CPD identifies gang members shows that the statute has not adequately guided law enforcement and is too vague.

The State argues that it is unlikely that police confusion about the definition of gang membership would result in arbitrary or discriminatory enforcement because "it is not gang membership that provides probable cause to arrest," but rather the unlawful possession of a firearm such that " gang membership is likely irrelevant" to an officer's decision to arrest. (St. Br., p. 27) However, the second prong of the vagueness doctrine, relating to arbitrary and discriminatory enforcement, extends not just to enforcement by police officers, but also to enforcement by prosecutors. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972). While gang membership may not be relevant to a police officer making a weapons arrest, it is relevant to which charges are brought by prosecutors. Moreover, the statutory scheme is designed such that prosecutors are to rely, when bringing charges, on gang designations made by police officers, even if officers use broad, inconsistent, discriminatory, and "over-inclusive" – in CPD's own terms – criteria for identifying gang members. See 20 ILCS 2640/15 (b) (requiring law enforcement to "notify the prosecutor of the accused of the accused individual's gang

membership or gang affiliate status" after making any gang designation in an arrest).

In sum, the statutory text defining gang membership is so broad and ambiguous as to provide little guidance and too much discretion to law enforcement, who then exercise that overly broad discretion by assigning gang designations in a subjective, inconsistent, and discriminatory way, almost exclusively targeting persons of color from low-income neighborhoods. Prosecutors then rely on such designations, leading to arbitrary and discriminatory enforcement of gang enhancement statutes such as the UPF / streetgang member statute.

C. The UPF / streetgang member statute does not comport with substantive due process because it criminalizes mere passive gang association and requires no nexus between the associational status that it criminalizes and the conduct prohibited by the statute.

In *Scales v. United States*, the United States Supreme Court explained that when the legislature seeks to attach criminal liability based on an associational status, the associational tie may not be merely passive or peripheral to the organization's criminal activity. *Scales v. United States*, 367 U.S. 203, 220 (1961). The State argues, "Street gang membership under section 24-1.8(a)(1) is limited to active membership because it represents either a commitment to undertake criminal actions on behalf of a gang or a history of taking such actions." (St. Br., p. 38) Thus, the State argues, "the statutory definition of street gang member necessarily entails active membership in a criminal prosecution." (St. Br., p. 39) Yet, this argument depends on accepting the State's erroneous statutory interpretation of "streetgang member," which requires this Court to read into the statute requirements and limitations that are not present in the text.

As argued in section A, subsection 2, the statutory definition of gang membership – those who "actually and in fact belong to a gang – does not discriminate between those who belong to the group only socially and those who belong with a criminal purpose. There is nothing inherent in the dictionary definition of "belong" that would indicate a willingness to commit crimes (as suggested by the State); nor can any criminal objective be inferred from the way

"streetgang" is defined, as it requires only that *any* member of a group, and not *each* member of a group engage in any criminal activities, which means that some members of the group may conceivably be unassociated with or even unaware of the group's criminal element. 740 ILCS 147/10. Similarly, in interpreting the statutory definition of who "voluntarily associates himself with a course or pattern of gang-related criminal activity," the State erroneously concludes that to voluntarily associate oneself with a pattern of gang-related criminal activity means that one has "actually joined in the activity as a partner or ally." (St. Br., p. 24) However, there is nothing inherent in the dictionary definition of "associate" used by the State that would exclude a more peripheral or "loose" act of allyship such as merely expressing support and approval for a gang crime rather than "actually join[ing] in the activity." (St. Br., p. 24)

Therefore, this Court should reject the State's interpretation of "streetgang member" as an "active" membership consisting of "either a commitment to undertake criminal actions on behalf of a gang or a history of taking such actions." (State's Br., p. 38) Instead, ascribing the text at issue here its plain and ordinary meaning, gang membership is defined in violation of the principles enunciated in *Scales*, where it is defined broadly and could apply to gang members that only have a passive, peripheral or non-criminal association with the gang. Targeting such members does not survive rational basis review because it is not a reasonable means of accomplishing the legislative goal of reducing gang-related violence. Gang members who have no intent to promote the criminal activities of the gang or of fellow gang members pose no greater risk than other members of the public who commit FOID-less firearm possession. The former, however, is subject to Class 2 criminal liability with an extended prison range, while the latter is only subject to Class A misdemeanor liability.

Thus, reading the streetgang member definition as it is actually written, to apply broadly to anyone who merely "belongs" to a gang (without requiring any intent to promote criminal activities by the gang or other gang members), the conduct of FOID-less firearm possession

is *not* necessarily "rendered more dangerous by gang membership," contrary to the State's argument. (St. Br., p. 39) This places the UPF / streetgang member statute squarely within the purview of *State v. O.C.*, 748 So.2d 945, 950 (Fla. 1999), *State v. Bonds*, 502 S.W.3d 118, 156-157 (Tenn. Crim. App. 2016), and *State v. Arevalo*, 470 P.3d 644, 649-650 (Ariz. 2020). As such, some "nexus" or connection between the prohibited conduct and gang membership is required to comport with substantive due process. *O.C.*, 748 So.2d at 950; *Bonds*, 502 S.W.3d 118 at 156-157; *Arevalo*, 470 P.3d 644 at 649-650.

The State argues that in cases such as *People v. Gardeley*, 927 P.2d 713 (Cal. 1996), and *State v. Woodbridge*, 791 N.E.2d 1035 (Ohio Ct. App. 2003), courts have not required any nexus or connection between the prohibited conduct (in this case FOID-less firearm possession), and the gang membership. (St. Br., pp. 42-43) Yet, at a minimum, these states have required "active membership" in the organization's criminal element – that is, some knowledge of and intent to promote the criminal acts of the gang or of fellow gang members – in contrast to Illinois' UPF / streetgang member statute. *Gardely* reasoned that the STEP Act did not criminalize mere passive or peripheral gang membership; rather, it imposed increased criminal penalties only when defendant committed criminal acts "for the benefit of, at the direction of, or in association with" a criminal street gang, and also with the "specific intent to promote, further, or assist" in criminal conduct by other gang members. *Gardely*, 927 P.2d at 725. Similarly, in *Woodbridge,* the statute was upheld because it did not impose criminal penalties based on mere passive or peripheral association alone and attached criminal liability only to a person who was an active gang member, in that he had knowledge that the gang engaged in a pattern of criminal activity, and he purposefully promoted, furthered, or assisted other gang members in a pattern of criminal gang activity. *Woodbridge*,153 Ohio App.3d 212, ¶¶ 35, 42. In contrast, given the broad way streetgang member is defined in Illinois, the UPF / streetgang member statute is not restricted solely to members of the gang who are aware of the gang's illegal activities

and specifically intend to further those activities. Instead, it includes anyone who merely "belongs" to the gang, even if only socially or with a non-criminal purpose. This does not comport with *Scales*' explication of the substantive due process standard for criminalizing association.

D. The UPF / streetgang member is facially unconstitutional because it impermissibly criminalizes a defendant's status in violation of the Eighth Amendment.

The State argues that to pass constitutional muster under the Eighth Amendment a statute needs merely to attach criminal liability on the basis of at least "one voluntary act," rather than punishing a status alone. (St. Br., p. 45, citing *Powell v. Texas*, 392 U.S. 514, 532, 549-550 (White, J., concurring.)). In support of its argument, the State discusses *Powell v. Texas*, which upheld a public drunkenness ordinance against an Eighth Amendment challenge because it did not punish the defendant for the involuntary status of being an alcoholic, but rather for the voluntary act of drinking to the point of intoxication in public. *Powell*, 392 U.S. at 531-32. The UPF / streetgang member statute, however, is distinguishable from *Powell*.

In *Powell*, criminal liability attached on the basis of the voluntary act of drinking to intoxication in public, a distinct offense not punished elsewhere in the Criminal Code. The voluntary conduct in the UPF / streetgang member statute – the possession of a firearm without a FOID card – already constitutes an offense: the Class A misdemeanor offense of unlawful use of a weapon ("UUW"). See 720 ILCS 5/24-1(a)(4). Thus, the specially enhanced Class 2 three-to-ten-year sentencing range in the UPF / streetgang member statute attaches not on the basis of the voluntary conduct of FOID-less firearm possession (which the legislature has already determined merits Class A liability), but rather it attaches solely on the basis of the defendant's status as a gang member.

The State responds to this argument by noting that the Supreme Court's Eighth Amendment jurisprudence permits the legislature to "determin[e] that certain criminal acts warrant a greater penalty when committed by offenders with particular statuses." (St. Br., p.

47) The State cites the examples of a prison employee subject to enhanced penalties for the conduct of smuggling cannabis into prison (720 ILCS 5/31-A-1.1(a)), enhanced penalties for adults as compared to juveniles for the same offenses, enhanced penalties for parents who commit the offenses of involuntary manslaughter or battery (720 ILCS 5/9-3(f); 720 ILCS 5/12-3.2), and government employees subject to criminal liability for sexual contact with a person in their care (720 ILCS 5/11-9.2).

However, these examples are all distinguishable because these statuses are for the most part voluntary, and quite unlike the involuntary status of being an addict that was at issue in *Robinson v. California*, 370 U.S. 660 (1962). Moreover, in all of these instances, the enhanced penalty attaches on the basis of the additional conduct of abdicating the duties and responsibilities that the person has decided to take on in assuming that voluntary role or status. A prison employee assumes the responsibility of caring for and keeping inmates out of trouble. A parent assumes the responsibility of ensuring the well-being of their child. A state employee such as a penal system employee or law enforcement officer assumes the responsibility of ensuring the physical safety of those in their custody, and not exploiting their power over those in the vulnerable position of being in custody. As for juvenile sentencing, the Supreme Court has determined, due to the incomplete neurobiological development of children, that children are less responsible for their actions, and therefore the same conduct by a child warrants less liability than an adult. *Montgomery v. Louisiana*, 577 U.S. 190, 207 (2016). In the State's examples, additional criminal penalties have not attached to identical conduct by status-holders due to their status alone. Instead, additional criminal liability attaches due to additional conduct – a special responsibility that has been abdicated arising out of the status voluntarily assumed by the status-holder.

In contrast, a gang member assumes no additional responsibilities by way of that status. Nor does a gang member, particularly one who only belongs to a gang for social purposes without any criminal objectives, pose any greater danger to the public than any other citizen

who commits the conduct of FOID-less firearm possession. Furthermore, in contrast to the State's examples cited above, gang membership as it currently exists is often a status that is involuntarily assumed. The State's arguments to the contrary notwithstanding, our own legislature has acknowledged that gang membership is often coerced in its legislative findings: "The General Assembly further finds that streetgangs are often controlled by criminally sophisticated adults who take advantage of our youth by *intimidating and coercing them into membership* by employing them as drug couriers and runners, and by using them to commit brutal crimes against persons and property to further the financial benefit to and dominance of the streetgang." 740 ILCS 147/5(c) (emphasis added). This is particularly the case where attempts to refuse gang recruitment or leave the gang, are often punishable by death or severe physical harm, as Appellant explained in the opening brief. To attach criminal liability on the basis of an associational status that may be, for all intents and purposes, inescapable for young people who live in certain neighborhoods, violates our most fundamental notions of fairness and proportionality.

Lastly, the State argues, based on its reading of *Powell*, that "an offense that includes both act and status elements is facially unconstitutional under *Robinson* only if the distinction between the two elements is illusory, such that . . . the act so necessarily follows from that status as to itself be involuntary." (St. Br., p. 52) Yet, this is just another way of stating that a criminal offense may only punish voluntary conduct to survive scrutiny under the Eighth Amendment. See *Powell*, 392 U.S. at 533 ("The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or . . . has committed some *actus reus*.").

Here, it is the element of gang membership alone that raises identical criminal conduct from a misdemeanor to a felony, and enhances the class of the offense at least two to three degrees. Because the UPF / streetgang member statute does not require the State to prove that

the act of possessing the weapon is in any way related to the accused's status as a gang member, it is the accused's wholly unrelated status alone that subjects him to a higher penalty, rather than his personal conduct. The extended Class 2 penalty, then, is not imposed on the basis of any voluntary conduct and constitutes a status offense, in violation of the Eighth Amendment. See *People v. Arevalo*, 249 Ariz. 370, 376 (2020) (in analyzing the constitutionality of a gang enhancement, finding that the distinction between a statute that criminalizes gang membership itself, and one that merely enhances criminal liability based on gang membership for an unrelated underlying crime, was insignificant).

E. Conclusion

For these reasons, this Court should not allow this statute to stand, as it is facially defective under both the Eighth and Fourteenth Amendments, constituting cruel and unusual punishment as well as a violation of both substantive and procedural due process.

CONCLUSION

For the foregoing reasons, Juan Villareal, petitioner-appellant, respectfully requests that this Court strike down 720 ILCS 5/24-1.8 (a)(1), the UPF / streetgang member statute, as facially invalid and vacate Villareal's conviction under 11CR1862501.

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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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JUAN VILLAREAL, Petitioner-Appellant.	)	Appeal from the Appellate Court of Illinois, No. 1-18-1817. There on appeal from the Circuit Court of Cook County, Illinois , No. 12 CR 13785: 11 CR 1862501. Honorable Angela Munari Petrone, 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 August 26, 2022, 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 petitioner-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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