No. 121417

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal From the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois.
Plaintiff-Appellant,	)	
v.	)	No. 13 CF 317
JULIO CHAIREZ,	)	The Honorable John A. Barsanti, Judge Presiding.
Defendant-Appellee.	)	

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

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ARGUMENT

The People's opening brief established that the Illinois statute criminalizing the carriage of a firearm within 1000 feet of a public park is constitutional because the conduct prohibited — carrying weapons in sensitive locations — is not protected by the Second Amendment. *See Dist. of Columbia v. Heller*, 554 U.S 570, 626 (2008). That is the end of the inquiry. But even if the statute is viewed as a regulation limiting the general right to bear arms in public, the right to carry arms outside the home lies beyond the core protections of the Second Amendment. *See People v. Fields*, 2014 IL App (1st) 130209, ¶ 57 (quoting *Heller*, 554 U.S. at 635). Therefore, the statute is constitutional so long as it bears a substantial relationship to an important government interest. *See United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010). Because the prohibition on carrying a weapon within 1000 feet of parks, schools, and other sensitive locations is substantially related to the important government interest in protecting children and other vulnerable populations from harm, the statute survives scrutiny. Moreover, even if there might be a set of circumstances under which the challenged statute could not be constitutionally enforced, it survives a facial challenge because it unquestionably does not impose a comprehensive ban in much of the State.

Additionally, defendant pleaded guilty only to violating subsection (a)(4), (c)(1.5) by carrying a weapon within 1000 feet of a park, C22, and therefore, the circuit court lacked authority to rule on the constitutionality of other subsections, or of applications of (a)(4), (c)(1.5) to other locations, such as the carrying of weapons within 1000 feet of a school. And should this Court hold that the ban on carriage within 1000 feet of a park is unconstitutional, then, pursuant to the Statute on Statutes, the Court should hold that the

invalid provision is severable from the other subsections of the unlawful use of a weapon (UUW) statute and from applications of (a)(4), (c)(1.5) to other locations because it is clear that the ban on carriage within 1000 feet of a park is not so essentially and inseparably connected in substance to the other bans in subsection (c)(1.5) that the General Assembly would not have passed them independently of one another. Finally, if this Court holds that 720 ILCS 5/24-1(a)(4), (c)(1.5) is uncontitutional, it should also reconsider its recent decision in *People v. Shinaul*, 2017 IL 120162 for the reasons explained in Justice Theis's dissent and allow the People to reinstate the charges that were *nolle prossed* in exchange for defendant's guilty plea.

I. Banning the Carriage of Weapons Within 1000 Feet of a Park Does Not Violate the Second Amendment.

As the People's opening brief explained, a two-step framework governs this Court's analysis. *In re Jordan G.*, 2015 IL 116834, ¶ 22. First, the Court must make a threshold determination of whether the regulated activity is protected by the Second Amendment. *Id.* To do so, the Court must conduct a textual and historical analysis to determine whether the conduct was protected by the Second Amendment at the time of its ratification. *Id.* If the regulated activity falls outside the scope of the Second Amendment as it was understood at the time of ratification, then it is categorically unprotected, and no further review is necessary. *Id.* If the regulated activity is not categorically unprotected, then the Court applies the appropriate level of scrutiny to the State's justification for the regulation. *Id.*

Under the Court's two-step, historical Second Amendment analysis, the conduct at issue here — carrying a firearm within 1000 feet of a public park — is not protected.

Regulations limiting public carriage are long-standing and rooted in the common-law right codified by the Second Amendment. The 1328 Statute of Northampton stated that "no person shall 'go nor ride armed by Night nor by Day in Fairs, Markets, nor in the Presence of the Justices or other Ministers nor in no Part elsewhere.'" Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 7-8 (2012) (quoting Statute of Northampton, 2 Edw. 3, c. 3 (Eng. 1328)). In other words, it barred carriage in sensitive locations. Defendant dismisses the relevance of this "ancient" statute. Def. Br. 9. In doing so, he relies on *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), where the Seventh Circuit relied on differences between England and America to conclude that it would "have been irrational" to distinguish between "keeping arms for self-defense in the home and carrying them outside the home" "in less peaceable America." Def. Br. 9[1] (citing *Moore*, 702 F.3d at 936-37). But in drawing that distinction, the Seventh Circuit focused on "the wild west" and the threat of "hostile Indians," *Moore*, 702 F.3d at 936, not on sensitive locations featuring children and other vulnerable populations. Indeed, *Moore* recognized that the Statute of Northampton was interpreted as limiting carriage only in "locations at which going armed was thought dangerous to public safety." *Id.* Dismissing the relevance of the Statute of Northampton to America at the time of the drafting of the Second Amendment ignores that Massachusetts, North Carolina and Virginia explicitly incorporated the Statute of Northampton into their state laws at that time. *See* Charles, 60 Clev. St. L. Rev. at 31-32 (citing 2 The Perpetual Laws, of the Commonwealth of

[1] Defendant-appellee's brief is cited as "Def. Br. _;" the People's opening brief is cited as "Peo. Br. _."

Massachusetts, from the Establishment of its Constitution to the Second Session of the General Court, in 1798 259 (Worcester, Isaiah Thomas 1799); Francois-Xavier Martin, A Collection of Statutes of the Parliament of England in Force in the State of North-Carolina 60-61 (Newbern 1792); A Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as are Now in Force 33 (Augustine Davis 1794)). Indeeed, the Supreme Court has recently affirmed that these historical limitations on the right to carry weapons in sensitive locations are beyond the scope of the Second Amendment. *See Heller*, 554 U.S. at 626.

Therefore, as the People's opening brief demonstrated, because a historical analysis demonstrates that regulations on carriage of weapons in sensitive locations was understood to lie outside the scope of the Second Amendment at the time of ratification, such conduct is categorically unprotected, and defendant's constitutional challenge fails. *See Jordan G.*, 2015 IL 116834, ¶¶ 22-25.

Defendant attempts to place the statute at issue here within the ambit of the Second Amendment by distinguishing statutes that prohibit carriage *in* sensitive places from statutes like this one that prohibits carriage within 1000 feet *of* a sensitive place. This distinction is without merit. In *Heller*, the Court held that "nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." 554 U.S. at 626. Federal law is very similar to Illinois law in that it bars carriage of weapons in a "school zone," 18 U.S.C. § 922(q)(2)(A), which is defined to include a 1000-foot area around the "grounds of a . . . school." 18 U.S.C. §§ 921(a)(25). When the Supreme Court expressly excluded laws

barring carriage in sensitive places from the protection of the Second Amendment, it was undoubtedly aware that the relevant federal law included an identical 1000-foot zone around the school, and thus *Heller* cannot be distinguished on this basis. Just as one can preserve an undiminished right of self-defense "by not entering sensitive places," Def. Br. 10 (citing *Moore*, 702 F.3d at 940), so can one avoid entering within 1000 feet of a sensitive place. To be sure, if the regulated zones around sensitive locations were so extensive that they functioned as a comprehensive ban on carrying weapons outside the home, then they would run afoul of the Second Amendment. But the far more measured regulation at issue here falls well short of such a prohibition.

And it would be irrational to allow a prohibition on carriage in a sensitive location, but have no buffer zone around that location. Not only are firearms designed to enable the user to commit violence from a distance, but the conditions that make a place "sensitive," such as a high concentration of children, do not dissipate immediately upon leaving the confines of that sensitive place. The size of the buffer zone used in subsection (c)(1.5) draws from well-established Illinois law. Indeed, the 1000-foot buffer was already in place to protect children near schools, parks, and public housing from exposure to drug dealers by exposing those who sell drugs within the 1000-foot zone to harsher penalties, when the General Assembly decided to extend that protection to ban guns from these sensitive locations. Amy Hetzner, *Where Angels Tread: Gun-Free School Zone Laws and an Individual Right to Bear Arms*, 95 Marq. L. Rev. 359, 385 (2011). In other words, to protect a sensitive location from the dangers of gun violence,

the State may extend its prohibition to include the area from within which a shooter might fire a gun.

If some level of Second Amendment scrutiny applies, intermediate scrutiny should be used here because the regulated conduct falls outside the core protections of the Second Amendment. Defendant characterizes the challenged regulation as flatly banning public carriage of firearms, Def. Br. 11, but the statute is actually part of the well-established class of regulations that merely limit carriage in sensitive locations.

"Although the second amendment guarantee has *some* application in the very different context of possession of firearms in public, 'outside the home, firearms rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.'" *Fields*, 2014 IL App (1st) 130209, ¶ 57 (quoting *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (emphasis original)). Many federal courts have agreed that intermediate scrutiny is appropriate for statutes that lie outside the core protections of the Second Amendment, including statutes restricting public carriage. *See, e.g., Drake v. Filko*, 724 F.3d 426, 430, 430 n.5 (3d Cir. 2013); *Kachalsky v. Westchester*, 701 F.3d 81, 96 (2d Cir. 2012); *Masciandaro*, 638 F.3d at 471. Under this standard, the People must show that the challenged regulation is substantially related to an important governmental objective. *See People v. Alcozer*, 241 Ill. 2d 248, 262 (2011); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (applying intermediate scrutiny in Second Amendment case).

Defendant's reliance on *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), *see* Def. Br. 14, is misplaced. In *Ezell*, the Seventh Circuit required Chicago to make a

more rigorous showing than intermediate scrutiny, "if not quite strict scrutiny," to defend the constitutionality of its complete ban on firing ranges within the city. *Ezell*, 651 F.3d at 708. *Ezell* concluded that Chicago's firing range ban constituted a serious encroachment on citizens' ability to maintain the proficiency necessary to use a firearm for self-defense, *id.*, thereby limiting the right that the Second Amendment "elevates above all other interests": the use of arms "in defense of hearth and home." *See Heller*, 554 U.S. at 635. In other words, Chicago's firing range ban affected the core of the Second Amendment right. In contrast, the law at issue here has no impact on the right to use arms in defense of hearth and home, and furthermore is not a ban on carrying arms for self-defense in public, but rather a regulation on the right to carry arms near a sensitive location. Even if such conduct is protected by the Second Amendment, it does not fall within the core Second Amendment right, and therefore, intermediate scrutiny is appropriate.

The People's opening brief detailed the history of the ban on carriage within 1000 feet of a school, and explained how that ban satisfies intermediate scrutiny because it is substantially related to the government's compelling interest in protecting children and other vulnerable populations. Peo. Br. 10-14. Defendant's argument that the statute is not sufficiently narrowly tailored because parks can be large and include areas that are not necessarily frequented by children, Def. Br. 13, does nothing to undermine the strength of the government's interest or the relationship between that interest and the ban on carriage near sensitive locations. Defendant's argument is akin to an overbreadth argument: because there might be some places where a person would be prohibited from carrying a

gun but where conditions do not make carriage unusually dangerous, the whole statute should be invalidated. Such an argument might be availing in a First Amendment case, but is not appropriate here. *See, e.g.*, *In re Lakisha M.*, 227 Ill. 2d 259, 276 (2008) (recognizing overbreadth only applies to First Amendment challenges).

The People also argued that the possibility that there are some places in Illinois where the 1000-foot restriction functions as a near-comprehensive ban is insufficient to sustain a facial challenge to the statute. *See* Peo. Br. 14-15 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Hill v. Cowan*, 202 Ill. 2d 151, 157 (2002)). In response, defendant waives any argument that the statute constituted a comprehensive ban on the right to bear arms, *see* Def. Br. 15-16 ("this is not why the statute is unconstitutional"), and clarifies that his sole argument is that prohibiting carriage within 1000 feet of a park is an unconstitutional restriction on Second Amendment rights.

II. *People v. Burns*, 2015 IL 117387, Does Not Control the Outcome of this Case.

Defendant argues that this Court need not engage in any such analysis here because the case is controlled by *People v. Burns*, 2015 IL 117387. *See* Def. Br. 7. *Burns* held that the sentencing provisions in subsection (d) of the aggravated unlawful use of a weapon (AUUW) statute that elevated a violation of subsection (a)(1), (a)(3)(A) from a Class 4 to a Class 2 felony where the defendant had previously been convicted of a felony did not create a separate offense, and that subsection (a)(1), (a)(3)(A) was facially unconstitutional regardless of whether the defendant was subject to a Class 4 or Class 2 felony penalty. *Id.* at ¶¶ 24, 32. Therefore, defendant argues, because subsection (a)(4) is

unconstitutional on its own, it cannot function as a constitutionally valid crime when combined with the additional element found in subsection (c)(1.5).

But the sentencing enhancement in *Burns* is distinguishable from the provision at issue here, which adds an extra element to the offense. As the Court noted in *Burns*, "The penalty enhancements in subsection (d) are not elements of the offense. They do not come into play until after the defendant is found guilty." *Id.* at ¶ 24. In contrast, a defendant's location is an element that must be proved to a jury beyond a reasonable doubt when he is charged with carrying a concealed weapon within 1000 feet of a park. *See* Illinois Pattern Jury Instructions, Criminal, No. 18.04W (4th ed. 2000). As the United States Supreme Court has explained, "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury." *Alleyne v. United States*, __ U.S. __, 133 S. Ct. 2151, 2155 (2013). Therefore, any aggravating fact that produces a higher sentencing range "is an element of a distinct and aggravated crime." *Id.* at 2163. Hence, unlike the sentencing enhancement at issue in *Burns*, the aggravated crime defined by (a)(4), (c)(1.5) deserves separate consideration from the basic crime defined by (a)(4) alone, even if that basic crime is facially unconstitutional. It is irrelevant that both crimes are versions of the offense of unlawful use of a weapon. By way of comparison, the FOID card and age restriction provisions of 720 ILCS 5/24-1.6 are both versions of the crime of AUUW. *See* 720 ILCS 5/24-1.6(a)(2), (a)(3)(C) & (a)(3)(I). This Court held that these versions of AUUW were constitutional, even as it declared another version of the same crime — lacking the additional FOID card or age element — unconstitutional. *See People v. Mosley*, 2015 IL 115872, ¶¶ 25, 36-37 (upholding versions of AUUW

defined by subsections (a)(2), (a)(3)(C) and (I), while holding unconstitutional version of AUUW defined by subsections (a)(2), (a)(3)(A)). Similarly, this Court can uphold the version of UUW defined by subsections (a)(4), (c)(1.5), even were it to conclude that the version of UUW defined by subsection (a)(4) alone is unconstitutional.

Nor does the *void ab initio* doctrine dictate the outcome here. Just as subsections (a)(1) and (a)(2) of the AUUW statute could continue to be enforced in conjunction with subsections (a)(3)(C) and (a)(3)(I), among others, even after they had been declared *void ab initio*, and unenforceable, in conjunction with subsection (a)(1); so, too, can subsection (a)(4) of the UUW statute continue to be enforced in conjunction with subsection (c)(1.5) even were it found *void ab initio*, and unenforceable, on its own. This Court's recent *void ab initio* jurisprudence makes clear that courts need not pretend that a statute never existed. *See People v. Blair*, 2013 IL 114122, at ¶ 29 (holding that "the void *ab initio* doctrine does not mean that a statute held unconstitutional never existed"); *see also People v. Holmes*, 2017 IL 120407, ¶ 32. "The actual existence of a statute, prior to a determination that the statute is unconstitutional, is an operative fact and may have consequences which cannot be justly ignored." *Id.* (quoting *Perlstein v. Wolk*, 218 Ill. 2d 448, 461 (2006)); *see also Holmes*, 2017 IL 120407, ¶ 32. In *Blair*, the Court held that the armed robbery with a firearm provision, which had been declared facially unconstitutional and *void ab initio*, could be resurrected by amending the armed violence statute to correct the constitutional infirmity, even though the General Assembly never reenacted the armed robbery statute. *Blair*, 2013 IL 114122, ¶ 35. That is because a statute declared *void ab initio* is unenforceable, not non-existent. Similarly, the

constitutional infirmity in subsection (a)(4) of the UUW statute can be cured, and the provision made enforceable, by applying it in conjunction with subsection (c)(1.5). The *void ab initio* doctrine provides no obstacle to that enforcement.

III. The Circuit Court Had Jurisdiction Only to Rule on the Constitutionality of Violations of 720 ILCS 5/24-1(a)(4), (c)(1.5) Within 1000 Feet of a Park.

The People's opening brief demonstrated that because defendant pleaded guilty only to violating subsection (a)(4) by carrying a weapon within 1000 feet of a park, C22, the circuit court lacked authority to rule on the constitutionality of other subsections, or of applications of (a)(4) to other locations covered by (c)(1.5), such as within 1000 feet of a school. *See Mosley*, 2015 IL 115872, ¶ 11 ("courts do not rule on the constitutionality of a statute where its provisions do not affect the parties, and decide constitutional questions only to the extent required by the issues in the case") (internal citations omitted); *see also Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 296 (2009) ("A court cannot rule on the constitutionality of a statute that is not before it, nor can the court rule on the merits of a case over which it lacks jurisdiction.") (Thomas, J., specially concurring). Nothing in defendant's brief calls this into question. *See* Def. Br. 19-20. However, the People agree with defendant that if the circuit court exceeded its authority, its order must be vacated only to the extent it invalidated any portion of the statute other than the application of (a)(4) to carriage of a firearm within 1000 feet of a park. *See Mosley*, 2015 IL 115872, ¶ 12 (vacating circuit court orders to extent they find statutory provisions not before the court unconstitutional).

IV. All Other Portions of the Statute Are Severable from the Challenged Provision.

Defendant argues that subsection (c)(1.5) is not severable from section (a)(4) because it "is a sentencing provision." Def. Br. 21. In other words, because a defendant cannot violate (a)(4), (c)(1.5) without violating (a)(4), if (a)(4) is unconstitutional, then so is all of (c)(1.5). But this argument ignores that (c)(1.5) can also define criminal conduct in conjunction with other subsections, such as (a)(9), and that (a)(4), (c)(1.5) defines multiple offenses, including not only possessing a gun within 1000 feet of a park, but also possessing a gun within 1000 feet of a school or courthouse, for example. Pursuant to the Statute on Statutes, the question, then, is whether the invalid provision is severable, i.e., whether the ban on carriage within 1000 feet of a park is essentially and inseparably connected in substance to the remaining provisions, such that the legislature would not have enacted the remaining provisions absent the invalid one. *See Jordan G.*, 2015 IL 116834, ¶ 18. As the People's opening brief demonstrated, Peo. Br. 17-18, the General Assembly certainly would have chosen to protect children at school and on their way to school on public transportation even if they could not also do so near parks. Nor is there any reason why the ban on carriage within 1000 feet of a school, for example, could not be enforced wholly independently of the ban on carriage within 1000 feet of a park. *See, e.g., Jordan G.*, 2015 IL 116834, ¶ 19 (AUUW without a FOID card and AUUW under 21 both severable from AUUW's unconstitutional aggravating factors, even though each must operate in conjunction with subsections (a)(1) and (a)(2) of the AUUW statute to form a substantive offense).

Therefore, even if this Court finds that criminalizing a violation of (a)(4) within 1000 feet of a park violates the Second Amendment, it should nevertheless hold that the remaining Class 3 felonies specified in subsection (c)(1.5) are severable.

V. The People Should Be Permitted to Reinstate *Nolle Prossed* Charges Against Defendant Even Though the Three-Year Statute of Limitations Has Run.

Under *People v. Shinaul*, 2017 IL 120162, the People cannot reinstate the charges they *nolle prossed* pursuant to defendant's guilty plea. *Id.*, ¶ 18 (where statute of limitations has run, it acts as complete bar on reinstating charges following defendant's successful motion to vacate guilty plea). However, not only does Justice Theis's dissent in *Shinaul* present a persuasive argument that contract principles and public policy dictate a contrary result, but this case demonstrates why Justice Theis was correct. Defendant chose to wait more than three years after his crime to seek vacatur of his conviction — and, then, only in the face of several pending petitions to revoke his probation — despite the fact that the basis for his claim was available to him when he entered his guilty plea. Vacatur of defendant's conviction now would unilaterally modify the parties' agreement and eliminate the People's basis for agreeing to *nolle prosse* the remaining charges in the first place. Justice Theis is correct that the proper remedy is to restore the parties to their respective positions before the plea agreement was entered. *Shinaul*, 2017 IL 120162, ¶ 41 (Theis, J., dissenting). Any other outcome allows defendant to escape the consequences of his criminal behavior, and denies the People the benefit of their bargain. *Id.* Therefore, if this Court holds that 720 ILCS 5/24-1(a)(4), (c)(1.5) is uncontitutional, it should also reconsider *Shinaul* and allow reinstatement of the charges that the People *nolle prossed* in exchange for defendant's guilty plea.

CONCLUSION

For these reasons, and those stated in the People's opening brief, this Court should reverse the judgment of the circuit court and reinstate defendant's conviction. Alternatively, if the Court vacates defendant's conviction, it should reconsider *Shinaul* and allow the People to reinstate the *nolle prossed* charges.

August 16, 2017

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CERTIFICATE OF COMPLIANCE

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. I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is thirteen pages.

/s/ Garson S. Fischer
GARSON S. FISCHER
Assistant Attorney General

CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned certifies that on August 16, 2017, the foregoing **Reply Brief of Plaintiff-Appellant** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and copies were served upon the following by email:

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Additionally, upon acceptance by the Court's electronic filing system, the undersigned will mail thirteen (13) duplicate paper copies to the Clerk of the Supreme Court of Illinois at 200 East Capitol Avenue, Springfield, Illinois 62701.

/s/ Garson S. Fischer
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