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SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Certiorari to the Colorado Court of Appeals Case Number 2017CA2249	
Petitioner TIMOTHY ROBERT MCBRIDE v. Respondent THE PEOPLE OF THE STATE OF COLORADO	
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REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit and formatting requirements set forth in C.A.R. 28(g).

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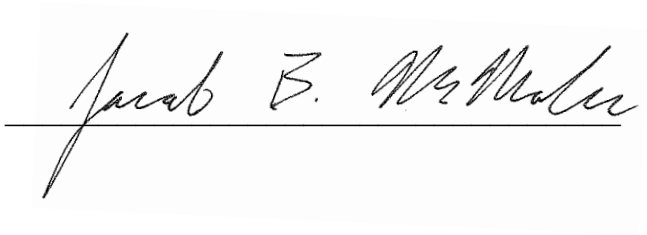

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I. This Court should apply the plain language of section 42-4-206(1), C.R.S., and hold that a tail lamp complies with the law if it "emits a red light plainly visible from a distance of five hundred feet to the rear."

A. This Court has not previously addressed what constitutes a violation of section 42-4-206(1), C.R.S.

The State acknowledges that this Court reviews sufficiency and statutory interpretation issues de novo, but it argues Mr. McBride's interpretation of section 42-4-206(1), C.R.S., "clashes with this Court's precedent," specifically, *People v. Brant*, 252 P.3d 459 (Colo. 2011). AB pp.7-8, 27-28. According to the State, *Brant* "*held* that a broken taillight alone justified a traffic stop under section 42-4-206." *Id.* pp.27-28 (emphasis added) (citing 252 P.3d at 463).

Brant did not so hold because, as Mr. McBride explained, *see* OB pp.14-15, and as the State fails to address, *Brant* lacked jurisdiction to review the stop. Because precedent does not address this question, this Court writes on a blank slate.

Even if this Court considers *Brant*'s "broken taillight" comment, it offers no support for the State's "only red" interpretation of section 42-4-206(1), C.R.S. *See* AB p.28 (acknowledging *Brant* "never addressed what colors the tail lamps were emitting"). *Brant* is off base; this Court should apply the law's plain text.

B. The text controls. This Court should reject the State's argument for a stricter law prohibiting white light.

Like Mr. McBride, the State contends that the statute's plain language controls. *See* AB p.12; OB pp.4-5, 10-14. The text of section 42-4-206(1), C.R.S., requires tail lamps to "emit[] a red light plainly visible from a distance of five hundred feet to the rear."

The State leaves out the distance provision in discussing the plain language, contending that the law "requires tail lamps emit only red light." AB p.12; *see also id.* pp.14, 20. By ignoring the distance provision, the State mischaracterizes Mr. McBride's position as indeterminate: "The defendant claims that in requiring tail lamps emit visible red light, the General Assembly intended to allow tail lamps to emit other colored lights *so long as* it displays *some visible red light as well*." *Id.* p.9 (emphases added). But a tail lamp complies if it "emits a red light plainly visible from a distance of five hundred feet to the rear." § 42-4-206(1), C.R.S.

According to the State, drivers who use tape to satisfy the law's five-hundred-foot rule are not safe from liability because police, on closer inspection, can still cite them if "the red tape melted or was otherwise compromised." AB p.31. The State essentially asks this Court to add a provision prohibiting tail lamps from emitting any white light, but "the prohibition against emitting white light that the [State] ascribes to [the] section is nowhere to be found," *Robinson v. State*, 431 S.W.3d 877,

881 (Ark. 2014) (Hart, J., dissenting, joined by Hannah, C.J.); *see Kroft v. State*, 992 N.E.2d 818, 821 (Ind. Ct. App. 2013) ("There is no requirement about 'only' red light being visible from a distance of 500 feet.").

The General Assembly used the word "only" just once in the statutory text. *See* § 42-4-206(1), C.R.S. (providing that, in a train of vehicles, "*only* the tail lamp on the rear-most vehicle need actually be seen from the distance specified" (emphasis added)). Yet the State argues for an implied "only red" condition because "[t]here was no need for the General Assembly to include the word 'only' when the statute lists one color; specifically identifying one color necessarily excluded others." AB p.14; *see id.* p.17 ("The General Assembly knew how to authorize more than one color, and when it wanted to, it did so expressly[.]" (emphasis omitted)).

There is no dispute that the statute makes red the color of compliance. Contrary to the State's argument that Mr. McBride is seeking an "exception" for compliance through non-red colors, *id.* p.14, his "argument is not that white light can satisfy section 42-4-206(1)'s red requirement," OB p.11. The point is that "when a red light is plainly visible from five hundred feet to the rear, the presence of some white light does not matter." *Id.* pp.11-12. The law does not say "only red," and this Court "do[es] not add words to the statute or subtract words from it," *Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007). "[W]e look to the plain and ordinary

meaning of the statutory language to determine the legislative intent. If the statutory language is clear, we apply the plain and ordinary meaning of the provision." *Id.* (citations and quotations omitted).

The State argues that "other terms" in the statue "confirm that it requires only red light." AB p.14. Specifically, the State relies on the words "when lighted" and argues Mr. McBride urges an interpretation that would have this Court "delete" these words from the law. *Id.* pp.14-16. The State is mistaken. The "when lighted" condition was triggered because Mr. McBride drove at night, a time when, under section 42-4-204(1), C.R.S., tail lamps must be illuminated. These tail lamps were illuminated. This dispute concerns whether the State proved beyond a reasonable doubt that they failed to "emit[] a red light plainly visible from a distance of five hundred feet to the rear." § 42-4-206(1), C.R.S. Mr. McBride's plain-language interpretation deletes no words from the law.

The State argues that the legislature cannot anticipate every issue of statutory construction, AB pp.16-17, and while that is true, it does not allow this Court to add words to the law. *See Turbyne*, 151 P.3d at 567. If the General Assembly desires a no-white-light policy, it can adopt one. In Alaska, the legislature specified, "No person may operate a motor vehicle on a roadway with any color of light illuminated other than the colors specified in this chapter." 13 AAC 04.145(f); *see Williams v.*

State, 853 P.2d 537, 538 (Alaska Ct. App. 1993) (discussing this statute). The State cites no parallel Colorado provision. This Court should reject the State's argument for a no-white-light condition not present in the text of section 42-4-206(1), C.R.S.

The statute's text supplies the rule. A tail lamp must emit a red light plainly visible from five hundred feet to the rear to comply with section 42-4-206(1), C.R.S.

II. The State's extra-textual arguments are immaterial and unpersuasive. If the law is ambiguous, this Court should apply the rule of lenity.

As shown, the text controls, but the State makes three additional arguments for its "only red" interpretation: (1) uniformity; (2) public safety; and (3) avoidance of discriminatory enforcement. *See* AB pp.22-33. None of these considerations supports the State's reading of the law.

First, the State argues, "[T]he defendant proposes a rule that creates no real uniformity at all." *Id.* p.28. But the uniform rule Mr. McBride proposes is the objective, five-hundred-foot rule found the plain text of section 42-4-206(1), C.R.S. The State argues its interpretation creates "the *most* uniform standard," AB p.25 (emphasis added), but the State's position is simply more strict. The General Assembly regulated tail lamps at the five-hundred-foot scale, but the State seeks uniformity down to the wavelength. Uniformity will be best served through application of the plain text.

The State discusses the legislative declaration recognizing conflicts "between the *state's* traffic laws and many of the *municipal* traffic codes." § 42-4-102, C.R.S. (emphases added); *see* AB pp.24-26. But uniformity between those levels is assured because this law *is* the General Assembly's statewide policy for tail lamps. *See* § 42-4-103(1), C.R.S. ("This article constitutes the uniform traffic code throughout the state and in all political subdivisions and municipalities therein."). Whether this Court adopts the State's interpretation or Mr. McBride's interpretation of section 42-4-206(1), C.R.S., the law's application will be equally uniform across Colorado.

The legislative declaration further found that state and local traffic conflicts were "compounded by the fact that today's Americans are extremely mobile." § 42-4-102, C.R.S. The goal of *national* uniformity led the General Assembly to look to the Uniform Vehicle Code, *id.*, but there is no national consensus on this question, *see People v. McBride*, 2020 COA 111, ¶ 19 (citing out-of-state cases); *see also* OB pp.16-18. In deciding whether section 42-4-206(1), C.R.S., bans tail lamps from emitting white light, this Court must place Colorado in one camp or another.

This Court should reject the State's argument for additional, unwritten liability and adopt Mr. McBride's plain-text interpretation, which accords with the better-reasoned out-of-state decisions. The State critiques *Kroft*, a decision from Indiana, for reaching its conclusion "without any analysis other than remarking that

its statute did not use the word 'only.'" AB p.30; *see* 992 N.E.2d at 821-22. But a lack of textual support is a concise and compelling reason to reject the "only red" reading, and it applies equally to section 42-4-206(1), C.R.S.

Second, the State argues that "predictability through uniformity promotes public safety on roads." AB p.28. But that point has nothing to do with what the underlying rule requires. The State proposes a clear rule, but only Mr. McBride's clear rule conforms to the statutory text.

The State contends its "only red" interpretation is *necessary* for public safety. *Id.* pp.26-27. Yet there is no evidence public safety collapsed in the jurisdictions that construed their laws as Mr. McBride urges this Court to read section 42-4-206(1), C.R.S. If tail-lamp confusion is the danger the State claims, it is surprising that prosecutors elsewhere "never even argued that their respective state statute[s] only required red light." AB p.29.

The State hinges its public-safety concern on the danger of white lights being confusing because they signal a car is approaching, driving either forward or in reverse. *Id.* pp.26-27. But section 42-4-215(6), C.R.S., does not require that back-up lamps be white. Although the division found that "federal standards and regulations have required white backup lamps since the late 1960s," *McBride*, ¶ 18 n.3, this Court, in construing statutes, "effectuate[s] the General Assembly's intent,"

People v. Cross, 127 P.3d 71, 73 (Colo. 2006). The fact that the General Assembly did not require white back-up lamps undercuts the State's argument that it intended to protect the clarity of white light as a signal of approach.

Further, white light can indicate that a vehicle, rather than approaching, is turning or staying in place. *See* § 42-4-215(2), (7), C.R.S. (providing that front turn signals and hazard lights may be white); *see also* § 42-4-215(4)-(5), C.R.S. (providing side cowl or fender lamps as well as runningboard courtesy lamps may be white). Further still, when a car is driving away from an observer, she can expect to see white light illuminating the rear registration plate, and that white light can even come from the tail lamp. *See* § 42-4-206(3), C.R.S.

The State's safety concerns do not make sense in the abstract, and they do not apply here—Deputy Stratton was not confused into thinking the car was backing up. (TR 5/31/17 p.21:4-14.) Drivers take their cues from total context and regularly encounter tail lamps in less than perfect condition. *See, e.g.*, *Kroft*, 992 N.E.2d at 822 ("[T]here is simply no evidence that Kroft posed any danger to motorists approaching him from behind because of the dime-sized hole in his tail lamp."). The General Assembly determined that tail lamps are clear enough to avoid confusion when they "emit[] a red light plainly visible from a distance of five hundred feet to the rear." § 42-4-206(1), C.R.S.

Third, the State invokes the constitutional-avoidance canon and contends that Mr. McBride's interpretation raises "potential enforcement challenges." AB pp.32-33. Echoing the division, the State worries "if a tail lamp shone a lot of white light with a smidge of red but could be perceived as faintly red at a 500-foot distance, that would introduce subjectivity on the part of police." *Id.* p.33 (quoting *McBride*, ¶ 14).

Traffic stops present a troublesome context for discriminatory enforcement, and this was a pretextual stop. (TR 5/31/17 pp.30, 39.) But it is the State's "only red" interpretation that should trigger enforcement concerns. Reading in a ban on white light will allow an officer to stop a driver, regardless of the tail lamps' compliance with the five-hundred-foot rule, by claiming he saw a smidge of white light. The statute's five-hundred-foot rule is objective, but as the division's example illustrates, the requirement for a red light that is "*plainly* visible," § 42-4-206(1), C.R.S. (emphasis added), will make for some hard cases. The statute's text introduces this subjectivity, however, and the inevitability of hard cases is no reason to expand liability and officer discretion with a no-white-light rule.

The statute's plain text resolves this case, but if this Court concludes section 42-4-206(1), C.R.S., is ambiguous, it should reject the State's extra-textual arguments and apply the rule of lenity. *See* OB pp.10, 18. An "only red" rule would work a wealth transfer from drivers to the State through fines and other charges

without advancing public safety. (TR 10/19/17 p.23:7-9; CF p.312.) The federal and state constitutions protect property from state deprivation without due process of law, *see* U.S. Const. amends. V, XIV; Colo. Const. art. II, § 25, and this statute does not give drivers fair notice that white light triggers liability, *see* § 2-4-201(1)(a), C.R.S. (presuming statutes are constitutionally compliant).

The State's rule would also be a windfall to auto-repair shops, but "[i]n enacting a statute, it is presumed that: Public interest is favored over any private interest." § 2-4-201(1)(e), C.R.S. The State goes outside the record to claim a replacement tail lamp is just $11.99. AB p.32 (citing https://www.carparts.com/tail-light-lens/replacement/11-1282-09). As viewed on January 24, 2022, the price listed at the State's link was $14.21.[1] There is no evidence this is the relevant part, however, and the State ignores labor costs. Its basic point is that replacing tail lamps is not so expensive when judged against the total costs of maintaining a vehicle. *Id.* pp.31-32. The marginal costs of daily life matter greatly for indigent Coloradans, however, and the State makes the wrong comparison in any event.

The commonsense repair point, which the Answer Brief does not dispute, is that tape is a less-expensive fix than a new tail lamp. *See* OB pp.13-14. Under the

[1] Attempts to preserve the State's carparts.com URL as a perma.cc link were unsuccessful.

State's interpretation of the law, however, drivers will find tape an unreliable solution because police can cite them for any tiny gap that allows white light to escape. AB p.31. If this Court is uncertain about the General Assembly's intent, it should reject the State's harsh interpretation of the law. Presumptively, "[a] just and reasonable result is intended" as well as "[a] result feasible of execution." § 2-4-201(1)(c)-(d), C.R.S. This Court should adopt Mr. McBride's interpretation under the rule of lenity if the law is ambiguous.

III. This Court should vacate Mr. McBride's infraction for insufficient evidence.

If this Court agrees with the division that section 42-4-206(1), C.R.S., requires "that tail lamps must shine only red," *McBride*, ¶ 14, then the prosecution's evidence was sufficient to establish a violation. At trial, Deputies Stratton and Briggs testified they saw some white light coming from the Lincoln's tail lamps. (TR 8/23/17 pp.215-16; TR 8/24/17 pp.12-14.)

But applying the plain language of section 42-4-206(1), C.R.S., this Court should hold that the emission of white light is immaterial if the tail lamp "emits a red light plainly visible from a distance of five hundred feet to the rear." Under this interpretation, the prosecution's trial evidence was insufficient so this Court should vacate the infraction.

If the evidence is such that reasonable jurors must necessarily have a reasonable doubt, the defendant is entitled to an acquittal. *People v. Bennett*, 515 P.2d 466, 470 (Colo. 1973); *see People v. Donald*, 2020 CO 24, ¶ 25 (citing *Bennett* and discussing adoption of substantial-evidence test).

From the prosecution's evidence, a rational factfinder could not conclude beyond a reasonable doubt that the tail lamps did not emit a red light plainly visible from five hundred feet to the rear. Testimony from Deputies Stratton and Briggs did not address how far away they were from the tail lamps when they saw white light. (TR 8/23/17 pp.215-16; TR 8/24/17 pp.12-14.) The State claims Deputy Cowley also saw the tail lamps emit white light, AB p.36 (citing TR 8/23/17 p.250:9-13), but he merely testified to what he heard Deputy Briggs air to Deputy Stratton over the radio (TR 8/23/17 p.250:14-19).

Photos of the Lincoln from trial do not permit a reasonable inference that the tail lamps failed to emit a red light plainly visible from five hundred feet to the rear either. (*See* People's Exs.6-8.) If the State's sufficiency argument depends on the trial photos not being in color, as the suppression exhibits were, *see* AB p.35 n.5, this Court should reject that argument because context establishes that the jury saw color photos. As Mr. McBride explained before the division:

> The State's trial Exhibits 6 and 7—photos of the Lincoln's backend—show the tail lights covered in red tape. (State's Tr Exs.6-

> 7.) The copies in the electronic record are black and white, but Deputy Stratton's testimony establishes the originals were in color. (TR 8/23/17 pp.221-22.) Further, this Court can review the color versions because these trial exhibits match Defense Exhibits B and D from the motions hearing, which are in color and in the record. (Def. Exs.B, D, Hrg. 5/31/17.) The photos show the tail lights emitted a mixture of red and white light at uncertain distances.

Opening Brief pp.21-22 (No. 2017CA2249). The State argued to the division that its evidence was sufficient because "[t]here was no *red* tape running down the center of the left taillight." Answer Brief p.40 (No. 2017CA2249) (emphasis added) (citing Peoples. Ex.6). Before this Court, the State argues the pictures "showed that the *red* tape had melted." AB p.37 (emphasis added) (citing People's Exs.6-7).

"The evidence presented at the suppression hearing, like the evidence at trial, established that the Lincoln's tail lamps emitted both red and white light." *McBride*, ¶ 43. Considered in the light most favorable to the State, the evidence did not allow a rational factfinder to conclude beyond a reasonable doubt that the tail lamps failed to emit a red light plainly visible from five hundred feet to the rear. This Court should vacate Mr. McBride's infraction under section 42-4-206(1), C.R.S., for insufficient evidence.

Alternatively, this Court should reverse the division, hold that tail lamps satisfy the statute when they emit "a red light plainly visible from a distance of five

hundred feet to the rear," § 42-4-206(1), C.R.S., and remand for further proceedings. *See Thomas v. People*, 2021 CO 84, ¶¶ 17-18 (taking similar course).

CONCLUSION

This Court should vacate Mr. McBride's traffic infraction for insufficient evidence. If this Court neither vacates nor affirms, it should reverse and remand for further proceedings.

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CERTIFICATE OF SERVICE

I certify that, on January 24, 2022, a copy of this Reply Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on John T. Lee of the Attorney General's office.