No. 122008

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate
	)	Court of Illinois, No. 1-14-3150.
Plaintiff-Appellee,	)	
	)	There on appeal from the Circuit
-vs-	)	Court of Cook County, Illinois,
	)	No. 14 CR 11336.
JEROME BINGHAM,	)	
	)	Honorable Bridget Jane Hughes,
Defendant-Appellant.	)	Judge Presiding.

BRIEF *AMICUS CURIAE* OF THE COLLATERAL CONSEQUENCES RESOURCE CENTER IN SUPPORT OF DEFENDANT-APPELLANT

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INTEREST OF AMICUS CURIAE

The Collateral Consequences Resource Center ("CCRC") is a non-profit organization established to promote public discussion and reform of the legal restrictions and social stigma that burden individuals with a criminal record after their court-imposed sentences have been served. CCRC offers practice and advocacy resources, provides information about how to obtain relief from collateral consequences in different jurisdictions, and disseminates news and commentary about this dynamic area of the law. CCRC resources are directed to lawyers and other criminal justice practitioners, courts, scholars and researchers, policymakers and legislators, as well as individuals directly affected by the post-release consequences of conviction.

Sex offender registration statutes such as Illinois's Sex Offender Registration Act ("SORA") at issue in this appeal (*see* 730 ILCS 150/1 *et seq.* (West 2012)) are based in significant part on the premise that released sex offenders pose a serious danger of committing future sex offenses, and that this danger will be mitigated by informing the community of their presence. In this brief, CCRC seeks to flesh out some of the reasons why SORA, as applied to defendant Jerome Bingham, violates the substantive due process protections of the United States and Illinois Constitutions. Specifically, CCRC will

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show that the facts of Bingham's case, viewed in conjunction with empirical evidence that the risk of repeat offense by released sex offenders is low and that registration has not been shown to reduce it, reveal critical defects in SORA's foundational premise. Indeed, academic research indicates that because such statutes interfere with registrants' ability to obtain housing, maintain employment, and achieve reintegration with families and communities, they are more likely to exacerbate than mitigate the risk of recidivism, in contravention of their goal of promoting public safety.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant Jerome Bingham was convicted of attempted criminal sexual assault in 1983 and served a four-year prison sentence. When SORA was first enacted in 1996 Bingham was not required to register as a sexual offender. SORA was amended in 2012 to make its registration requirements retroactively applicable to anyone who "was convicted of [a qualifying sexual offense] … on or before July 1, 1999" and "is convicted of a felony offense after July 1, 2011," regardless of whether the post-2011 offense had any sexual component. 730 ILCS 150/2(E)(7) (West 2012). Released sexual offenders who fall within the scope of this provision are defined by SORA as "sexual predator[s]." *Id.*; *see also* 730 ILCS 150/3(c)(2.1) (West 2012)

[1] CCRC has no financial interest in the outcome of this case.

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("A sex offender or sexual predator, who has never previously been required to register under this Act, has a duty to register if the person has been convicted of *any* felony offense after July 1, 2011.") (emphasis added).

Bingham became subject to this amended registration requirement following his 2014 conviction for stealing six wooden pallets worth $72 from a K-Mart storage lot, an offense that ordinarily would have been a misdemeanor but was charged as a felony because Bingham had committed a prior similar offense. Pursuant to the expanded scope of SORA as amended in 2012, Bingham is required to register as a "sexual predator" for the rest of his life. *See* 730 ILCS 150/2(E)(7); 730 ILCS 150/7 (West 2012). In the *more than three decades* between Bingham's 1983 conviction for attempted criminal sexual assault and his 2014 conviction for stealing six wooden pallets from a K-Mart, Bingham was not charged with any other sex offense.

As applied to Bingham, SORA's registration requirements do not satisfy the substantive due process standards of the United States and Illinois Constitutions because there is no rational relationship between SORA's goals of protecting the public from the commission of future sex-crimes by released sexual offenders or notifying the public of the presence of a dangerous sexual predator and SORA's assumption that Bingham's theft of

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$72 worth of goods from an unfenced outdoor store lot, combined with a single, 31-year-old conviction for a sexual offense, evidences that he poses such a threat and therefore must register as a sexual predator for the rest of his life.

Indeed, multiple large-scale studies establish that sex offenses generally have the lowest rate of repeat offense of any type of crime other than homicide. Just as significant, evidence shows that indiscriminate registration and notification statutes such as SORA do not help to decrease the rate of recidivism among sex offenders. In light of that evidence, it was not reasonable for SORA to treat Bingham's commission of a theft that lacked any sexual component as indicative that he is a threat to commit another sexual crime.

This is especially so because the application of SORA here ignored perhaps the most significant factor that appears pertinent to the likelihood of reoffending: the time that has passed between the prior sexual offense and the triggering offense. Evidence indicates that the longer an individual has gone without committing a new sexual offense, the less likely he is to commit a further sexual offense in the future. Yet the 2012 SORA amendments perversely target individuals who have gone *at least* 12 years without committing a new sexual offense. In Bingham's case, that period is

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31 years, which is compelling evidence that he is *unlikely* to commit another sex crime, making the registration requirement particularly irrational in his case.

Moreover, strong evidence supports the conclusion that registration and notification statutes actually undermine the goals they purport to promote because registration interferes with reintegration of sex offenders into the community—and thus increases the potential for recidivism—by throwing up serious obstacles to obtaining safe and affordable housing, maintaining stable employment, and sustaining family relationships. In so doing, registration statutes like SORA fail to satisfy the rationality requirement of due process when applied to an individual like Bingham.

Finally, because SORA retroactively imposes sufficiently heightened burdens and restrictions on released offenders like Bingham whose sex offense may have occurred years in the past, it violates the prohibitions against *ex post facto* punishment in the United States and Illinois Constitutions.

ARGUMENT

I. SORA Does Not Satisfy The Requirements Of Due Process As Applied To Individuals Like Bingham.

Both the U.S. and Illinois Constitutions provide that no person shall be deprived of life, liberty, or property "without due process of law." U.S.

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CONST. amend. XIV, § 1; ILL. CONST. 1970 art. I, § 2. Where, as here, a statute challenged on due process grounds is not alleged to affect a fundamental constitutional right, "the appropriate standard of review is the rational-basis test." *People v. Lindner*, 127 Ill. 2d 174, 179 (1989). To survive a due process challenge "[u]nder the rational-basis test, a legislative enactment must bear a reasonable relationship to the public interest intended to be protected, and the means adopted must be a reasonable method of accomplishing the desired objective." *Id.* at 180 (internal quotation marks omitted). Federal law applies the same standard. *See, e.g.*, *Seling v. Young*, 531 U.S. 250, 265 (2001) ("[D]ue process requires that the conditions and duration of [civil] confinement under the Act bear some reasonable relation to the purpose for which persons are committed.").

This Court has held that SORA's purpose "is to aid law enforcement by facilitating ready access to information about sex offenders and, therefore, to protect the public." *People v. Johnson*, 225 Ill. 2d 573, 585 (2007). Thus, SORA's foundational premises are that (1) released sex offenders pose a serious risk of repeat offense so that their presence in a community threatens public safety; and (2) registration and community notification can significantly mitigate that risk. Accordingly, under the rational basis test as applied to Bingham this means that (1) there must be a rational relationship

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between SORA's goal of protecting the public from repeat sexual offenders and its requirement that Bingham register as a sexual predator for life because he was convicted of stealing $72 worth of wooden pallets and had been convicted 31 years earlier of a sexual offense; and that (2) SORA's methods for achieving its public-safety goals are reasonable as applied to Bingham. *See Lindner*, 127 Ill. 2d at 180. Common sense strongly counsels that there is no rational-basis for any such conclusion, and common sense is confirmed by empirical evidence demonstrating that neither criterion is satisfied.

A. There Is No Rational Relationship Between SORA's Goal Of Protecting The Public From Repeat Sex Offenders And Its Requirement That Bingham Register As A Sexual Predator After His Conviction For A Minor Theft 30 Years After His Sole Sexual Offense.

The Court of Appeals held that due process is satisfied here because committing *any* felony subsequent to being convicted of a sexual offense—even one that, like Bingham's theft, indisputably lacked a sexual component—establishes a sufficiently great likelihood that the registrant will commit future sexual offenses from which the public must be protected through registration. Specifically, the Court of Appeals held that it would have been rational for the Legislature to have determined that Bingham poses a "potential threat of committing a new sex offense in the future"

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because he had "committed a sex offense in the past … and has shown a recent, general tendency to recidivate by committing a new felony since the amendment of the Act in 2011[.]" *People v. Bingham*, 2017 IL App (1st) 143150, ¶ 24.

But SORA is not aimed at protecting the public from crime generally, so Bingham's tendency to commit non-sex crimes bears no relationship to SORA's goal of protecting the public from future sexual offenses by released sexual offenders. Indeed, if anything, Bingham's criminal history over the 30 years following his lone sex offense conviction provides strong evidence that he is *not* likely to commit a future sex crime. Not one of Bingham's 11 convictions following his 1983 conviction for attempted criminal sexual assault—including the 2014 theft conviction that triggered Bingham's obligation to register under SORA—involved a sexual component. *See* Br. & Argument of Def.-Appellant ("Appellant's Br.") at 2-3. Moreover, an extensive body of research has found that recidivism rates for released sex offenders generally are low, and even lower with the passage of time.[2]

[2] *See, e.g.*, Matthew R. Durose, et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010, Supplemental Tables* Table 2, U.S. Dep't of Justice, Bureau of Justice Statistics (Dec. 2016, NCJ 244205); Patrick A. Langan, et al., *Recidivism of Sex Offenders Released from Prison in 1994*, U.S. Dep't of Justice, Bureau of Justice Statistics (Nov.

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One large-scale study of 270,000 prisoners conducted by researchers from the U.S. Bureau of Justice Statistics ("BJS") determined that only 5.3% of adult sex offenders were arrested for a new sex crime following release. *See* Patrick A. Langan, et al., *Recidivism of Sex Offenders Released from Prison in 1994* 24-25, U.S. Dep't of Justice, Bureau of Justice Statistics (Nov. 2003). Another more recent BJS study similarly found that 5.6% of released prisoners whose most serious crime was rape or sexual assault were re-arrested for rape or sexual assault within the next five years. *See* Matthew R. Durose, et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010, Supplemental Tables* Table 2, U.S. Dep't of Justice, Bureau of Justice Statistics (Dec. 2016, NCJ 244205). And a large-scale study focused specifically on Illinois arrest data from 1990 to 1997 found that fewer than 7% of sex offenders committed another sex offense within five years after their initial arrest. *See* Lisa L. Sample & Timothy M.

2003); Cal. Sex Offender Mgmt. Bd., *Recidivism of Paroled Sex Offenders – A Ten (10) Year Study* (2008); State of Conn., Office of Policy & Mgmt., Criminal Justice Policy & Planning Div., *Recidivism Among Sex Offenders In Connecticut* (Feb. 15, 2012); Jill S. Levenson & Ryan T. Shields, *Sex Offender Risk and Recidivism in Florida* (2012); State of New York, Dep't of Corr. & Cmty. Supervision, *2010 Inmate Releases: Three Year Post Release Follow-Up* (2014); Ohio Dep't of Rehab. & Corr., Bureau of Planning & Evaluation, *Ten-Year Recidivism Follow-Up of 1989 Sex Offender Releases* (2001); Robert Barnoski, *Sex Offender Sentencing in Washington State: Recidivism Rates*, Wash. State Inst. for Pub. Policy (2005).

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Bray, *Are Sex Offenders Dangerous?* 3(1) CRIM. & PUB. POLICY 73-74 (2003). By contrast, property offenders had a 38.8% rate of recidivism after five years. *See id.* at 73. Many studies show that re-arrest rates for sex offenders are the lowest of any offense group, with the exception of homicide.[3]

Notably, the authors of STATIC-99, the standard instrument for estimating the recidivism risk of sex offenders, have concluded that recidivism rates decline rapidly over time as former offenders remain within their communities. *See* R. Karl Hanson, et al., *High Risk Sex Offenders May Not Be High Risk Forever*, 29(15) J. INTERPERSONAL VIOLENCE 2792, 2807, 2812-13 (2014). Specifically, "[t]his study found that sexual offenders' risk of serious and persistent sexual crime decreased the longer they had been sex offense-free in the community." *Id.* at 2807. The authors explained that "[t]his pattern was particularly evident for high-risk sexual offenders, whose yearly recidivism rates declined from approximately 7% during the first

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[3] *See*, *e.g.*, Citizens Alliance on Prisons & Public Spending, *Denying Parole At First Eligibility: How Much Public Safety Does It Actually Buy?* (2009); State of New York, *2010 Inmate Releases: Three Year Post Release Follow-Up* (June 2014); Rhiana Kohl, et al., *Massachusetts Recidivism Study: A Closer Look at Releases and Returns to Prison*, Urban Inst., Justice Policy Ctr. (2008); Sample & Bray, *Are Sex Offenders Dangerous?* at 73; Glen Holley & David Ensley, *Recidivism Report: Inmates Released from Florida Prisons, July 1995 to June 2001*, Florida Dep't of Corr. (2003).

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calendar year, to less than 1% per year when they have been offense-free for 10 years or more." *Id.*

Of course, even a 5-7% rate of recidivism is a matter of tremendous concern when serious offenses such as rape are involved, and such comparatively low recidivism rates would not invalidate programs that could reasonably be found to reduce the risk of repeat sex offenses. But multiple studies have found that blunderbuss public registration and notification requirements like those imposed by SORA that are so broad as to ensnare people like Bingham create no statistically significant reduction in recidivism rates.

For example, one study based on criminal conviction records in Iowa concluded that "SORN [*i.e.*, sex offender registration and notification] has not reduced the rate of sex offender recidivism, nor has it led to a decrease in the number of offenses committed by recidivating sex offenders." Richard Tewksbury & Wesley G. Jennings, *Assessing the Impact of Sex Offender Registration and Community Notification on Sex-Offending Trajectories*, 37(5) CRIM. JUSTICE & BEHAVIOR 570, 579 (2010). Rather, "[a]mong a 10-year cohort of Iowa sex offenders, ... the sexual recidivism rate [is] virtually identical prior to and following the implementation of SORN …." *Id.* Another study analyzed the U.S. Department of Justice's data that tracked the recidivism rates of nearly 300,000 inmates released from prison in 1994. *See*

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Amanda Y. Agan, *Sex Offender Registries: Fear Without Function*?, 54(1) J. LAW & ECON. 207 (2011). The data compared individuals "who recidivated in terms of the percentages of those who had to register and those who did not." *Id.* at 228. The study concluded that the difference between the two groups was small and "not statistically significant." *Id.* "Subsequent arrests and convictions for sex offenses or for other crimes [were] not significantly different for registered and unregistered offenders." *Id.* at 229; *see also* Richard Tewksbury, et al., *A Longitudinal Examination of Sex Offender Recidivism Prior To and Following the Implementation of SORN*, 30(3) BEHAV. SCI. LAW 308, 324 (2012) (study matched two groups of approximately 250 individuals—one group released prior to the implementation of sex offender registration, one after—and concluded that "not only is sex recidivism extremely low among sex offenders regardless of SORN status, but that the general recidivism trends are largely unaffected by SORN").

When these data showing that convicted sex offenders generally pose a very low risk of committing other sex crimes and that registration statutes like SORA do not materially reduce rates of recidivism are combined with the indisputable fact that Bingham personally had not, so far as is known, engaged in a single sex-related offense in the more than 30 years since his

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sole sex offense conviction, there can be no rational basis for imposing SORA's myriad onerous obligations on Bingham based solely on his having stolen $72 worth of wooden pallets from a K-Mart.

This Court previously has struck down a provision of the Illinois Vehicle Code that subjected a sex offender to automatic, mandatory driver's license revocation regardless of whether the individual had used a vehicle to commit a sexual offense, holding that it was not rationally related to the Code's purpose of protecting "the public interest [in] the safe and legal operation and ownership of motor vehicles." *People v. Lindner*, 127 Ill. 2d 174, 182-83 (1989); *see also People v. Jones*, 223 Ill. 2d 569, 604 (2006) (explaining that, in *Lindner*, the revocation of the defendant's driver's license did not bear a rational relationship to the public interest to be served because the defendant's crimes "neither involved a motor vehicle nor bore any rational relationship to his ability to drive a motor vehicle safely") (citing *Lindner*, 127 Ill. 2d at 183). Likewise, imposing SORA's obligations and restrictions on Bingham based solely on his conviction for a petty theft committed 30 years after his lone sexual offense is not rationally related to SORA's purpose of protecting the public from repeat sexual offenders.

Notably, there is a disclaimer on the first page of the Illinois Sex Offender Registry's website that states that the Illinois State Police ("ISP")

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> *has not considered or assessed the specific risk of re-offense* with regard to any individual prior to his or her inclusion on this Registry and *has made no determination* that any individual included in the Registry *is currently dangerous*. Individuals included on the Registry are included *solely by virtue of their conviction record* and Illinois state law. The primary purpose of providing this information is to make the information easily available and accessible, *not to warn about any specific individuals.*

Illinois Sex Offender Information, *available at* www.isp.state.il.us/sor (last visited on Oct. 10, 2017) (emphasis added). The disclaimer further emphasizes that

> [t]he information contained on this site does not imply listed individuals will commit a specific type of crime in the future, nor does it imply that if a future crime is committed by a listed individual what the nature of that crime may be. ISP makes no representation as to any offender's likelihood of re-offending.

Id. In short, as applied to Bingham, the ISP—the State agency that administers Illinois's Sex Offender Registry—openly acknowledges that Bingham's lifelong obligation to register as a sexual predator is not grounded on a determination of Bingham's actual dangerousness or whether any aspect of his conduct during the 30 years between his one sex-crime conviction and his conviction for stealing $72 worth of wooden pallets indicates that he is a risk to commit future sexual crimes. Instead, Bingham's inclusion on the Registry stems solely from the Legislature's sweeping conclusion that all people convicted of a sexual offense "on or

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before July 1, 1999" who are "convicted of a felony offense after July 1, 2011" present a serious risk of committing future sexual crimes, justifying their lifelong obligation to register as sexual predators and to suffer the substantial burdens and disabilities accompanying such registration. 730 ILCS 150/2(E)(7).

Because there is absolutely no basis in Bingham's criminal history for concluding that he is likely to commit a future sexual offense, and because empirical evidence strongly suggests that Bingham's risk of re-offense is extremely low, the imposition of SORA's requirements on Bingham based solely on his 2014 theft conviction is arbitrary and unreasonable and therefore violates Bingham's substantive due process rights under the United States and Illinois Constitutions. *See People v. Pepitone*, 2017 IL App (3d) 140627, ¶ 15 (a statute is arbitrary and unreasonable when it sweeps too broadly), *appeal allowed by People v. Pepitone*, 2017 WL 2297892 (Tbl.) (May 24, 2017).

B. SORA's Methods For Protecting The Public From Repeat Sexual Offenders Are Not Reasonable As Applied To Individuals Like Bingham.

1. It is not reasonable for SORA to subject Bingham to the same registration requirements and potential penalties as released offenders who commit other sex crimes.

To survive rational-basis review in this case, SORA's methods for

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achieving its goal of protecting the public from repeat sexual offenders must be reasonable as applied to Bingham. *See Lindner*, 127 Ill. 2d at 180. As already noted, SORA indiscriminately and equally sweeps into its net of designated "sexual predators" all people convicted of a sexual offense on or before July 1, 1999 who are convicted of *any* felony after July 1, 2011. *See* 730 ILCS 150/2(E)(7); *see also* 730 ILCS 150/3(c)(2.1). Thus, low-risk individuals like Bingham are indiscriminately grouped with comparatively high-risk repeat sexual offenders. Under SORA, each of these individuals is subject to the same extensive in-person reporting requirements and supervision periods (*see* 730 ILCS 150/3(a), (b), (c)(3), (c)(4) (West 2012)), verification requirements (*see* 730 ILCS 150/8-5 (West 2012)), banishment from public parks (*see* 720 ILCS 5/11-9.4-1 (West 2017)), and criminal penalties for failure to comply with their SORA obligations (*see* 730 ILCS 150/10(a) (West 2012) (first violation is a Class 3 felony; second violation is a Class 2 felony)).

Unlike probation and parole conditions, these registry and reporting requirements do not decrease over time as individuals successfully integrate back into the community. Moreover, registrants cannot petition a court for a change of status. Given that the conviction that triggered Bingham's obligation to register under SORA was a petty theft of $72 worth of goods

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that did not involve any sexual component, and that Bingham had no history of sex crime after his lone sex-offense conviction 30 years earlier, it is not reasonable for SORA to subject him to the same burdensome lifelong registration requirements and potential penalties as are applied to individuals whose post-July 1, 2011 crimes are sexual in nature.

To illustrate the unreasonableness of SORA's indiscriminate treatment of Bingham, we note for the Court that at least nine States have recognized the importance of making individualized assessments before imposing registration obligations by making their registries risk-based, rather than offense-based. In other words, these States' registration schemes evaluate an individual's level of risk using an empirically-based risk assessment methodology and an assessment of his or her individualized risk factors.

For example, North Dakota requires the State Attorney General to "conduct a risk assessment of sexual offenders" and individually classify such offenders as "low-risk, moderate-risk, or high-risk." N.D. Cent. Code § 12.1–32–15(12) (2015). With narrow exceptions, the duration of an individual's registration obligation is based on this individualized risk assessment and not on the individual's crime of conviction. *Id.* § 12.1–32–15(8) (unless convicted of kidnapping, sexual abuse of a child under twelve,

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or multiple sex offenses, the lifetime registration obligation applies only to an individual assessed as "high risk"). North Dakota also affords registrants an opportunity to petition the Attorney General's risk assessment committee and provide any information that may warrant a lower risk assessment. *Id.* § 12.1–32–15(12)(d).

Rhode Island similarly provides for the individualized assessment of registrants to place them in one of three tiers based on their risk of re-offending. R.I. Gen. Laws § 11–37.1–12 (2015) (requiring State parole board to establish different dissemination and publication guidelines for individuals presenting a "low," "moderate," or "high" risk of re-offending). Only those who are recidivists, or convicted of certain aggravated offenses, are subject to a categorical lifetime registration requirement without any individualized assessment. *Id*. § 11–37.1–4; *id.* § 11–37.1–2 (defining aggravated offense as an offense involving "sexual penetration of victims of any age through the use of force … or offenses involving sexual penetration of victims who are fourteen (14) years of age or under"). Otherwise, registrants are evaluated and assigned a risk level by the State's Sex Offender Board of Review.

Perhaps due process does not require this degree of rationality in the construction of a registration system, but that hardly means that it can tolerate the degree of irrationality inherent in the application of SORA to

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someone like Bingham. To begin with, the provision is perversely irrational in that it targets individuals who have gone at least 12 years without being convicted of any sexual offense, for it applies to persons who were convicted of sex offenses before July 1, 1999, and whose registration-triggering offense occurs after July 1, 2011. In Bingham's case, his sole sex offense was followed by 30 years without another sex-offense conviction. Considering that fact in combination with the character of the offense that triggered Bingham's obligation to register, it is difficult to imagine facts less rationally connected with the classification of an individual as a dangerous sexual predator. Unless the State is completely free to act arbitrarily in imposing the onerous registration obligations and restrictions that SORA entails, the application of the statute to Mr. Bingham must be deemed so irrational as to violate due process.

2. Research casts doubt on the reasonableness of SORA's methods for protecting the public from repeat sexual offenders because it shows that the collateral consequences of registration tend to promote, rather than discourage, recidivism.

Another reason why this Court should be skeptical that there is a rational relationship between increased public safety and SORA's indiscriminate requirement that a person like Bingham register as a sexual predator is that social science research strongly suggests that successful

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reintegration of released offenders into the community is a key factor in reducing recidivism rates. Yet the severe collateral consequences imposed on individuals by the registration regime actually impede their successful rehabilitation and reintegration into society. As a result, sex offender registration and notification laws in fact increase the likelihood that registrants will recidivate because "[b]road notification policies are more likely to undermine the stability of sex offenders than to provide the sweeping protection they intend to achieve." Jill S. Levenson, et al., *Megan's Law and Its Impact on Community Re-Entry for Sex Offenders*, 25 BEHAV. SCI. & LAW 587, 599 (2007); *see also* Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21(1) J. CONTEMP. CRIM. JUSTICE 67, 68 (2005) (stating that negative community response to a sex offender living in the neighborhood may make that individual more likely to recidivate); UAA Justice Ctr., *Sex Offender Registries and Notification Programs* 3 (2009), *available at* http://justice.uaa.alaska.edu/overview/2009/04.sex-offender-registries.pdf ("The limited utility of public notification systems, balanced against the barrier such systems pose to community reentry … may actually make released offenders more dangerous rather than less ….").

Successful reintegration into the community is empirically linked with

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reduced recidivism. *See* Laura Whitting, et al., *The Impact of Community Notification on the Management of Sex Offenders in the Community: An Australian Perspective*, 47(2) AUSTRALIAN & NEW ZEALAND J. CRIM. 240, 244-46 (2014); Svenja Göbbels, et al., *An Integrative Theory of Desistance From Sex Offending*, 17 AGGRESSION & VIOLENT BEHAV. 453 (2012). Scholars have explained that civic participation and one's perceived identity as a conforming and engaged citizen are related to criminal offenders' ability to live as law-abiding members of the community. *See* Christopher Uggen, et al., *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 281, 303-04 (2006). Strong social bonds, marital attachment, and job stability facilitate the lifestyle changes required to avoid new criminal conduct. When a released offender is offered employment or is involved in a strong romantic relationship, recidivism is less likely. *See* Tony Ward & D. Richard Laws, *Desistance from Sex Offending: Motivating Change, Enriching Practice*, 9(1) INT'L J. FORENSIC MENT. HEALTH 11, 13 (2010). Indeed, as noted above, the authors of STATIC-99 found that sex offenders' "risk of serious and persistent sexual crime" decreased substantially the longer they remained in the community without relapse, with yearly rates of recidivism of high-risk individuals "declin[ing] from approximately 7% during the first calendar

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year, to less than 1% per year when they [had] been offense-free for 10 years or more." Hanson, et al., *High Risk Sex Offenders May Not Be High Risk Forever* at 2807.

Unfortunately, as we show in the following pages, the collateral consequences of registration and notification statutes undermine reintegration. Registrants have difficulty finding stable housing and employment, and in developing pro-social behavior, when required to register on widely disseminated lists. Registrants are also subject to harassment and have been targeted for abuse.

It is particularly difficult for registrants to find stable housing, a problem that is often exacerbated by laws and ordinances that exclude registered sex offenders from certain areas or types of housing. For example, in Illinois, child sex offenders may not reside within 500 feet of a "school, park, or playground," or "a facility providing services directed exclusively toward persons under 18 years of age unless the sex offender meets specified exemptions." 730 ILCS 150/8 (West 2012). And federal law bars individuals like Bingham who are subject to lifetime registration from admission into federally assisted housing. *See* 42 U.S.C. § 13663 ("Notwithstanding any other provision of law, an owner of federally assisted housing shall prohibit admission to such housing for any household that includes any individual

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who is subject to a lifetime registration requirement under a State sex offender registration program.").

Moreover, private landlords and community members often are reluctant to rent to or live near offenders. Registrant information is accessible on the Internet and is used to screen out registrants from safe housing for which they would otherwise be qualified. *See* Sarah Tofte & Jamie Fellner, *No Easy Answers: Sex Offender Laws in the US*, Human Rights Watch Report 7-8, 9-10, 100-118 (Sept. 2007). Difficulties in obtaining affordable housing lead many registrants to become homeless or transient. A report published by the National Institute of Justice, the research and evaluation arm of the Department of Justice, noted that

> [i]f unable to find legal housing, offenders may report false addresses, become homeless or go underground. Others may be forced to live in rural areas with less access to employment or mental health services. Even in rural areas where schools and day care centers are more geographically dispersed, most unrestricted land is forest or farmland.

Nat'l Inst. of Justice, *Sex Offender Residency Restrictions: How Mapping Can Inform Policy* 1 (July 25, 2008), *available at* http://www.nij.gov/topics/corrections/community/sex-offenders/ pages/residency-mapping.aspx. The California Supreme Court recently held that residency restrictions imposed on sex offenders by California's Penal Code violated due process as applied to parolees in San Diego County

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because the collateral effects of the restrictions—a "greatly increased … incidence of homelessness," difficulty in obtaining "medical treatment, drug and alcohol dependency services, psychological counseling and other rehabilitative social services"—"hamper[ed]" rather than promoted "the efforts of parole authorities and law enforcement officials to monitor, supervise, and rehabilitate them in the interests of public safety." *In re Taylor*, 343 P.3d 867, 869 (Cal. 2015). The court therefore concluded that enforcement of the residency restrictions against the complaining parolees "bears no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators, and has infringed the affected parolees' basic constitutional right to be free of official action that is unreasonable, arbitrary, and oppressive." *Id.* at 879.

Public registration requirements also pose a severe obstacle to registrants' efforts to find and keep employment. For example, in Kentucky 42% of surveyed sex offenders were dismissed from their jobs when it was discovered that they were registered sex offenders. *See* Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 531, 532-33 (2007). In Florida, 27% of the surveyed registrants reported being dismissed from their job because their boss or coworkers found out about the

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employee's registration as a sex offender. Jill S. Levenson & Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21(1) J. CONTEMP. CRIM. JUST. 49, 58 (2005). Another study found that 42.1% of female sex offenders in Kentucky and Indiana were fired from a job because of public registration. *See* Tewksbury, *Exile at Home* at 533.

No matter how well-qualified, hard-working, or unlikely to re-offend, registrants are regularly excluded from jobs because of the business location or the attitudes of employers. *See generally* Shelley Albright & Furjen Denq, *Employer Attitudes Toward Hiring Ex-Offenders*, 76 PRISON J. 118, 127-35 (1996) (analyzing empirical research conducted on the issues ex-offenders face in seeking or retaining employment); Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOWARD L.J. 753, 770-74 (2011) (noting the social stigma and attendant difficulties in seeking and maintaining employment after release from prison). Restricted employment opportunities greatly hinder registrants' ability to support themselves and their families. *See Doe v. Attorney General*, 686 N.E.2d 1007, 1013 (Mass. 1997) (noting that dissemination of registration information may harm a registrant's ability to earn a living); John M. Nally, et al., *Post-Release Recidivism and Employment Among Different Types of Released Offenders:*

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A 5-Year Follow-up Study in the United States, 9(1) INT'L J. CRIM. JUSTICE SCI. 16 (2014) (analyzing the post-release employment data among different types of offenders).

The collateral consequences of registration can go beyond obstacles to effective community reintegration. Registrants have been the target of harassment, abuse, or worse. *See* Stacey Katz Schiavone & Elizabeth L. Jeglic, *Public Perception of Sex Offender Social Policies and the Impact on Sex Offenders*, 53 INT'L J. OFFENDER THERAPY & COMP. CRIM. 679, 683 (2009); Michelle Cohen & Elizabeth L. Jeglic, *Sex Offender Legislation in the United States: What Do We Know?*, 51 INT'L J. OFFENDER THERAPY & COMP. CRIM. 369, 376 (2007) (citing adverse consequences of being publicly listed as a sex offender as possibly leading to recidivism). One judge found that the online dissemination of registry information promoted vigilantism, noting that two men in Maine had been murdered after their names were discovered on the registry. *See State v. Letalien*, 985 A.2d 4, 29 (Me. 2009) (Silver, J., concurring); *see also E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997) ("Retribution has been visited by private, unlawful violence and threats and, while such incidents of 'vigilante justice' are not common, they happen with sufficient frequency and publicity that registrants justifiably live in fear of them."); Lexi Pandell, *The Vigilante of Clallam*

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County, THE ATLANTIC, Dec. 4, 2013, at 5 (reporting on the murder of two registered sex offenders and noting that between 15% to 20% of convicted sex offenders report vigilantism or harassment).

Research indicates that the collateral consequences of registration are pervasive. For example, as noted above, nearly half of registered sex offenders in Kentucky have lost their jobs or homes (or both) or were threatened or harassed as a result of their registration. *See* R. Tewksbury, *Exile at Home* at 533. In Wisconsin, sex offenders suffered "housing problems (83%), isolation or harassment (77%), employment instability (57%), and harm to family members (67%)." Levenson, et al., *Megan's Law and Its Impact on Community Re-Entry for Sex Offenders* at 590. In Indiana and Kentucky, female registrants reported "job loss" (42%), "housing disruption" (32%), "loss of social relationships" (40%), harassment (34%), and assault (10%). *Id.*

Registration and notification laws thus make it more difficult for those subject to them to conform conduct to the law. In one study of 183 non-random participants recruited from outpatient sex offender counseling centers surveyed, 71% stated that the law interfered with their recovery by causing more stress in their life, 64% felt alone and isolated because of the law, 52% lost friends or close relationships, 46% were afraid for their safety because of

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notification provisions, 67% stated that shame and embarrassment kept them from engaging in social activities, and 72% reported less hope for the future because of the law. Levenson & Cotter, *The Effect of Megan's Law on Sex Offender Reintegration* at 58. A review of eight studies involving diverse populations, survey methods, and response rates found that substantial numbers of registrants reported exclusion from residences and job loss as social consequences of being publicly identified as sex offenders in their communities. *See* Michael P. Lasher & Robert J. McGrath, *The Impact of Community Notification on Sex Offender Reintegration*, 56(1) INT'L J OFFENDER THERAPY & COMP. CRIM. 6 (2012).

One report also found that open notification laws destabilize the offender's family, which is crucial to the individual's reintegration into the community. *See* Richard Tewksbury & Jill Levenson, *Stress Experiences of Family Members of Registered Sex Offenders*, 27(4) BEHAV. SCI. LAW 611, 623-24 (2009). Family members provide critical support for registrants. These findings show that family members of registrants also experience high levels of residential and financial instability, public hostility, social isolation, fear, shame, and property damage. *See id.*; *see also* Tofte & Fellner, *No Easy Answers* at 117.

In short, because the collateral consequences of registration aggravate

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"risk factors for recidivism such as lifestyle instability, negative moods, and lack of positive social support," they can undermine the purpose of the law by increasing rather than mitigating risk to the community. Levenson, et al., *Megan's Law and Its Impact on Community Re-Entry for Sex Offenders* at 590; *see also* Tewksbury, *Collateral Consequences* at 69 (stating that a registrant's possible reaction to collateral consequences may be to "feel that his case is helpless and [that] he will always be seen in a negative light, and thus reoffending would make little difference to him"). Research also indicates that these collateral consequences increase the "[a]cute dynamic risk factors" of recidivating, including "emotional crisis; a collapse of previous social supports; contextual factors such as hostility, substance abuse, and sexual preoccupations; and … health problem[s] or homelessness." Cal. Sex Offender Mgmt. Bd., *Homelessness Among Registered Sex Offenders in California: The Numbers, the Risks and the Response* at 15-16 (2008); *see also* Ctr. for Sex Offender Mgmt., *Recidivism of Sex Offenders* 5 (2001) (detailing the various types of recidivism risk factors). One criminologist has contended that this labeling of criminals is a form of "disintegrative shaming" that drives them to continue their criminal behavior and may make them more likely to recidivate. *See* John Braithwaite, *Crime, Shame, and Reintegration* 101-02 (Cambridge Univ.

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Press 1989).

While we recognize that the foregoing research is not specific to SORA or to Bingham, it serves to illustrate the irrationality of SORA's application to Bingham, insofar as he has become exposed to all of the adverse consequences discussed above—which work counter to SORA's public-safety purpose—based on a theft conviction that had no sexual component at all and a criminal record that has been free of any sex offenses for more than three decades. Due process does not tolerate such an arbitrary result and Bingham therefore should not be subjected to SORA's registration requirements and other obligations.

II. The Enhanced Burdens Imposed By Registration Under the 2012 SORA Amendments Convert It To A Punitive Statute That Is Invalid Under State And Federal *Ex Post Facto* Prohibitions.

This Court and the U.S. Supreme Court have made clear that laws that are punitive in effect are subject to the proscription against retroactive punishment imposed by the *Ex Post Facto* Clauses of the United States and Illinois Constitutions. *See* U.S. CONST. art. I, §9, cl. 3; ILL. CONST. 1970 art. I, §16; *see also Smith v. Doe*, 538 U.S. 84, 92 (2003); *United States v. Ward*, 448 U.S. 242, 249 (1980); *Birkett v. Konetski*, 233 Ill. 2d 185, 208-09 (2009). Although this Court has held that earlier iterations of SORA were not punitive because they "d[id] not place an *affirmative* disability or

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restraint on sex offenders" (*People v. Malchow*, 193 Ill. 2d 413, 421 (2000) (emphasis in original)), it has not yet had occasion to consider whether the 2012 amendments to SORA have sufficiently transformed its impact on registrants as to render it punitive. Bingham presents extensive argument in his opening brief demonstrating why those amendments violate the *ex post facto* proscriptions of the United States and Illinois Constitutions, which we join and will not duplicate here. *See* Appellant's Br. at 14-52.

We do, however, want to highlight for the Court that in one of the leading cases in which the United States Supreme Court held that a sex offender registration provision did not impose *ex post facto* punishment, the Court identified as "a most significant factor" its conclusion that the scheme at issue was rational in relation to the statute's purpose because "the risk of recidivism posed by sex offenders [wa]s 'frightening and high.'" *Smith*, 538 U.S. at 102-03 (some internal quotation marks and brackets omitted) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)); *see also Packingham v. North Carolina*, 136 S. Ct. 1730, 1739 (2017) (Alito, J., concurring) ("'When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.'") (quoting *McKune*, 536 U.S. at 33).

As Bingham explains in his brief, the Court based that conclusion on

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an unsupported assertion made in a 1986 article in *Psychology Today* that was repeated without analysis in a later DOJ Manual. Appellant's Br. at 43-44. In fact, as we have detailed above (at 8-10), contrary to the Supreme Court's assertion in *Smith*, there is extensive empirical evidence showing that released sex offenders actually have a markedly *low* rate of recidivism for the same or similar types of offenses in comparison with those convicted of most other types of crimes—between 5% and 7%, and decreasing sharply over time. The evidence further shows that registration statutes do not improve these recidivism rates in a statistically significant way and if anything increase the likelihood of re-offending because their burdensome obligations and restrictions impede released offenders' reintegration into society and ability to establish stable and productive lives.

In light of all this evidence, this "most significant factor" actually points in the direction of the conclusion that the enhanced registration obligations and restrictions imposed on people like Bingham have crossed the border into punitive terrain subject to *ex post facto* limitations.

CONCLUSION

The Court of Appeals' judgment should be reversed.

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CERTIFICATE OF COMPLIANCE

I, Michael A. Scodro, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 8807 words.

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