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On Direct Appeal from the Circuit Court

for the Sixteenth Judicial Circuit, Kane County, Illinois

Kopf

Plaintiff-Appellee/Cross-Appellant

v.

Kelly, Raoul, and McMahon

Defendants-Appellants/Cross-Appellees

and

Hampshire Police Department

Defendants

19-CH-000883

The Hon. Kevin T. Busch

Judge Presiding

Martin T. Kopf *pro se*

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IN THE
SUPREME COURT OF ILLINOIS

MARTIN KOPF, Plaintiff-Appellee/Cross-Appellant v. BRENDAN KELLY, in his official capacity as Director of the Illinois State Police, KWAME RAOUL, in his official capacity as Attorney General of the State of Illinois, and JOE McMAHON, in his official capacity As Kane County State's Attorney, Defendants-Appellants/ Cross-Appellees and HAMPSHIRE POLICE DEPARTMENT, Defendants	)	On Direct Appeal from the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois No. 19-CH-000883 The Honorable KEVIN T. BUSCH Judge Presiding

PLAINTIFF'S OPENING BRIEF

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PLAINTIFF'S CROSS-APPEAL

I. Irrebuttable Presumption Argument

Plaintiff brings forth a challenge based upon the irrebuttable presumption doctrine. Plaintiff alleges that this should be considered a matter of first impression, as no Illinois court has considered an irrebuttable presumption doctrine brought in a challenge to the Scheme. Plaintiff contends that the circuit court erred in dismissing this challenge by relying on precedents not applicable to his *as-applied* challenge and determining that an irrebuttable presumption challenge is solely a procedural due process claim, relying on *People v. AvilaBriones*, 2015 IL App. (1st) 132221 and *Connecticut Dep't of Public Safety v. Doe,* 538 U.S. 1 (2003).

An irrebuttable presumption (interchangeable with "conclusive presumption" *Cleveland Bd. Of Educ. V. LaFleur*, 414 U.S. 632 (1974)) is one where the basic fact is conclusive evidence of the existence of another fact. In this case, the basic fact is that the Plaintiff pleaded guilty to a sex offense involving a 15-year-old over two decades ago. The presumed fact is that he remains such a grave danger to society that the Scheme still applies to him over 17 years after he completed his sentence and shall apply to him for the remainder of his natural life. There exists a long line of cases where an irrebuttable presumption has been found unconstitutional, invalidating *classificatory* legislation: *Bell v Burson*, 402 U.S. 535 (1971)(finding unconstitutional a Georgia law revoking one's driver's license where the driver failed to post security bond and without a fault hearing); *Stanley v. Illinois*, 405 U.S. 645 (1972)(finding unconstitutional an Illinois law which

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conclusively presumed all unmarried fathers were unfit parents); *Vlandis v. Kline,* 412 U.S. 441 (1973)(finding unconstitutional a Connecticut law which conclusively fixed a student's residency status at time of application); and *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974)(finding unconstitutional a regulation which forced a pregnant teacher to take unpaid leave five months before expected birth of child). As in this case, the cited cases created irrebuttable presumptions as a means of achieving what was wanted by the respective legislatures. In *Vlandis*, the Court held that due process is violated when the presumption is deemed *not universally true* and a reasonable alternative to rebut the presumed fact are available. *Vlandis* at 452.

In the case at bar, Plaintiff contends that the Sex Offender Registration Act, 730 ILCS 150/ ("SORA"), the Sex Offender Community Notification Law, 730 ILCS 152 and the residency, presence and all other restrictions contained in the Criminal Code, 720 ILCS 5/11-9.3 and 9.4 as they pertain to the designations of "child sex offender" and "sexual predator" (collectively referred to as the "Scheme") create an unconstitutional irrebuttable presumption as-applied to the Plaintiff. The Scheme presumes that he will forever be a danger to society, so much that he must abide by ever-changing laws regarding where he can live, where he may move about the community, how and when he can travel, all while being under the direct control and supervision of law enforcement.

The Defendants' contention that this "registration scheme" is just that, a registration scheme and "does not take into account, and therefore does no[t] presume whether an offender is likely to reoffend" (C 525) misses the mark. The Defendants admit that the Scheme does create a presumption of danger: "The purpose of SORA is to enhance public safety..."(C 289) *citing*

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Lesher v. Trent, 407 Ill.3d 1170, 1175 (5th Dist. 2011)); "[L]ifelong monitoring of [registrants] serves legitimate penological goals because its features focus on keeping individuals convicted of sex offenses against minors away from minors, which diminishes the *likelihood that they will repeat their crimes.*'(C 293 *citing People v. Avila-Briones*, 2015 IL App(1st) 132221). (*emphasis added).* The Defendants argue that the Scheme does not create a presumption of danger, yet the Defendants also argue that the Scheme is necessary to keep minors safe from the "likelihood" that the Plaintiff will recidivate.

Having Plaintiff's current photo underneath bold red letters with the designation of "Sexual Predator" (C 537) along with Plaintiff's current address and including older photos dating to 2004, also implies a level of dangerousness. While "sexual predator' is defined by statute as being guilty of one of several offenses, the general public knows it as a "person who has committed a sexually violent offense and especially one who is likely to commit more sexual offenses."
https://www.merriamwebster.com/dictionary/sexual%predator#:~:text=Definition%20of%20sexual%20predator,to%20commit%20more%20sexual%20offenses

"Under Illinois law, Stanley is treated not as a parent, but as a stranger to his children, and the dependency proceeding has gone forward on the presumption that he is unfit to exercise parental right." *Stanley* 648. Likewise, Plaintiff's continued requirements under the Scheme, being labelled a "sexual predator" and "child sex offender" presumes that Plaintiff is unfit to be free within the community; unfit to be free from the lifetime supervision, surveillance and control of law enforcement. The Scheme was enacted and continuously

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amended for one (or a combination of all) of three reasons: 1.) The requirements are arbitrary; 2.) The zeal of the legislature to inflict further suffering on those once convicted of a sex offense; and/or 3.) The legislature determined that persons convicted of certain offenses will remain a danger to society for the remainder of their lives. The fundamental question before the Court in *Stanley* was: "is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant?" *Id.* 649. It must be asked in this case is a Scheme that presumes Plaintiff has a "likelihood" to sexually recidivate, and therefore distinguishes him from all other free law-abiding citizens and which places undue burdens on him constitutionally repugnant as well?

2. Illinois Courts Have Determined Legislative Intent

Illinois courts have determined that the Scheme is designed to protect the public. But that raises the inevitable question of exactly who the public is being protected from and why? The answer is simple: The public is being protected from everyone included on the Registry because they present a danger to the community.

In *People v. Adams*, 144 Ill.2d 381 (Ill. 1991), this Court determined that the legislative intent in requiring former offenders to register "was to create an additional measure of protection for children from the increasing incidence of sexual assault and child abuse." *People v. Malchow*, 193 Ill.2d 413 ¶12 (2000) *citing Adams,* 387. This Court in *Malchow* further said "the Notification law shows on its face that its purpose is protection of the public rather than punishment." *Id.* ¶22. In *People v. Cornelius*, 213 Ill.2d 178 (2004) this Court proclaimed, "the

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Registration Act was designed to aid law enforcement agencies in allowing them to 'monitor the movements of the perpetrators by allowing ready access to crucial information.'" *Id.* 194 *quoting Adams* 386. This Court went on to state the goal of the Notification Act was the "safeguarding [of] the public-especially children-from convicted sex offenders." *Id.*, 201.

More recently, this court in *People v. Minnis,* 2016 IL 119563 stated "the statutory scheme intended to prevent sex offenses against children and to protect the public." *Id.* ¶34. Further, "the legislature is entitled to 'conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism.'" *Id. quoting Smith v. Doe*, 538 U.S. 84, 103 (2003).

To further the argument that the intent of the legislature or the effect of the Scheme do create an irrebuttable presumption, the court in *People v. Stork*, 305 Ill.3d 714 (1999) quoted a legislative declaration referring to "the high recidivism rate of child sex offenders." *Id.* 721 *quoting* 90th Gen. Assem., HB 1557, 1997 Session. In *People v. Huddleston*, 212 Ill.2d 107 (2004) this Court stated: "[a]lthough there is considerable debate over the degree to which treatment of sex offenders may be effective, it *is* clear that state legislatures may respond to what they reasonably perceive as a 'substantial risk of recidivism.'" *Id.* 138 (emphasis in original)(*quoting Smith*, 538 U.S. 84, 103).

This Court has consistently determined the legislative intent of the Scheme was to protect the public in general, and children, from *all* persons on the Registry; that *all* persons deemed "child sex offenders" and "sexual predators" are forever a danger to society. Therefore, the courts have already answered the question of whether the Scheme creates a

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permanent irrebuttable presumption of the Plaintiff. By stating the legislative intent of the Scheme as one that protects the public from those convicted of a sex offense, and the public wouldn't need protection from one who is not dangerous, the U.S. Supreme Court, Illinois courts in general, and this Court in particular, have all defined the scope of the presumption in their respective rulings. The presumption is that Plaintiff, by virtue of his conviction for a sex offense, is so dangerous that the public must be warned of his presence; so dangerous that he is restricted in where he may move about the community and country; so dangerous that he may only live in certain areas (subject to change on 22 days notice); and so dangerous that law enforcement is required to supervise, surveil and exercise controls over Plaintiff's life.

3. The irrebuttable presumption doctrine implicates both procedural and substantive due process.

The Plaintiff alleges that the district court erred in dismissing the Plaintiff's irrebuttable presumption challenge on the grounds that *People v. Avila-Briones*, 2015 IL (1st) 132221, is controlling. Plaintiff contends that there are numerous distinct differences in *Avila-Briones* and the instant case.

First, *Avila-Briones* was a challenge to the Scheme on direct appeal from his criminal conviction and while he was still serving his sentence. Plaintiff here is bringing a substantive challenge after spending 40% of his life subject to the ever-changing requirements of the Scheme. Secondly, the defendant in *Avila-Briones* was sentenced to a term of six years in prison due to having been convicted of three Class 2 felonies or greater, *Id.* ¶6 while Plaintiff was sentenced to a term of three years probation (C 401). The courts in these two cases

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determined that Plaintiff could be rehabilitated in the community whereas, in *Avila-Briones*, the defendant was mandatorily sentenced to prison because of prior felonies.

Another important, and probably the most striking difference, is that in *Avila-Briones*, the court specifically noted "defendant can point to no evidence in the record that he is unlikely to recidivate." *Id.* ¶63. Plaintiff has a 20+ year record proving he has been rehabilitated with no felony, misdemeanor or probation violations. Therefore, unlike *Avila-Briones* who "lacks some impulse control and [has] a general tendency to recidivate" *Id.*, the same cannot be said of the Plaintiff. Plaintiff has proven that he doesn't possess any recidivist characteristics.

But probably the biggest difference between the two cases, and why *Avila-Briones* should not foreclose Plaintiff's irrebuttable presumption challenge is in the complaints themselves. *Avila-Briones* brought both substantive and procedural due process challenges in separate counts. There, defendant did not bring an irrebuttable presumption challenge, and the court did not conduct an irrebuttable presumption analysis. Plaintiff brought both substantive and procedural due process challenges as well as a separate irrebuttable presumption challenge in which the Defendants replied to. (C 348, C553-554, C570).

Plaintiff alleges that the circuit court misinterprets the procedural due process finding in *Avila-Briones*. The circuit court's decision stated: [l]ikewise the *Doe* decision informed the 1st district court of appeals when it rejected a challenge based on alleged irrebuttable presumptions in SORA. *Avila-Briones* ¶91-92." (C 591). Where Plaintiff respectfully disagrees with the circuit court is in the interpretation of Plaintiff's claim versus the claim and decision in

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Avila-Briones.

The difference is strikingly simple. In *Avila-Briones*, the court stated: "[d]efendant contends that the missing procedure in this case is a mechanism by which the state should evaluate his risk of reoffending. According to the defendant, such a procedure would ensure that the burdensome restrictions of these laws are only placed on those who pose a risk of committing additional sex crimes." *Avila-Briones*, ¶90. As the circuit court in this case explained that *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003) informed *Avila-Briones*, it is important to note what *Doe* found which is procedural due process does not require a *predeprivation* hearing where the registration requirement is based on the fact of a previous conviction. *Id.* 4. And as the challenge to the Scheme in *Avila-Briones* was arising on direct appeal of his criminal conviction, the defendant was arguing he was entitled to a predeprivation hearing. That is not the crux of Plaintiff's irrebuttable presumption challenge. There are two main differences to the challenge before this Court. The first is that this is not a pre-deprivation challenge as in *Avila-Briones* and *Doe*. In those cases, it was argued that procedural due process should apply *before* one is placed on the Registry. Plaintiff's challenge is based on the *continued* imposition of the Scheme. Also, Plaintiff's irrebuttable presumption challenge is that the laws automatically presume that Plaintiff has a high risk of recidivating for the rest of his life solely due to his conviction, much like the law in *Stanley* which presumed that all unwed fathers were unfit to parent their children or the law found unconstitutional in *Vlandis,* which presumed all out-of- state students at time of admission would never take up residence within the state

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during their college years. Or *In Re: D.W.,* 214 Ill.2d 289 in which this Court found that a parent who had been convicted of certain offenses against a child is unfit to be a parent was unconstitutional because the parent was not able to present evidence to refute the presumption.

Plaintiff's argument is that an irrebuttable presumption challenge is both a substantive *and* procedural due process challenge. The Supreme Court has consistently found unconstitutional the legislative tendency to impose a detriment based on a presumed characteristic due to the existence of another characteristic regardless of any evidence that the presumed characteristic is not true. It is Plaintiff's argument that the presumed fact implicates substantive due process because without proving it is true, the presumption is arbitrary. And because the presumption is irrebuttable, then procedural due process would be implicated. In 2020, the Pennsylvania Supreme Court, deciding the very issue before this Court, refused to "pigeonhole" the irrebuttable presumption challenge into procedural or substantive due process. *Commonwealth v. Torsilieri*, 232 A.3d 567, 581-582 (Pa. 2020). (Finding that the PSORA created an irrebuttable presumption and remanded to the district court for further evidentiary hearing).

4. The irrebuttable presumption doctrine implicates Equal Protection Clauses

Plaintiff contends that an irrebuttable presumption can also be viewed through the lens of equal protection based on the classification process. The most specific of the long line of cases from the Supreme Court is *Carrington v. Rash*, 380 U.S. 89 (1965) which used the

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irrebuttable presumption doctrine under the Equal Protection Clause of the U.S. Constitution. "[N]or shall any State...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. It mandates that individuals in similar situations be treated equally by the law. Similarly, the Illinois Constitution states: "No person shall be...denied the equal protection of the laws. IL Const. Art. 1, Sect. 2.

Rash involved a voting rights case where Texas refused to allow any servicemember to vote in state or local elections if they were in the military. The soldier had purchased a home, registered his vehicle there, owned a business in the state and the defendant admitted that the plaintiff was planning to remain in the state after his military service. After comparing the restriction to other transient persons who were allowed to obtain voting privileges, *Id.* 95-96 the Supreme Court found "[b]y forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment." *Id.* 96.

Likewise in *Stanley*, 405 U.S. 645, the Supreme Court used the irrebuttable presumption doctrine under an equal protection analysis based on the appellee's status as an unwed father. Mr. Stanley was an unmarried father with a common-law wife that was deceased. The state declared the children dependents based solely on the statutory presumption that unwed fathers were unfit to care for their children. The Court compared his situation to that of other parents: "[t]he State of Illinois assumes custody of the children of married parents, divorced parents and unmarried mothers only after a hearing and proof of neglect. The children of

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unmarried fathers...are declared dependent children without a hearing on parental fitness and without proof of neglect." *Id.* 658. The Court also said that because the state "insists on presuming rather than proving" *Id.* the statute is "inescapably contrary to the Equal Protection Clause." *Id.*

Therefore, Plaintiff brings two separate irrebuttable presumption challenges: one under substantive/procedural due process; the other under equal protection.

5. Application for Heightened Scrutiny

Plaintiff brings many claims for the application of heightened scrutiny, some of which may have been previously decided by other courts here in Illinois but not as-applied to the Plaintiff and not in the context in which Plaintiff presents them to this Court. Plaintiff asks that these be considered under a first impression analysis.

A. *The Scheme violates Plaintiff's fundamental right to practice his religion.*

The right to practice one's religion is among the most fundamental of the freedoms guaranteed by the Bill of Rights. Government officials may not impede the exercise unless it threatens the rights, welfare and well-being of others. See *Gillette v. United States* 401 U.S. 437 (1971). "[T]he free exercise of religion is an inherent, fundamental, and inalienable right secured by Article I, Section 3 of the Constitution of the State of Illinois." Religious Freedom Restoration Act 775 ILCS 35/10(a-1).

Plaintiff has been Catholic since his baptism. He attended Catholic schools from kindergarten until completion of high school. Plaintiff has received 5 of the 7 Sacraments,

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(excluding Holy Order and obviously Last Rites). Plaintiff is unable to attend Church, practice his Faith in any way or even raise his two young children religiously because Catholic Churches have elementary schools on the grounds. Plaintiff was not allowed to attend the wedding ceremony of his brother nor the funeral mass of his Mother due to the presence restrictions: "[i]t is unlawful for a child sex offender to knowingly be present...on real property comprising any school." 720 ILCS 5/11-9.3(a). The State has prosecuted ex-offenders from being on the property of a Catholic Church which has a school attached. (*i.e.* see *People v. Lieb*, 2020 Ill. App. 170837 (2020)). The Supreme Court has found that laws prohibiting one from the free exercise of religion to be unconstitutional under the Free Exercise Clause of the First Amendment which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U.S. Const. amend I. The Illinois Constitution also protects the free exercise of religion: "The free exercise and enjoyment of religious...worship, without discrimination, shall forever be guaranteed..." IL Const. Art. 1, Sect 3.

"[T]he 'exercise of religion often involves not only belief and profession but the performance of...physical acts...[such as]...assembling with others for a worship service [or] participating in sacramental use of bread and wine..." *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 877 (1990). The presence restrictions deny the Plaintiff his right to participate in those required performances of his Catholic faith. These restrictions do not just cover a specific act, such as the illegal use of *hoasca* in *Gonzalez v. O Centro Espirita*

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Beneficente 564 U.S. 418 (2006). This law substantially burdens Plaintiff's fundamental right to free exercise of his Catholic beliefs.

Because free exercise of religion is a fundamental right a strict scrutiny test must be applied. *Sherbert v. Verner*, 374 U.S. 398 (1963). The Court in *Verner* conducted a balancing test to determine whether the statute at hand, the denial of unemployment benefits because the person could not observe key religious practices, impermissibly denied the appellant her right to freely exercise her religious beliefs. The first part of the inquiry was "whether the disqualification for benefits impose[d] any burden on the free exercise of appellant's religion." *Id.* at 403. In the case before this Court, Plaintiff alleges that the imposition of the presence restrictions poses a burden on Plaintiff's free exercise of religion. Plaintiff is absolutely barred from attending any Catholic Church because of the presence restrictions. Doing so would place Plaintiff in danger of arrest and conviction of a felony.

But that does not end the first part of the test for "[i]f the purpose or *effect* of a law is to impede the observance of one religion[]...that law is constitutionally invalid..." *Id.* at 404 *quoting Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)(*emphasis added*). The effect of this law is that Plaintiff is forever barred from ever attending Catholic Church services, being able to confess his sins and receiving Communion. The law forces the Plaintiff to choose between: following the precepts of his religion and forfeiting his liberty in the way of potential conviction; or the further abandonment of his religion in order to retain his freedom from conviction. This is not an indirect consequence. Rather an arrest and conviction would be the direct effect of Plaintiff practicing his

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faith.

The second step of the inquiry is determining if there is a compelling state interest that justifies the substantial infringement of Plaintiff's rights to freely exercise his religion under the constitutions. "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitations.'" *Verner* at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). The conduct or actions being forbidden must pose some substantial threat to public safety, peace or order. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1878); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Cleveland v. United States*, 329 U.S. 14 (1946).

Plaintiff acknowledges that protecting society from *recidivist* sex offenders is of primary importance to public safety. But Plaintiff counters with this is an as-applied challenge to the statute. A court must determine if the Plaintiff is the type of person that this law is designed to target. It cannot be disputed that Plaintiff has led a law-abiding life for the last two decades. That Plaintiff has proven he can and will abide by society's laws and expectations for over 40% of his life should be of consequence.

This is still an as-applied challenge. A litigant "who has an adequate opportunity to present evidence in support of an as-applied, constitutional claim will have his claim adjudged on the record he presents." *People v. Coty*, 2020 IL 123972, *citing People v. Holman*, 2017 IL 120655. Plaintiff was not given an adequate opportunity to present a record on *all* his claims before the circuit court. Plaintiff will address the Defendant's argument that he forfeited his as-applied

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challenge *infra*. It is important for Plaintiff to note that not only is Plaintiff an ex-offender, but he is also a victim of sexual abuse as a young child. This is of great significance for this Court to understand. While the question may be asked how someone who has been a victim of sexual abuse as a child go on to victimize a child, this Court has already found the answer to that question:

> "Because of their emotional immaturity, children are exceptionally vulnerable to the effects of sexual assault. 45 Ariz. L. Rev. at 29; 39 Duq. L. Rev. at 38. Long-term follow-up studies with child sexual abuse victims indicate that sexual abuse is "grossly intrusive in the lives of children and is harmful to their normal psychological, emotional and *sexual development* in ways which no just or humane society can tolerate."' 25 Am. J. Crim. L. at 87, quoting C. Bagley & K. King, Child Sexual Abuse: The Search for Healing 2 (1990). The child's life may be forever altered by residual problems associated with the event. 45
>
> Ariz. L. Rev. at 209; 15 Ga. St. U.L. Rev. at 843." *People v. Huddleston,* 212 Ill. 2d 107, 135 (2004)(*emphasis added*)

While this Court noted the "psychological, emotional and sexual development" harm that is borne by victims of child sexual abuse, no courts throughout this country have ever recognized that some offenders may have been victims themselves. Plaintiff claims this Court should take this into account, as in one study, 42% of convicted sex offenders reported being sexually abused as a child. R. Langevin, P. Wright & L. Handy, Characteristics of sex offenders who were sexually victimized as children. *Annals of Sex Research* 2, 227-253 (1989).

In a more recent study to Plaintiff's as-applied challenge, 35% of veterans were incarcerated in prison for a sexual offense as opposed to 23% of non-veterans; and 11.8% of veterans were incarcerated in jail for a sexual offense versus 5.3% of non-veterans. J. Bronson, E. Carson, M. Noonan, & M. Berzofsky, Veterans in prison and jail, 2011-2012. *Bureau of Justice*

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Statistics special report (NCJ 249144, p. 1-22). (2015) Washington, D.C: U.S. Department of Justice, Office of Justice Programs. These are just two of many studies which show there are mitigating factors in Plaintiff's case: 1. he is a Veteran with serious but treatable mental health issues as well as severe physical issues who was self-medicating and over-medicating at the time of the offense; and 2. Plaintiff is also a victim of childhood sexual abuse. Both factors are proven to increase the possibility of committing a sexual offense.

A. *The Scheme Violates Plaintiff's Fundamental Right to Raise His Children*

Plaintiff claims that the Scheme limits his fundamental right to raise his children. "[T]he interest of parents in the care, custody and control of their children- is perhaps the oldest of the fundamental liberty interests recognized by this court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Scheme limits the Plaintiff's ability to participate and support his children in their education, including any extra-curricular activities. Plaintiff is barred from ever attending a graduation ceremony. Plaintiff's youngest child couldn't attend pre-school because of Plaintiff's designation as a sexual predator and child sex offender. Because Plaintiff is arbitrarily designated as a "sexual predator" and "child sex offender" for the remainder of his life, he is restricted from many places a parent must or should go in furtherance of his care, custody and control of his children.

Also important is how the Scheme relates to the Dissolution of Marriage Act 750 ILCS 5/("DOMA"). DOMA specifically states that a court may use a person's status as a former sex offender in order to allocate parenting time. 750 ILCS 5/602.5(c-14). Plaintiff is currently going through a divorce due to the *effects* of the Scheme on him and his family, therefore this argument

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is applicable. If a court can look at the *effects* of the Scheme, specifically not being able to attend a child's concert, not being able to attend any extra-curricular activity, not being able to pick up or drop off a child from school – even in a case of illness or injury--then the Scheme most certainly does affect parental rights.

The issue continues in the allocating parenting time. If Plaintiff is not allowed to go to a child's school concert or extra-curricular activity, he must cede the care and custody of his child to someone else, *for example,* 720 ILCS 5/11-9.3(a)(b-2)(c). The presence restrictions bar Plaintiff from ever taking his children to a tutoring service or even any pediatric medical or dental professional: "[i]t is unlawful for any child sex offender...to knowingly be present at any:(i) facility providing programs or services exclusively directed toward persons under the age of 18;" 720 ILCS 5/11-9.3(c).

This Court has recently found these restrictions to be without exception. In *People v. Legoo*, 2020 IL 124965, this Court upheld the conviction of the defendant for being a child sex offender in a public park. The facts of the case are that the defendant's son was at the park watching a baseball game. The defendant had no one else to go get him. Defendant rode to the park, told his child to come home and left. Defendant was convicted under 720 ILCS 11/9.4-1(b). This Court found that the law, *without exception*, bars anyone ever convicted of a sex offense against a child from being in a public park. While this Court noted that defendant's constitutional challenge was not well-developed, *Id.* ¶28, it was found that defendant did not have a necessity defense. *Id.* ¶33. This Court stated: "even if defendant did not have anyone else available to help

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retrieve his son from the park, he could have called the police department for assistance rather than entering the park himself..." *Id.* ¶34.

Plaintiff respectfully disagrees and asks this Court to revisit that decision. What this Court suggested is that if Plaintiff's child is in the park, and Plaintiff has no one to help him retrieve his child, then he is to call local police to retrieve his child. Not only does Plaintiff agree with the dissent that law enforcement may not always have the time, *Id.* ¶49, but there are other serious parental issues at stake as well. By calling the police to retrieve a child from the park because the parent wants that child home, then the parent is forced to cede care, custody and control of his child to the state. While this may only be temporary, it may lead to being permanent. The Illinois Department of Children and Family Services (DCFS) may be required to become involved. If a situation is shown where a parent cannot care for a child, even if it is not the parent's fault, then a dependency hearing may be initiated, and the child(ren) may be removed from the parent. *Legoo* is an example. If law enforcement is called numerous times to retrieve a child from an area that is restricted to a "child sex offender" or "sexual predator" then law enforcement may feel compelled, or may do so out of animus, to contact DCFS. The argument being the registrant parent can not properly care for the child due to the restrictions on his/her movements and a continued need to contact law enforcement to retrieve a child from a restricted area. Taking this Court's suggestion to involve law enforcement to retrieve a child from a restricted area, it is not beyond the realm of possibility that the officer could undermine the authority of the parent and what the parent believes is in the best interests of his/her child.

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Using *Legoo*, what if an officer said, "get home when the game is over" instead of "get home now?" There could be several reasons: animus against the ex-offender; frustration at having to complete a mundane task; difference in parenting styles; or maybe not fully understanding the situation. The suggestion by this Court takes the care, custody and control of the child from a registrant parent and places it in the direct control of the state. Doing so, Plaintiff argues, would impermissibly infringe on a registrant's fundamental right as a parent.

Further, a family court may also look at the social effects of the Scheme; the effects which the "community" at large inflict on the Plaintiff and his family. A court may consider: the multiple instances of harassment (13 documented instances) that Plaintiff has faced; the unwarranted brutal attack that Plaintiff suffered; the alienation, verbal abuse and bullying that his children currently or will face in the future due to his registration status; housing instability he faces and the fact that the family would have to pack up and leave in 22 days. A family court may judge that it is not safe to live with the ex-offender parent, not due to any danger the ex-offender would pose to his/her children, but because of the effects of the Scheme.

Therefore, Plaintiff argues that the Scheme directly affects his fundamental rights to raise his children and strict scrutiny must apply. Not only are Plaintiff's parental rights limited in the educational arena, but a court may limit or strip entirely Plaintiff's parenting time because of community notification and vigilantism.

C. *The Scheme Limits and Strips Plaintiff of Fundamental Right to Privacy.*

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The Scheme, specifically the Notification Act, violates Plaintiff's fundamental right to privacy guaranteed to him by the Illinois Constitution under both Article I, Section 6 and Article I, Section 12. Section 6 states: "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, *invasions of privacy* or interceptions of communications by eavesdropping devices or other means." IL Const., Art. I, Sect. 6 (*emphasis added*). "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." IL Const. Art. I, Sect. 12.

The Supreme Court further recognized the right of privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Justice Douglas stated the guarantees of the Bill of Rights have "penumbras, formed by emanations from those guarantees that help give them life and substance" *Id.* at 484 and that is from where the right to privacy came forth. The Supreme Court went further in *Stanley v. Georgia*, 394 U.S. 557 (1969) by stating "also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Id.* at 564.

In Illinois court cases, the most suitable case is *Midwest Glass Co. v. Stanford Development Co.*, 34 Ill. App. 3d 130, 339 N.E.2d 274 (1975) in which the appellate court found there was a right to privacy regarding public disclosure of debts. The court referred to Prosser's analysis of the common law right to privacy in which he divided the right of privacy into four distinct grounds for complaint: unreasonable intrusion into the seclusion of another;

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appropriation of another's name or likeness; public disclosure of private facts; and publicity which unreasonably places another in false light before the public. W. Prosser Law of Torts § 117 (4th ed. 1971). The court found that the case was based on public disclosure of private facts and further found that there was no public disclosure.

This Court has also held that the privacy protections guaranteed under the Illinois Constitution "go[] beyond federal constitutional guarantees by expressly recognizing a zone of personal privacy...the protection of that privacy is stated broadly and without restrictions." *Kunkel v. Walton* 179 Ill.2d 519, 537 (1997) *Citing In re May 1991 Will County Grand Jury*, 152 Ill.2d 381, 391 (1992).

Unlike previous challenges to the Scheme, Plaintiff is not disputing his conviction from 20 years ago as a private fact. Plaintiff is alleging that the public disclosure of his current address, well outside of the county where his conviction records are stored, is private. He is also claiming that the disclosure of his tattoo, multiple medical scars, email, driver's license number and cell phone number are private facts.

Are a person's home address, email address, telephone number, license plate numbers, driver's license number all private information under Illinois law? The answer is found in the Freedom of Information Act. Section 2 defines private information as:

> [U]nique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information passwords or other access codes, medical records, home or personal telephone numbers and personal email addresses. Private information also includes home address and personal license plates...5 ILCS 140/2 (c-5)

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Plaintiff alleges his fundamental right to privacy under the U.S. and Illinois Constitutions is affected.

The next factors are what information is acquired and what is done with this information. To answer the first part of this inquiry, Plaintiff points to the Sex Offender Registration Act 730 ILCS 150/ ("SORA"). SORA requires that Plaintiff provide the following: current photograph; current address; telephone number, including cellular number; email address(es); instant messaging identities; chat room identities; other Internet identities; Uniform Resource Locators; all blogs and internet sites used or maintained; county of conviction; license plate number(s); any distinguishing marks on his body; and all internet protocol addresses. 730 ILCS 150/3 (a). All this information encompasses many of the items listed as private information in the Freedom of Information Act as listed above.

The Sex Offender Community Notification Law, 730 ILCS 152/ ("SOCNL") describes what the Defendants are required to do with this private information. First, the ISP must make the information of all ex-offenders, whether currently dangerous or not, accessible on the internet. 730 ILCS 152/115 (b). The county must disclose the name, address of Plaintiff, email address and all other internet identifiers to the following: the boards of higher education of each nonpublic college or university; school boards of public-school districts and all nonpublic schools; child-care facilities; libraries; public housing agencies; DCFS; social service agencies that serve minors; volunteer organizations that serve minors; and any victim of a sex offense in Kane County. 730 152/120 (a)(1-10). The ISP or any law enforcement agency, at their own discretion,

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may disclose the Plaintiff's private information to any person "likely to encounter" him. 730 ILCS 152/120 (b). HPD is allowed to let any person of the public examine and/or copy all of Plaintiff's private information, specifically: name; address; date of birth; email address; any other internet identifiers or websites; blogs and other internet sites that Plaintiff may use or have used; license plate number; and any distinguishing marks on Plaintiff's body. 730 152/120 (c). And remarkably, the ISP or any other law enforcement agency may post Plaintiff's email address, instant messaging identities, chat room identities, and any other internet identities, any blogs or websites the Plaintiff may have used or will use on the internet or *even in the media*. 730 ILCS 152/120 (d).

What is the justification for the government to compile and distribute the Plaintiff's private information to others? If the answer is to protect the public, then it would be a presumption in which the Defendants must prove to a court that Plaintiff is one of those registrants from which the public needs to be kept safe. Or there are two other options: 1. the laws are arbitrary, which would be in violation of substantive due process; or 2. the laws are designed to enact further punishment on the Plaintiff, in violation of the *ex post facto* clauses of both the federal and state constitutions.

And because the Scheme impermissibly infringes on Plaintiff's fundamental right to privacy, strict scrutiny (or at the very least, intermediate scrutiny) must apply. Because the Scheme is not narrowly tailored to achieve the compelling State interest of protecting children from repeat offenders, that there exists no way for Plaintiff to be removed from the Registry

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and all its accompanying violations of Plaintiff's privacy, then it must be found unconstitutional as-applied to the Plaintiff.

D. *The Illinois Human Rights Act places Plaintiff in a "protected class."*

Under the Illinois Human Rights Act 775 ILCS 5/, (HRA), the legislature adopted laws to protect the rights of *all* citizens of the state. The Declaration of Policy states: "[i]t is the public policy of this State: (E) Public Health, Welfare and Safety. To promote the public health, welfare and safety by protecting the interests of all people in Illinois in maintaining personal dignity, in realizing their full productive capacities, and furthering interests, rights and privileges of this State." *Id.*

Under the HRA, Plaintiff is part of a protected class which the HRA was enacted to protect. The definition of a protected class includes those with a conviction record. "'Conviction record' means information indicating that a person has been convicted of a felony, misdemeanor or other criminal offense." *Id.* 1-103(G-5). The HRA surely cannot offer less protection than its federal counterpart in accordance with the Fourteenth Amendment. The HRA embodies the same principles as its federal sister, namely those that prevent discrimination based on race, religion, national alienage or as a discrete and insular minority as defined under "suspect class." The HRA extends those protections. The HRA "forbids discrimination based on age 40+), ancestry, arrest record, citizenship status, color, conviction record, disability (physical and mental), marital status, military status, national origin, orders of protection, pregnancy, race, religion, retaliation, sex, sexual harassment, sexual orientation,

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and unfavorable military discharge."

https://www2.illinois.gov/sites/ihrc/process/Pages/FAQs.aspx.

According to the Human Rights Commission, the above classes are *always* covered under the HRA from disparate treatment ("when a person is treated less favorably than others because of their membership in a protected class" *Id.*).

When presented with an issue of statutory construction, this court's primary objective is to ascertain and give effect to the intent of the legislature." *People v. Minnis*, 2016 IL 119563 ¶25. A court "must view the statute as a whole, construing words and phrases in light of other relevant statutory provisions." *Carmichael v. Laborers' & Retirement Board Employees' Annuity & Benefit Fund,* 2018 IL 122793, ¶35. It is Plaintiff's argument that the legislative intent of the HRA was to enact *greater* protection than its federal counterpart through the *increased* definition of the classes protected. It stands to reason that because the legislature clearly defined the "discrete and insular minorities," those without a say in the political process, to include someone with a conviction record, strict scrutiny should apply.

The presence restrictions are in violation of the HRA, regarding this case, as they conclusively presume Plaintiff's classifications as a "child sex offender" and sexual predator" gives Plaintiff the likelihood to recidivate against a child. The presence restrictions directly conflict with the HRA.

The presence restrictions state that Plaintiff is prohibited from being present or loitering within 500 feet of daycares, schools, parks, and anywhere else whose primary purpose is to

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serve minors. This is in direct conflict with what the legislature intended with HRA. The HRA clearly prohibits the denial of access to public accommodations to those who have a conviction record. "'Conviction record' means information indicating that a person has been convicted of a felony, misdemeanor or other criminal offense, placed on probation, fined, imprisoned or paroled pursuant to any law enforcement or military authority. HRA 775 ILCS 5/1-103(G-5). Plaintiff falls into this class.

Plaintiff is no longer serving his sentence. Plaintiff's sentence, a term of three years probation, was completed 17 years ago. Plaintiff is no longer under the control and supervision of the Cook County Probation Department and is considered a "free man." Plaintiff does concede that while serving a criminal court's sentence of imprisonment, mandatory supervised release, parole or probation, certain civil liberties have been given up, but only to the point where the criminal sentence ends. And the HRA clearly sets that out regarding limiting a person's access to public accommodations.

The HRA states that it is a rights violation to "[d]eny or refuse to another the full and equal enjoyment of the facilities, goods, and services of any public place of accommodation." 775 ILCS 5/5-102(A). "Public accommodations" as defined by the HRA include: "a museum, library, gallery, or other place of public display or collection" 775 ILCS 5/5(A)(9); a *park*, zoo, amusement park, or other places of recreation," *Id.* (A)(10); "a nonsectarian nursery, day care center, elementary, secondary...school or other place of education," *Id.* (A)(11).

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It is evident that the legislature sought to prohibit the actual infirmities contained in the presence restrictions of the Scheme. By including all with a conviction record, with no exceptions, the HRA clearly prohibits the presence restrictions. Because the two statutes are clearly at odds with each other, Plaintiff argues that strict scrutiny should apply.

E. *The Scheme interferes with Plaintiff's fundamental reputational right.*

The Scheme impermissibly affects Plaintiff's fundamental right to reputation under the Illinois Constitution. Plaintiff damaged his reputation by committing a sexual offense over 20 years ago. It is not the reputational harm that occurred 20 years ago which Plaintiff challenges. It is the reputational harm that continues to this day due to an act that occurred two decades ago.

By the continuous posting of Plaintiff's picture under big bold red letters stating "Sexual Predator" the Defendants depict Plaintiff as a current danger. It is much like walking into the local post office and seeing "Wanted" posters, posters with the faces and description of wanted fugitives. To depict the Plaintiff in such a manner, the Defendants completely erase any good he has done in his life over the past 20 years. And it impairs his ability to do good acts in the future.

Plaintiff has picked up the art of woodworking, mainly to help with his mental health issues and to stave off the boredom of being unable to keep a regular job. Plaintiff has amassed thousands of dollars in tools. He has subscribed to woodworking journals. And when constructing his new home, Plaintiff had a dedicated two car garage workshop incorporated

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into the construction. Plaintiff's plan was to build furniture and sell it, with the profits going to charities which help veterans with mental health issues. Plaintiff suffers from mental health issues related to his time in the military. Plaintiff follows the issues of mental health issues amongst veterans. Plaintiff has become a regular contributor to a group called the Til Valhalla Project, a charity which not only presents plaques to families of fallen servicemembers, but who also help veterans with mental health issues. Plaintiff is also aware of another group Wounded Warriors, whose mission is to help veterans with mental health issues.

Plaintiff wants to help his brother and sister veterans. By trying to get as much money into charities that help veterans with mental health issues, maybe Plaintiff can prevent just one veteran from making a life-altering mistake like he had. Not only is his housing insecurity affecting this, it's also the state's continued projection of Plaintiff as a dangerous "Sexual Predator," which is broadcast world-wide, which is affecting his ability to help those in need. Also, all his internet identifier information is available to anyone upon request, or distributed to multiple agencies, schools etc. which prevents Plaintiff from completing this dream. Plaintiff and anyone in his household are barred from joining the community Facebook page, where Plaintiff has been told items are listed for sale constantly. The ability for the public to have access to private information of the Plaintiff also prevents him from taking steps to achieve his goal of helping fellow veterans. If a citizen gains knowledge of any website, social media, etc. that Plaintiff is selling his creations, that person can most assuredly undermine Plaintiff's efforts.

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This poses a question for this Court: does the fundamental right to reputation in Illinois, as protected by Art. I, Sect. 12 of the Illinois Constitution protect the right to *repair* one's reputation. Plaintiff argues that it does. Merriam-Webster Dictionary defines reputation as: "overall quality or character as seen or judged by people in general; a place in public esteem or regard: good name." https://www.merriam-webster.com/dictionary/reputation. The reputation of a person is not based on one act alone. The reputation of a person is based on a lifetime of acts. The Scheme harms Plaintiff's reputation every day through the continued use of "Sexual Predator" in describing him. Take the following example: prior to joining the Navy, Plaintiff played college football at a small school in central Illinois. Just because he was a college football player over 30 years ago does not mean he is a college football player now. He is no more a college football player now than he is a "sexual predator" or "child sex offender" now. Yet, over 20 years after the fact, the Scheme continues to describe him as such. The fact Plaintiff, in the ensuing two decades after his conviction has shown "proof of the most positive character" *Heiner v. Donnan*, 285 U.S. 312, 324, (1932), is of no consequence; Plaintiff will forever be a "sexual predator" and "child sex offender."

It is Plaintiff's argument that the right to reputation is a fundamental one. But reputation is not based on one incident, it is based on a long list of successes and failures through the course of one's life. And the Illinois Constitution states: "[e]very person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation." IL Const. Art. I, Sect. 12. That reputation is included with privacy,

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property and the person (meaning health and welfare), all fundamental rights, then reputation must be considered fundamental as well. A person can sue another for reputational harm. Yet the State has created a Scheme that produces decades of reputational harm. Plaintiff should be allowed to regain his reputation. For if not, then it would be in violation of Art. I, Sect. 11 of the Illinois Constitution which states, in part: "[a]ll penalties shall be determined...with the objective of restoring the offender to useful citizenship." IL Const. Art., I, Sect. 11.

F. The Right to Interstate/IntraState Travel is Fundamental

Plaintiff is no longer serving his sentence therefore he should have the right to travel freely throughout the country. Yet the Scheme limits his ability to do that. Illinois law states:

> A [registrant] who is temporarily absent from his or her current address of registration for 3 or more days shall notify the law enforcement agency having jurisdiction of his registration, including the itinerary for travel." 730 ILCS 150/3(a).

Plaintiff claims this not only "chills" his fundamental right to travel, but also restricts it. Any violation is a Class 3 felony and has a required minimum 7 days confinement in the county jail with a mandatory minimum fine of $500. 730 ILCS 150/10(a).

"The right to travel...protects the right of a citizen of one state to enter and to leave another state." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). The Supreme Court, in deciding an earlier cases, stated:

> For all the great purposes for which the federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." *Crandall v. State of Nevada*, 73 U.S. 35, 48-9 (1867) *quoting Passenger Cases*, 48 U.S. 283, 492 (1849)(Mr. Chief Justice Taney dissenting).

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Plaintiff claims that the phrase "as freely as in our own States" would make the right to intrastate travel fundamental as well. The Supreme Court also noted the right to travel *freely* to and from another state is a fundamental one. *United States v. Guest*, 383 U.S. 745, 757 (1966).

Plaintiff alleges the Scheme denies him his right to travel *freely* and chills this fundamental right by forcing him to inform law enforcement anytime he leaves his residence for more than 3 days. Plaintiff puts forth three hypothetical situations that are not out of the realm of possibility: the need to leave his residence for 3 days or more for an emergency, yet the local registering official is not available. Plaintiff cannot travel until the registering official returns; he was only planning on being gone for two days instead of three, but an unforeseeable event occurred (weather, accident, mechanical problems); or Plaintiff's itinerary was changed due to same event(s). In each hypothetical, Plaintiff faces felony conviction, mandatory confinement and mandatory fine.

By requiring Plaintiff to inform law enforcement of his intention to travel throughout the country that he served, protected and gave up his physical and mental health for, is not the ability to travel "freely." Plaintiff alleges that a citizen's freedom to travel from state to state is a fundamental right that can legally restricted only in the narrowest of circumstances. Interstate travel is a basic right under the Constitution, which can be held to be a "seizure" within the meaning of the Fourth Amendment. The Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. The accused's freedom to travel while on pretrial release may be made by the state to

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restrict a properly accused citizen's constitutional right to travel outside of the state as a condition of his pretrial release and may order him to make periodic court appearances. Such conditions are appropriately viewed as seizures within the meaning of the Fourth Amendment, and allowable if there is probable cause for the seizure.

Likewise, in the context of supervised release such as probation/parole, one's rights are generally restricted, as the person is considered in custody of the state.

> "To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen...they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters...acquiring or operating a motor vehicle...,[and]...traveling outside the community... parolees must regularly report to the parole officer to whom they are assigned, and sometimes they must make periodic written reports of their activities. *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972).

It cannot be said enough, Plaintiff finished his sentence over 17 years ago. Therefore, he is no longer under the supervision and control of the state. Yet, the state continues to exercise supervision and control of his right to travel freely throughout this country. This can only be because the state has conclusively presumed that the Plaintiff is still a danger to the public; or it is further punishing him for a crime committed over two decades ago without a court imposing said punishment.

G. *Plaintiff has a fundamental right to be free from harassment and physical attack*

Over the course of his 2+ decades under the requirements of the Scheme, Plaintiff and his family have endured numerous instances of harassment: multiple false accusations

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(ultimately proven false); fireworks intentionally aimed at him and his (at the time) tender-aged child; an adult female intentionally causing his special needs tender-aged child to physically harm himself; threats; attempted assault; and assault, requiring hospitalization and a major neck surgery. These are just the cases in which Plaintiff can prove through police reports and medical documentation. Never once was there an arrest made, warnings issued or any other intervention by law enforcement or the court system. In fact, after the two most recent incidents in which Plaintiff was harassed and threatened for not only his registrant status but also due to this case, Plaintiff attempted to have a Temporary Restraining Order issued. The court, in denying his petition, stated: "I do not believe the legislature intended for a TRO to be used in a situation like this." What's troubling is the fact that Plaintiff served and protected this country, yet when he asked for protection from the legal system, he was denied based on a conviction from over two decades ago.

But this is the direct effect of the Scheme on the Plaintiff, specifically the Notification Law. Because the Plaintiff is presumed to be a danger to the community for his natural life, the legislature determined that the community needs to be informed of his whereabouts, even though he has changed residences multiple times.

The Illinois Constitution states: "All men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty and the pursuit of happiness." IL Const. Art. 1, Sect. 1. The Scheme's effect interferes with these rights. Plaintiff and his family have been harassed and Plaintiff severely attacked, in which resulted in

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permanent nerve damage in Plaintiff's left arm. That the rights to life and pursuit of happiness are unable to be taken away (inalienable) and permanent (inherent) and that they are the first rights guaranteed by the Illinois Constitution, can only mean they are fundamental in Illinois.

Plaintiff alleges that strict scrutiny must apply because of the inherent dangers that Plaintiff and his family have, and will continue to endure, because of the effects of the Community Notification Law.

5. Argument

An irrebuttable presumption, interchangeable with "conclusive presumption," *LaFleur*, at 798, is one in which the proof of a fact (in this case, a sexual offense against a 15-year-old) is conclusive proof of a second fact (in this case, that Plaintiff has a likelihood of reoffending). The United States' Supreme Court has found on multiple occasions that such mandatory, irrebuttable presumptions are in violation of the Fourteenth Amendment to the U.S. Constitution. Because the Illinois State Constitution cannot offer less protections than its federal counterpart, any irrebuttable presumption must be in violation of Art. I, Sect. 2 of the State Constitution.

Like every other irrebuttable presumption case, this challenge involves classificatory legislation. The Scheme rests, in essence, upon the principle that Plaintiff, having been convicted of a sex crime against a 15 y.o., will forever have a likelihood of recidivating, especially against children. The Scheme controls every aspect of the Plaintiff's life for the rest of his time. It controls where he may live, where he may move about the community, where

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and how he can travel, all his electronic communications and if and how he may raise his children. The Illinois Scheme is one of the toughest in the nation. Restoration of Rights Project, *50 State Comparison: Relief from Sex Offender Registration Obligations,* Collateral Consequences Resource Center https://ccresourcecenter.org/state-restorationprofiles/50state-comparison-relief-from-obligations/; *see also Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 135-136 (Alaska, 2019)(noting "[a] majority of states now provide for individualized risk assessment hearings under which registrants...can be relieved of registration obligations"). Only 16 states, according to the Restoration of Rights Project, do not provide for some measure of relief from their respective schemes (this number does not count PA, MI and SC due to recent court decisions invalidating their respective schemes).

Plaintiff argues that the imposition of the Scheme is arbitrary and the claim of a valid governmental interest "cannot in every context, be insulated from all constitutional protections." *Stanley v. Georgia*, 394 U.S. 557, 563 (1969). If the Scheme's purpose rests on the likelihood that Plaintiff is going to recidivate, shouldn't the Plaintiff, after two decades, have the ability to prove that he will not recidivate? The Supreme Court addressed this issue in *Schlesinger v. Wisconsin*, 270 U.S. 230 (1926) where the Court held a presumption was invalid on the grounds that the statute made a presumption conclusive without regard to the actualities. Further, in *Stanley v. Illinois,* 405 U.S. 645 (1972) the Supreme Court found that forbidding the exercise of the right to prove false a presumption is so arbitrary and unreasonable that the presumption cannot stand. This Court, in *Wingert v. Hradisky*, 2019 IL

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123201 found the Drug Dealer Liability Act facially unconstitutional as the "Act violates the Due Process Clause of both the U.S Constitution and the Constitution of the State by imposing an irrebuttable presumption of causation that has no rational connection between the fact requiring proof and the fact presumed." *Id.* ¶20. This Court went on to say further the "Constitutional guarantee of due process is implicated 'whenever the state engages in conduct towards its citizens deemed oppressive, arbitrary or unreasonable.'" *Id.* ¶29 *quoting People v. McCauley*, 163 Ill.2d 414, 425 (1995).

That is what the Scheme does here, and which is why the irrebuttable presumption challenge involves both procedural and substantive due process. Because without a procedure in place to allow the Plaintiff to be removed from the Scheme's orbit, the Scheme is arbitrary in violation of substantive due process. Or as one commentator stated: "the Doctrine rejects the conclusiveness of the presumption embodied in the statute if the presumed fact is not universally true...The basis of the defect is substantive; the relief is procedural." *Aliens and the Federal Government: A Newer Equal Protection*, 8 U.Cal. D. L. Rev. 1, 24-25. "But when...the procedure forecloses the determinative issues...when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests..." of Plaintiff and his children. *Stanley*, at 657.

In *LaFleur*, 414 U.S. 632 (1974), every teacher four or more months pregnant was required to take unpaid leave because it was decided that they were physically incapable of continuing their duties. The Supreme Court found this to be unconstitutional, in violation of the

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Due Process Clause, because the teachers were offered no opportunity to show the presumption was incorrect as-applied to them individually. That is the basis of Plaintiff's argument here. The legislature has determined that certain registrants are "sexual predators" and "child sex offenders." The legislature has determined that there is a high likelihood of recidivism and has placed an ever-changing restrictive Scheme on them. There is no avenue for a member of this class to challenge the presumption that there is a likelihood that [s]he will recidivate. Indeed, the likelihood of reoffending lies at the core of this Scheme. The Defendants go as far as to admit this in their arguments before the circuit court. In State Defendant's Motion to Dismiss, the Defendants admit that that the "policy reason" behind the Scheme is that "Plaintiff is dangerous and likely to commit further criminal sexual acts and that this danger will be mitigated by informing the public of [his] presence." (MTD C 525). And in Defendants' Opening Brief to this Court, they admit that there exists a presumption of dangerousness in the Scheme: "[I]t is 'self-evident that creating a buffer between a child daycare home and the home of a child sex offender may protect at least some children from harm.'" Brief p. 29 *quoting Vazquez v. Foxx*, 895 F.3d 515, 525(7th Cir. 2018). The Defendants are arguing that the Scheme does not create a presumption, then use that presumption in supporting the existence of the Scheme. If the Scheme is just how the Defendants argue, that is "it was only a 'registration scheme' and 'does not take into account, and therefore does not presume, whether an offender is likely to reoffend," Brief at 12 (*quoting* C 525), then what is

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the purpose? If a person is unlikely to reoffend yet that person is still subject to the entirety of the Scheme, then the Scheme is either arbitrary or punishment.

Defendants contend that "Plaintiff is conflating the policy reason behind the statute with a legally binding presumption applicable in a judicial proceeding." (MTD 525). Plaintiff is not doing that at all. Plaintiff has brought before the circuit court and this Court *multiple* cases in which the Supreme Court has determined that classificatory presumptions are unconstitutional. In a decision which occurred while this case was proceeding, the Pennsylvania Supreme Court found that their scheme did in fact create an irrebuttable presumption of dangerousness and remanded back to lower court for an evidentiary hearing. *Commonwealth v. Torsilieri*, 232 A.3d 567, 585; 587-589 (Pa. 2020).

Defendants argue that the definition of presumption under *People v. Pomykala*, 203 Ill.2d 198 (2003) is controlling. (MTD 525). Yet *Pomykala* was a case involving an irrebuttable presumption that changed the rules of evidence. The statute at issue was: "[i}n cases involving reckless homicide, being under the influence of alcohol or any other drug or drugs at the time of the alleged violation shall be presumed to be evidence of a reckless act unless disproven by evidence to the contrary." 720 ILCS 5/9-3(b)(West 2020). But this isn't a case involving shifting the burden of proof. And this is not a criminal proceeding. Plaintiff has (hopefully) made clear; this is not a case of a "device used in court to aid a fact finder towards a conclusion." (MTD C 525). This is a *classificatory* scheme devised by the legislature, much like the classifications in *Stanley, LaFleur,* and others cited *supra.* which asks is the classification properly drawn?

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Plaintiff argues this is the ultimate question which this Court must decide. And in each case before the Supreme Court, which was premised on a mandatory classification, the Court found those schemes to be unconstitutional based on a three prong test: "1. a rational connection exists *in common experience* between the fact proved and the fact presumed; 2. the presumption is not so unreasonable so as to be merely arbitrary; and 3.) the presumption is not conclusive or irrebuttable, *i.e.*, it does not deny a party the right to introduce other evidence relating to issue in order to controvert the fact presumed." Shepherd, J. C., *Constitutional Law-Permanent Irrebuttable Presumption of Nonresidency upon Students is Unconstitutional*, 23 DePaul L. Rev. Rev. 1314 (1974) 1316 (and cases cited therein).

The first prong, does a rational connection exist in common experience between the proven fact and the presumed fact entail an examination of the actual recidivism rates of registrants. Or, as the Supreme Court has stated more than once, the presumed fact must be universally true. *LaFleur,* 646 *citing Vlandis,* 452. Mr. Justice Stewart found that provisions cannot be too broad to be justified by the state's asserted interests and therefore is unconstitutional "when that presumption is not necessarily or universally true in fact" *Vlandis,* 452. *see also Tot v. United States*, 319 U.S. 463, 467-468 (1943)(Finding that a statutory presumption cannot be sustained if there is no rational connection in common experience between the fact proved and the ultimate fact presumed). As Plaintiff is classified as a child sex offender and sexual predator, to survive the first prong of the irrebuttable presumption

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challenge, there must be conclusive evidence that *all* those deemed sexual predators and child sex offenders will remain a danger to the public for the rest of their lives.

The empirical evidence from the largest study ever conducted, the findings of the U.S. Department of Justice (DOJ), studies conducted by sister states, the American Law Institute, and most importantly, the findings of the State of Illinois all point to the opposite. These conclusions are evidence that the arbitrary presumption that persons once convicted of certain sex offenses will remain a danger to society for the rest of their lives is not universally true. Persons once convicted of a sex offense have a lower rate of recidivism than that of any other class of convicted offenders. The research has also proven that 95% of all sex crimes are committed by first time offenders.

In a 2015 U.S. Department of Justice brief (DOJ), they recognized "[despite the intuitive value of using science to guide decision-making, laws and policies designed to combat sexual offending are often introduced or enacted in the absence of empirical support...there is little question that both public safety and the efficient use of public resources would be enhanced if sex offender management strategies were based on evidence of effectiveness rather than other factors." Lobanov-Rostovsky, C., *Adult Sex Offender Management*, p 1 https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/adultsexoffendermanagement.pdf. The brief notes that the Scheme has shown no impact on the recidivism rates for exoffenders. *Id.* p 2. But the brief highlights the negative and injurious impact that it does have on those persons who are subject to the Scheme: physical assault 8%; property damage 14%;

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threatened and/or harassed 20%; loss of housing 19%; family member/roommate harassed or assaulted 16%; and negative psychological impact 40-60%. *Id.* p 3. Plaintiff has experienced all these effects of the Scheme.

The DOJ concludes that "the evidence is fairly clear that residence restrictions are not effective...[and]...may actually increase offender risk by undermining stability...[and]...[t]here is nothing to suggest this policy should be used at this time." *Id*, p 4. The DOJ further concludes that "[i]t must be stressed that all of the above-noted policies that show a positive impact should be implemented in a targeted rather than one-size-fits-all fashion commensurate with offender risk and need." *Id.* p 5. The final conclusion of the DOJ is that policymakers need "to use *empirically* supported strategies." *Id.* p 5. (*emphasis added*),

In 2019, the DOJ released a report on the recidivism rates of sex offenders released from state prisons. Alper, M. Ph.D., & Durose, M. R., *Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2004-2014),*

https://bjs.ojp.gov/content/pub/pdf/rsorsp9yfu0514.pdf

At the outset, it's important to note that this study is not based on samples of offender populations, as in the case in most of the academic research in this area. Rather, this report details the entire population of persons released from state prisons across 30 states. This means that the 7.7% sex offense recidivism rate among those with prior sex offense convictions is not an estimate of the recidivism rate based on statistical sampling; it's the actual rate of recidivism for the population, with recidivism being defined as an arrest for a new sex offense.

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In 2003, the DOJ released another report studying the 3-year recidivism rates of sex offenders released from state prisons from 15 states, including Illinois. C 439. This study includes 4,295 men convicted of a sex crime against a child. C 439. Over the 3-year follow-up, 3.3% of previously convicted child sex offenders were rearrested for another sex offense against a child. *Id.*

The legislature is fully aware of the recidivism rates of persons once convicted of a sex offense. In 2016, the Illinois 99th General Assembly created a task force "to examine the implementation and impact of the state's sex offender registration and residency restrictions." *Sex Offenses & Sex Offender Task Force Final Report*, 2017 p 1, C 31. https://icjia.illinois.gov/researcghub/articles/sex-offenses-and-sex-offender-registrationtaskforce-final-report

There are many important findings in this report, but Plaintiff wishes to stress the one in which no Illinois court has addressed: "the greatest predictor of risk reduction is the length of time a convicted person lives in the community without re-offending. The longer a convicted person desists from criminal behavior, the lower his or her risk." *Id.* p 20, C 50. Plaintiff has lived a lawful life for the last two decades. He has long passed what is known as the "desistance threshold." The desistance threshold is the point in time "a convicted person's risk is at the same level as the general population. Research indicates that individuals convicted of sexual offenses reach the desistance threshold at 10 years of offense-free community living." *Id. citing* Hanson, R.K., Harris, A.J.R., Helmus, I., & Thornton, D. High-risk sex offenders may not be high

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risk forever. *Journal of Interpersonal Violence*, 29(15), 2792-2813. That the legislature has not acted on its own findings only goes to show that there are other factors at play, which will be discussed *infra*.

Finally, in meta-analysis published recently, the study found "individuals convicted of sexual offenses often age out of crime as other individuals do." Zgoba, K.M., & Mitchell, M.M., The Effectiveness of Sex Offender Registration and Notification: A Meta-Analysis of 25 years of Findings, *Journal of Experimental Criminology,* 19, 71-96 21 (2023) https//doi.org/10.1007/s11292-021-09480-z p 80. This study is the largest analysis ever on the recidivism of ex-offenders. It comprises the recidivist data of 474,640 formerly imprisoned individuals taken from 18 previous studies. *Id.* p 71. The study went on to say that the link between criminal behavior and age is "firmly established in criminology and desistance from criminal offending is 'nearly inevitable' across offender types." *Id.* Recidivism rates drop steeply for individuals in their 40s and 50s and after age 60 were less than 4%. Because of this, the study concluded that longer periods of registration and community control required by the Scheme made the it inefficient and makes it difficult for the public to determine the true risk an individual offender may pose while forcing ex-offenders into homelessness and preventing successful reintegration into the community. *Id.* 80-81.

The study further found that the lifetime requirements under the Scheme are not rationally related to recidivism because of the desistance threshold. The study shows that after 10-15 years living offense-free in the community, even those high-risk individuals were as likely

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to reoffend as any other person in the community to offend. This is saying two things: first, no person has a zero risk of committing a sex offense. That is statistically impossible. Every person has about a 1.5% risk of committing a sexual offense as the percentage is determined by the number of first-time offenders divided by every person in the community. Second, "[t]hese time-based requirements suggest that rule and law-abiding behavior are irrelevant and life consequences are set according to one singular criminal act, even if this offense occurred decades before." *Id.* The study goes on to say: "[t]his policy response (lifetime registration) promotes the fundamental idea that individuals convicted of sexual offenses maintain a high and enduring risk across their lifespan." *Id.* This ignores the decades of empirical research in this field and that strategies to identify and control only the high-risk offenders would produce better successes. *Id.*

This study's final conclusion is that the Scheme does nothing to deter sexual recidivism. "The notion here is that if we apply a label to an individual and tell everyone else to watch this person's behavior, they will desist from the unwanted behavior. However, research has not supported this assumption." *Id.* Further the study notes that the Scheme has the potential to *increase* the risk of individuals. By not helping an offender reintegrate in society coupled with the internalization of the lifetime labels in which the government places upon the individual, the Scheme then creates a "self-fulfilling prophecy." *Id.*

These findings are only a sample. They include the findings of the DOJ, the State and the largest analysis ever performed. They show that the recidivism rate is nowhere near the

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oftquoted "frightening and high" recidivism rate of ex-offenders, let alone being "universally true in fact" required by the analysis. *Vlandis* 452. Therefore, Plaintiff alleges the first prong of the analysis is that the Scheme is an irrebuttable presumption.

The second prong that a court must consider is that the presumption is not so unreasonable to be merely arbitrary. To answer this question, one needs to consider "[w]hen a statutory provision imposes a burden upon a class of individuals for a particular purpose and certain individuals within the burdened class are so situated that burdening them does not further that purpose..." then the provision is arbitrary. Michigan Law Review, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?* 72 Mich. L. Rev. 800 (1974) https://repository.law.umich.edu/mlr/vol72/iss4/4 . Or as Mr. Justice Scalia phrased it, [o]ur irrebuttable presumption cases must be analyzed as calling into question not the adequacy of procedures but...the adequacy of the 'fit' between the classification and the policy that the classification serves." *Michael H. v. Gerald D,* 491 U.S. 110, 121 (1989).

It is obvious that the "fit" in which Mr. Justice Scalia was referring to is not met here. The meta-analysis conclusions contained *supra* only confirm that. For there to be a fit between the Scheme and requiring lifetime registration, it would have to be shown that the Scheme deters recidivism. The Supreme Court has found that a presumption cannot be sustained based on its convenience in comparison to producing evidence of the ultimate fact. *Tot v. United States*, 319 U.S. 463 (1943); *Stanley*, 405 U.S. 645 (1973). Yet, in the State's own findings:

> "the General Assembly recognized that while Illinois' registry and residency restrictions were intended to provide information to victims and law enforcement and protect the

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> public, these laws and policies do not assess or differentiate based upon the specific risks of each offender, potential threat to public safety, or an offender's likelihood of re-offending. Furthermore, the General Assembly highlighted that the lack of individualized assessment prevents communities and law enforcement from being able to identify, treat, and supervise high-risk individuals in a manner consistent with current best practices. Task Force p. 1, C 31.

The legislature has already recognized as far back as seven years ago that the Scheme is not rationally related to protecting anyone from recidivist sex offenders because the law is arbitrary. By arbitrarily imposing restrictions on all those statutorily deemed sexual predators and child sex offenders, the Scheme does not achieve its two primary objectives; protecting the public and aiding law enforcement. Not only has the legislature recognized and publicly admitted that the Scheme is not a perfect fit; it admits that it does not fit the goals at all. According to the State's own findings, mixing low risk offenders in with high-risk ones "not only frustrates the ability of law enforcement agencies and communities to provide appropriate supervision and treatment of high-risk offenders but also can lead to making low-risk offenders worse, as research shows treating low-risk people like high-risk people can increase the likelihood they will reoffend." Task Force p. 19 C 49. Therefore, Plaintiff argues that the second prong of the test is also in favor of an irrebuttable presumption, as it is merely arbitrary.

The third prong easily shows that the Scheme falls into the category of an irrebuttable presumption. The third prong requires that the presumption is not conclusive or irrebuttable, meaning that there must be a way of disproving it. There exists no possibility under current

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Illinois law for anyone deemed a child sex offender or sexual predator to be removed the Scheme's requirements and restrictions. Without any procedure, the remedy for the substantive infirmity, one must abide by the Scheme for a lifetime.

Reasonable alternatives exist to determine the presumed danger of an ex-offender and are found in the State's own findings: "[r]isk assessment tools are used by system actors to measure an individual's risk or likelihood to reoffend." Task Force, p 18. C 48. The state recognized the use of structured risk assessment tools as a viable means of evaluating the recidivism risk of ex-offenders. These risk assessment tools include the Static99R/Static-200-R, Stable-2007, SOTIPS, and SVR-20. *Id.* 19 C 49. The State already has in place the means to use the tests but, according to their own findings, they use the wrong tests. "Illinois probation departments use the LSI-R and the Illinois Department of Corrections is planning to implement SPIN, both of which measure general offending risk. Little information is available on how often the sexual offending risk is assessed, what tool is used, and who administers the tool." *Id.* p 21 C 51.

Plaintiff contends that because there are accurate risk-assessment tools available to measure the risk of reoffending, and other states use these risk assessment tools, he should be able to utilize the tools available to assess his risk and then be able to petition to be removed from the registry. Or, after Plaintiff has proven that he has returned to a law-abiding life he should automatically be removed.

But, as to the third prong of the irrebuttable presumption test, the State's own findings prove that there exist several structured risk assessment tools available to use to determine

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whether he remains a danger to society. By ignoring these findings, the legislature is only placing people in more harm than promoting safety, the main goal of the Scheme.

In *Torsilieri*, the court found the analysis to be a little bit different. The court found that the three prong test consisted of: "1) the existence of a presumption that impacts an interest of the due process clause; 2.) a presumption that is not universally true; and 3.) the existence of reasonable alternative means to ascertain the presumed fact." *Commonwealth v. Torsilieri*, 232 A.3d 567, 586 (Pa. 2020)(*internal quotes omitted*). While Plaintiff cannot find the exact reference to the one difference, Plaintiff will address the "alternate prong." *Torsilieri* found that their scheme implicated the fundamental right to reputation. In evaluating this, the lower court, citing scientific research, found that "[t]he public declaration, based on faulty premises..., that all sexual offenders are dangerous recidivists only serves to compound the isolation and ostracism experienced by this population and sorely diminish their chances of productively reintegrating into society." *Id.* 586 (quoting the lower court's decision).

Plaintiff makes that same claim here. As Plaintiff has argued *supra*, he has not been able to successfully reintegrate into the community. He and his family are continuously harassed, he has suffered a brutal attack, Plaintiff and his two sons will forever face housing insecurity due to the residency restrictions which can force them from a home.

But as explained *supra*, the retroactive imposition of the residency restrictions also affects Plaintiff's property rights. While the Defendants and the circuit court relied on *Vazquez*, the court and Defendants misread Plaintiff's argument. Plaintiff will forever have limited

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property rights due to retrospective legislation passed. No matter where Plaintiff and his children move in this state, Plaintiff's property rights are less than that of others.

Plaintiff also has, for the rest of his life, a diminished right to privacy. Plaintiff's current address and current photo are available for the whole world on the internet. Plaintiff's phone number, email address, and any other electronic internet identifiers are distributed among various agencies, schools, and victims. Further, anyone can enter the local police station and request all the information including tattoos and medical scars. As privacy is a fundamental right in Illinois, Plaintiff will forever have a diminished right to privacy.

Plaintiff has a diminished fundamental right to raise and care for his children; lost his fundamental right to practice his religion; the Scheme interferes with his fundamental right to interstate and intrastate travel. Plaintiff asserts that the Scheme impacts more fundamental rights than the challenge brought in *Torsilieri*.

The Plaintiff alleges that, because there is no process for judicial review, not for the initial requirement for the Scheme to be imposed but for the continued imposition of it, it cannot withstand constitutional scrutiny. Because there exists no process for removal from the Scheme, it must be considered arbitrary. Because the Scheme impacts fundamental interests of the Plaintiff, the Scheme must be narrowly tailored to the compelling state interest in which it was enacted to solve. By including individuals who have a low-risk of reoffending, the Scheme is "overinclusive and dilutes its utility by creating an ever-growing list of registrants that is less effective at protecting the public and meeting the needs of law enforcement." *Powell v. Keel*,

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28033 (S.C. 2021). *see also State v. Letalien*, 2009 Me. 130 ¶77.(Silver, J. concurring); Platt, E.R. *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, N.Y.U. Rev. L. & Soc. Change 727, 752 (2013).

While the Defendants may point to the "frightening and high" recidivism rates among exoffenders, "there is "scant support for the proposition that SORA in fact accomplishes its professed goals" and that more recent empirical studies refute this claim. *Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016). Because the Scheme does not provide a review to measure Plaintiff's individual risk of recidivism, it "is not tied to the relative public safety risk presented by the particular registrants and is excessive with respect to the purpose for which it was enacted." *Letalien*, ¶77 (Silver, J. concurring). The over-inclusiveness was also noted in other cases as well: *Smith v. Doe*, 538 U.S. 84, 116 (2003)(Ginsberg, J., dissenting found the scope of Alaska's scheme "notably exceeds its compelling purpose"); *Doe v. State,* 189 P.3d 999, 1017 (Alaska 2008) (significant that Alaska's scheme "provides no mechanism by which a registered sex offender can petition the state or a court for relief from the obligations of continued registration).

The State provides relief for some offenders. Some offenders are automatically removed from the Scheme after 10 years. And there exists protections before an SDP or SVP label is applied and there exists processes for those labels to be removed as well. There exists no process, either before the imposition of the label or after a certain amount of time for those deemed child sex offenders and/or sexual predators. The Plaintiff, arbitrarily branded as both, will retain those labels for life. That clearly violates the decisions enunciated in *Stanley, LaFleur,*

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and *Vlandis*, all decided on the equal protection portion of the irrebuttable presumption doctrine.

For the above stated reasons, Plaintiff alleges that the Scheme is not narrowly tailored nor rationally related to the evils it was designed to protect. Plaintiff asks this Court to either declare the Scheme, as-applied to him, unconstitutional because it creates an irrebuttable presumption on equal protection and/or due process grounds or to remand to the circuit court for further proceedings, including an evidentiary hearing.

II. The Scheme violates the *Ex Post Facto* Clause of both the Illinois and U.S. Constitutions.

Plaintiff brings a challenge to the Scheme alleging that the Scheme violates the *ex post facto* clauses of the U.S. Constitution and the Illinois Constitution. The U.S. Constitution provides, in pertinent part: "No state shall...pass any...ex post facto Law," U.S. Const., Art. I, §10. Likewise, the Illinois Constitution provides: "No ex post facto law...shall be passed. IL Const. Art. I, Sect. 16. In interpreting the *ex post facto* prohibition, this Court looks to the Supreme Court's interpretation of the federal prohibition. *Fletcher v. Williams*, 179 Ill.2d 225 (1997).

Plaintiff contends that the Scheme, by its ever-increasing requirements and restrictions, is a violation of the *ex post facto* clauses of both constitutions. Plaintiff recognizes that this Court and other Illinois courts have consistently found that the Scheme is not punishment. *see, for example, People v. Adams*, 144 Ill.2d 381, 389, 581 N.E.2d 637, 641 (1991); *People v. Malchow*, 193 Ill.2d 413, 424, 739 NE.2d 433, 440 (2000); *see also Avila-Briones*. Yet the previous cases

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have many distinctions which are much different than the as-applied challenge Plaintiff brings before this Court.

The first distinction is that Plaintiff simultaneously brings an irrebuttable presumption challenge. No other Illinois case has brought an irrebuttable presumption challenge, let alone arguing it alongside an *ex post facto* challenge. This is a significant difference. Plaintiff alleges that the Defendants are unable to successfully argue that the laws do not create a presumption while at the same time using that same presumption in arguing that the Scheme does not violate *ex post facto* prohibitions. As one factor in any *ex post facto* analysis deals with this presumption, *Smith v. Doe*, 538 U.S. 84, 103-04 (2003), the Defendants must choose between admitting or denying the presumption, which would entirely change the *ex post facto* analysis, which Plaintiff will hopefully show *infra*.

The second major difference is this is the first case before this Court in which a strictly as-applied challenge arises from an individual being subject to the Scheme for over 20 years, without any subsequent convictions. That Plaintiff brings this substantive challenge, not due to the initial conviction nor a subsequent conviction for violating a portion of the Scheme is of equal importance. Plaintiff will hope to show this Court the differences in the analysis *infra*.

The final distinction between this case and prior cases before this Court is the abundance of case law from other jurisdictions which have found that the continued imposition of their respective schemes is violative of *ex post facto* clauses. *see, for example, Does #1-5 v. Snyder*; *Commonwealth v. Muniz*, 164 A.3d 1189 (2017). There is further updated case law

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from the Seventh Circuit Court of Appeals which redefines "retroactive" law. *Koch v. Village of Hartland*, 43F.4th 747 (7th Cir. 2022). Plaintiff will hopefully show that these decisions change the *ex post facto analysis*.

1. Analysis

The major concern regarding the adoption of the prohibition of *ex post facto* laws in the U.S. Constitution was to "assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legislation" after the American Revolution. *Miller v. Florida*, 482 U.S. 423, 429, 107 (1987) *citing Calder v. Bull*, 3 U.S. 386, 391 (1798).

The clauses also aimed to give individuals fair warning about what constitutes criminal activity and what punishments shall be imposed for that conduct. "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver v. Graham*, 450 U.S. 24, 30 (1981). Chief Justice Chase, writing for the majority then defined the four categories of laws that violate the *ex post facto* clauses:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when it was committed. 3rd. Every law that changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. *Calder*, at 390

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There are two characteristics which make laws *ex post facto*: They are "both retroactive and penal." *see Weaver*, at 29 ("it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.")

A. *The Scheme has retroactively increased requirements as-applied to Plaintiff*

Plaintiff pleaded guilty to his crime in 2003. Since that time, the Scheme has changed numerous times to include more burdensome reporting requirements; more restrictive travelling scheme; increased the "fee" for registration tenfold; and increased the residency and presence restrictions. Plaintiff claims that these changes are retrospective in nature, thereby violating the third factor that Chief Justice Chase enunciated in *Calder, supra.*

Plaintiff acknowledges that Illinois courts have declared that the changes to these laws are not retrospective in nature. But Plaintiff asks this Court to revisit those decisions considering *Does v. Snyder* and *Koch v. Village of Hartland,* both of which adopted the Supreme Court's definition of retroactivity in *Smith v. Doe*, and other cases.

In *Weaver v. Graham,* a Florida state law changed the formula for "gain-time credits," making it more difficult for prisoners to receive those credits and it applied to every prisoner, even those convicted before the passage of the law. The Supreme Court found that "it is the effect, not the form, of the law that determines whether it is ex post facto" *Id.* at 28. The Court went on to further state that when analyzing retroactivity of a law, "[t]he critical question is whether the law changes the legal consequences of acts completed before its effective date."

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Id. The Court concluded that if a law "applies to [individuals] convicted for acts committed before the provision's effective date," it is to be considered retroactive. *Id.*

In *Vartelas v. Holder*, 566 U.S. 257 (2012) the Supreme Court reaffirmed its decision on retroactivity. There, Congress changed immigration laws in enacting the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIA). Under the old system, "lawful permanent residents who had committed a crime of moral turpitude could return from brief trips abroad without applying for admission to the United States." *Id.* at 263. The question presented before the Court was whether the IIRIA could apply to those who committed moral turpitude crimes before the Act's inception. The Court found that the law was in fact retroactive as "[n]either the sentence, nor the immigration law in effect when [the immigrant] was convicted and sentenced, blocked him from occasional visits" out of the country. *Id.* at 267. The Court found that applying the new law to the plaintiff "would thus attach 'a new disability' to conduct over and done well before the provision's enactment." *Id.* Therefore, "[t]he essential inquiry is 'whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 273

The Seventh Circuit has joined the overwhelming majority of her sister circuits in finding that the continued increasing of requirements and restrictions under the states' collective schemes apply retroactively. *See e.g. United States v. Young*, 585 F.3d 199, 203 (5th Cir. 2009)(*per curiam*)("Although SORNA does relate to old conduct that was criminal when done, the question is whether SORNA punishes this old conduct."); *Does #1-5 v. Snyder* 834 F.3d 696,

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698 (6th Cir. 2016)("It is undisputed on appeal that SORA's 2006 and 2011 amendments apply to them retroactively."); *Russell v. Gregoire*, 124 F.3d 1079, 1083 (9th Cir. 1997)("[T]he focus of the ex post facto inquiry is...whether any such change...increases the penalty by which a crime is punishable."); and *Shaw v. Patton*, 823 F.3d 556, 560 (10th Cir.)("In 1998, when Mr. Shaw was convicted, Oklahoma did not have any residency or loitering restrictions for sex offenders...Mr. Shaw is subject to restrictions on reporting, residency, loitering only because Oklahoma changed its laws years after [his] criminal conduct. By definition, these restrictions are being retroactively applied to [him].")

Because the *Leach-Vazquez* rule has been overturned by the Seventh Circuit in *Koch*, Plaintiff contends that Defendants can no longer argue that the Scheme applies prospectively and asks this Court to reanalyze whether the retroactive imposition of restrictions and requirements enacted since January 2003 constitute punishment in violation of the *ex post facto* clauses.

B. *Applying the Intent-effects test.*

The next part of deciding whether a law violates the *ex post facto* clause is the "intenteffects test." *Smith v. Doe,* 538 U.S. 84, 92-3 (2003). The first question asked is if the legislature intended for the Scheme to be punitive, *Id.* at. If not, then the second part of the test is whether the Scheme is "so punitive...[in]...effect as to negate [the legislature's] intention to deem it 'civil'" *Smith,* at 92. To determine the effect, courts employ the five factors used in *Kennedy v. Mendoza-Martinez.* 372 U.S. 144, 168-69 (1963).

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While Illinois courts have continuously proclaimed the intent of the legislature as devising as civil scheme, Plaintiff asks this Court to revisit the intent of the Scheme as-applied to his case and in light of the following arguments.

While the Defendants may claim that the legislature intended for the Scheme to be a civil regulatory Scheme, Plaintiff claims otherwise. Plaintiff claims that the legislature intended for the Scheme to resemble parole/probation. Because Plaintiff is no longer serving his sentence, he is no longer under the control, surveillance and supervision of the Cook County Probation Department and should be treated just as any other free, law-abiding citizen. Yet, the Scheme shifts the control, supervision and surveillance to state, county and local law enforcement. This is not the *effect* of the Scheme; it is the *intent* of it. This Court found that the Scheme "was designed to aid law enforcement agencies in allowing them to 'monitor the movements of the perpetrators by allowing ready access to crucial information." *People v. Adams*, 144 Ill.2d 381, 387 (1991). By monitoring the movements of ex-offenders, law enforcement is quite simply acting as a *de facto* probation/parole officer and, according to this Court, that was the intention of the legislature. But to further add to this argument, Plaintiff suggests that the legislature's intent for law enforcement to act in the role of a probation/parole officer is apparent in the codification of portions of the Scheme into the Illinois Compiled Statutes dealing with "Corrections." The Supreme Court found this to be a factor in deciding the legislature's intent. *Smith v. Doe*, 538 U.S. 84, 94 (2003). "Other formal

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attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent." *Id. citing Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

The legislature codified both the Sex Offender Registration Act 730 ILCS 150/ and the Sex Offender Community Notification Law 730 ILCS 152/ into Chapter 730 of the Illinois Compiled Statutes, which is entitled "Corrections." According to the Supreme Court, this is evidence that the legislature did not intend for these laws to be a civil regulatory scheme. *Id.* It proves that the legislature intended for the laws to act in such a way as probation/parole. Other statutes in Chapter 730 deal with the court system (730 ILCS 167/; 730 ILCS 168/); parole and probation (730 ILCS 105/; 730 ILCS 110); prisoners (730 ILCS 155/; 730 ILCS 210). Plaintiff alleges the schemes being included in the chapter only proves the legislature's intent. In *Smith*, the Court found that because "[t]he notification provisions of the Act are codified in the State's 'Health, Safety, And Housing Code,'...that the statute was intended as a nonpunitive regulatory measure." *Smith*, 94. Plaintiff alleges this factor proves that the Scheme's intent is to provide further punishment outside any a court has imposed. Had the legislature intended for the Scheme to be a non-punitive civil regulatory scheme, then it could have been codified under Chapter 740 entitled "Civil Liabilities."

Because the legislature did not include a purpose statement with these statutes, something uncommon, Plaintiff asks this Court to deduce the legislative intent from statements made by the legislators, not just in floor debates but also in the media. Plaintiff alleges that the

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quotes in the media are just as important as the quotes in floor debates. Further, rules of decorum are more relaxed in the media, where a legislator, governor, or attorney general may truly show the animus that they possess towards those once convicted of a sex offense. While the hatred may be deserved, one of the main purposes behind the *ex post facto* clauses is to prevent that animus from further punishing unpopular groups. *Calder*, at 391.

On 07 April 2000, the Illinois Senate debated HB 4045 which was the original statute addressing residency restrictions. While public safety was addressed during this debate, the Chief Senate sponsor of the bill, Senator Patrick O'Malley, acknowledged the *ex post facto* intent: "[T]he public policy discussion around here is whether or not certain people who commit certain acts are going to be subject to restrictions even after they have served their time for the crime they have committed."(91st Gen. Assem. Trans. at 56) www.ilga.gov/senate/transcripts/strans91/ST040700.pdf. But Senator O'Malley concluded the debate with the most telling statement on the true intent of the statute in particular, and the Scheme in general: "This is one more statement to these people...*get out of Illinois. Id.* at 62. Plaintiff argues that not only were the residency restrictions enacted to attempt to banish registrants from Illinois, but by stating "this is one more statement" one could conclude that the whole Scheme was intended to banish ex-offenders from the state. This is just one example of the quotes that Plaintiff can provide from legislative debates.

C. *Effects of the Scheme constitute ex post facto punishment*

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Plaintiff alleges that the effects of the Scheme constitute punishment, in violation of the *ex post facto* prohibitions found in the federal and state constitutions. There have been numerous courts which have found that the respective state schemes were punishment: *People v. Tetter*, IL 2018 Ill.App.3d 150243(*rev'd on other grounds*); *People v. Kochevar*, 2018 Ill.App.3d 140660(*rev'd on other grounds*); *Does v. Snyder*, 934 F.3d 696 (6th Cir. 2016)(*cert. denied*); *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017); *Starkey v. Okla. Dep't. of Corr.*, 305 P.3d 1004 (Okla. 2013).

Courts typically use the framework found in *Smith v. Doe*, to determine if a scheme is penal or civil. This framework is taken from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). The *Mendoza-Martinez* analysis consists of 7 factors to determine if the purpose or effects of a scheme constitute punishment. These 7 factors are: 1. "[w]hether the sanction involves an affirmative disability or restraint;" 2. "whether it has historically been regarded as punishment;" 3. "whether it comes into play only on a finding of scienter;" 4. "whether its operation will promote the traditional aims of punishment—retribution and deterrence;" 5. "whether the behavior to which it applies is already a crime;" 6. "whether an alternative purpose to which it may rationally be connected is assignable for it;" and 7. "whether it appears excessive in relation to the alternative purpose assigned." *Mendoza-Martinez*, 168-169.

(1)The Scheme imposes a disability or restraint

"Here, we inquire how the effects of the Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith*, 99100.

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Smith found Alaska's Scheme (ASORA) did not impose a disability because ASORA did not have an in-person reporting requirement. *Id.* 100. *Smith* also noted "[b]y contrast offenders subject to...[ASORA]...are free to live and work as other citizens, with no supervision." *Id.* 100. Plaintiff alleges that this Court has not conducted an *ex post facto* analysis on the entire Scheme and no Illinois court has conducted an analysis when the challenger has spent over 20 years as a law-abiding citizen. Plaintiff suggests that this is a matter of first impression. The Scheme does impose disabilities. As stated *supra*, these disabilities include a diminished right to privacy, diminished right to parent his children, diminished property rights, loss of the right to practice his Faith, and diminished right to interstate travel. These are all fundamental rights that Plaintiff has lost or have been diminished. Yet Plaintiff is no longer under the custody and control of the criminal justice system. As such, there exists no reason nor precedent for these rights to continue to be diminished/revoked. In *Packingham v. North Carolina*, 528 U.S. ___ 2018, the Court noted this in *dictum*: "Of importance, the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court." *Id.* 1373. And this Court took notice of the *Packingham dictum* in *People v. Morger*, 2019 IL 123643: "The comment, perhaps, expresses the Court's concern over the proliferation of statutes that govern the lives of sex offenders who have served their sentences, circumscribing myriad aspects of their lives." *Id.* note 3. Therefore, both this Court and the Supreme Court have acknowledged that the schemes do create disabilities.

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And the Scheme also creates restraints on the Plaintiff. The Scheme restrains Plaintiff's: movement about the community; ability to own or establish a home; ability to parent his child; ability to engage in intra/inter-state travel; and ability to openly communicate on the internet. Plaintiff is further restrained/detained at least one time (and up to 4 more times) every year for registration. The Scheme today requires much more from Plaintiff than the scheme at issue in *Smith*. The regulations on where/how Plaintiff may live, "loiter," travel, communicate electronically, and move about the community were not at issue there and, as the Sixth Circuit noted in *Snyder,* it imposes "significant restraints on how registrants may live their lives...These are direct restraints on personal conduct." *Snyder,* 703. *Snyder* found that the "restrictions are far more onerous than those considered in *Smith." Id.*, 704. In *Muniz,* the Court found "the inperson reporting requirements, for both verification and changes to an offender's registration, to be a direct restraint..." *Muniz*, 1211. Plaintiff alleges the same. And the court in *AvilaBriones* agreed: "he will be monitored and bound by strict limits on his freedom for the rest of his life." *Avila-Briones,* ¶66. Plaintiff urges this Court to find this factor to be punitive.

Plaintiff contends that the Scheme closely parallels parole/probation. The in-person reporting requirements, the address check, the reduced expectation of privacy and the limits on Plaintiff's movements are all aspects found in typical probation/parole requirements. While the *Smith* Court rejected the characterization of SORA as probation because it did not impose mandatory restrictions, the Court did recognize the argument had "some force" and is even more compelling if the SORA did impose restrictions. *Smith*, 123.

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The *Snyder* Court offered the following analysis in determining whether SORA has been traditionally considered punishment: "(1) it involves pain or other consequences typically considered unpleasant; (2) it follows from an offense against the rules; (3) it applies to the actual offender; (4) it is intentionally administered by people other than the offender; and (5) it is imposed and administered by an authority constituted by a legal system against which the offense was committed." *Snyder*, 701 *citing* Hart, H.L.A., *Punishment and Responsibility*, 4-5 (1968).

The Scheme imposes probation/parole-like conditions on the Plaintiff, long after he has completed his sentence. Illinois' definition of "probation" is: "a sentence or disposition of conditional and revocable release under the supervision of a probation officer." 730 ILCS 5/5-118. "Parole" is defined as: "the conditional and revocable release of a person committed to the Department of Corrections under the supervision of a parole officer." 730 ILCS 5/5-5-16.

Plaintiff is under the supervision and control of local law enforcement. The registering official can (and has) forced Plaintiff to come in to register outside of his yearly registration date. Plaintiff is required to follow numerous requirements and restrictions, much like probationers/parolees. And if Plaintiff does not follow said regulations, Plaintiff will be arrested and charged. Like the *Muniz* Court found, this is akin to probation. *Muniz*, 1213. And the *Snyder* Court agreed: "registrants are subject to numerous restrictions on where they can live, work and, much like parolees, they must report in person...Failure to comply can be punished

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by imprisonment, not unlike a revocation of parole...the basic mechanism and effects have a great deal in common [with parole/probation]." *Snyder*, 703.

The Scheme also promotes the historical punishment of shaming. While it does not appear that the *Snyder* Court addressed this, the *Starkey* and *Muniz* Courts did address this factor. The *Muniz* Court distinguished itself from the *Smith* case by stating, "*Smith* was decided in an earlier technological environment." *Muniz*, 1212. The *Muniz* Court further stated:

> The environment has changed significantly with the advancements in technology since [*Smith* decision in 2003]...approximately 75[%] of households...have internet access. Yesterday's face-to-face shaming punishment can now be accomplished online...The public internet website...broadcasts worldwide, for an extended period of time, the personal identification information of individuals who have served their "sentences." This exposes registrants to ostracism and harassment without any mechanism to prove rehabilitation—even through the clearest proof...the extended registration period and the worldwide dissemination of registrant's information authorized by SORNA now outweighs the public safety interest of the government so as to disallow a finding that it is merely regulatory. *Muniz*, 1212 *quoting Commonwealth v. Perez*, 97 A.3d 747, 765-66, (2014)(Donohue, J. concurring).

Likewise, in *Doe v. State*, 189 P.3d 999 (Alaska 2008), the Alaska Supreme Court found that the public notification provisions resemble the punishment of shaming. *Id.* 1012. "The dissemination provision at least resembles the punishment of shaming..." *Id. citing E.B v. Verniero*, 119 F.3d 1077, 1115-19 (3rd Cir. 1997)(Becker, J. concurring in part and dissenting in part); *Smith*, 115-116(Ginsburg, j. dissenting).

But the Plaintiff is not the only one receiving the shaming. His soon-to-be ex-wife and his two school-aged children are also shamed and ostracized. This is one main reason Plaintiff's wife filed for divorce, to protect the children from further ostracism and violence. Other children and even adults have harassed Plaintiff's children. They were at the house when he

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was attacked. They were in his vehicle when he was harassed. Other children in the area refuse to play with them. One study shows that policies intended to protect children and families are in reality tearing these families apart through the experienced social rejection and isolation. Kilmer, A. & Leon, C.S. 'Nobody worries about our children': unseen impacts of sex offender registration on families with school-age children and implications for desistance. *Criminal Justice Studies* Vol. 30, No.2, 181-201 (2017). http://dx.doi.org/10.1080/1478601X.2017.1299852.

The Scheme also promotes banishment from the community through residency restrictions. Banishment is "punishment inflicted upon criminals by compelling them to quit a city, place or country, for a specified period of time, or for life." *United States v. Ju Toy*, 198 U.S. 253, 269-70. The Kentucky Supreme Court found that residency restrictions are a form of banishment:

> "courts reviewing sex offender residency restrictions have avoided or sidestepped the issue of whether these restrictions constitute banishment, and dissenting judge have been far more intellectually honest concluding that residency restrictions constitute banishment...While...not identical to traditional banishment, it does prevent the registrant from residing in large areas of the community. It also expels registrants from their own homes, even if their residency predated the statute or arrival of the school, daycare, or playground. Such restrictions strike this Court as decidedly similar to banishment. *Commonwealth v. Baker,* 295 S.W.3d 437, 444 (2009)

Starkey found the residency restrictions in Oklahoma to be a form of banishment. *Starkey*, ¶60. For the above reasons, Plaintiff alleges that the Scheme should be considered as punishment.

Every decision Plaintiff has read, little weight is given to a finding of *scienter*, therefore Plaintiff will not address it.

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The Scheme promotes the traditional aims of punishment: retribution and deterrence. It promotes general deterrence through the threat of negative consequences, i.e. eviction, living restrictions, presence restrictions, travel restrictions, loss of privacy and humiliation. *Starkey*, ¶63; *Baker*, 444. The *Snyder* Court, in finding this factor to be punitive, stated: its professed purpose is to deter recidivism (though...it does not in fact appear to do so), and it doubtless serves the purpose of general deterrence." *citing* Prescott J.J. & Rockoff, J.E., *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?,* 54 J.L. & Econ. 161 (2011). The *Smith* Court conceded that the scheme "might deter future crimes. Smith 102. And Defendants in this case have previously stated that the Scheme does have deterrent effects. *see supra.*

The Scheme is also retributive, as it looks back at the offense, and nothing else, in imposing its restrictions. The registrants are marked as ones who cannot be admitted back into the community. In *Doe v. State*, 189 P.3d 999, the Court took notice that the Alaska Scheme did not "differentiate those individuals the state considers to pose a high risk to society from those it views as posing a low risk." By imposing restraints on registrants solely for their past crimes, and not based on a threat to the community, the Scheme imposes the traditional aims of punishment.

Plaintiff's challenge differs from every other challenge at this point. The Defendants cannot logically claim that there is a rational purpose for the Scheme, as-applied to the Plaintiff, without using an irrebuttable presumption.

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But courts have found that, without a mechanism by which a registrant may be removed from the Scheme, then the Scheme is not rationally related to protecting the community from recidivist sex offenders.

> [I]t would be naïve to look no further, given pervasive attitudes toward sex offenders...The fact that the Act uses past crime as the touchstone. probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones. *Smith*, 108-09. (Souter J. concurring). *see also Weaver v. Graham*. 450 U.S. 739, 747 (1987)(Ex Post Facto Clause was meant to prevent "arbitrary and potentially vindictive legislation.").

Further, take the residency restrictions as-applied in this case. This is a case about a homebased-daycare. It is perfectly legal for Plaintiff to be at his house during the day, when the daycare is open, yet he cannot sleep there at night, when the daycare is not operating. The *Baker* Court used that as an example of how SORA is not rationally related to its stated goal and therefore is punitive. *Commonwealth v Baker,* 444.

The *Snyder* Court, on the other hand, assailed the whole Scheme:

[T]he record before us provides scant support for the proposition that SORA...accomplishes its professed goals...it...gives us a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement is *Smith* that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'" *Smith*, 103. One study suggests that sex offenders are *less* likely to recidivate than other sorts of criminals. (*citing* Greenfield, L.A., *Recidivism of Sex Offenders Released from Prison in 1994* (2003)). Even more troubling is evidence in the record supporting a finding that offense-based public registration has, at best, no impact on recidivism...laws such as SORA actually *increase* the risk of recidivism...nothing...in the record suggests that the residential restrictions have any beneficial effect on recidivism...the statute makes no provision for individualized assessments of proclivities or dangerousness, even though the danger posed by some...is doubtless far less than that posed by a serial child molester. *Snyder*, [citation].

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Here is where Plaintiff's irrebuttable presumption challenge comes into play: If Defendants claim there is a rational connection in keeping Plaintiff encumbered by the Scheme for the rest of his life because he committed a sex offense 20 years ago, then Defendants are admitting Plaintiff has an irrebuttable presumption of dangerousness. But if the Defendants deny there is an irrebuttable presumption created by the legislature or the Scheme towards the Plaintiff, then the Scheme must be considered punitive, as it is not rationally related to a nonpunitive purpose.

Plaintiff alleges that this factor must be found punitive.

When looking at the excessiveness factor, the courts typically first look to the "magnitude of the restraint" and then to the threat to public safety. *Baker*, 446. In *Kansas v. Hendricks*, 521 U.S. 346, the Supreme Court held that involuntary commitment of sex offenders after their period of incarceration was constitutional because the statute required an individual assessment. In *Smith*, while the Court noted that individual assessment is not needed for registration, in *Hendricks*, "the magnitude of the restraint made individual assessment appropriate." *Smith*, 104.

In the case at bar, Plaintiff contends that the Scheme does not restrain as much as *Hendricks*, it is not commitment, but the Scheme does include more restraints than the statutes at issue in *Smith*. As the *Snyder* Court stated: "SORA puts significant restrictions on where registrants can live, work, and 'loiter,' but the parties point to no evidence in the record that the statutes imposes on registrants are counterbalanced by any positive effects...The

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requirement that registrants make frequent in-person appearances before law enforcement...appears to have no relationship to public safety at all." *Id.* . Justice Ginsburg, in her dissent in *Smith* stated:

> [T]he Act has a legitimate civil purpose; to promote public safety by alerting the public to potentially recidivist sex offenders in the community. But its scope notably exceeds this purpose. The Act applies to all convicted sex offenders, without regard to their future dangerousness. And the duration...is keyed not to any determination of a particular offender's risk of reoffending, but to whether the offense of conviction qualified as aggravated...And meriting the heaviest weight in my judgement, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation. `*Smith*, 116-17, (Ginsburg, J. dissenting).

Conclusion

So is the Scheme punitive? Many courts confronting similar laws have found it is. *See, e.g., Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009) and cases cited *supra.*

Snyder, in concluding the Scheme was punitive stated:

[a] regulatory regime that severely restricts where people can live, work, and "loiter," that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome inperson reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping...communities safe, is something altogether different from and far more troubling than Alaska's first-generation registry law. SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns to them to years, if not a lifetime, of existence on the margins, not only of society, but often...from their own families, with whom, due to school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information...the fact that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the Ex Post Facto

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Clause...as dangerous as it may be to not punish someone, it is far more dangerous to permit the government under the guise of civil regulation to punish people without prior notice. *Does v. Snyder*, 934 F.3d 696, 705 (6th Cir. 2016)

Plaintiff asks this Court to find that the Scheme violates the *Ex Post Facto* Clause of the U.S. Constitution and the State of Illinois Constitution.

REPLY TO DEFENDANTS' BRIEF

III. Plaintiff has not abandoned his as-applied challenge and circuit court did not err in finding the residency restrictions facially unconstitutional.

The circuit court did not err in finding that the residency restrictions were facially unconstitutional. Plaintiff does believe that the circuit court erred in applying rational basis review. Plaintiff argues that strict scrutiny should apply in this case. But even applying rational basis review, the residency restrictions cannot withstand constitutional scrutiny, specifically under the Equal Protection Clause and Substantive Due Process of the Fourteenth Amendment to the United States Constitution and Article I Section 2 of the Illinois Constitution.

1. *Plaintiff did not abandon his as-applied challenge*

Plaintiff first needs to address the ridiculously false claim by State Defendants that he "abandoned [as-applied] claim by objecting to an evidentiary hearing before the circuit court." State's Opening Brief p. 23. This claim is dangerously misleading. Plaintiff objected to an evidentiary hearing only as it pertained to the remand to comply with Supreme Court Rule 18 and the record is crystal clear on this point. Further, it was the circuit court itself that decided an evidentiary hearing was not required. Finally, because the circuit court found that the

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residency restriction was *facially* unconstitutional, an evidentiary hearing was not required.

State Defendants filed a motion to vacate the circuit court's decision and to remand for an evidentiary hearing and a ruling to comply with Supreme Court Rule 18. Plaintiff objected to the evidentiary *only as it pertained to the remand.* Plaintiff's argument was essentially that an evidentiary hearing was not required to comply with Rule 18 and for judicial economy. Plaintiff clearly stated that an evidentiary hearing would be premature at that time and another evidentiary hearing would need to take place once this Court rules in his favor on any number of his as-applied challenges on cross-appeal. This Court then remanded the case back to the circuit court for the limited purpose of complying with Rule 18. The remand order, denied in part, made no mention of an evidentiary hearing therefore none was required to be conducted at that time.

Upon remand, State Defendants attempted to circumvent this Court's limited remand order by attempting to argue that an evidentiary hearing was required to comply with Rule 18. Transcript of Proceedings dated 28 January 2022 p 2-5 ("28 Jan Transcript"). The circuit court even noted that the remand order did not include any order for an evidentiary hearing and that Rule 18 makes no specific reference that it requires an evidentiary hearing to take place to meet its obligations, "I don't see that [Rule 18] requires any type of stipulated facts." 28 Jan Transcript @ p 4.

At that same hearing, Plaintiff put forth his opinion that the parties were there on remand for the express purpose of complying with Rule 18, that this Court already entertained arguments on the evidentiary hearing, that the remand order did not explicitly state that the

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circuit court should conduct an evidentiary hearing so therefore, *at that time*, any evidentiary hearing would not only be improper but would also be in violation of this Court's order. *Id.* p 5-6.

The circuit court then put forth the way in which it was going to proceed: "I need to make a decision for myself whether or not I need evidence to make the Rule 18 findings." *Id.* @ p. 7. The circuit court went on to say further "[i]f I agree with [Defendants], I'm either going to accept stipulated facts from both parties or if you are not in a position to stipulate to facts, I'll set a hearing. If I disagree with him, then I'll just make my Rule 18 findings of record..." *Id.* @ p 8. Therefore, while the circuit court entertained Plaintiff's initial objection, the objection was basically moot as the circuit court made it crystal clear that it would make the decision whether an evidentiary record was required, and it would allow Plaintiff to stipulate to facts or hold an evidentiary hearing.

In the ensuing hearing, dated 16 February 2022 ("16 Feb Transcript") the State Defendants conceded that an evidentiary hearing was not required because the circuit court found the residency restrictions as it works with the Home Daycare Act had a *facial* defect:

> Whether or not [stipulated facts are] necessary kind of depends on a discussion of...the order...we were kind of operating under the assumption...that your Honor's ruling was more of as-applied ruling which is why we were pushing for a stipulated record.
> 16 Feb Transcript p.3

Finally, the circuit court, preempting this argument stated for the record, "[s]o it is clear...I have denied their request to supplement the record with additional facts." *Id.* p 9.

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Therefore, while Plaintiff did object to an evidentiary hearing and/or stipulated facts, the argument from State Defendants that Plaintiff then forfeits his as-applied challenges must fail as the record is clear that State defendants have not been honest with this Court as to the circumstances; no evidentiary record was needed as the statutes, as they work together, were facially unconstitutional; the State Defendants attempted to circumvent this Court's limited remand order; the circuit court made the ultimate decision on whether additional facts were necessary and the circuit court would have given the Plaintiff an ability to either accept stipulated facts or have an evidentiary hearing.

1. *The circuit court was correct in finding the home daycare restriction facially unconstitutional*

The circuit court found the residency restriction, prohibiting a person labelled as a "child sex offender" from living within 500 feet of a home daycare (720 ILCS 5/11-9.3(b-10) was facially unconstitutional. The circuit court found that the definition of "home daycare" as it is defined in the Child Care Act (225 ILCS 10/2.18) and as it interplays with the residency restriction violates both the Equal Protection Clause and the Due Process Clause, specifically substantive due process. While the circuit court did not specifically state if they are violations of the United States or State of Illinois Constitutions, Plaintiff agrees with the Defendants that the analysis would be the same under either Constitution, as the Illinois Constitution does not afford more protection than its federal counterpart.

The Child Care Act defines a day care home as: "[F]amily home which receives more than 3 up to a maximum of 16 children for less than 24 hours per day. The number counted

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includes the family's natural or adopted children and all other persons under the age of 12. The term does not include facilities which receive only children from a single household. (225 ILCS 10/2.18). The circuit court found that this definition and the restriction of those statutorily deemed a child sex offender produces absurd results. As these day care homes are "family homes," they are in residential areas. There are numerous other family homes which include other children, some under the age of 12. For example, in the 500 foot radius around Plaintiff's house, there are estimated to be over 50 children living there.

3. *Equal Protection*

The circuit found, and Plaintiff agrees, that the residency restrictions violate the Equal Protection Clause. As previously stated, the clause under the Illinois Constitution does not offer more protection than that of its federal counterpart. Where Plaintiff respectfully disagrees with the circuit court is in the analysis. The circuit claimed that the residency restrictions do not implicate a fundamental right. Plaintiff alleges that he has a fundamental right to property under both the U.S. and Illinois Constitutions.

Both the state and federal constitutions recognize the right to property as fundamental. U.S. Const. amend. V; amend. XIV; IL Const. Art. 1, Sect. 2. The constitutions' text are in lockstep: no person shall be denied life, liberty or property without due process of the law. Therefore, Plaintiff alleges, there must be a compelling danger to force Plaintiff out of his home.

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Also, Plaintiff alleges that the residency restrictions violate equal protection without even taking into consideration the definition of a home daycare.

(1) *Home Daycare*

Equal protection is denied using the definition contained of home daycare. As the circuit court correctly pointed out, there are two classes of registrants that are homeowners. One is the registrant who lives next door (or within 500 ft. of a home daycare) and those registrants that do not. While the circuit court produced an extreme example, Plaintiff will put forth less of one. Take the registrant that lives within 500 ft of a home with children. Let's say this home has four children living with the parents. That is legal. But, as in the case here, there is a registrant living within 500 ft of a home with one child, and that home takes in three children from three separate households. That is not legal, and the registrant must move.

Further, the law states a home daycare as defined by the home daycare act. It does not say that the home daycare must be licensed. When does a non-licensed home daycare become a home daycare? Is it one day, like in the case of a sleepover? Is it one week in the case of an extended family staying? The restrictions do not make that clear.

(2) *Alternative Equal Protection Grounds*

This case can be decided, facially or as-applied, on alternative Equal Protection grounds. The residency restrictions divide registrants into four distinct categories based on when they purchased their homes:

> It is unlawful for a [registrant] to knowingly reside within 500 feet of a school building or the real property comprising any school that persons under the age of 18 attend.

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> Nothing in this subsection (b-5) prohibits a [registrant] from residing within 500 feet of a school...*if the property is owned by the* [registrant] *and was purchased before July 7, 2000.* 720 ILCS 5/11-9.3(b-5).
> It is unlawful for a child sex offender to knowingly reside within 500 feet of a playground, child care facility, day care home, group daycare home, or a facility providing programs or services exclusively directed toward persons under 18 years of age. Nothing in this subsection prohibits a [registrant] from residing within 500 feet of a playground or a facility providing programs or services...[to children]...*if the property is owned by the* [registrant] *and was purchased before July 7 2000.* Nothing in this subsection prohibits a [registrant] from residing within 500 feet of a child care institution, day care center, or part day care child facility *if the property is owned by...*[registrant]...*and was purchased before June 26, 2006.* Nothing in this subsection prohibits a [registrant] from residing within 500 feet of a day care home or group day care home *if the property is owned by the* [registrant] *and was purchased before August 14, 2008.* 720 ILCS 5/11-9.3(b-10)*(emphasis added).*

The above emphasized portions show the classes created: those who had purchased a home before 2000, those that purchased a home between 2000-2006, those that purchased a home between 2006-2008 and those who purchased a home after 2008. This produces some absurd results. Take the case of the Plaintiff, a person who committed his crime 20+ years ago, who successfully completed treatment and has been offense-free in the community for over two decades. He cannot live anywhere in the restricted areas, even in the case of one opening after he purchased his house or, as in this case, law enforcement was unaware of a prohibited location being there. Compare that to someone who purchased a house in 1999 and was just sentenced to probation. That person is allowed to live near any of the prohibited locations, even though the just convicted person has not gone through treatment, is still serving a sentence and has not been proven to be a law-abiding citizen.

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The residency restrictions do not rationally categorize those deemed child sex offenders into classes that would further protect the community. Rather, the legislature irrationally categorized them into different groups, not by date of conviction or by an individual determination of dangerousness, but by when they purchased a home.

The Seventh Circuit addressed this issue directly in *Miller et al v. Carter*, 547 F.2d 1314 (7th Cir. 1977). The court found that an ordinance, which barred certain felons from obtaining a chauffeur's license, violated the Equal Protection Clause because it treated certain offenders who already had their license differently from those who did not. "[P]laintiff Miller is absolutely barred from obtaining a license, although he was convicted of armed robbery over eleven years ago, while someone who already holds a license may be permitted to retain it, although convicted of armed robbery only yesterday." *Id.* ¶8. Much like the statute in *Miller* where the date the license was obtained was the determining factor, it is the date when the house is obtained that is the determining factor in the residency restrictions.

The *Miller* Court addressed this distinction bluntly:

> Such distinctions among those members of the class of ex-offenders are irrational, regardless of the importance of the public safety considerations underlying the statute or the relevance of prior convictions to fitness...allowing existing licensees who commit felonies to continue to be eligible for licensing undercuts the reasonableness of the basis for the classification, which is that the felony is per se likely to create a serious risk which cannot be sufficiently evaluated to protect the public through individualized hearings...[the statutes] discriminate irrationally among the class of ex-offenders, they violate the equal protection clause of the Fourteenth Amendment. *Id.* ¶9

Both these cases relate to the same thing: property (license v. home) and date the property was acquired.

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This statute directly affects Plaintiff's fundamental right to own, use, and enjoy his property. No matter where he moves, Plaintiff and his children will forever be at risk of being forced out, as the legislature has chosen to place the rights of other property owners, those that wish to open a home daycare, or the community wishing to build a park, over his property rights. There exists no "move to the offender" clause in the statutes. Under the Scheme, like Georgia's, "it is apparent that there is no place...where a [registrant] can live without being continually at risk of being ejected." *Mann v Georgia Dept. of Corr.*, 653 S.E.2d 740, 742 (Ga. 2007). Therefore, Plaintiff alleges that the residency restrictions must be found unconstitutional due to the irrationality of basing the loss of property on the date property was acquired instead of date of conviction or risk to recidivate.

4. Substantive Due Process Violation

Illinois has one of the toughest residency restriction laws in the country. Of the 50 states and Washington D.C., 17 do not have state-imposed residency restrictions; another 9 limit restrictions to only those on probation/parole/supervision or determined high-risk; and 2 more are based on the date of conviction. https://www.probationinfo.org/sor/residence. Illinois is only one of two states (La.) that include home daycares in the restrictions. *Id.* The distances also vary greatly, from 300 ft (Mont.; R.I.) to 3,000 ft (Miss.). *Id.*

Therefore, it is plain to see that residency restrictions are just plain arbitrary. There is no set "safe" distance known to legislatures because residency restrictions have been proven to

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be useless in preventing sexual recidivism. In fact, research has shown that residency restrictions place communities in more danger.

In 2007, the Minnesota Department of Corrections released a study entitled: *Residential Proximity & Sex Offense Recidivism in Minnesota*, https://mn.gov/doc/assets/04-07SexOffenderReport-Proximity_tcm1089-272769.pdf. The study, in conjunction with a study on recidivism rates, tracked 3,166 sex offenders released from prison. Out of those, 224 committed another sex crime. The study proves not one case would have been deterred by a residency restriction law. The report stated "residency restrictions...would likely have, at best, only a marginal effect on sexual recidivism. Although it is possible that a...law could avert a sex offender from recidivating sexually, the chances that it would have a deterrent effect are slim because *the types of offenses it is designed to prevent are exceptionally rare...virtually nonexistent*(in Minn.)*over the last 16 years. Id.* p2. The State of Illinois findings only corroborate the findings from Minnesota. The Task Force stated: "[r]esearch has found that residency restrictions lead to neither reductions in sexual crime, nor recidivism, nor do they act as a deterrent." Task Force p. 12. The Task Force went on to further state: "[o]ne reason for this null finding is that while residency restrictions were premised on preventing sexual abuse by strangers, research has shown most offenders are not strangers to their victims and abuse tends to happen in a private residence rather than identified public locations." *Id.* p.22

Therefore, not only are the residency restrictions not narrowly tailored to fit achieve the goal of public safety as they would be to survive strict scrutiny, but they are also not even

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rationally related to that goal as they are arbitrary, as the studies and comparison to other states show. The legislature is fully aware of this, and has been since 2017, yet they choose not to act. It appears that the legislature is waiting for this Court to strike down the laws for political purposes.

CONCLUSION

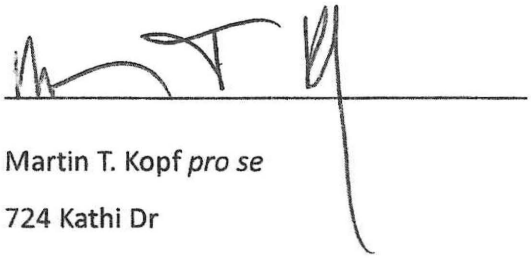
Plaintiff has brought forth many claims that he asks this Court to consider as matters of first impression in Illinois: irrebuttable presumption; many claims of fundamental rights never decided in a case such as this; the fact that Plaintiff has been a law-abiding citizen for 2+ decades, yet he is still not a free man, not because of his court-imposed sentence, but because of the legislatively imposed punishment. Plaintiff has also brought, for the first time that he can find, an equal protection challenge to the residency restrictions.

Plaintiff is asking this Honorable Court to find the Scheme unconstitutional, either asapplied to him or facially on any one of the challenges he put forth in this argument. Or, in the interim, Plaintiff respectfully asks this Court to remand the case back to the circuit court for an evidentiary hearing on any one or all of Plaintiff' as-applied claims. Plaintiff further asks this Court to allow him to keep his house, so he may have a place for children to come visit, assuming the family court allows him parenting time with them.

MARTIN T. KOPF PRO SE

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the 341 (h)(1) table of contents and statements 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 22,524 words.



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CERTIFICATE OF FILING AND SERVICE

I certify that on 28 April, 2023, I electronically filed the foregoing Opening Brief of Plaintiff-Appellee/Cross-Appellant with the Clerk of the Court for the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that the other participants in this action, named below, are registered contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under the penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information and belief.

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