No. 122034

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Petition for Appeal from
	)	the Appellate Court of Illinois,
Plaintiff-Petitioner,	)	Third District,
	)	No. 3-14-0627
v.	)	
	)	There on Appeal from the Circuit
MARC A. PEPITONE,	)	Court of the Twelfth Judicial Circuit,
	)	No. 13 CM 844
Defendant-Respondent.	)	
	)	Hon. Carmen Goodman,
	)	Judge Presiding

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

The appellate court correctly held that section 11-9.4-1(b) of the Criminal Code of 2012 violates substantive due process under rational basis review since permanently banning all child sex offenders and sexual predators from all public park property and buildings, without limitation, is an unreasonable means of protecting the public.

A. Section 11-9.4-1(b) fails the rational basis test since empirical studies rebut the argument that the statute is reasonable and not overbroad.

1. Justice Kennedy's oft-repeated statement that recidivism rates among sex offenders are "frightening and high" is an unsubstantiated proclamation that should no longer provide the basis for upholding unconstitutional legislation.

(b) Statistics patently refute the State's assertion that "[statistics] do demonstrate that public parks are frequently the sites of sex offenses against minors" (St. Br. 14) and, coupled with the House and Senate Debate transcripts, equally call into question the true intent of the Legislature.

B. The extraordinary overbreadth of section 11-9.4-1(b) demonstrates that permanently banning all child sex offenders and sexual predators from all public parkland and public park buildings is not a reasonable means of potentially promoting public safety.

1. The Appellate Court correctly concluded that section 11-9.4-1(b) is overbroad since it criminalizes innocent conduct by making mere presence on public park property a crime, with the additional effect of predominantly and irrationally ensnaring a vast swath of other innocent conduct unrelated to the State's interest.

2. Similar statutes have been upheld by courts specifically because they are narrower in scope than section 11-9.4-1(b) and thus not unreasonably overbroad.

ISSUE PRESENTED FOR REVIEW

Whether section 11-9.4-1(b) of the Criminal Code of 2012 violates substantive due process under rational basis review since permanently banning all child sex offenders and sexual predators from all public park property and buildings, without limitation, is an unreasonable means of protecting the public.

STATUTE INVOLVED

720 ILCS 5/11-9.4-1 (2012) **Sexual predator and child sex offender; presence or loitering in or near public parks prohibited** – reads in pertinent part:

(a) For the purposes of this Section:

"Child sex offender" has the meaning ascribed to it in subsection (d) of Section 11-9.3 of this Code, but does not include as a sex offense under paragraph (2) of subsection (d) of Section 11-9.3, the offenses under subsections (b) and (c) of Section 11-1.50 or subsections (b) and (c) of Section 12-15 of this Code.

"Public park" includes a park, forest preserve, bikeway, trail, or conservation area under the jurisdiction of the State or unit of local government.

(b) It is unlawful for a sexual predator or a child sex offender to knowingly be present in any public park building or on real property comprising any public park.

STATEMENT OF FACTS

The facts in this case are not in dispute. Where additional facts are necessary for an understanding of the issue raised in this appeal, they will be included, together with appropriate record references, in the argument portion of this brief.

ARGUMENT

The appellate court correctly held that section 11-9.4-1(b) of the Criminal Code of 2012 violates substantive due process under rational basis review since permanently banning all child sex offenders and sexual predators from all public park property and buildings, without limitation, is an unreasonable means of protecting the public. 720 ILCS 5/11-9.4-1(b) (2012).

To survive a substantive due process challenge that does not involve a fundamental right, a statute must satisfy rational basis review. Although section 11-9.4-1(b) impinges on certain fundamental rights, such as First Amendment activities, Defendant does not contend that being present in a park is a fundamental right and thus employs the rational basis test in determining the legality of the statute. "Pursuant to [the rational basis] test, a statute will be upheld if it 'bears a reasonable relationship to a public interest to be served, and the means adopted are a reasonable method of accomplishing the desired objective.' [Citation]" *In re J.W.*, 204 Ill. 2d 50, 66-67 (2003). Defendant does not dispute that "protect[ing] users of public parks from child sex offenders and sexual predators" is a public interest. Illinois Senate Debate, *SB 2824, 96th General Assembly, 98th Legislative Day* (March 16, 2010, transcript p. 55) (hereinafter "Senate Debate"). However, Defendant maintains that section 11-9.4-1(b) is unconstitutional since criminalizing the mere presence of a child sex offender or sexual predator in a public park building or on real property comprising any public park, at all times, and without limitation, is overbroad and thus an unreasonable means of achieving the ostensible end of protecting users of public parks.

The appellate court agreed with Defendant and struck down section 11-9.4-1(b) on substantive due process grounds since it fails the rational basis test. *People v. Pepitone*,

2017 IL App (3d) 140627; *People v. Jackson,* 2017 IL App (3d) 150154, ¶ 25 (reaffirming holding in *Pepitone* upon review). In declaring the statute facially unconstitutional, the court explained that the statute (1) is overbroad and "not reasonably related to its goal of protecting the public, especially children, from individuals fitting the definition of a child sex offender or a sexual predator" and (2) "arbitrarily strip[s] a wide swath of innocent conduct and rights" from sex offenders subject to the statute. *Pepitone,* 2017 IL App (3d) 140627, ¶ 24. This Court granted the State's petition for leave to appeal. No. 122034 (May 24, 2017). Accordingly, this Court must now consider whether section 11-9.4-1(b) is arbitrary or unreasonable in determining whether it is constitutional under rational basis review. *In re M.A.,* 2015 IL 118049, ¶ 55; *Doe v. City of Lafayette, Ind.,* 377 F.3d 757, 773 (7th Cir. 2004) (citing *Lee v. City of Chicago*, 330 F.3d 456, 467 (7th Cir. 2003).

A. Section 11-9.4-1(b) fails the rational basis test since empirical studies rebut the argument that the statute is reasonable and not overbroad.

The State argues that, in the name of public safety, it is rational to permanently ban all child sex offenders (and sexual predators), from all public parks and buildings on parkland, including all conservation areas, trails and bikeways under the jurisdiction of the state or of a local unit of government, at all times, irrespective of a sex offender's likelihood to re-offend, and without considering the nature of the particular prior crime, regardless of whether a child or any human is present, or even likely to be present (St. Br. 6, 11). The State's argument relies substantially on the well-settled principle that rational basis review is "highly deferential to the findings of the legislature." (St. Br. 7-8).

While this standard of review admittedly is quite deferential, "it is not 'toothless'" *Pepitone,* 2017 IL App (3d) 140627, ¶ 14 (citing *People v. Jones,* 223 Ill. 2d 569, 596 (2006)), and in performing its duty of judicial review, the Judiciary sits as the last line of

defense in ensuring the Constitution is upheld, including by the Legislature. Thus, a highly deferential standard of review does not equate to complete acquiescence, and nor should it, since it is the responsibility of this Court to ensure that a statute does not violate the rights bestowed by the Constitution upon every American citizen and taxpayer. *See Packingham v. North Carolina*, 528 U.S. __, 137 S. Ct. 1730, 1736 (2017) ("the assertion of a valid governmental interest 'cannot, in every context, be insulated from all constitutional protections.'").

1. Justice Kennedy's oft-repeated statement that recidivism rates among sex offenders are "frightening and high" is an unsubstantiated proclamation that should no longer provide the basis for upholding unconstitutional legislation.

In declaring that "[t]he General Assembly's concern regarding recidivism rates is not merely rational, it is also widely accepted by courts and legislatures," the State offers Justice Kennedy's conclusion that the risk of recidivism for sex offenders is "'frightening and high'" as evidence of the purported rationality behind section 11-9.4-1(b). (St. Br. 11). This comes as little surprise since the phrase "frightening and high" has repeatedly been used by courts as a justification for additional post-release collateral consequences imposed on sex offenders throughout the country.[1] Consequently, it is important to examine the basis of the assertion to form an honest valuation of its worth and utility henceforward.

Justice Kennedy first asserted that "[t]he risk of recidivism posed by sex offenders is 'frightening and high'" when he authored a four-person plurality opinion in *McKune v. Lile*, 536 U.S. 24, 34 (2002) (opinion of Kennedy, J., announcing judgment of the Court).

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[1] A Westlaw search conducted on November 6, 2017, found the phrase "frightening and high" in 115 state and federal judicial opinions throughout the United States, including in a First a Circuit decision issued as recently as September 22, 2017. *United States v. Garcia*, 872 F.3d 52, 55 (1st Cir. 2017).

Smith v. Doe, 538 U.S. 84, 103 (2003) (quoting *McKune*, 536 U.S. at 34). Justice Kennedy supported this conclusion by explaining that the recidivism rate "of untreated offenders has been estimated to be as high as 80%." *McKune*, 536 U.S. at 33 (referencing U.S. Dept. of Justice, Nat. Institute of Corrections, A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii (1988)). In examining the truth of that statement, the authors of a 2015 article in Constitutional Commentary traced the source of that statistic. The authors determined that the only source of that claim was the sentence: "Most untreated sex offenders released from prison go onto commit more offenses – indeed, as many as 80% do." Ira Mark Ellman & Tara Ellman, "*Frightening and High"*: *The Supreme Court's Crucial Mistake About Sex Crime Statistics,* 30 Const. Comment. 495, 498-99 (2015) (hereinafter *Crucial Mistake*). That single sentence, which has provided the basis for a significant amount of American jurisprudence and legislation governing sex offenders, was found in a 1986 article published in *Psychology Today*, a mass-market magazine, not a peer-reviewed journal. *Id*.

The Ellmans further explain that the offhand statement spoke to the effectiveness of counseling programs in reducing recidivism, was not accompanied by any supporting reference, and was made by a man with no scientific credentials who earned his living selling such counseling programs to prisons. *Id.* at 499. The authors were thus able to conclude:

> "[The Supreme Court's] endorsement has transformed random opinions by self-interested nonexperts into definitive studies offered to justify law and policy, while real studies by real scientists go unnoticed. The Court's casual approach to the facts of sex offender re-offense rates is far more frightening than the rates themselves..." Ellman, *Crucial Mistake*, 30 Const. Comment. at 508.

Like the Ellmans, The Sixth Circuit has also recognized the logical fallacy in championing statistics that are accompanied by neither context nor reliable source, and explained that "significant doubt [has been] cast by recent empirical studies on the pronouncement in *Smith v. Doe*, that '[t]he risk of recidivism posed by sex offenders is "frightening and high."'" [citations] *Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016)). Significantly, the statement in *Snyder* is supported by actual empirical data that, as will be shown below, not only debunks the notion that sex offenders are far more likely to reoffend than any other convicted criminal, but also betrays the unreasonableness of banning all child sex offenders from all public parks, at all times.

2. Statistics showcase the overbroad nature of section 11-9.4-1(b) where they (a) further call into question the proclamation that the recidivism rate among sex offenders is "frightening and high," and (b) demonstrate that few, if any, sex offenses occur in parks.

The State argues that statistics that demonstrate that section 11-9.4-1(b) is rational are "unnecessary" for it to be upheld. (St. Br. 14). While that may be so, nor can "vague, undifferentiated fears" as they pertain to a particular group of people support an ordinance, even under rational basis review. *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 449 (1985).

The State also explains that "this Court would uphold [section 11-9.4-1(b)] under the rational basis test even if the General Assembly's belief that public parks present particular dangers were merely 'rational speculation unsupported by evidence.'" (St. Br. 12). While unsupported speculation may suffice to strip a group of individuals of the rights they are due as taxpayers and citizens, when readily available statistics demonstrate the overbreadth and unreasonable means of section 11-9.4-1(b), they cannot and must not be ignored.

(a) Comprehensive empirical studies cast serious doubt on the rate of recidivism amongst the non-homogenous group of people classified as "sex offenders."

Notwithstanding readily available statistics found in reports from the United States Bureau of Justice and elsewhere, unsubstantiated assertions about sex offender recidivism were made when House/Senate Bill 2824 was offered at the third reading in the House. Specifically, Representative Franks, who sponsored the bill, stated: "the reason we need this legislation is because research shows that child sex offenders are significantly more likely to reoffend;" and, "I think we're dealing with a different class of offender; one whose empirical evidence indicates are much more likely to reoffend." Illinois House Debate, *SB 2824, 96th General Assembly, 128th Legislative Day* (April 21, 2010, transcript p. 49, 52) (hereinafter "House Debate"). Franks did not provide any authority in support of his conclusory statements.

Representative Reboletti also presented his view as to why Bill 2824 should be passed, explaining, "If you can't find sex offenders and you're out looking for them, here we are, we're just enforcing a condition to make sure that when these people who recidivate at 40 or 50 or 60 percent of the time, once they get out of prison, we don't want them back where they commit their crimes." House Debate (transcript p. 63). And, in presenting Bill 2824 to the Senate for a third reading, Senator Althoff, again without providing a source, commented that "convicted sex offenders are four times more likely to reoffend." Senate Debate (transcript p. 55).

While the pronouncements described above may have been useful in convincing the Legislative body to pass Bill 2824, they are nonetheless contradicted by comprehensive recidivism studies which demonstrate that "[s]ex offenders do not recidivate at far higher

rates than other offenders, as is often believed." *Sex Offender Laws*, Human Rights Watch, Vol. 19, No. 4(G), p. 28. Instead, "numerous, rigorous studies analyzing objectively verifiable data – primarily arrest and conviction records – indicate sex offender recidivism rates are far below what legislators cite and what the public believes." *Id.* at pp. 26-28. So, although "[s]ome politicians cite recidivism rates for sex offenders that are as high as 80-90 percent[,]" the available science refutes those assumptions, showing instead that "most (three out of four) former sex offenders do not reoffend and most sex crimes are not committed by former offenders." *Id.* at pp. 26-27. In fact, "one study suggests that sex offenders (a category that includes a great diversity of criminals, not just pedophiles) are actually *less* likely to recidivate than other sorts of criminals." See *Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016), (emphasis in original) (referencing Patrick A. Langan, *et. al., Recidivism of Sex Offenders Released from Prison in 1994* (2003)).[2]

More specifically, in 2003, the Bureau of Justice conducted and published the most comprehensive recidivism study to date. Patrick A. Langan, *et al.*, Bureau of Justice Statistics, Dep't of Justice, *Recidivism of Sex Offenders Released from Prison in 1994* (2003).[3] The study examined recidivism patterns of male sex offenders released from prisons in 1994 across fifteen states, including Illinois. Of the 272,111 total released prisoners, 9,961 were classified as sex offenders. Comparing the re-arrest rates of sex

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[2] The 6th Circuit mistakenly attributes *Recidivism of Sex Offenders Released from Prison in 1994* (2003) to Lawrence A. Greenfield, but it was Patrick A. Langan, et al. who authored that report. Lawrence A. Greenfield authored a separate report under the auspices of the Bureau of Justice Statistics, Dep't of Justice, which is entitled *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* (Feb. 1997), which is available at https://bjs.gov/content/pub/pdf/SOO.PDF

[3] Available at https://goo.gl/nLe1BA.

offenders and non-sex offenders during the three-year testing period, the researchers found that the overall re-arrest rate of sex offenders was far lower than that of non-sex offenders. Langan, *et al.,* at 24. The study also computed the re-arrest rates of sex offenders and non-sex offenders who were arrested specifically for a sex offense and concluded the following:

> "Compared to non-sex offenders released from State prisons, released sex offenders were 4 times more likely to be rearrested for a sex crime. Within the first 3 years following their release from prison in 1994, 5.3% (517 of the 9,691) of released sex offenders were rearrested for a sex crime. The rate for the 262,420 released non-sex offenders was lower, 1.3% (3,328 of 262,420)." *Id.*

Notably, based on the above statistics it is over 6 times more likely that a sexual assault would be committed by a non-sex offender released prisoner since, out of the total number of individuals who were arrested for a sexual offense, only 13% were prior sex offenders. Langan, *et al.,* at 24. But perhaps even more significant for demonstrating the overbroad nature of section 11-9.4-1(b) is that only 2.2% of child sex offenders reoffended within 3 years, accounting for 209 victims, making non-sex offender released prisoners 16 times more likely to commit a sex offense than child sex offenders. *Id.* at 31.

(b) Statistics patently refute the State's assertion that "[statistics] do demonstrate that public parks are frequently the sites of sex offenses against minors" (St. Br. 14) and, coupled with the House and Senate Debate transcripts, equally call into question the true intent of the Legislature.

Neither the State (in its brief) nor the Legislature (at the House and Senate debates) have demonstrated any logical nexus between parks and child sex offenses, much less sex offenses committed against children by repeat offenders in parks. Instead, the House and Senate Debates lend weight to the notion that Bill 2824 was passed (1) based on the very type of "vague, undifferentiated fears" pertaining to a particular group of people that our Supreme Court has held cannot support an ordinance, even under rational basis review

(*City of Cleburne*, 473 U.S. at 449), and (2) for political popularity, or, more accurately, to avoid political disfavor. Further, the one study the State relies on in support of its argument that permanently banning all child sex offenders from all public parks and park buildings is reasonable, instead supports Defendant's argument that permanent banishment is the precise opposite.

Statistics

In the 22-page transcript of the House Debate, an attempt at explaining the logic behind section 11-9.4-1(b) is fleetingly made twice. Representative Franks described that bank robbers "rob the banks because that's where the money is. And that's why child sex offenders go to parks, because that's where the kids are." House Debate (transcript p. 70). And Representative Reboletti provided the following justification for the banishment: "Well, guess what, when you rape a child you lose a hell of a lot of privileges here in this state and you should. And you know what, if you can't go to a park, too bad. It's that simple. We don't want sex predators near children." House Debate (transcript p. 67). Similarly, in the spare, one-paragraph-long statement by Senator Althoff that preceded a majority vote in favor of passing Senate Bill 2824, no factually nor statistically supported mention is made of the specific danger that previously-convicted child sex offenders pose specifically to people in every type of public park/building. Senate Debate (transcript p. 55).

However, data supplied in one of the U.S. Department of Justice reports previously mentioned plainly contradicts the notion that parks are particularly attractive to sex offenders and particularly dangerous for potential victims. Lawrence A. Greenfield, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault*, U.S. Department

of Justice (Feb. 1997). According to the report, "[n]early 6 out of 10 rape/sexual assault incidents were reported by victims to have occurred in their own home or at the home of a friend." *Id*. at 3. Another 10% of victims stated the crime occurred on a street away from home, while 7.3% of victims identified the scene of the crime as a parking lot/garage. Parks were not singled out, but "[a]ll other locations" accounted for only 26.1% of the victimizations. *Id*. at 34. Although the study does not indicate what percentage of "all other locations" parks account for, it is reasonable to conclude that, at the very most, parks must account for less than 7.3% of all other locations or parks would have been specifically listed the way parking lot/garage was.[4]

What's more, the study the State cites in its brief only bolsters the conclusion that, at the absolute most, only an extremely small percentage of sexual assaults occur in parks, including against adult victims. (See St. Br. at 14) (referencing Michael Planty, Ph.D., et al., *Female Victims of Sexual Violence*, Bureau of Justice Statistics Special Report, p. 4, Table 2 (1994-2010), available at https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf). Significantly, Table 2 of the study, the table to which the State cites, shows that from 2005-2010 over 85% of sexual assaults occurred at a location other than a park, and only an undefined percent of sex offenses that constituted the 15% of sex offenses that occurred at other locations represented parks. *Id.* Table 2 breaks down the locations where sex offenses occurred as follows:

- 67% - at or near the victim's home or at or near the home of someone known by the victim
- 10% - commercial place / parking lot or garage
- 8% - school
- 15% - open area/public transportation/other

[4] It is worth noting that it is entirely possible, even if unlikely, that parks do not constitute any percentage of the 26.1% of other locations.

Notably, once again parks are not given their own category. Their absence allows for the reasonable conclusion that parks, at the very most, account for less than 8% of sexual assaults or they would have been specifically enumerated the way "school" was. Even if parks were to be the location of 7.9% of sexual assaults, and that is highly unlikely since 9 separate types of locations were listed as falling under the 15% "other" umbrella category which includes parks, there is no indication whatsoever that it is repeat offenders who commit whatever the small fraction of sex offenses is that occur in parks.

Notwithstanding these logical deductions, the State, relying on the very statistics listed above, misleadingly asserts that the report "confirmed that the highest percentage of sexual assaults of females outside of their homes occurs in 'locations such as … a park, field, or playground not on school property.'" (St. Br. 14). This statement is not an accurate portrayal of the information provided by the study. The State pulled its truncated list of "park, field or playground…" from the full list of nine places, each of which accounted for too small of a percentage of sex offenses to qualify as a separate category. Specifically, the study defines the 15% "other" locations as "[i]nclud[ing] locations such as[:]

- an apartment yard;
- a park, field or playground not on school property;
- a location on the street other than that immediately adjacent to home of the victim, a relative, or a friend;
- on public transportation;
- in a station or depot for bus or train;
- on a plane;
- or in an airport." Michael Planty, Ph.D., et al., *Female Victims of Sexual Violence*, Bureau of Justice Statistics Special Report, p. 4, Table 2 (1994-2010).

It also bears pointing out that the State distorted the appellate court's holding by claiming that "[e]ven the study cited by the appellate court found that 'fields/woods' are common sites of sexual violence against minors. (St. Br. 14) (citing Howard N. Snyder,

Nat'l Center for Juv. Just., *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* 6 (2000)).[5] Not only did the study neither implicitly nor explicitly find that "fields/woods" are *common* sites of child sex offenses, but nor did the appellate court offer the study to demonstrate such. Instead, the court cited the study in support of its "hold[ing] that section 11-9.4-1(b) is facially unconstitutional because it is not reasonably related to its goal of protecting the public, especially children, from individuals fitting the definition of child sex offender or sexual predator." *Pepitone,* 2017 IL App (3d) 140627, ¶ 24. The court appended the following footnote to its holding:

> "An example of the tenuous link between public parks and sex offenses committed by strangers against children can be seen in reports from the United States Bureau of Justice Statistics; for example, in a study published in 2000, 77% of sexual assaults against minors occurred in a residence and of the 23% that occurred outside a residence, the most common locations 'were roadways, fields/woods, schools, and hotels/motels.' [citation] *Pepitone,* 2017 IL App (3d) 140627 at ¶ 24 n.4.

The holding of the appellate court, the study itself, and the context in which the court offered the study (i.e. in support of its holding that the link between public parks and sex offenses is so tenuous that section 11-9.4-1(b) simply is not reasonable) suffice to expose the disingenuousness of the State's assertion that the study found that "'fields/woods' are common sites of sexual violence against minors." (St. Br. 14).

So, although Senator Althoff opined at the Senate Debate that, "[b]y their nature, parks have many obscured views and other distractions that . . . offer opportunities for sex offenders to access potential victims," not only does her statement lack statistical support, but if its logic were to be re-deployed, then it could be used to ban sex offenders from no

[5]Available at: https://www.bjs.gov/content/pub/pdf/saycrle.pdf.

less than everywhere. Senate Debate (transcript at 55). For example, if the goal is to protect "potential victims," which the Legislature deems to be both "[c]hildren and lone adults," from sex offenders in places that provide "obscured views" (*id.*), then what limits the Legislature from banning sex offenders from public parking garages, public libraries, public hospitals, public restrooms, public transportation (which frequently contains lone passengers in enclosed moving cabins, obscured from anyone's view), public sidewalks, and the list goes on. But one need not resort to rhetorical questions to identify that section 11-9.4-1(b) is facially unconstitutional in that the means it employs to protect "potential victims" are vastly overbroad and, therefore, irrational.

Defendant notes that the State culled 13 cases where a sex offense either occurred in a park or was somehow loosely connected to a park (i.e. a victim was picked up on the street by offender and driven to a park where the offense then occurred, or picked up in a park and driven elsewhere). (St. Br. 13-14). These 13 cases span a 39-year period, the final judgment date for the oldest in time being 1968, and are inapposite. For one, the string citing tends to indicate that, on average, a sex offense occurs in a park once every three years. Secondly, the State did not provide any indication that any of the sex offenses described in any of the 13 cases was perpetrated by a repeat offender, much less a repeat child sex offender. As such, it is entirely likely that, had section 11-9.4-1(b) been in effect over the duration of the cases listed by the State, it would not have even reached the crimes described in those cases.

In sum, statistics belie the efficacy of the parks statute in preventing sex offences. Statistics demonstrate that: (1) the State's generalized interest in "public safety cannot justify policies that impose serious burdens on entire categories of individuals when many

of them actually present little risk" to the public, and especially where "more accurate assessment criteria employing established actuarial measures, *** could easily be employed instead." Ellman, *Crucial Mistake*, 30 Const. Comment. at 506; and (2) banning child sex offenders from parks has that effect alone since, at a minimum, 93% of sex offenses do not occur in parks and only 2.2% of child sex offenders reoffend. If section 11-9.4-1(b) is reviewed through an empirically-grounded lens that does not become clouded by emotion, speculation or retributive motives, its indiscriminate, ungrounded and irrational nature is markedly clear.

House and Senate Debates – Bill 2824

After specifically noting that there is "'conflicting evidence on [the rate of recidivism],'" the State is fast to profess, "[b]ut the Necessary and Proper Clause 'gives Congress the power to weigh the evidence and to reach a rational conclusion, for example, that safety needs justify postrelease registration rules.'" (St. Br. 15) (citing *United States v. Kebodeaux*, 133 S. Ct. 2496, 2503 (2013)). While Congress may have the power to reach rational conclusions based on a weighing of evidence, the House and Senate Debate transcripts make it strikingly clear that the Legislature did not so much as consider *any* evidence, much less carry out a measured approach to weighing the actual, readily available evidence (presented above) against speculative concerns about public safety.

Rather, the House Debate tends to indicate that the predominate motivation for passing the legislation was political in nature. To elaborate, Representative Fritchey encouraged House members to "check [their] moral feelings about these heinous crimes and look at the legality of what [they're] doing," imploring the Members to "put [their] primary responsibility over that of emotions or mail pieces and vote 'no.'" House Debate

(transcript, pp. 53, 69). He even prophetically stated that, "[section 11-9.4-1(b)] may be so overly broad it would not withstand court scrutiny." *Id.* at 69. Nonetheless, he realized that, "so many [Members] are going to vote for this Bill for political cover and to avoid a political hit and to avoid the mail piece, not because it affects a policy, not because there's a reason to keep [child sex offenders] away from a park where there's no kids around…" House Debate (transcript p. 53).

Other representatives acknowledged the same political motivation behind voting for the Bill. For example, Representative Dunkin, who characterized the Bill as "almost as a political ups," explained that "…no Member's going to vote against this Bill because none of us, especially those of us, well, actually, none of us, whether you have children or not, would do anything that's going to even give the appearance of coddling a sex offender." House Debate (transcript p. 56-57). Like Representative Fritchey, Representative Dunkin expressed his own reservations about the Bill when he recognized that "our child sex offender laws are all over the place and there's really, there seems to be no rhyme or reason or no rhythm when it comes to enforcing sex offenders." *Id*. Representative Sacia voiced his concerns, stating that, although he voted to get the Bill out of committee, he "[has] great reservations," yet realized that "[a] lot of people are going to feel compelled to vote for [the Bill]." *Id.* at 59.

Representative Washington noted that sex offenders "pay taxes to supplement forest preserves" and "[t]hey pay taxes to supplement public usage, and asked, "..when do we cut bait here… are there not families affected, are there not rights? Can you really legislate morality?" *Id.* at 60-61. Nevertheless, Washington also identified that "…this is a good political legislation. This is good legislation to win elections." *Id.*

And, as far as the Senate Debate, what is notable is that there was no debate at all. Not one question was asked. Instead, as described above, the sole justification for stripping rights from a heterogeneous grouping of people was that parks "have obscured views." (transcript, p. 55). So, although the State avers that, here, "the General Assembly could weigh the evidence and rationally conclude that keeping child sex offenders out of public parks protects children," not only did the General Assembly fail to weigh *any* evidence, but actual evidence contradicts the State's averment. (St. Br. 15).

When the statistics put forth above are combined with the insight that the Legislature's motivation for passing Bill 2824 was political in nature and not public safety, then, in the words of a North Carolina Justice, "there is no intellectually honest basis for stating that the [State's] ban on access to parks bears any significant relationship to the protection of citizens from sexual predators." See *Standley v. Town of Woodfin*, 186 N.C. App. 134, 160 (2007) (Justice Geer, dissenting) (finding a city ordinance that banned child sex offenders from a town's parks unconstitutional since it was unreasonable in light of statistics and alternative, less extreme restrictions).

B. The extraordinary overbreadth of section 11-9.4-1(b) demonstrates that permanently banning all child sex offenders and sexual predators from all public parkland and public park buildings is not a reasonable means of potentially promoting public safety.

The appellate court characterized the "sweep" of section 11-9.4-1(b) as "extraordinary." *Pepitone,* 2017 2017 IL App (3d) 140677, ¶ 22. For one, by permanently criminalizing the mere presence of a child sex offender in a public park and in public park buildings, section 11-9.4-1(b) has the *de facto* effect of outright precluding child sex offenders from participating in an amazingly vast array of innocent activities. Further, section 11-9.4-1(b) impinges on certain fundamental rights, such as First Amendment

activities, in significant ways. Finally, when ordinances similar to section 11-9.4-1(b) have been upheld, it has been precisely because their sweep is confined in scope such that they fall short of being unreasonably overbroad, unlike section 11-9.4-1(b).

1. The Appellate Court correctly concluded that section 11-9.4-1(b) is overbroad since it criminalizes innocent conduct by making mere presence on public park property a crime, with the additional effect of predominantly and irrationally ensnaring a vast swath of other innocent conduct unrelated to the State's interest.

The Appellate Court was correct in following this Court's precedents in striking section 11-9.4-1(b) as facially unconstitutional since it "contain[s] no culpable mental state" and "reach[es] countless types of innocent conduct, much like walking a dog as [Defendant] was doing at the time he was arrested." *Pepitone,* 2017 IL App (3d) 140677, ¶ 20. Due process limits the Legislature's otherwise broad discretion to fashion criminal offenses. *Madrigal*, 241Ill. 2d at 466; U.S. Const., amend. XIV; Ill. Const. 1970, art 1 §2. This Court has "repeatedly held that a statute violates the due process clauses of both the Illinois and United States Constitutions if it potentially subjects wholly innocent conduct to criminal penalty without requiring a culpable mental state beyond mere knowledge." *People v. Madrigal,* 241 Ill. 2d 463, 467 (2011); see also *People v. Wright*, 194 Ill. 2d 1, 28 (2000); *People v. Carpenter*, 228 Ill. 2d 250, 268 (2008); *People v. Wick*, 107 Ill. 2d 62, 65 (1985); *People v. Zaremba,* 158 Ill. 2d 36, 42 (1994). In other words, "wrongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 252 (1952).

Accordingly, a rational Legislature does not intend to sweep in innocent conduct unnecessary to a statute's purpose. If a statute "can be read to apply to wholly innocent conduct, it does not bear a rational relationship to a legitimate State purpose." *Zaremba*, 158 Ill. 2d at 39. Conversely, if a statute "capture[s] the precise activities that it was meant

to punish," it should be upheld. *Madrigal*, 241 Ill. 2d at 476 (quoting *People v. Williams*, 235 Ill. 2d 178 (2009)).

In *Madrigal*, this Court struck down an identity theft statute that criminalized "knowingly us[ing] any personal identification information . . . of another for the purpose of gaining access to any record of the actions taken, communication made or received, or other activities or transactions of that person, without the prior express permission of that person." 241Ill. 2d at 464. The purpose of the statute was "to protect the economy and people of Illinois from the ill-effects of identity theft." *Id*. at 467. Since the statute failed to require a culpable mental state beyond mere knowledge, this Court found that it reached innocent conduct unrelated to its purpose, such as "using the internet to look up how their neighbor did in the Chicago Marathon" or "a husband who calls a repair shop for his wife, without her 'prior express permission,' to see if her car is ready." *Id*. at 470-71, 472. Because the statute applied to these scenarios, the law was not a rational way of addressing the problem of identity theft. *Id*. at 473.

Similarly, in *Carpenter*, this Court invalidated a statute that prohibited owning a motor vehicle that the owner "knows to contain a false or secret compartment." 228 Ill. 2d at 268. The purpose of the statute was to "protect the police and punish those who hide guns and illegal contraband from officers." *Id*. at 268-69. But, the statute did not require the container's contents to be contraband. *Id*. at 269. In light of the missing connection between the statute's purpose and its broad sweep, this Court held that the statute unconstitutionally "criminalize[d] innocent conduct" and "violate[d] due process." *Id*. at 269; see also *Wright*, 194 Ill. 2d at 28 (invalidating statute that criminalized knowing failure to comply with vehicle title record-keeping laws since it punished innocent conduct

unrelated to its purpose of establishing a system to prevent or reduce the transfer or sale of stolen vehicles); *Zaremba*, 158 Ill. 2d at 38-42 (invalidating theft statute that criminalized knowingly obtaining or exerting control over stolen property in law enforcement custody, such as an evidence technician's act of taking for safekeeping proceeds of a theft from the police officer who recovered it); *Wick*, 107 Ill. 2d at 66 (invalidating aggravated arson statute that criminalized knowingly damaging a building by fire which results in injury to a fireman or policeman because it could criminalize innocent conduct, such as a farmer's act of demolishing his deteriorated barn if a fireman standing by were injured at the scene).

This Court has appropriately rejected State efforts to abandon this line of authority. *Madrigal*, 241 Ill. 2d at 477 (citing among other cases, *Staples v. United States*, 511 U.S. 600, 610 (1994)). The State does not repeat that argument here. Instead, the State asserts that the appellate court "misapplied rational basis review" by "conclud[ing] that because it could conceive of 'innocent conduct,' such as walking a dog, that could be criminalized under the statute, the legislature was irrational for enacting it." (St. Br. 19). This is an inaccurate characterization of the appellate court's finding that "[section 11-9.4-1(b)] contains the type of overly broad sweep that doomed the statutes in *Wick, Zaremba, K.C., Wright,* and *Carpenter*." *Pepitone*, 2017 IL App (3d) 140677, ¶ 23.

To elaborate, in applying rational basis review to section 11-9.4-1(b), the appellate court was tasked with "[[Step] 1] identifying the public interest that the statute is intended to protect, [[Step] 2] examining whether the statute 'bears a reasonable relationship' to that interest, and [[Step] 3] determining whether the method used to protect or further that interest is 'reasonable.'" [citation], *People v. Diestlehorst*, 344 Ill. App. 3d 1172, 1184 (2003).

In maintaining that the appellate court misapplied rational basis review, the State incorrectly conflates Step 2 with Step 3. That is, the State claims that the appellate court's analysis was complete after Step 2 in that, "'"[if] there is any conceivable set of facts that show a rational basis for the statute, the statute would be upheld.'"' (St. Br. at 19) (quoting *Pepitone*, 2017 IL App (3d) 140677, ¶ 14) (quoting *In re M.A.*, 2015 IL 118049, ¶ 55). As the appellate court correctly identified, however, the analysis continues to Step 3, such that, "to pass constitutional muster under rational basis review, a statute must not be arbitrary or unreasonable," *Pepitone*, 2017 IL App (3d) 140677, ¶ 15 (citing *In re M.A.*, 2015 IL 118049, ¶ 55).

When the appellate court correctly applied rational basis review, it determined that the statute fails Step 3 since the method used (permanently banning all child sex offenders from all public park land and buildings) is not a reasonable means of protecting the public, especially children, from individuals classified as a child sex offender. *Pepitone*, 2017 IL App (3d) 140677, ¶ 24. And, in conducting the Step 3 analysis, the Appellate Court found this Court's long line of "innocent conduct" precedent useful. For one, mere presence in a public park, without more (i.e. culpable mental state), is innocent conduct in and of itself. Taken a step further, an extraordinary amount of innocent activity is *de facto* criminalized by the ban, such as walking one's dog in a park, which greatly contributes to the unreasonableness of section 11-9.4-1(b). See *Pepitone*, 2017 IL App (3d) 140677, ¶ 23 (offering numerous examples of the "extensive" list of innocent activities that routinely occur in public park buildings or on public park property and in which individuals subject to the ban cannot partake). Walking a dog was but one of countless "innocent conduct"

examples which, cumulatively, constituted but one of several reasons offered by the appellate court to display the overbreadth, and thus unreasonableness, of the statute.

Even the State admits that statutes fail rational basis review when they "predominantly and irrationally affect[ ] conduct unrelated to the State's interest." (St. Br. 22). To claim that section 11-9.4-1(b) does not predominantly and irrationally affect conduct unrelated to the State's interest in protecting children is untenable if not outrageous. Even a vastly truncated list of innocent activity, unrelated to the State's interest, that is ensnared by section 11-9.4-1(b) should suffice to demonstrate its overbreadth. For example, child sex offenders can *never* partake in any of the following innocent activities:

- visit the Field Museum, the Shedd Aquarium, the Art Institute, the Adler Planetarium, the Chicago History Museum, or the Museum of Science and Industry, all of which are public buildings on park land, and all of which double as event space for adult evening charity fundraisers and other events

- attend a Chicago Bears game, or any of the countless concerts hosted at Soldier Field, both of which tend to be predominantly adult activities, since Solider Field rents the land on which it sits from the Chicago Park District

- participate in any event hosted in Grant Park, which has been the location of countless protests, movements, political rallies (including the 2008 Presidential election night event), demonstrations, concerts, Fourth of July celebrations, and victory parades for the Chicago Blackhawks and Chicago Bulls, etc. over the years.

- buy fresh produce at the Green City Farmers Market in Lincoln Park, or any of the many other farmers markets that are setup on public parkland

- visit the Lincoln Park Zoo

- run in the Chicago Marathon, since the start and finish lines are in Grant Park and the race runs through Lincoln Park, or run in any other of the numerous races that start and finish in Grant Park

- attend the Taste of Chicago, Lollapalooza, or the Blues Fest, all of which occur in Grant Park

- be a member of the Chicago Audubon Society, which is run by the Chicago Park District, and which hosts bird-watching walks in various public parks in Chicago

- join or participate in any of the 2,837 "Adult" leagues and classes sponsored by the Chicago Park District such as, single-sex or coed softball, basketball, tennis, hockey, rugby, or volleyball leagues, and yoga, swimming, sign language, music, painting, photography, creative writing or ballet classes, and nor can they be employed as an instructor or coach for any of these activities[6]

- use any public golf course, tennis court, basketball court, soccer field, softball/baseball diamond, or swimming pool, which hints at economic discrimination since Illinois citizens who can afford to join private golf clubs and the like are not in the majority

- enjoy a hike, picnic or excursion in Starved Rock, or any of the other 72 State Parks, 6 State Forests, 26 State Wildlife Areas, 12 State Recreation Areas, or 2 State Nature Preserves in Illinois[7]

- ride on a bus line that travels through Lincoln Park, or any other park (see House Debate, transcript p. 68-69, where representative Fritchey discusses the limitations child sex offenders face in terms of which bus lines they are permitted to use).

- bike, walk, or jog along the lakefront in Chicago

- go to the public beach in Chicago

- attend any event in a park such as a concert, parade, movie or family gathering

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[6] The Chicago Park District limits its "Adult" sports leagues to individuals who are either 18 or older. A complete list of the classes and leagues for the current, Fall 2017 season, can be found by visiting: https://apm.activecommunities.com/chicagoparkdistrict/Activity_Search?Page=1 (last visited November 7, 2017)

[7] A full list of Illinois public park land where child sex offenders are banned from entering can be found at http://www.stateparks.com/illinois_parks_and_recreation_destinations.html (last visited November 7, 2017). The list of public park land and public buildings on parkland, along with bikeways, trails, and conservation areas under the jurisdiction of a unit of local government, and from which child sex offenders are permanently banned from entering, is far too extensive to list here. Suffice to say, it amounts to essentially all public space.

- take their own children or dogs to a park
- bird watch, hunt, camp or photograph on public park land
- perform construction, landscaping or maintenance on parkland, or be employed as a curator, docent, janitor, ticket seller, etc. in a museum, or any other public building on park land
- walk or fish along a Riverwalk
- visit popular attractions like Buckingham Fountain and the Bean.

The above list is far from exhaustive. Rather, it presents a small collection of both very specific as well as more general innocent activity in which child sex offenders are permanently precluded from partaking. As the list makes clear, public parks encompass far more than places with playgrounds which, admittedly, can be attractive to children. Children, however, are not even permitted to participate in the countless *adult only* or nighttime activities that take place either on public park land or in buildings on such land.

Additionally, the list displays that certain First Amendment fundamental rights are significantly impinged, such as the freedom of speech and the right to peaceably assemble. U.S. Const. amend. I. Child sex offenders are barred from assembling in a park that is hosting a holiday festivity or parade, a political rally, protest, march, or movement. Justice Kennedy enunciated well the significant and historical connection between parks, a traditional public forum, and the First Amendment in the recent decision, *Packingham v. North Carolina*, 580 U.S. ____, 137 S. Ct. 1730 (2017), when he stated:

> "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is the quintessential forum for the exercise of First Amendment rights. See *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989). Even in the

> modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire."[8]

Accordingly, for the reasons described above, this Court should agree with the appellate court and find that the "overly broad sweep" of section 11-9.4-1(b), which has the effect of "stripping a wide swath of innocent conduct and rights [a child sex offender] has as a citizen and taxpayer," violates due process "because it is not reasonably related to its goal of protecting the public." *Pepitone*, 2017 IL App (3d) 140677, ¶¶ 23-24.

2. Similar statutes have been upheld by courts specifically because they are narrower in scope than section 11-9.4-1(b) and thus not unreasonably overbroad.

In describing its overbreadth, the appellate court compared section 11-9.4-1(b) to its predecessor statute, 720 ILCS 5/11-9.4(a) (2003) (repealed by Pub. Act 96-1551 (eff. July 1, 2011)), explaining that "the legislature has attempted to actually fit statutes in other instances [i.e. 720 ILCS 5/11-9.4(a) (2003)] within the purview of their stated government interest." *Pepitone*, 2017 IL App (3d) 140677, ¶¶ 20-22. The abandoned provision read:

> "It is unlawful for a child sex offender to knowingly be present in any public park building or on any real property comprising any public park *when persons under the age of 18 are present in the building or on the grounds and to approach, contact, or communicate with a child under 18 years of age*, unless the offender is a parent or guardian of a person under 18 years of age present in the building or on the grounds. (emphasis added)."

The predecessor statute was challenged on substantive due process grounds in *People v. Diestlehorst*, 344 Ill. App. 3d 1172 (2003). In upholding section 11-9.4(a) of the

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[8] In *Packingham v. North Carolina*, 137 S. Ct. at 1735 (2017), the Supreme Court struck, as unconstitutional on First Amendment grounds, a North Carolina statute making it unlawful for a registered sex offender to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.

Code as constitutional, the Appellate Court, Fifth District, first determined that "[i]t is clear from a reading of the statute that section 11-9.4(a) is intended to protect children from known sex offenders." *Id*. at 1184. With that public interest in mind, the court then found that the statute passed the rational basis test since the restrictions the statute placed on known child sex offenders bore a reasonable relationship to achieving its end-goal.

The court based its decision largely on the following reasoning: that, because "[s]ection 11-9.4(a) does not prohibit a known child sex offender from being present in a public park and enjoying its amenities," and because the statute "make[s] an exception for a known child sex offender who is a parent or a guardian of a person under the age of 18," the statute is not overly broad and, so, it does not violate a defendant's substantive due process rights. *Id*. at 1185. It is not a far jump to deduce from the court's reasoning that, had the statute been devoid of these narrowing parameters and instead provided for an all-out ban on all child sex offenders from enjoying a park's amenities or spending time with offspring in a park, then the statute would be irrationally overbroad and not reasonably related to the protection of children from child sex offenders.

Significantly, although section 11-9.4(a) was repealed and replaced by section 11-9.4-1(b), an essentially identical version of section 11-9.4(a) is current law contained in 720 ILCS 5/11-9.3(a-10) (2017). Section 11-9.3(a-10) reads as follows:

> "It is unlawful for a child sex offender to knowingly be present in any public park building, a playground or recreation area within any publicly accessible privately owned building, or on real property comprising any public park *when persons under the age of 18 are present in the building or on the grounds and to approach, contact, or communicate with a child under 18 years of age*, unless the offender is a parent or guardian of a person under 18 years of age present in the building or on the grounds." (emphasis added).

Without commenting on the constitutionality of section 11-9.3(a-10), Defendant notes, just as the appellate court recognized, that this statute at least reflects an attempt on the part of the Legislature to tailor the legislation to the desired end of preventing sex offenses against children in parks. *Pepitone,* 2017 IL App (3d) 140677, ¶ 21. But perhaps even more noteworthy is that section 11-9.3(a-10) does *not* criminalize presence in parks. Under section 11-9.3(a-10), child sex offenders *can* be present in parks, though they are barred from specific conduct (i.e. interacting with children in parks who are not their own offspring). Given that section 11-9.3(a-10) is current law, in addition to section 11-9.4-1(b), it would seem the former statue, which is more tailored to the Legislature's intent and thus ostensibly more reasonable, should be the one of the two statutes to prevail.

Like the *Diestlehorst* opinion, the decision in *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004), is instructive in analyzing the reasonableness of section 11-9.4-1(b). Defendant acknowledges that his argument is at odds with the majority's holding in *City of Lafayette*; however, not only was the holding quite narrow, but there are distinctions to be drawn as well as a well-reasoned, vociferous dissent that supports Defendant's argument. There, similar to, though less sweeping than, section 11-9.4-1(b), the city of Lafayette issued a letter informing the plaintiff that he was banned from all public parks in the city. The plaintiff sued the city to have the ordinance declared unconstitutional, both as a violation of his First Amendment right to freedom of thought, and on the ground that it deprived him of his fundamental rights under substantive due process, including "a generalized right to movement" and the right "to enter parks and to loiter for other innocent purposes." *Id*. at 769. The majority rejected the plaintiff's contentions, holding that the ordinance did not violate substantive due process since, although "not unimportant," the

right to enter and loiter in parks is an "uncomfortable fit" with those rights previously determined by the Supreme Court to be fundamental, such as the right to marry, reproduce, rear one's child as one so chooses, bodily integrity, and others. *Id*. at 770.

Notably, the majority discussed at length the "demonstrable threat of sexual abuse" presented by Doe himself, the only person impacted by the ordinance. *Id*. at 774. In fact, the reason the majority believed the city had a compelling interest to ban Doe from public parks was based strictly on Doe's unique characteristics. For example, the majority found it important that Doe was an admitted "sexual addict who always will have inappropriate urges toward children," emphasizing that "[t]he City has banned only one child sex offender, Mr. Doe, from the parks, and they have banned Mr. Doe only because of his near-relapse in January of 2000 when he went into the park to engage in psychiatric brinkmanship." *Id*. at 773.

Finally, while Doe did not raise the issue of the ban being overbroad, the dissent was "puzzled by the omission of that issue from [Doe's] discussion," noting that the city would typically ban an individual from public parks for a week or, at most, a summer, but certainly not a lifetime. *Id*. at 775, and see n.6. Unlike *City of Lafayette,* section 11-9.4-l(b) imposes an all-out ban on every child sex offender, and imposes the ban state-wide. Although the plaintiff in *City of Lafayette* invoked a strict scrutiny analysis by alleging a substantive due process violation of a fundamental right, the court there also found that the ordinance passed the rational basis test since it was reasonable to ban Doe from city parks based on Doe's specific threat of reoffending against children. In contrast, it appears that the Illinois Legislature has made no attempt to determine the level of danger posed by any particular child sex offender since, in passing section 11-9.4-1(b), it imposed an all-out ban

on all child sex offenders without conducting any sort of analysis as to the likelihood of reoffending.

Thus, *City of Lafayette* supports Defendant's argument that a categorical, permanent ban on all child sex offenders from ever stepping foot in a public park or building on public park land, throughout the entire state, regardless of an individual's likelihood to reoffend or specific prior offense, cannot withstand a substantive due process challenge. See also *Brown v. City of Michigan City*, 462 F.3d 720, 733 (7th Cir. 2006) (upholding city ordinance that banned *one* convicted child sex offender from city parks, who frequented them once or twice daily, and who exhibited atypical behavior such as observing families and repeatedly watching park patrons with binoculars).

Similarly, the Appellate Court, Second District, examined the constitutionality of section 11-9.3 of the Code, a statute which places affirmative restrictions on child sex offenders in an attempt to protect children, in *People v. Stork*, 305 Ill. App. 3d 714 (1999). As the *Stork* court described, section 11-9.3 makes it unlawful for a child sex offender to "knowingly be present in a school zone *'unless the offender *** has permission to be present*.'" *Id*. at 722 (emphasis in original). The court reasoned that "[b]y construing the statute to proscribe only conduct performed 'without lawful authority,' the possibility that the statute reaches innocent conduct is avoided." *Id*. (emphasis added). The court upheld the statute as constitutional, finding that the statute bore a reasonable relationship to protecting school children from known sex offenders by "prohibiting known child sex offenders from having access to children in schools, *where they are present in large numbers*." *Id*. (emphasis added).

The statute at hand, though similar to those ruled on in *Diestelhorst*, *City of Lafayette*, and *Stork*, differs from them in significant ways. For one, the statutes and ordinance that were held to be constitutional were far narrower in scope in that they contained at least one limiting provision. The *Diestlhorst* statute not only required that children under the age of 18 be present in a park, but also a concrete act by the child sex offender, namely, approaching or attempting to interact with a child, in order for the statute to be triggered. The ordinance in *Lafayette* pertained only to one demonstrably high-risk individual, and only preluded that individual from entering parks in a limited geographical area. See *Pepitone*, 2017 Il App (3d) 140627, ¶ 22 ("[section 11-9.4-1(b)] also obviously makes no attempt to assess the dangerousness of a particular individual, which is the major distinguishing factor between this case and cases such as *Doe v. City of Lafayette*"). Finally, the *Stork* statute limited a child sex offender's ability to be present in a school zone, a location that admittedly has a direct connection to children, but, importantly, permitted the presence of a sex offender should permission be obtained.

Unlike the statutes and ordinance described above, section 11-9.4-l(b) does not restrict a known child sex offender's access to a person, much less a child, for the statute to be violated. Rather, section 11-9.4-l(b) criminalizes mere presence by restricting every known child sex offender's access to places, and does so without caveat. Because section 11-9.4-1(b) neither requires the presence of any person of whatever age, nor does it provide any exception should certain qualifications be met (as does section 11-9.3), the statute casts an impermissibly broad net and is not reasonably related to the public interest of protecting people.

In sum, far from rational, the sweeping and unsubstantiated nature of the means employed by section 11-9.4-1(b) to "protect users of public parks" showcases just how arbitrary the statute is. Instead of banning child sex offenders from public parks when persons under the age of 18 are present; or during certain hours; or banning them from parks that have playgrounds; or permitting sex offenders to be present in a public park if it is not wooded, or if accompanied by a person who is not a known sex offender; or requiring a permit for registered sex offenders to enter parks for specific purposes; or limiting the ban only to parks frequented by minors; or limiting the ban only to individual sex offenders based on conduct suggesting a risk of re-offending in a park; or incorporating any number of reasonable limitations on the statute's breadth, the statute imposes an unreasonable affirmative disability on all child sex offenders by legislating their permanent banishment from all public parks.

As described previously, the overbreadth of section 11-9.4-1(b) means that, amongst other things, a child sex offender can never walk a dog in a public park, go hunting in a public forest preserve, participate in a rally (in exercise of First Amendment rights) held in a public park, take a shortcut through a park, attend a concert or parade hosted in a public park, coach his/her child's Little League team or merely, as the *Diestelhorst* court put it, enjoy a park's amenities, all of which are entirely innocent and legitimate activities.

Section 11-9.4-1(b) is by far the most restrictive statute aimed at child sex offenders in Illinois to date. While less restrictive statutes have been held to be constitutional, it is precisely because they were less restrictive that they were found to pass constitutional muster. Section 11-9.4-1(b) is a prime example of the continuing trend of, with each passing enactment, making it harder and harder for a person to avoid both persecution and

prosecution as a convicted sex offender. While some regulation of convicted child sex offenders may be appropriate, section 11-9.4-1(b) goes too far in the restraints it places on them.

Simply put, the salutary objective of protecting the public welfare is not a free license for government restriction of constitutional rights and liberties. The sweeping scope of section 11-9.4-1(b) confirms the need for meaningful judicial checks to ensure that such provisions do not exceed constitutional limits. As such, this Court should agree with the appellate court and find section 11-9.4-1(b) facially unconstitutional.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court affirm the appellate court's vacatur of his conviction and holding that section 11-9.4-1(b) is unconstitutional on its face.

Alternatively, if this Court declines to accept Defendant's argument that section 11-9.4-1(b) is facially unconstitutional, Defendant respectfully requests that this cause be remanded to the Appellate Court, Third District, for a decision on the undecided issue of whether the statute was unconstitutionally applied to Defendant in violation of the *ex post facto* clause.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Katherine M. Strohl, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 35 pages.

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No. 122034

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Petition for Appeal from
	)	the Appellate Court of Illinois,
Plaintiff-Petitioner,	)	Third District,
	)	No. 3-14-0627
v.	)	
	)	There on Appeal from the Circuit
MARC A. PEPITONE,	)	Court of the Twelfth Judicial Circuit,
	)	No. 13 CM 844
Defendant-Appellee.	)	
	)	Hon. Carmen Goodman,
	)	Judge Presiding

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that, on November 13, 2017, an electronic copy of the Brief and Argument in the above-entitled cause was (1) filed with the Clerk of the above Court, using the Court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses listed below. Additionally, on the same date, one copy was mailed to Defendant-Appellee in an envelope deposited in a U.S. mailbox in Ottawa, Illinois, with proper postage prepaid. The original and twelve copies of the Brief and Argument will be sent to the Clerk of the above Court upon receipt of the electronically submitted filed stamped brief.

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