**THIS APPEAL INVOLVES A DELINQUENT MINOR PROCEEDING UNDER THE JUVENILE COURT ACT**
No. 1-15-3047

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

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| IN THE INTEREST OF<br><br>ADAM C., a minor<br><br>Respondent-Appellant. | )))<br>)))<br>))) | Appeal from the Circuit Court of Cook County, Illinois<br><br>No. 14 JD 1155<br><br>Honorable Cynthia Ramirez, Judge Presiding. |

# REPLY BRIEF FOR RESPONDENT-APPELLANT

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## I. The provisions of the Illinois Sex Offender Registration and Notification Act that apply to juveniles violate the United States and Illinois constitutions, in that they require all children adjudicated delinquent of certain offenses to register as a sex offender for at least five years, and require limited dissemination of the juvenile's confidential records, without first considering the child's recidivist tendencies.

The State fails to address how Illinois's juvenile sex offender registration and notification laws ("juvenile SORNA laws") are unconstitutional because they categorically apply to ***all*** juveniles adjudicated delinquent of sex offenses, without any assessment of a juvenile's risk of re-offending. Apart from its response to Adam's procedural due process challenge, the State merely argues that the application of SORNA laws to juveniles in general is constitutional. The State also repeatedly invokes cases that addressed the constitutionality of adult SORNA laws. But because the inability of judges to consider whether a ***juvenile*** is at risk of re-offending before imposing registration violates substantive and procedural due process, the Eighth Amendment, and the proportionate penalties clause, the juvenile SORNA laws are unconstitutional.

The State contends Adam has "attempt[ed] to self-define the challenged provisions" by referring to the laws as the "juvenile SORNA laws," rather than separately as the SORA law and the Notification law. (St. Br. 4-6) However, "SORA and the Notification Law work in tandem to regulate sex offenders." (St. Br. 5, *citing People v. Cornelius*, 213 Ill. 2d 178, 181 (2004).) Thus, the State's argument is ultimately just a complaint against how Adam refers to

these laws.

The State also contends Adam does not have standing to challenge the penalty provision for a violation of the registration laws, 730 ILCS 150/10, because he has not been charged with a violation of the laws. (St. Br. 5-6) However, in *People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶¶18-23, an adult defendant – who had also not been charged with any violation of the registration laws – not only challenged this penalty provision, but also challenged provisions of the Criminal Code that subjected him to criminal penalties if he was present in certain locations. The State contended that the defendant lacked standing to challenge those additional provisions because "those laws are independent of SORA and the Notification Law and they are 'not applicable to [defendant]." *Id.* at ¶26. However, *Avila-Briones* rejected the State's argument. It found the defendant had standing because "'the fact that a party may be forced to alter his behavior so as to avoid penalties under a potentially illegal regulation is, in itself, a hardship.'" 2015 IL App (1st) 132221, ¶35, *quoting United States v. Loy*, 237 F.3d 251, 257 (3d Cir. 2001). This Court explained that the "defendant will have to be on guard to ensure that his day-to-day behavior does not run afoul of the tight controls on his movements and behaviors," and that "judicial economy would certainly be served by ruling on defendant's claims now, rather than requiring him to file a separate civil suit challenging the statues at issue or to purposely violate the statutes in order to seek judicial review." *Id.* at ¶35-36.

Here, as the State advances elsewhere in its brief, the penalty provision challenged by Adam (730 ILCS 150/10) is crucial to the registration laws, in that it provides the "teeth" to ensure the laws have effect. (St. Br. 12-13, 38-39) Thus, this penalty provision has been considered when analyzing the constitutionality of the Act. *See People v. Malchow*, 193 Ill. 2d 413, 417 (2000).

Next, the State correctly contends that this Court is obligated to follow the law of the Illinois Supreme Court. (St. Br. 7) In Adam's opening brief, he identified prior cases that have analyzed the SORNA laws. (Resp. Br. 7-42) However, he also explained how those cases either did not address the specific issues raised here (Resp. Br. 10, 13, 31), or how changes in the underlying circumstances or the laws themselves warranted that the issue be revisited. (Resp. Br. 16-18, 31-33)

The State contends Adam's citation to out-of-state cases is inappropriate because there is no uniformity of sex offender registries throughout the country. (St. Br. 10-11) Yet, when Adam relied on a case from another state, he explained the differences between the SORNA laws in that state to Illinois. Moreover, the State never contends that any of these distinctions undermine Adam's arguments. Thus, these cases may be relied on as persuasive authority. *See Andrews v. Gonzalez*, 2014 IL App (1st) 140342, ¶23.

Incidentally, the State contends erroneously that "[f]ederal minimum standards exist that require the states to include some juveniles in their registries and notification systems." (St. Br. 10-11, fn. 3) Under the Adam

Walsh Child Protection and Safety Act of 2006, states must impose certain registration requirements on juvenile sex offenders, or be assessed a penalty in grants allocated to the states under a separate program. 420 U.S.C. §§3750. However, this Act does ***not*** require states to include juveniles in their notification laws. After the Counsel of State Governments issued a resolution "strongly oppos[ing] SORNA's application to juvenile sex offenders," the Attorney General decided states need ***not*** disclose information about juvenile sex offenders, even to schools or other organizations, to avoid the financial penalty. *See In re C.P.*, 967 N.E.2d 729, 739 (Ohio 2012). Moreover, many states do not comply with the national guidelines. The Illinois Justice Commission noted in 2014 that 11 states and the District of Columbia do not have a juvenile registry, another 19 only impose the registry through individualized risk assessment, and over half of the remaining states apply only to the oldest juveniles. (Resp. Br. 21-22)

Finally, the State contends disingenuously that Adam has not made a facial challenge because he relied on his own circumstances to argue that the statutes are unconstitutional. (St. Br. 8-9) In every instance where Adam discussed his own case, he had already argued that the juvenile SORNA laws were facially unconstitutional. (Resp. Br. 7, 14, 26-27, 30) He included facts about his own case strictly to further illustrate that principle.

The State's contention that a proper facial challenge must demonstrate the juvenile SORNA laws would be unconstitutional even to "recidivist child-

rapist murders" (St. Br. 8-9) also fails. Again, Adam does not challenge the application of SORNA laws in general to juveniles, but argues the laws are unconstitutional because they do not require an individualized determination that registration is necessary. Under this argument, even those ultimately deemed to be "recidivist child-rapist murderers" should first receive a hearing where their risk of reoffending is established.

### A. The juvenile SORNA laws violate substantive due process.

#### 1. Strict Scrutiny

While *In re J.W.*, 204 Ill. 2d 50 (2003), held that requiring juveniles to register as sex offenders does not violate substantive due process, the defendant in that case did not contend that any fundamental right was violated, and thus the Court did not consider whether strict scrutiny should apply. *Id*. at 67. The State disputes this argument, citing *Avila-Briones*, 2015 IL App (1st) 132221. (St. Br. 15) While *Avila-Briones* did assert that *J.W.* analyzed this issue, *Id*. at ¶74, *Avila-Briones* was incorrect. *See J.W.*, 204 Ill. 2d at 67.

On the merits, the State does not dispute that the juvenile SORNA laws fail strict scrutiny. Instead, the State argues that they do not infringe on any fundamental rights sufficient to warrant strict scrutiny. First, the State contends incorrectly that Adam has claimed he has "a substantial liberty interest in living 'without government interference,'" and that "this exact argument" was rejected in *Avila-Briones*. (St. Br. 116) Adam instead argued

that appearing in person to register infringes on liberty interests of juveniles, especially since juveniles may be dependent upon their family for transportation, and since any violation is a strict liability felony offense. (Resp. Br. 10-11) As the *amicus* explains at 26-27, the reporting obligations are severe, and the risk that the child will make a mistake is significant. *See* 730 ILCS 150/3, 150/6.

As held in *People v. Dodds*, 2014 IL App (1st) 122268, ¶38, the risk of suffering a criminal conviction for failing to comply with registration laws places "a severe constraint on a defendant's liberty," even for adults. The State contends *Dodd* is inapplicable because it only allowed a defendant to withdraw his guilty plea because he was misled as to the SORNA laws. (St. Br. 17) While true, this Court still allowed the adult defendant to withdraw his plea because it recognized that the burdens of registration placed a severe constraint on his liberty. *See id*. at ¶38 ("[m]andatory registration under the SORA is arguably as severe as involuntary commitment or deportation, since it has stigmatizing and far-reaching consequences into every aspect of the registrant's life"; "because a violation of the SORA is a strict liability offense punishable by jail time, lifetime registration places a severe constraint on a defendant's liberty"). This Court should make this same conclusion when analyzing the constitutionality of the juvenile SORNA laws.

Next, despite the State's contention that "every Illinois court that has addressed the issue has determined that the challenged laws do not implicate

a fundamental right," the cases cited by the State do not address whether a fundamental interest was infringed by the juvenile SORNA laws. (St. Br. 17) *People v. Adams*, 144 Ill. 2d 381, 390-91 (1991), and *J.W.*, 204 Ill. 2d at 67, only considered the laws under the rational basis test. In *Avila-Briones*, 2015 IL App (1st) 132221, ¶¶73-80, *People v. Grochocki*, 343 Ill. App. 3d 664, 669 (3d Dist. 2003), *People v. Logan*, 302 Ill. App. 3d 319, 332 (2d Dist. 1998), *Cornelius*, 213 Ill. 2d at 205, and *Doe v. Tankeske*, 361 F.3d 594, 597 (9th Cir. 2004), the courts addressed the impact of registration laws on adults. Finally, in *In re T.C.*, 384 Ill. App. 3d 870, 874-75 (1st Dist. 2008), the defendant did not challenge the juvenile SORNA laws, but argued instead that the Juvenile Court Act violates due process because it denies minors the right to a jury trial except in certain circumstances. Though he did assert that being subjected to juvenile SORNA laws entitled him to a jury trial, the court only considered whether the SORNA laws in place in 2004 implicated a fundamental liberty interest. *Id.* at 874. As the court explained, at that time registration entailed "signing a written statement annually, in person, attesting that such person is a sex offender," along with providing a picture and fingerprints, as well as a duty to report any changes in address, school or employment. *Id.* As the State concedes (St. Br. 37), the registration laws applicable to Adam are much more cumbersome. (Resp. Br. 31-32)

The notification requirements implicate additional fundamental interests, including the right to privacy. The State notes that in *In re Lakisha*

*M.*, 227 Ill. 2d 259 (2008), held that juvenile delinquents have a "diminished expectation of privacy." (St. Br. 19) Yet, *Lakisha M.* only held that juveniles have a diminished expectation of privacy in terms of providing information about their delinquency adjudications to ***law enforcement***. The Court also suggested juveniles do possess a right of privacy under the Illinois Constitution and the Juvenile Court Act to keep their delinquency records confidential from the general public. *See id*. at 273 ("The provisions of our Juvenile Court Act that afford minors greater privacy protections do so with respect to the general public."); and at 280 ("the [juvenile DNA indexing] statute does not unreasonably invade respondent's privacy [under the Illinois Constitution] because the genetic analysis information derived from the DNA samples is not disseminated to the general public, but only to law enforcement officials"). While the State correctly contends that the Illinois Constitution only prohibits unreasonable violations of privacy (St. Br. 19) *(see* Ill. Const. 1970, art. I, §6), the juvenile SORNA laws unreasonably disseminate information about a juvenile's sex offense, even when the juvenile is unlikely to sexually reoffend.

The State correctly asserts that the Court held again in *In re Jonathan C.B.*, 2011 IL 107750, ¶89, that juveniles adjudicated delinquent of a felony have a diminished interest in privacy. Nonetheless, the Juvenile Court Act, 705 ILCS 405/1-7, still provides juveniles with a heightened privacy interest as compared to adults. While the Act precludes information about juvenile sex offenders from being sealed or expunged (St. Br. 20), it limits who may inspect

those records. 705 ILCS 405/5/901(1). Where the juvenile SORNA laws override that statutory privacy protection, they infringe on rights ordinarily protected in Illinois. *See People v. Dipiazza*, 778 N.E.2d 264, 271 (Ct. App. Mich. 2009) (adult defendant whose crime would not be considered a conviction, as long as he completed an assignment, "suffered a disability and losses or rights or privileges" by being included in sex offender registry because it "created public access to compiled information that was otherwise closed to public inspection").[1]

The juvenile SORNA laws also infringe upon juveniles' constitutional rights to pursue happiness and to receive a remedy for injuries to reputation.

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[1]Citing *In re Phillip C.*, 364 Ill. App. 3d 822, 827 (1st Dist. 2006), the State contends that "Illinois has [already] rejected [an] argument that SORA implicates [a] juvenile offender['s] right to privacy under [the] state or federal constitution." (St. Br. 20) However, Adam does not allege an independent violation of his privacy, but argues only that strict scrutiny is warranted under substantive due process analysis. *See Karabetsos v. Village of Lombard*, 386 Ill. App. 3d 1020, 1022 (2d Dist. 2008) ("It should be noted here [when addressing a substantive due process claim] that 'fundamental right' is not synonymous with 'constitutional right.' ... if the challenged conduct implicates an explicit constitutional right, it would be proper to assess the conduct with reference to that provision."). While the court determined in *Cornelius* and *Malchow* that the right to privacy was not even ***implicated*** by the SORNA laws, those cases involved adults. *See Cornelius*, 213 Ill. 2d at 196 (adult notification law does not infringe right to privacy because adult convictions are already public record).

The parties agree that mere stigma is not enough; but that harm to reputation must be accompanied by a loss of present or future employment, or create a stigma that is capable of being proved false. *Lyon v. Dep't of Children & Family Servs.*, 209 Ill. 2d 264, 273 (2004); *In re J.R.*, 341 Ill. App. 3d 784, 799 (1st Dist. 2003). Adam and the *amicus* have shown how these "plus" factors are implicated by the juvenile SORNA laws. (Resp. Br. 13-16; *Amicus* Br. 4-19)

First, the laws impact the ability of juveniles to obtain future employment because they can impede a juvenile's ability to pursue higher education. (Resp. Br. 14-15; *Amicus* Br. 15-19) The State concedes that the right to pursue a profession is a protected property and liberty interest. (St. Br. 23) But citing *Coldwell Banker Residential Real Estate Services, Inc. v. Clayton*, 105 Ill. 2d 389, 397 (1985), and *Lawson v. Sheriff of Tippecanoe County*, 725 F.2d 1136, 1138 (7th Cir. 1984), the State argues that Illinois does not protect "a general future interest in being employed at any particular job." (St. Br. 23) In *Lawson*, the court held that an employee fired from her job had not asserted a constitutionally protected interest because she was not entitled to work at a particular job. *Id*. Yet the court also explained that she ***would*** have cited a valid liberty deprivation, if her employer had fired her for a publicly announced reason that affected her ability to obtain other jobs. *Id*. *See also Lyon*, 209 Ill. 2d at 273 (due process implicated where plaintiff, a teacher, was placed on registry of suspected child abusers because he was effectively barred from pursuing his chosen occupation). The juvenile SORNA laws do not

simply deny children a particular job, but they broadly affect an ability to obtain employment by impeding access to higher education. (Resp. Br. 14-16)

The State notes that the particular school into which Adam was accepted gave no indication that it would rescind his admission once notified of his sex offender status. (St. Br. 23-24) Yet, as the State notes, a facial challenge does not turn on one set of facts alone. Adam's probation officer explained that many institutions of higher education ***do*** rescind offers of admission, once information about a sex offender is disclosed, or alternatively take back offers of financial assistance. (C. 185-86) The State contends that this assertion "defies common sense," since there are no restrictions on federal financial aid for incarcerated juveniles. (St. Br. 23) Yet the fact that juvenile delinquents may be able to apply for federal financial aid does not mean that they will not lose scholarships or financial aid received from private or state institutions. Moreover, even if juvenile sex offenders are able to still attend college, the manner in which their status must be disclosed to the school (730 ILCS 152/121) could impact their reputation with teachers and fellow students, ostracizing them and negatively impacting their education. (Resp. Br. 14; *Amicus* Br. 18-19)

A juvenile's right to pursue a trade is further impacted by the fact that the juvenile notification law also gives law enforcement discretion to disseminate registration information to ***anyone***, if the officer believes that person's safety ***may*** be compromised. 730 ILCS 152/121. Thus, the juvenile's

registration information could be disseminated directly or indirectly to an employer. As the *amicus* explains at pages 17 and 18, this disclosure can drastically affect a juvenile's ability to find a job.

As also explained (Resp. Br. 15-16; *Amicus* Br. 6-14), an additional "plus" factor is established where the information conveyed by the dissemination of a juvenile's status as a sex offender falsely impugns his reputation by suggesting that he is likely to sexually reoffend. *See May v. Meyers*, 254 Ill. App. 3d 210, 213 (3d Dist. 1993) (harm to reputation is not limited to facts disclosed, but also considers what individual who receives information may reasonably understand it to mean).

Where the juvenile SORNA laws impact numerous liberty interests, strict scrutiny is warranted. Because the State does not dispute that the laws do not employ the least restrictive means consistent with attaining the intended goal, they are unconstitutional. (Resp. Br. 16, 22)

**2. Rational Basis**

The Illinois Supreme Court held in 2003 that the juvenile SORNA laws were rationally related to the protection of the public. *J.W.*, 204 Ill. 2d at 67-72. Nonetheless, Adam cited numerous cases that have held that changes in underlying circumstances may warrant a finding that laws once held constitutional no longer relate to a legitimate purpose. (Resp. Br. 17-18) The State does not dispute these cases, or their application here, but contends disingenuously that Adam is trying to "analogize his conduct" to the facts of

those cases. (St. Br. 25-26) Here, *J.W.* was based on a finding of a "direct relationship between the registration of sex offenders and the protection of children." 204 Ill. 2d at 67-72. But 11 years later, the Illinois Juvenile Justice Commission determined that Illinois's juvenile SORNA laws actually create "significant obstacles to public safety." Illinois Juvenile Justice Commission, *Improving Response to Sexual Offenses Committed by Youth* (2014), 4, 42-45. Since no court has considered the juvenile SORNA laws in light of this report, *stare decisis* is not implicated.

The State does not dispute the Commission's findings that most juvenile sex offenders will not reoffend, that the registration laws interfere with rehabilitation, and that requiring all juvenile sex offenders to register hinders public safety. (Resp. Br. 18-22) Instead, the State argues that the report is unreliable because it focuses on the best interests of sex offenders, when "the legislature must also examine what is [] in the interest of public safety and potential risk to future victims... ." (St. Br. 26) Yet, these interests ***were*** important to the Commission. *See* IJJC Report at 7. (C. 236) ("... it is the intent of the Commission to help reduce sexual victimization and the harm it causes by advancing public policy and law that prevents sexual victimization, addresses the harm done to victims, and strengthens Illinois families and communities"). Yet, the Commission ultimately concluded that requiring youth to register "without regard to risk does not enhance public safety," and instead creates "significant obstacles" to public safety. *Id*. at 8. (C. 237)

The State asserts that the Commission's recommendations were directed at the legislature. (St. Br. 7) Regardless, the report also shows that the current juvenile SORNA laws are not rationally related to the interest they were intended to create. Thus, whatever the legislature does in the future, the current practice of requiring all juvenile sex offenders to register is unconstitutional.

The State notes that *Avila-Briones*, 2015 IL App (1st) 132221, ¶¶83-84, held that a law is not infirm simply because it is over-inclusive. (St. Br. 25) Yet, the Commission did not merely find the juvenile SORNA laws over-inclusive, but showed how the laws are not furthering the interests they were designed to advance.

Finally, the State argues that requiring registration "is a reasonable means of furthering the goal of rehabilitating a juvenile sex offender by keeping her or him under the watchful eyes of law enforcement, thus providing some impetus and incentive to control his or her behavior." (St. Br. 27-28) But as explained in the opening brief and acknowledged by the Commission, Illinois already meets these ends. (Resp. Br. 21) A sex offender evaluation is required before the juvenile is given a dispositional sentence, and judges may confine juveniles or enter orders of probation requiring them to, *inter alia*, appear in person before any person or agency, attend programs, and successfully complete sex offender treatment. 705 ILCS 405/5-701, 5-710, 5-715. These programs promote rehabilitation and keep watch over the juvenile,

but the registration laws hinder rehabilitation. (Resp. Br. 20-21) Moreover, Adam does not argue that ***no*** juvenile sex offender should be required to register. Thus, if registration did further rehabilitation, it could still be imposed on those who need it, following a hearing where risk was assessed.

**B. The juvenile SORNA laws violate procedural due process.**

In *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 201-02 (2009), the court held that juvenile SORNA laws do not violate procedural due process because they are offense-based, and minors have procedural safeguards during the delinquency proceedings which result in their adjudications. However, this classification system itself violates procedural due process. (Resp. Br. 23-30) The State notes that *Connecticut v. Doe*, 538 U.S. 1, 8 (2003), held that procedural due process does not forbid states from making offense-based classifications. (St. Br. 29) However, *Doe* addressed adult sex-offender registration. *Id*. at 3-4. Since *Doe*, the Court has held repeatedly that laws permissible for adults may not be constitutional for children. *Miller v. Alabama*, 132 S.Ct. 2455 (2012); *J.D.B. v. North Carolina*, 131 S.Ct. 2694 (2011); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

The State contends that *Roper*, *Graham*, *Miller*, and *J.D.B.* have no applicability to a procedural due process claim because they involved the eighth amendment or *Miranda* custody analysis. (St. Br. 29-30) However, Adam did not apply the underlying substantive analyses of these decisions to

his procedural due process claim; he cited these cases to show how constitutional analysis is different for adults and juveniles. Thus, the fact that the Court allowed offense-based registry classifications for adults does not mean it would approve of offense-based classifications for children. Moreover, in light of the trend to mandate different rules for children – both inside and outside the Eighth Amendment – the failure of the juvenile SORNA laws to allow judges to consider a juvenile's youth before subjecting him to the registry violates procedural due process. *See C.P.*, 967 N.E.2d at 736-37 (Ohio's offense-based classification system violated rights of juveniles to due process, especially in light of instruction from U.S. Supreme Court to treat juveniles differently from adults); *J.B.*, 107 A.3d at 7 (Pennsylvania's sex offender registry laws violated juveniles' due process rights because they removed judges' ability to consider juvenile's rehabilitative prospects or likelihood of recidivating).[2]

**1. Private interest at issue.**

In arguing that no private interest is affected by the juvenile SORNA laws, the State refers to its arguments with respect to substantive due process. (St. Br. 31, 33) Yet, when addressing procedural due process, courts have been

[2]The State notes that, in *In re M.A.*, 2015 IL 118049, ¶44, the Illinois Supreme Court found that the categorical registration of juveniles in the Violent Offender registry comports with procedural due process. (St. Br. 29) Yet, since *M.A.* addressed a different statute, it is not binding. Moreover, *M.A.* did not address the differences between youth and adults.

reluctant to find that being labeled as a sex offender does not implicate any liberty interests at all. *See People v. Cardona*, 2012 IL App (2d) 100542, ¶47 (addressing procedural due process claim regarding adult SORNA laws, after acknowledging that sex offender registrants "certainly" face stigma and restraints, and noting that higher courts are reluctant to find sex offender registration does not implicate a liberty interest).

**2. Risk of erroneous deprivation and probative value of additional or substitute procedural safeguards.**

The State contends that the risk of an erroneous deprivation of liberty is "minimal" because, as the Court found in *Konetski*, 233 Ill. 2d 185, the juvenile procedure leading to adjudication satisfies due process. (St. Br. 34) However, finding a juvenile guilty of a certain offense is not enough to prove he is currently dangerous, and thus should be subjected to the sex offender registry. As explained in the opening brief, the laws allow erroneous deprivations of liberty, because juveniles like Adam – who have already been shown to be low-risk under factors created by the legislature (730 ILCS 150/3-5) – are still required to register. (Resp. Br. 26-27)

Citing the Illinois Administrative Code (20 Ill. Admin. Code §1200.30), the State argues that Illinois already "guard[s] against factual errors in the registry." (St. Br. 34) However, this procedure only allows for correction of factual errors, such as remaining on the registry after a registration period has ended. *Id.*

**3. The government's interest.**

The parties agree that the State has an interest in including some juveniles on the registry. (St. Br. 34-35) This does not diminish the value of requiring an individual determination of dangerousness before placement. (Resp. Br. 28)

**4. Fiscal or administrative burden.**

The State asserts that Illinois has a "fiscal and administrative interest in reducing the cost and burden of additional court proceedings related to sex offenders." (St. Br. 34-35) This argument is hollow, since the State does not address how juveniles adjudicated delinquent of sex offenses already receive a sex offender assessment before disposition (705 ILCS 405/5-701); or how the additional factors to consider at a registration termination hearing are also available at the dispositional hearing. (Resp. Br. 29) Allowing a juvenile court to use this information before placing a juvenile on the registry conserves costs, avoiding the need for another hearing five years later. It also preserves resources in monitoring sex offenders by not requiring law enforcement to track low-risk juveniles.

The State contends that a cost-benefit analysis should be directed at the legislature. (St. Br.35) However, this analysis is a specific factor to consider under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Moreover, the juvenile SORNA laws deprive juveniles of several liberty interests without an adequate opportunity to be heard. Thus, while it might ultimately be up to the legislature to ***craft*** juvenile SORNA laws that meet constitutional standards

(St.Br. 35), this Court may also declare that the current laws do not meet those standards.

### C. The juvenile SORNA laws violate the Eighth Amendment and the proportionate penalties clause.

The State notes that the U.S. Supreme Court held that SORNA laws are not punitive in *Smith v. Doe*, 538 U.S. 84 (2003). (St. Br. 36) However, *Smith* did not address juvenile SORNA laws, but made this finding in the context of adult offenders. (Resp. Br. 30)

The State also argues that Illinois courts have found that prior SORNA laws are not punitive. (St. Br. 36-39) Yet, the State concedes that the juvenile SORNA laws applicable to Adam are different from the laws that have been so addressed by our Supreme Court. (St. Br. 37-38)[3] Thus, the State does not dispute that the current juvenile SORNA laws have not been analyzed by the Illinois Supreme Court to determine if they have a punitive effect under *Kentucky v. Mendoza-Martinez*, 372 U.S. 144 (1964). (Resp. Br. 31-33) The State does contend this issue was already decided by an appellate court, in *People v. Fredericks*, 2014 IL App (1st) 122122. (St. Br. 39-40) However, "the opinion of one district, division, or panel of the appellate court is not binding

[3]The State contends the juvenile SORNA laws of 2013 are not applicable to Adam, and that instead he is subject to the laws in place in 2015. (St. Br. 36) But the State agrees that there has been only one irrelevant change in the laws from 2013 to 2015. (St. Br. 36, 39) Thus, even if the 2015 laws apply, the claims before this Court are not altered.

on other districts, divisions, or panels." *O'Casek v. Children's Home and Aid. Soc. of Illinois*, 229 Ill. 2d 421, 440 (2008). Moreover, *Fredericks* only addressed whether current SORNA laws punished adults. 2014 IL Ap (1st) 122122, ¶¶52-61. Thus, if anything, *Fredericks*'s application of *Mendoza-Martinez* to the adult SORNA laws shows a recognition that prior decisions from the Illinois Supreme Court on punishment are not binding.

The State offers its own thoughts on how the amendments to the SORNA laws reflect "a studied and careful modification of SORA to adapt to societal needs and challenges, and not a turn towards punishment." (St. Br. 37-39) However, whether or not there were valid reasons underlying the ***intent*** of the legislature in amending the SORNA laws, the State incorrectly asserts that "[t]he fact that a civil statute has some punitive aspects does not transform it into a penal statute." (St. Br. 39) As the State later concedes (St. Br. 40-41), legislative intent will be disregarded when a statute's effect is punitive. *Smith*, 538 U.S. at 92.

**1. The juvenile SORNA laws have a punitive effect.**

**a. An Affirmative Disability Akin to Punishment**

The State asserts incorrectly that this factor was intended to reference "physical restraint." (St. Br. 41) Other types of disabilities are akin to punishment, including occupational and housing disabilities. *Smith*, 538 U.S. at 100. As explained in Subpart A, *supra*, the juvenile SORNA laws create these disabilities.

Moreover, in addressing whether adult SORNA laws created disabilities other than physical restraints, *Smith* considered whether the laws caused public hostility. *Id*. The Court agreed that "the public availability of the information may have a lasting and painful impact on the convicted sex offender." *Id*. at 101. However, any such disability would have already occurred, "because the information about the individual's conviction was already in the public domain." *Id*. at 101. As explained in Subpart A, information about juvenile delinquencies is ***not*** already within the public domain, apart from the juvenile SORNA laws.

*Smith* also found there were no affirmative restraints or disabilities created by the statute before the Court because that statute did ***not*** require in-person registration. 538 U.S. at 101. By contrast, the Illinois laws do contain this requirement. 730 ILCS 150/3. The State contends "Illinois is free to recognize that in-person registration is not an affirmative restraint and the act of registering is no more onerous than showing up at the registered times in person at the Secretary of State's office to get a driver's license." (St. Br. 42) However, in-person registration cannot be fairly likened to obtaining a driver's license, a benefit, since a person who fails to appear to register as a sex offender will suffer a felony conviction. 730 ILCS 150/10. Moreover, while *Logan* found that this requirement did not create a substantial disability upon an adult, 302 Ill. App. 3d at 329, the difficulties children face in appearing in person to register (*see* Subpart A, *supra*; *Amicus* Br. 25-27), are substantial.

**b. Historical Considerations**

The State correctly notes (St. Br. 42-43) that *Smith* found Alaska's SORNA laws were not akin to probation or mandatory supervised release. *See id*. at 101-02. However, again, the statute at issue in *Smith* did not require registrants to register in person. *Id*. at 101. By contrast, the in-person reporting requirements in Illinois are frequent. 730 ILCS 150/3. The Maryland Supreme Court found that similar reporting requirements – along with the possibility of incarceration for failing to comply – did resemble probation or parole. *Doe v. Dep't. of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 139 (Md. 2013).

**c. Scienter**

The State agrees this factor carries little weight. (St. Br. 43)

**d. The traditional aims of punishment.**

The State contends a deterrent effect does not render the laws criminal. (St. Br. 44) But Adam argued the application of the laws in disregard of the dangerousness of a particular juvenile shows a ***retributive*** effect. (Resp. Br. 35-36)

**e. Application only to Criminal Behavior**

The State concedes this factor supports a punitive effect. (St. Br. 45)

**f. Advancing a Non-Punitive Interest**

The laws have a legitimate regulatory purpose. (St. Br. 45; Resp. Br. 36)

**g. Excessive Legislation in Relation to Civil Intent**

While the State does not dispute the juvenile SORNA laws ensnare juveniles who pose little risk to the community, the State contends that *Smith*, 538 U.S. at 104, held that legislatures can "reasonably regulate the grave concerns of recidivism of sex offenders as a class." (St. Br. 45-46) Yet the Court's decision in *Smith* was based on a finding that, given general studies on adult sex offenders, "Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism." *Id.* at 103. While this may be true for adults, it is not true for juveniles. (Resp. Br. 19-20; *Amicus* Br. 9-11) Placing all juveniles adjudicated delinquent of sex offenses on the registry, despite the fact that most will not recidivate, is punitive.

**2. The punitive effect of the juvenile SORNA laws is cruel and unusual as well as disproportionate.**

The State offers no response to how the punitive effects of the juvenile SORNA laws are cruel and unusual. (Resp. Br. 37-40; *Amicus* Br. 34-43) But, a national consensus exists against requiring ***all*** juvenile sex offenders to register (Resp. Br. 37); the laws disregard fundamental characteristics of youth (Resp. Br. 38-39); and they do not validly advance the traditional aims of punishment. (Resp. Br. 39-40) Where the punishing effects of registration are being suffered by juveniles who pose no danger to the community, they are cruel and unusual.

The State does contend that, since the juvenile SORNA laws do not subject juveniles to imprisonment, proportionate penalty analysis is not implicated. (St. Br. 46-47) However, the State cites no authority which holds

that this clause extends only to imprisonment. To the contrary, it protects Illinois citizens beyond the eighth amendment, and demands that all punishments be imposed with an aim toward rehabilitation. *People v. Clemons*, 2012 IL 107821, ¶40. Since automatic sex offender registration works ***against*** rehabilitation (Resp. Br. 18-21), the juvenile SORNA laws violate the Illinois Constitution.

### D. Alternative Remedies

Even if this Court finds the registration laws valid, it should find the notification requirements of 730 ILCS 152/121 unconstitutional. (Resp. Br. 41-42)

Additionally or alternatively, this Court should strike down 730 ILCS 150/10(a) as applied to juveniles, which makes a violation of the registration requirements a strict liability felony offense, because it can potentially punish innocent behavior. (Resp. Br. 41) The State contends that *People v. Molnar*, 222 Ill. 2d 495, 522 (2005), already rejected this challenge, finding that a registrant should know of his duties under the SORNA laws, and thus has a sufficient culpable mental state to be criminally penalized if noncompliant. (St. Br. 47-48) However, juveniles are not as adept as adults at understanding legal requirements, and even juveniles who intend to report in person may fail to do so simply because they had no means of transportation. (Resp. Br. 41)

## II. The juvenile SORNA laws are unconstitutional as applied to Adam C., who has no criminal history and is now attending college, and was determined by both a clinical psychologist as well as his probation officer to be at low risk of sexually re-offending.

The State claims it has responded to Adam C.'s "as-applied challenges together with his [] facial claims." (St. Br. 9-10) Adam is only able to perceive of two points made by the State in this regard.

First, the State contends that "while Respondent and Amici focus on Respondent's background and the facts surrounding the offense, together with his social investigation and defense-paid sentencing "mitigation" evaluation, these are irrelevant to the analysis."(St. Br. 9) But in *People v. Thompson*, 2015 IL 118151, ¶35, the court stated unequivocally that "[a]n as-applied challenge requires a showing that the statute violates the constitution as it applies to the facts and circumstances of the challenging party." Indeed, the facts of the defendant's own case are the "key" to such challenge. *Id*. at ¶38.

To contend otherwise, the State cites to *In re M.A.*, 2015 IL 118049. (St. Br. 9) However, *M.A.* expressed again that, "[i]n an 'as applied' challenge, the facts surrounding the plaintiff's particular circumstances become relevant." *Id.* at ¶40. In the paragraphs cited by the State, the court merely held it was inappropriate to reweigh the facts underlying the juvenile's adjudication of delinquency. *Id*. at ¶¶61-63. By contrast, in *People v. Miller*, 202 Ill. 2d 328, 335-36 (2002), the defendant – like Adam – was subjected to statutes that ***mandated*** a certain result (the imposition of a natural life sentence), without any consideration of his background. Yet, the Court held that, while the legislature has the power to prescribe mandatory sentences in general, the statutes were still unconstitutional as applied to the defendant, given the

specific facts of his case. *Id*. at 341-43.

Adam does not dispute the facts giving rise to his adjudication. His claims are instead based on evidence presented in the trial court that addressed his likelihood of sexually reoffending. Of course that evidence is relevant to whether laws designed to prevent recidivism are unconstitutional as applied to him. By contending that this evidence is not relevant, the State has avoided making any mention – even in its statement of facts – of either the risk assessment performed on Adam or the probation officer's request that the court not impose the restrictions on Adam because he would likely not re-offend. (C. 185-86, 95-112) *See People v. Weinke*, 2016 IL App (1st) 141196, ¶54.

The only additional argument made by the State which can be construed as a response to the as-applied challenge undercuts its argument that the facts of this case are irrelevant. According to the State, it is rational to subject Adam to the juvenile SORNA laws because he "sexually abused a sleeping victim." (St. Br. 24) However, this argument ignores the evidence presented that Adam presents a low risk of re-offending.

In summary, the purpose of the juvenile SORNA laws is to protect the public, but it is undisputed that Adam is unlikely to re-offend, and requiring him to register could hinder his rehabilitation and make him more likely to reoffend. Thus, the application of the juvenile SORNA laws to him does not reasonably serve the interest the statutes were intended to protect, violating substantive due process. (Resp. Br. 43-46) Similarly, the manner in which the

juvenile SORNA laws infringe on Adam's liberty are substantial, especially since he is pursuing higher education. Thus, the denial of a prior opportunity for him to rely on evidence that shows he is not a risk to the community also violates his right to procedural due process. (Resp. Br. 46-47) Finally, since Adam is not a threat, subjecting him to the juvenile SORNA laws constitutes cruel and unusual punishment that also violates the proportionate penalties clause, because Adam was only 16 years old at the time of this offense, has had no other contact with the juvenile justice system, and because registration will interfere with his rehabilitation. (Resp. Br. 47-50)

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**CERTIFICATE OF COMPLIANCE**

I, Caroline E. Bourland, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding words contained in the Rule 341(d) cover, the appendix, and the Rule 341(c) certificate of compliance, is 6,732 words.

CAROLINE E. BOURLAND
Assistant Appellate Defender

No. 1-15-3047

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

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|---|---|---|
| IN THE INTEREST OF<br><br>ADAM C., a minor<br><br>Respondent-Appellant. | )))<br>)))<br>))) | Appeal from the Circuit Court of Cook County, Illinois<br><br>No. 14 JD 1155<br><br>Honorable Cynthia Ramirez, Judge Presiding. |

**NOTICE AND PROOF OF SERVICE**

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|---|---|
| TO: | Ms. Anita Alvarez, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602<br><br>Adam C., 8442 S. Constance Ave., Chicago, IL 60617 |

The undersigned, being first duly sworn on oath, deposes and says deposes and says that six copies of the Reply Brief are being personally delivered to the Clerk of the Appellate Court and that I am personally serving opposing counsel with three copies and mailing appellant one copy by depositing the copy in the mail in Chicago, Illinois, with sufficient prepaid postage and addressed as indicated above on March 16, 2016.

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SUBSCRIBED AND SWORN TO BEFORE ME
on March 16, 2016.

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| | |
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Assigned: Caroline E. Bourland