THIS APPEAL INVOLVES A DELINQUENT MINOR PROCEEDING UNDER THE JUVENILE COURT ACT

No. 15-3047

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

IN THE INTEREST OF Adam C., minor,

(PEOPLE OF THE STATE OF ILLINOIS,

Petitioner-Appellee,

vs.

ADAM C.,

Respondent-Appellant.)

Appeal from the Circuit Court of Cook County, Juvenile Division.
Honorable **Cynthia Ramirez**, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLEE

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POINTS AND AUTHORITIES

STATEMENT OF FACTS

On May 12, 2013, 16 year-old Respondent, Adam C., was charged in a petition for adjudication of wardship with committing a Class 2 level felony of sexual conduct upon 8 year-old K.J. (CL.5) The court found him guilty and sentence him to thirty months' probation. (CL.365-66)

The evidence showed that on May 11, 2013, the victim was at home on West 76th Street in Chicago, where she lived with two brothers, Jamichael and Jakhem, her mother and stepdad. (R.P20, P55) That evening, a few of Jakhem's friends came over, including his best friend, Respondent. (R.P21) K.J. let them in the basement, then returned upstairs to her room, and watched T.V. for a few hours before she fell asleep in her bed in shorts and a t-shirt. (R.P.23-25) About 1-2 a.m., K.J. awoke. She was on her stomach; her shorts were down under her buttocks and Respondent was going up and down on her behind, "humping" her. (R.P24) After Respondent got off of her, he told K.J. that she had "white stuff" on her and wiped the "clear crust" that felt like water off with a tissue, then threw it away in the bathroom garbage and went back downstairs. (CL.156, R.P27-29, P32) K.J. went to her grandmother's bedroom and told her what happened. (R.P30)

Diane Washington[1], the grandmother of K.J.'s brother, Jakhem, testified that she was aware the boys were downstairs that night. (R.P42-44) About 2 a.m., K.J. came into her room and climbed in bed with her, saying, "Grandma, can I tell you something?" (R.P45) "Adam was freaking on me" and "the bed was moving." (R.P47-48) K.J. also said that Adam used a tissue on some "white stuff" on her. (R.P48) Diane got up and woke up Jamicheal, who went to the basement and got Jakhem who got Adam. (R.P49-51) K.J.

[1] The court admitted K.J.'s statements to Washington and a forensic interviewer pursuant to 725 ILCS 5/115-10. (R.43; 115-hearing)

was crying and shaking so Diane took her upstairs and back to bed. (R.P51)

Kimberly J-H., K.J.'s mother, confirmed that K.J.'s date of birth is June 4, 2004. (R.P53-54) Kimberly worked at a hospital, but on the weekend of May 12, 2013, she was in Indiana, and Diane, Jakhem's grandmother, was watching the three children. (R.P54-56) When Kimberly returned from Indiana on the afternoon of May 13, she picked up the children and returned home. She retrieved the tissue from the upstairs bathroom from the garbage and put it in a bag; she also bagged K.J.'s clothes and the sheets from K.J.'s bed for the technician. (R.P57-58, P60-62) Kimberly took K.J. to the emergency room at Children's Memorial. (R.P62) After the medical examination, they returned home. Chicago Police Evidence Technician Carla Rodriguiez came and retrieved the bagged items and inventoried them and secured them for later DNA testing. (R.P63, R.P65-71)

Chicago Police Evidence Technician Kamal Judeh testified that on November 26, 2013, he took a buccal swab from Respondent and inventoried it. (R.P150-55) Without objection, Illinois State Police Forensic Biologist Jennifer Wagenmaker testified as an expert that she identified semen on the toilet paper, and in two stains (Exh.2A & B) on the underwear and packaged and stored the items for later DNA testing; she did not examine the bed sheets. (R.P75-84, P91) Wagenmaker also received and preserved the blood standard from the sexual assault kit for K.J. and Respondent's blood standard from his buccal swab. (R.P85-87) Without objection, Illinois State Police Forensic Biologist and DNA Analyst Lisa Kell testified as an expert that she analyzed and compared the DNA profiles from the crime scene, exhibit samples and standards. Kell concluded that the DNA profile on the toilet paper matched Respondent while one of the stains on the underwear (Exh.2A) matched K.J. and Respondent. (R.P119-128) On the toilet paper stain, Kell calculated frequencies for the match at 1 in 27 quintillion black, 1 in 3

sextillion white, or 1 in 2.1 sextillion Hispanic unrelated individuals. (R.P128) The same probability frequency occurred for the major male profile match to Respondent on the underwear stain (Exh.2A). (R.P130-31) On the other underwear stain (Ex.2B), Respondent could not be excluded from the male fraction at 13 of the 15 loci tested. (R.P132)

Chicago Detective Athena Mullen testified that K.J. went to the Children's Advocacy Center on May 13, 2013. (R.P160) On November 26, 2013, Det. Mullen spoke to the Respondent at Area Central police station with his mother was present. (R.P166) Respondent's date of birth is April 12, 1997. (R.P161) After Det. Mullen read Respondent his *Miranda* warnings and he acknowledged that he understood them and agreed to speak, Respondent told Det. Mullen something to the effect of "he didn't penetrate that girl" and agreed it was "like a hotdog in a bun." (R.P162) Respondent also told the detective that he "wanted to get some help." (R.P163)

The People rested. (R.P167) Respondent's motion to strike the lab technicians' testimonies and the testimony of Detective Mullen was heard and denied. (R.P167-72) Respondent's motion for directed finding was argued and denied. (R.P172-78) Respondent then rested. (R.P178) After closing arguments, the court found that K.J. was credible, Respondent's semen was present on her clothes as well as the tissue he used to wipe K.J. The court had "no doubt" that Respondent committed the offense of aggravated criminal sexual abuse, and entered a finding of delinquency. (R.P178-87)

Respondent's motion to declare the Sex Offender Registration Act and Notification Law unconstitutional as applied to Respondent was heard and denied. (CL.293-325; CL.328-344; CL. 346-51; R.R2-4; R.T4-38) An oral motion for new trial was made and denied as untimely. (R.T2-4)

Social investigations were completed (R.U2-3; CL.175-84; 185-86; 353-63), and K.J.'s mother read a victim impact statement to the court, describing K.J.'s theft of her innocence by Respondent, a person she knew and trusted like family. (R.U4-7) In aggravation, the prosecutor noted that Respondent had been suspended more than 11 times from schools (R.U7); after the crime, Respondent simply went back downstairs and went to sleep pretending that nothing had happened, so he showed no remorse; he had refused to admit guilt until the DNA proof; and he continued to minimized his actions as noted by his probation officer. (R.U7-9) Respondent argued that he took responsibility "very early on," (R.U10), arguing that the "risk assessment" he had done showed his mitigation. (R.U10-11) Respondent apologized, stating he had "resentment and remorse." (R.U12) Taking into account all of the information provided, the court sentenced respondent to three years' probation, 50 hours of community service, no involvement with gangs, guns, or drugs, attendance in school, DNA testing, and juvenile sex offender counseling. (R.U12-18; CL.365-66) The court advised Respondent of his duty to register and he registered under SORA. (RU18-21; CL.364-65) Respondent now appeals. (CL.112)

ARGUMENT

I. INTRODUCTION AND STANDARD OF REVIEW

A. Introduction

Respondent bundles sections of the Illinois Sex Offender Registration Act (SORA), 730 ILCS 150/1 *et seq.*, and the Sex Offender Community Notification Law ("Notification Law"), 730 ILCS 152/101 *et seq.*, that are applicable to juveniles into a single "scheme" that

he calls "SORNA[2]." (R.Br.2) Respondent argues that the challenged provisions (1) violate substantive due process in that they infringe on his "fundamental right to liberty" to be free from governmental monitoring, invade his privacy, impair his reputation, and interfere with his pursuit of happiness (R.Br.10-16); are facially "irrational" (R.Br.16-22), and not rationally tailored given his circumstances (R.Br.43-46); (2) violate procedural due process because they do not provide him, a first-time offender, with a hearing at which the State proves his future "dangerousness" and at which he can object (R.Br.22-30; 46-47); and (3) they are punitive and therefore qualify as "cruel and unusual" punishment, and violate the proportionate penalties clause. (R.Br.30-42; 47-48)

Respondent's attempt to self-define the challenged provisions into a "SORNA" scheme should be summarily rejected. As argued *infra*, while SORA and the Notification Law work in tandem to regulate sex offenders, *People v. Cornelius*, 213 Ill. 2d 178, 181 (2004), the only provision that is a criminal offense is SORA's penalty provision (730 ILCS 150/10), and it is not triggered by *registration*, but instead by a *violation* of SORA. The People cannot enforce §150/10 until and unless a violation of SORA occurs, but Respondent has not been charged with, nor adjudicated for, a violation of SORA and could not face this penalty without further conduct by him. "To have standing to challenge the constitutionality of a statute, one must have sustained or be in immediate danger of sustaining a direct injury as a result of enforcement of the challenged statute." *People v. Mosley*, 2015 IL 115872, ¶¶48; *In re M.I.*, 2013 IL 113776 ("courts will not consider the validity of a statutory provision unless the person challenging the provision is directly

[2] Respondent identifies the SORA provisions as: 730 ILCS 150/2 (definitions), 150/3 (duty to register), 150/3-5 (application to juvenile delinquents), 150/6 (duty to report change of address), 150/8 (registration and DNA submission), 150/10 (penalty); and the Notification Law provision as: 730 ILCS 152/121 (notification regarding juvenile offenders). (R.Br.2)

affected by it") (internal quotations omitted). The People acknowledge that recently this Court in *People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶¶30-31, found that a defendant had standing to make a "bundle" attack on SORA (adding two criminal and two civil statutes) before ultimately affirming the constitutionality of SORA and declining to revisit the issue of whether the claimed "scheme" constituted punishment under the eighth amendment or the proportionate penalties clause. *Id.* at ¶¶17-20. However, the People contend that such an extension of "standing" principles invites defendants to cherry pick hypothetically applicable laws into whatever "bundle" they can conceive of to claim a violation. Respondent is no more at risk of an "immediate danger" of a criminal penalty simply because he has to register under SORA than a person who registers for their driver's license risks a conviction for driving with a suspended license. Neither has standing to challenge hypothetical criminal laws. Respondent's grouping of the challenged provisions into a single classification of "SORNA" to reach a claim that they are punitive should be rejected. The People will instead use "SORA" to designate the challenged provisions of the Sex Offender Registration Act and the "Notification Law" to designate the challenged §121 of the Sex Offender Community Notification Law throughout this brief.

Ultimately, Respondent recognizes that Illinois courts have ruled on the constitutionality of SORA (*see People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 205-06 (2009) (rejecting procedural due process claim and holding that plain language of SORA clearly required minor to register) and *In re J.W.*, 204 Ill. 2d 50, 62 (2003) (rejecting minor's substantive due process challenge to SORA)), and the Notification Law (*see People v. Malchow*, 193 Ill. 2d 413, 420 (2000) and *Konetski*, 233 Ill. 2d at 203 (noting that §121 of the Notification Law reduces the impact of registration on juveniles)). But he argues that these are outdated decisions and that out-of-state jurisprudence or "new

studies" like the report of the Illinois Juvenile Justice Commission should cause this Court to reconsider its views on juvenile sex offenders. (R.Br.18-19, citing *Improving Response to Sexual Offenses Committed by Youth: Recommendations for Law, Policy and Practice* at 15, Illinois Juvenile Justice Commission, Illinois Dep't of Human Services (Mar. 2014), avail at: http://ijjc.illinois.gov/youthsexualoffenses) (hereafter *IJJC Report).* However, unlike out-of-state courts, "the [Illinois] appellate court must follow the law as declared by our supreme court." *Rockford Financial Systems, Inc. v. Borgetti*, 403 Ill. App. 3d 321, 331 (2d Dist. 2010); *People v. Fountain*, 2012 IL App (3d) 090558, ¶ 23 ("As an intermediate appellate court, we are bound to honor our supreme court's conclusion on [an] issue unless and until that conclusion is revisited by our supreme court or overruled by the United States Supreme Court."). Further, whether Illinois' interests would be furthered by the recommendations in the *IJJC Report* is a policy question that should more properly be directed at the legislature. *See IJJC Report* at 6 (identifying best practices for "effective treatment and supervision" of juveniles adjudicated delinquent for a sex offense).

There are no "fundamental" liberty interests implicated by SORA or the Notification Law; instead every Illinois court has upheld these laws as rational. *See Avila-Briones*, 2015 IL App (1st) 132221. *See also In re M.A.*, 2015 IL 118049 (upholding categorical registration of juveniles in the Violent Offender registry). Moreover, Respondent has improperly applied eighth amendment jurisprudence to argue that his self-defined SORNA "scheme" is unconstitutional. *See People v. Patterson*, 2014 IL 115102, ¶97 ("a constitutional challenge raised under one theory cannot be supported by decisional law based purely on another provision"). In the remainder of this brief, the People will untangle Respondent's arguments and demonstrate that SORA and the Notification Law remain lawful regulatory exercises of the police power of the General Assembly.

B. Standard of Review

The standard of review of the constitutionality of a statute is *de novo*. *People v. Molnar*, 222 Ill. 2d 495, 508 (2006). Statutes are presumed to be constitutional. *People v. Alcozer,* 241 Ill. 2d 248, 259 (2011); *People v. Johnson*, 225 Ill. 2d 573, 584 (2007) ("All statutes carry a strong presumption of constitutionality."). Respondent has the burden of rebutting that presumption to demonstrate clearly a constitutional violation, because he is the party challenging the validity of the statute. *Alcozer,* 241 Ill.2d at 259; *In re M.G.,* 301 Ill. App. 3d 401, 406 (1st Dist. 1998) (party challenging the statute has the burden of clearly establishing the alleged constitutional violation).

While Respondent seeks facial invalidation of all of the challenged provisions (R.Br.Arg. I., pp.7-42), he never attempts to prove that these provisions are invalid in *all* of their applications. Respondent makes two arguments (I. (facial) and II. (as-applied)), however a review of the purported facial claims discloses that he frequently relies on *his own circumstances*, as a first-time juvenile delinquent sex offender that he concludes has a low-risk of reoffending to show the purported constitutional violations. (*See e.g.*, R.Br.7 (arguing his risk level); R.Br.14 (arguing his school status); R.Br.26-27 (arguing that he is not a danger so early termination is insufficient for him); R.Br.30 (arguing that law enforcement wastes resources in keeping tabs on him); R.Br.36-37 (arguing that the law is excessive for his circumstance and thus has been transformed from its civil intent into a punitive one). This is decidedly *not* a facial challenge and fails for this simple reason.

Facial challenges to legislative acts are the most difficult challenges to mount, in that the challenger must establish that no set of circumstances exists under which the law would be valid. *In re M.A.*, 2015 IL 118049, ¶¶39-40; *People v. Greco*, 204 Ill.2d 400, 407 (2003). That a statute might operate unconstitutionally under some conceivable set of circumstances

is insufficient to render it wholly invalid, as courts have not recognized an overbreadth doctrine outside the limited context of the first amendment. *Greco,* 204 Ill.2d at 407. Accordingly, Respondent must conclusively show that there is no set of circumstances under which the challenged SORA and Notification Law provisions pass constitutional muster, however, Respondent never shows that the application of these laws to all offenders – including recidivist child-rapist murderers – *i.e.*, those committing the most heinous crimes – is unconstitutional. *Id.* at 400; *People v. Huddleston*, 212 Ill. 2d 107, 133 (2004). For this reason, Respondent's facial attacks must fail.

A review of Respondent's claims shows that the civil regulations of SORA and the Notification Law provide all the necessary process due, do not unconstitutionally impact on any protected "liberty" or "privacy" interest held by juvenile delinquents, and are rationally related to the laudable legislative goal involving the protection of children against sexual offenders.

Additionally, 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. *Cf.*, *In re M.A.*, 2015 IL 118049, ¶¶61-63(focus on the facts and background of the minor registrant is irrelevant to the due process and equal protection arguments concerning the Violent Offender Registry). Thus, Respondent has also failed to demonstrate that the challenged laws are unconstitutional as applied to him. *See M.A.*, 2015 IL 118049, ¶¶39-40; *People v. Molnar*, 222 Ill. 2d 495, 510-511 (2006) ("finding that a statute is constitutional as applied will necessarily compel a finding that the statute is constitutional on its face"). Because a finding that the challenged provisions are constitutional as to Respondent necessarily compels a finding that they are also facially constitutional, the People address

Respondent's as-applied challenges together with his purported facial claims.

II. SORA AND THE NOTIFICATION LAW ARE RATIONALLY DESIGNED TO INCREASE LAW ENFORCEMENT MONITORING AND PROVIDE FOR LIMITED NOTIFICATION REGARDING JUVENILE SEX OFFENDERS.

Preventing harm is a proper regulatory goal. *United States v. Salerno*, 481 U.S. 739, 747 (1987) ("preventing danger to the community is a legitimate regulatory goal"). Registration laws are designed to prevent future crimes and crime prevention is a compelling government interest. *Schall v. Martin*, 467 U.S. 253, 264-65 (1984). Protection of the public, and especially children, from sexual harm has always been the primary goal of the SORA and the Notification Law. *People v. Huddleston*, 212 Ill. 2d 107, 133 (2004) ("welfare and protection of minors has always been considered one of the State's most fundamental interests"); The public interest of SORA and the Notification Law is to provide continued protection of the public through registration and law enforcement scrutiny of a convicted or adjudicated sex offender. *People v. Johnson*, 225 Ill. 2d 573, 585 (2007); *In re J.W.*, 204 Ill. 2d 50, 67 (2003), citing *People v. Adams*, 144 Ill. 2d 381, 390 (1991) (identifying purpose of SORA as providing officers ready access to information on known sex offenders); *People v. Malchow*, 193 Ill.2d 413, 419-20 (2000) (protection of the public is purpose of Notification Law).

Initially, it must be noted here that throughout his brief, Respondent looks to other state decisions for support of his claims. *See e.g.*, R.Br.11-13, 15, 1721,25, 32, 33, 34-36, 39, 47. Yet, there is no standard or uniformity in the state registries. As long as they are consistent with federal minimum standards, states can structure their registries in a variety of ways.[3] *See* U.S. Dep't of Justice, SMART (Office of Sex Offender, Sentencing,

[3] Federal minimum standards require the states to include some juveniles in the registries and notification systems. *See* 42 U.S.C. 16901 *et seq.* (requires juveniles 14 or older who

Monitoring, Apprehending, Registering, & Tracking), *Sex Offender Registration and Notification in the United States: Current Caselaw and Issues*, (Sept.2014) available at: http://www.smart.gov/caselaw/handbook_sept2014.pdf. The majority of states require juveniles to register in their SORA registries. *See* Nicole I. Pittman & Quyen Nguyen, *A Snapshot of Juvenile Registration and Notification Laws: A Survey of the United States* 44-53 (2011), avail at: http://www.njjn.org/uploads/digital-library/SNAPSHOT_web10-28.pdf. (listing 35 states that require juveniles to register, about half of which disclose information to the public). In some states, juvenile registration periods automatically expire; others allow juveniles to petition for removal. *See e.g.*, Ariz. Rev. Stat. Ann.§13-3821(D) (juvenile registration expires at age 25); La. Rev. Stat. 15:542, 15:544 (juveniles over 14 adjudicated for serious sex offenses required to register for 15 years may petition to reduce the term to 10 years with a clean record while on the registry; those who must register for life may be reduced to 25 years for a clean record). Some, like Illinois, limit dissemination and notification of registry information for juveniles; others provide that such information is to be available on the state's public Website. *See e.g.*, Ind. Code Ann.§11-8-8-7 (all juvenile registrants over 14 listed on public Website); Mass.Gen.Laws ch.6§178I (juveniles listed on public Website depending on the tier of offense). The point is that states have considerable discretion in their statutory registration schemes and Illinois need not imitate any other state's scheme to meet constitutional standards.

Inclusion in SORA is offense-based; *i.e.*, the legislature decided that commission of designated offenses, rather than an assessment of the dangerousness of an individual

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are adjudicated delinquent for sexually assaultive crimes to register). States are free to impose greater restrictions than the federal minimums. *See "Juvenile Offenders Required to Register Under SORNA: A Fact Sheet,"* U.S. Dep't of Just., OJP: Sex Offender Sentencing, Monitoring, Apprehension, Registration and Tracking (SMART) Office, available at: http://ojp.gov/smart/pdfs/factsheet_sorna_juvenile.pdf.

offender should trigger registration. It is well-established that a legislature has the power to make "reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith v. Doe*, 538 U.S. 84, 103 (2003) (construing Alaska's categorical sex offender registration statute). States have the power to make a universal assessment without a corresponding risk assessment. *Id.* at 104. As such, states may choose to regulate certain offenders as a class. *Id.* (citing as an example a case that upheld the denial of right to practice medicine to all felons).

SORA operates by requiring registrants to register their name, address and contact information, current photograph, DNA, social media, vehicle registration information, employment and school information with local law enforcement in the jurisdiction where he or she lives, works, or attends school. 730 ILCS 150/3, 150/8. Respondent is required to register in SORA because he is defined as a sexual predator having been adjudicated delinquent of a covered crime, here a violation of 720 ILCS 5/11-1.60 (aggravated criminal sexual abuse). 730 ILCS 150/2(E)(1); 730 ILCS 150/3 (a), (b) (registrants have a duty to register within three days in person and provide accurate information as required by the Department of State Police). After initial registration, registrants are required to re-register at least annually, may be required to report up to four times per year, and have a duty to report a change of address to law enforcement within three days. 730 ILCS 150/3, 6.

It is well established that SORA's registration requirement is part of a regulatory scheme, not a punishment. *In re J.W.*, 204 Ill. 2d at 75; *Malchow*, 193 Ill. 2d at 424; *Adams*, 144 Ill. 2d at 386-90. And to ensure compliance, a violation for certain registrants can result in an administrative extension by the Illinois State Police who administer the database. 730 ILCS 150/7. However, the legislature has also recognized that "[r]egulations without 'teeth' or penalties for their violation are difficult of enforcement." *People v.*

Mueller, 352 Ill. 124,133 (1933). Thus, to penalize those who fail to comply, violations of SORA are also criminal offenses. *People v. Molnar*, 222 Ill. 2d 495, 508 (2006); *People v. Marsh*, 329 Ill. App. 3d 639, 648 (1st Dist. 2002)("when a defendant fails to register and authorities therefore cannot monitor his movements and whereabouts, he is free to commit sexual offenses without possible detection. Thus, the victims who might ensue as a result of a past offender's failure to register under the Act are the potential victims of future sex offenses."). Accordingly, failure to register is a Class 3 felony. 730 ILCS 150/10 (includes additional penalties).

SORA and the Notification Law have evolved over the years to adapt to societal needs and challenges. For example, crimes covered have been expanded to include certain precursor crimes against children. *See* e.g., *Johnson*, 225 Ill. 2d at 588 (SORA requires registration for certain "precursor" crimes where there is a high risk of sexual exploitation to children). And since 1999, juveniles have been required to register in SORA. *See* P.A. 91-48 (eff. June 30, 1999) That same year, Illinois added that a person adjudicated delinquent of Respondent's offense (aggravated criminal sexual abuse) would be required to register as a sexual predator for life. *Id.*; 730 ILCS 150/2(E)(1) (defining sexual predator as "any person who, after July 1, 1999, is . . . [c]onvicted of a violation or attempted violation of *** [720 ILCS 5/] 11-1.60 or 12-16 (aggravated criminal sexual abuse)."

These laws have also evolved to add special protections for juvenile delinquents. For example, in 2007, the legislature removed the provision that required juveniles to appear on the public registry after age 17, enabling juveniles to remain registered as juveniles for the entirety of their registration term. *See People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 203 (2009), citing P.A.95-658, §5 amending 730 ILCS 150/2(A), 3(a). Thus, information about a juvenile offender's identity and offense, even after he reaches the age

of majority, is disseminated to only a limited number of people and will never appear on the public registry. 730 ILCS 152/121 (for juvenile registrants, law enforcement may disseminate to persons whose safety may be compromised, school principal or administrative officer, and guidance counselor). Additionally, in 2007, the legislature added the early-termination provision in §3-5 to SORA, allowing a court to grant sex offenders who were prosecuted in juvenile court early removal from SORA by petition after a term of years (two years for misdemeanors and five years for felonies) if, a court finds by a preponderance of the evidence that the registrant "pose[s] no risk to the community." 730 ILCS 150/3-5 ("Application of Act to adjudicated juvenile delinquents"); P.A. 95-658. If the court grants early removal, then the juvenile registration is terminated and registry information is expunged. 730 ILCS 150/3-5(g).

Ultimately, whether viewed individually or cumulatively, the evolution of SORA and the Notification Law remain rationally related to the original purpose of the statutes. They comport with due process and remain civil, not punitive, in nature. *See People v. Avila-Briones*, 2015 IL App (1st) 132221 (rejecting substantive and procedural due process challenges and proportionate penalties challenge in upholding the constitutionality of SORA as a civil regulation).

III. SORA AND THE NOTIFICATION LAW COMPORT WITH SUBSTANTIVE DUE PROCESS. (Responding to Arguments I.A. & part of II.A)

Respondent argues that the challenged laws are violative of substantive due process under the federal and Illinois constitutions, because they infringe on his fundamental liberty interests to be free from a "continuing, intrusive, and humiliating regulation" that is comparable to government surveillance. (R.Br.10-11, quoting *Doe v. Atty.Gen.*, 686 N.E.2d 1007, 1016 (Mass.1997)) He also seeks strict scrutiny review on the basis that his

rights to "privacy, happiness, and reputation" have been violated. (R.Br.11-16) In the alternative, he argues that these provisions are over-inclusive, ensnaring registrants who pose little danger of reoffending and thus fail to bear a rational relationship to the goal of protecting the public from sex offenders. (R.Br.16-22)

However, as argued below, Respondent has failed to establish that he has a fundamental liberty interest. Instead, Respondent's due process claims are subject to rational basis review. Using rational basis review, the Illinois Supreme Court has already rejected a substantive due process challenge to SORA and the Notification Law under the Illinois constitution. *See In re J.W.*, 204 Ill. 2d 50, 67 (2003) (rejecting substantive due process challenge to SORA, and citing with approval same in *People v. Adams*, 144 Ill. 2d 381, 390 (1991); *People v. Cornelius*, 213 Ill. 2d 178, 205 (2004) (rejecting substantive due process challenge to Notification Law). Respondent argues that the *J.W.* respondent did not claim a violation of a fundamental right and so either *J.W.* did not address the issue (R.Br.10), or it should be reconsidered. (R.Br.18) However, this Court recently rejected the same argument in *People v. Avila-Briones*, 2015 IL App (1st) 132221 (finding SORA implicates no fundamental rights). Respondent's citation to out-of-state caselaw or "new studies" is insufficient to render the Illinois Supreme Court or this Court's decisions obsolete or wrong.

A. There Is No Constitutionally Protected Fundamental Interest At Issue

The constitutional guarantee of substantive due process provides that a person may not be deprived of liberty without due process of law. *People v. Madrigal*, 241 Ill. 2d 463, 466 (2011). Respondent claims his fundamental rights are implicated under both the federal and state constitutions. (R.Br.9) The language of the federal and state due process clauses is the same, and our Supreme Court has generally construed the

applicable due process clause of the Illinois Constitution in harmony with the federal constitution. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, sec. 2; *People v. DiGuida*, 152 Ill. 2d 104, 118 (1992)(citation omitted) (It is only "[w]here the language of the State constitution, or where debates and committee reports of the constitutional convention show that the Framers intended a different construction, [that this Court] will construe similar provisions in a different way from that of the [United States] Supreme Court").

Respondent first argues that he has a fundamental liberty interest in living "without government interference" and that registration is a "substantial disability or restraint on the free exercise of individual liberty." (R.Br.11) But this Court has already rejected this exact argument in *People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶81 (no fundamental interest implicated in law enforcement monitoring and tracking in SORA).

It is telling that despite the many Illinois courts that have reviewed these laws, Respondent cites to cases from Massachusetts, Hawaii and Maine – all of which construe their own registries in light of their own state's constitutional principles. (R.Br.11, citing cases) For example, Respondent's citations to *Doe v. Attorney General*, 426 Mass. 136 (Mass. 1997), and *State v. Guidry*, 105 Haw. 222 (Haw. 2004), to claim a fundamental right to be free from "government surveillance," are not applicable because they addressed procedural due process not substantive due process arguments as this Court so found in *Avila-Briones*, reasoning that such a "distinction is critical, because the substantive due process clause establishes that the government may not infringe on certain rights created by the due process clause itself, whereas the procedural due process clause [is broader and] protects any life, liberty, or property interest—whether created by the constitution or not—on which the government attempts to infringe." *Id.* at ¶80. And Respondent's citation to *State v. Letalien*, 985 A.2d 4, 24-25 (Me.2009) is also inapposite

where, unlike Illinois, Maine's version of SORA is part of the criminal sentence so governmental surveillance is part of the state criminal supervision disposition in Maine.

The only Illinois case Respondent cites for the premise that SORA places "a severe constraint on a defendant's liberty" is *People v. Dodds*, 2014 IL App (1st) 122268. (R.Br.11) However, *Dodds* never addressed the constitutionality of SORA, but instead addressed the question of whether defendant should be permitted to withdraw his plea due to ineffective assistance of counsel in a case brought under 735 ILCS 5/2-1401, where counsel affirmatively misled a defendant as to the application of SORA. *Id.* at ¶26. Thus, *Dodds* offers no support on the question of a liberty interest in SORA.

Every Illinois Court that has addressed the issue has determined that the challenged laws do not implicate a fundamental constitutional right, nor are convicted felons a suspect class. *In re J. W.*, 204 Ill. 2d 50, 67 (2003) (SORA does not involve a fundamental right); *People v. Adams*, 144 Ill. 2d 381, 390 (1991); *Avila-Briones*, 2015 IL App (1st) 132221 (finding SORA implicates no fundamental rights); *In re T.C.*, 384 Ill. App. 3d 870, 874 (1st Dist. 2008) (SORA registration does not implicate juvenile's liberty or privacy interests); *People v. Grochocki*, 343 Ill. App. 3d 664, 669 (3d Dist. 2003) (dissemination of SORA information does not involve interest under due process clause); *People v. Malchow*, 306 Ill. App. 3d 665, 672 (2d Dist. 1999) (registration does not implicate liberty interest); *People v. Logan*, 302 Ill. App. 3d 319, 332 (2d Dist. 1998) (SORA does not implicate liberty interest). *See also People v. Cornelius*, 213 Ill. 2d 178, 205 (2004) (no fundamental right implicated by Notification Law).

There is also no federal fundamental right at issue. Very few rights are considered to be "fundamental" and the Supreme Court has "always been reluctant to expand the concept of substantive due process." *Washington v. Glucksberg*, 521 U.S. 702, 720

(1997) (fundamental rights include the right of parents to care, custody and control of their children; free speech; free assembly and free association; voting; marital privacy and bodily integrity). Federal due process jurisprudence follows a two-part analysis to determine whether a liberty interest is "fundamental." *Glucksberg*, 521 U.S. at 720-21. First, a court must carefully formulate the interest at stake. Second, the court must determine whether that interest is "deeply rooted in this Nation's history" or "implicit in the concept of ordered liberty." *Id.* at 721. If both parts of the analysis are present, then review of the statute is subject to strict scrutiny. If not, rational basis review applies.

Respondent cites to no "carefully formulated" federal interest in being free from registration and he does not claim that a sex offender's claimed right to be free from registration is "deeply rooted in the concept of ordered liberty." In fact, federal caselaw is to the contrary. *Doe v. Tankeske*, 361 F.3d 594, 597 (9th Cir. 2004) (applying *Glucksberg* to conclude that "persons who have been convicted of serious sex offenses do not have a fundamental right to be free from the registration"). Thus, there is no Illinois or federally-protected fundamental liberty interest at issue.

Respondent also argues that avoiding criminal penalties implicates his liberty interests under the federal constitution. (R.Br.11, citing *Marks v. U.S.*, 430 U.S. 188, 191 (1977)). But *Marks* is inapposite because it involved the application of *ex post facto* principles in an obscenity conviction. Respondent will not face potential criminal penalties unless he fails to register and comply with SORA and then only after a future successful, separate action requiring proof of additional elements. 730 ILCS 150/10. Thus this case is unlike *Marks*. *Cf. Doe v. Fortenberry*, 2006 U.S. Dist. LEXIS 53912 (S.D. Miss. 2006) (finding no standing to raise due process challenge based upon a claimed liberty interest in avoiding criminal penalties because they apply only if registrant fails to

register as a sex offender).

Respondent next argues that his privacy rights under the Illinois Constitution, art. I., §6 and codified in the Juvenile Court Act provides a constitutional right of privacy for juveniles. (R.Br.12) Respondent's constitutional attacks stem from his belief that he, as a *juvenile* offender, has a protected and heightened liberty interest in his privacy. However, Respondent has no constitutionally-protected or heightened privacy interest simply because he is a juvenile delinquent. *In re Lakisha M.*, 227 Ill. 2d 259, 270-71 (2008) (noting "diminished expectation of privacy" for delinquent juveniles). The "zone of privacy" that is recognized under the federal constitution is very limited. *See Carey v. Population Serv. Int'l*, 431 U.S. 678, 684-85 (1977) (only personal decisions relating to marriage, procreation, contraception, family relationships, child-rearing and education are within 'zone of privacy' under federal constitution). Further, the "stigma" of registration does not implicate a protected liberty or property interest under the fourteenth amendment. *See Paul v. Davis*, 424 U.S. 693, 701 (1976) (in addition to stigmatizing statement, defendant must also establish some tangible and material and state-imposed burden or alteration of status or right); *Grochocki*, 343 Ill. App. 3d at 673 (following *Paul* in finding that any stigma suffered from SORA registration arises from offender's own acts); *In re J.R.*, 341 Ill.App.3d 784, 799 (1st Dist. 2003) ("[a]ny stima that may occur is a result of the offender's status as being adjudicated as a delinquent sex offender and not as a direct result of the notification").

While the Illinois Constitution provides a more expansive privacy protection, it only protects against "unreasonable invasions of privacy" (*Kunkel v. Walton*, 179 Ill. 2d 519, 538 (1997)), and does not include a right to remain an anonymous and private juvenile sex offender. *See e.g.*, *Cornelius*, 213 Ill. 2d at 195-96, citing Ill.Const. 1970, art. I, §6

(although "zone of privacy" is protected in Illinois Constitution, sex offender does not have cognizable privacy interest in his registry information, and there is no invasion of privacy in disseminating that information as provided in notification law); *In re Phillip C.*, 364 Ill. App. 3d 822, 827 (1st Dist. 2006) (Illinois has rejected argument that SORA implicates juvenile offender right to privacy under state or federal constitutions).

Relying on the Juvenile Court Act's confidentiality provisions that limit the dissemination of, and accessibility to, juvenile law enforcement and court records (R.Br.12, citing 705 ILCS 405/1-7, 1-8; 705 ILCS 405/5-901, 5-905), Respondent asserts that she possesses a cognizable right to privacy that is constitutionally protected. However, our Supreme Court has repeatedly held that the Juvenile Court Act "is a purely statutory creature whose parameters and application are defined solely by the legislature." *People v. P.H.*, 145 Ill. 2d 209, 223 (1991). Consequently, the Court has found that juveniles have neither a common law nor a constitutional right to adjudication under the Juvenile Court Act. *Id.* Likewise, juvenile offenders adjudicated under the Juvenile Court Act do not have an independent common law or constitutional right to privacy in their juvenile records beyond what the legislature provides. For example, juvenile adjudication records "based upon *** sex offenses which would be felonies if committed by an adult" are statutorily barred from being sealed or expunged. 705 ILCS 405/5-915; *Duncan v. People ex rel. Brady*, 2013 IL App (3d) 120044, ¶18 (early termination of SORA registration requirement did not entitle petitioner to sealing or expungement of eligible sex offense adjudication or SORA registry records where "legislature clearly did not intend for records of sexual offenses [or their indicia] to be sealed").

Respondent's reliance on *In re A Minor*, 149 Ill. 2d 247 (1992) and *In re K.D.*, 279 Ill.App.3d 1020 (2d Dist. 1996) (R.Br.12) is easily distinguished where the courts there

found a privacy interest in the minor *victims* not juvenile delinquents. *See A Minor* at 256-57 (minor victims had "done nothing to limit or diminish their constitutional right to be free from governmental and nongovernmental invasions of their privacy. *They are not juvenile delinquents*. They are not participating in the juvenile proceedings begun on their behalf through their own free will. They were victims of abuse by a parent. They were thrust into the juvenile system by actions of third parties, not by their own actions."); (emphasis added); *In re K.D.*, 279 Ill.App.3d at 1023 (abused victim has an interest in nondisclosure). Ultimately, juvenile offenders adjudicated under the Juvenile Court Act do not have an independent common law or constitutional right to privacy in their juvenile records beyond what the legislature provides. Here, the legislature has properly and reasonably exercised its prerogative to reconfigure the privacy afforded to juvenile sex offenders covered by SORA to provide for limited dissemination. 730 ILCS 152/121.

Again, Respondent turns to out-of-state jurisprudence in *United States v. Three Juveniles*, 61 F.3d 86 (1st Cir. 1995) and *United States v. Brian N.* 900 F.2d 218 (10th Cir. 1990), but these are federal cases construing the federal juvenile delinquency laws. (R.Br.12-13) And, again Respondent asks this Court to draw instruction from out-of-state cases construing their own state registries. (R.Br.13, citing *In re W.Z.*, 957 N.E. 2d 367 (Ohio App.2011) and *People v. Dipiazza*, 778 N.W. 2d 264 (Mich.App.2009), but these cases are not remotely helpful where Illinois caselaw governs and rejects the juvenile delinquents' claimed protected "privacy" interests. *See Lakisha M.*, 227 Ill. 2d at 270-71 (identity of minor found guilty of committing a felony offense and made a ward of the court "is a matter of state interest"); *In re Jonathon C.B.,* 2011 IL 107750, ¶89 (same). Respondent's attacks here must fail because the foundational premise—that he has a constitutionally-protected liberty interest and an identifiable privacy interest—is without

support and contrary to Illinois and federal jurisprudence. *Cf. Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 499-506 (6th Cir. 2007), and cases cited therein (rejecting substantive due process and equal protection challenge to sex offender registry because no protected liberty or privacy interest impacted).

Respondent also argues that his "good name, reputation, honor, or integrity" has been violated. (R.Br.13-14, quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1971). However, *Constantineau* involved analysis of procedural, not substantive, due process. *Constantineau* involved a state statute that allowed the sheriff to post a sign prohibiting liquor stores from selling to persons that the sheriff deemed were excessive drinkers and therefore a danger to the peace of the community. That statute was held unconstitutional because it provided no notice or even a hearing. 400 U.S. at 437.

As Respondent concedes, the "stigma" of registration does not implicate a protected liberty or property interest under the fourteenth amendment. (R.Br.14) *See Paul v. Davis*, 424 U.S. 693, 701 (1976) (in addition to stigmatizing statement, defendant must also establish some tangible and material and state-imposed burden or alteration of status or right); *Grochocki*, 343 Ill. App. 3d at 673 (following *Paul* in finding that any stigma suffered from SORA registration arises from offender's own acts); *In re J.R.*, 341 Ill.App.3d 784, 799 (1st Dist. 2003) ("[a]ny stima that may occur is a result of the offender's status as being adjudicated as a delinquent sex offender and not as a direct result of the notification"). So, in an effort to meet the "alteration of a previous legal status" for the plus prong of *Paul*'s stigma-plus test, Respondent argues that SORA and the Notification Law limit his opportunities for employment or education. (R.Br.14) But this argument, too, fails because the laws do not regulate any particular employment or educational opportunity.

Respondent cites to Pennsylvania caselaw (R.Br.15, citing *In re J.B.*, 107 A.3d 1 (Penn.2014), but there is caselaw in Illinois that answers the issue. Illinois protects, as a property and liberty interest, the right to pursue a trade, occupation, business or profession, but it does not protect a general future interest in being employed at any particular job. *See* e.g., *Coldwell Banker Residential Real Estate Services, Inc. v. Clayton*, 105 Ill. 2d 389, 397 (1985); *Lawson v. Sheriff of Tippecanoe County*, 725 F.2d 1136, 1138 (7th Cir. 1984) ("This liberty [interest] must not be confused with the right to a job . . . but if a state excludes a person from a trade or calling, it is depriving him of liberty, which it may not do without due process of law."). This is what distinguishes Respondent's cited case of *Lyon v. Dept. of Children and Family Svcs.*, 209 Ill.2d 264, 273 (2004), where at issue there was a risk of the loss of a profession whereas here Respondent's claim of potential impact on possible future employment is speculative. (CL.182, social investigation notes that Respondent is considering teaching after college). The same infirmity undermines Respondent's claimed impairment of his educational interests. (R.Br.14, claiming that offers of admission or financial assistance may be rescinded if notified of sex offender status). Colleges and universities accept students based on many factors and even adult prison inmates and incarcerated juveniles are eligible for financial aid to attend college, and most restrictions on financial aid are removed once an inmate is released. *See Federal Student Aid Eligibility for Students Confined in Adult Correctional or Juvenile Justice Facilities* (Dec. 2014), U.S. Dep't of Education, avail. at: https://studentaid.ed.gov/sites/default/files/aid-info-for-incarcerated-individuals.pdf. It defies common sense to believe that federal financial aid would be readily available if such persons were routinely barred from seeking higher education. Moreover, Respondent's own filings from the University of Illinois, show that a

registered juvenile sex offender who is admitted will be offered a single room or a room with a roommate preference. (CL.351) Thus, Respondent has failed to establish that his general educational interests qualify as a "plus" factor for the stigma-plus test.

Citing *Hawaii v. Bani*, 36 P.3d 1255 (Haw.2001), Respondent argues that the Notification Law provisions imply that Respondent is "dangerous." (R.Br.15) However, *Bani* involved the "public notification" sections of its SORA and the version at issue has been superseded. *See Silva v. State*, 133 Haw. 252 (Haw.App. 2014). More to the point, the Illinois Notification Law (§121) has removed juveniles from the public registry. 730 ILCS 152/121. The Notification Law does not render the juvenile adjudication process public. Juveniles who are sex offenders receive closed hearings, sealed records, and have the other procedural protections of the juvenile process. Thus, the legislature has expressed a reasonable policy decision that certain information related to a juvenile sex offender will be subject to limited dissemination. To the extent that Respondent complains that his status as a sex offender will be disclosed to his "roommate" at college, it is very reasonable to permit disclosure of registry information "to any person when that person's safety may be compromised." 730 ILCS 152/121. Given that Respondent, an overnight guest, sexually abused a sleeping victim, it is rational that a roommate might be considered a person whose safety might be compromised by Respondent.

Ultimately, Respondent cannot distinguish the multiple Illinois cases specifically rejecting the notion that juvenile delinquents have a heightened privacy interest. As a result, Respondent's attacks here must fail because the foundational premise—that he has a constitutionally-protected liberty interest and an identifiable privacy interest—is without support and contrary to Illinois and federal jurisprudence.

B. SORA And The Notification Law Are Reasonable and Rational

Respondent argues that SORA and the Notification Law violate substantive due process principles because "new studies" and academic research shows that not all juvenile sex offenders will reoffend and his social investigation shows that he has a low-risk, and therefore these laws are not reasonably related to protection of the public. (R.Br.16-22) However, that some sex offenders may not reoffend does not render SORA and the Notification Law infirm. *See People v. Avila-Briones*, 2015 IL App (1st) 132221 ¶¶83-84 (under rational basis review, a law is not infirm because it is over or under-inclusive). A registry is necessarily preventive in nature – it is forward-looking and the line-drawing by the legislature need not be a perfect exercise, just a rational one. *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (neither "perfection" nor "mathematical nicety" are required for state line-drawing).

Nonetheless, citing out-of-state jurisprudence on loitering near pinball machines and "guest statutes," Respondent argues that "changes in the underlying circumstances may warrant a finding that a statute no longer relates to a legitimate government purpose. (R.Br.17, citing Iowa and Hawaii cases) And Respondent attempts to analogize his conduct to that of consensual sex between adults. (R.Br.17, citing *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (finding a due process violation in a Texas sodomy statute that applied solely to homosexuals who engaged in consensual sexual conduct). But, this case is not about Respondent's choice of partner or relationship, it is about sexual abuse of children. *See e.g., People v. Downin*, 357 Ill.App.3d 193 (3rd Dist. 2005) (in a criminal sexual abuse case, rejecting defendant's "valiant attempt to stretch the boundaries of *Lawrence*"). *Cf., State v. Van*, 688 N.W. 2d 600 (Neb. 2004)(in a criminal sexual assault case, finding nothing "in *Lawrence* to even remotely suggest that nonconsensual sexual

conduct is constitutionally protected under any circumstances"). Facilitating law enforcement monitoring and protecting the public from juvenile sex offenders cannot remotely be equated with the changing circumstances of consensual sex or pinball loitering or "guest statutes."

Relying heavily on the *IJJC Report,* Respondent argues that SORA and the Notification Law do not enhance public safety. (R.Br.18-20) But, as the Juvenile Justice Commission freely noted, its goals were to "identify evidence-based best practices," and to make "recommendations to ensure the effective treatment and supervision of youth who are adjudicated delinquent for a sex offense." *See* IJJC *Report* at 6. Unlike the *IJJC Report*, with its heavy focus on the best interests of juvenile sex *offenders*, the legislature must also examine what is also in the interest of public safety and potential risk to future *victims* of violent juvenile offenders. It is the legislature's purview to determine the policies that best protect children from the dangers posed by juvenile sex offenders.

Respondent asks this Court to reconsider the Illinois Supreme Court's opinion in *J.W.* that there is a rational basis for SORA and argues that the IJJC Report concludes that the registry is "over-inclusive" and "interferes with rehabilitation" of juvenile offenders. (R.Br.18, 20, citing a law journal article that dramatically claims that mandatory lifetime registration for juveniles could impede brain development and increase suicide). However, this Court must accept that *J.W.* governs the substantive due process analysis. The fact that other jurisdictions wish to treat their registration laws as part of their sentencing schemes or that commissions advocate for juveniles to be treated more leniently is insufficient for this Court to ignore the Illinois Supreme Court's rulings, which unlike the out of state jurisdictions or focused commissions, are binding upon this Court. *See People v. Caballes*, 221 Ill. 2d 282, 313 (2006) (noting that Illinois'

"jurisprudence of state constitutional law cannot be predicated on trends in legal scholarship, the actions of our sister states, a desire to bring about a change in the law, or a sense of deference to the nation's highest court").

Ultimately, Respondent's argument fails to consider that SORA and the Notification Law have an independent regulatory purpose, which, while protective of young offenders, also concern public safety as an equally important goal. Respondent's analysis also ignores the evolution of the juvenile justice system. Rehabilitation is a worthy goal and remains an integral part of the juvenile justice system, but since 1999, reform efforts have demonstrated the legislature's fundamental shift from having the singular goal of rehabilitation of juvenile offenders to include the need to protect the public and the desire to hold juveniles accountable for violations of the law. *See, e.g., In re Jonathon C.B.*, 2011 IL 107750, ¶87 (noting recent changes in Juvenile Court Act "to hold juveniles accountable for their actions and to protect the public"); *In re A.G.*, 195 Ill. 2d 313, 317 (2001) (noting that legislature has included protection of public and accountability as policy goals in Juvenile Court Act). 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 her or his behavior. It also provides a juvenile registrant with structure and discipline by requiring compliance with SORA's mandates, in order to stop the juvenile from entering the pipeline leading to chronic criminality, *i.e.*, the precise goal of rehabilitation. *See Jonathon C.B.*, 2011 IL 107750, ¶103 (quoting *In re Lakisha M.*, 227 Ill. 2d 259, 274 (2008), noting that DNA sampling "'has a deterrent and rehabilitating effect because it identifies those at risk of reoffending,' and thus is consistent with the Act's purpose of rehabilitating juveniles to prevent further delinquent behavior"; and

finding that reduced confidentiality of court records and prohibition of expungement for juvenile sex offenders "would have the deterrent and rehabilitating effect, of identifying those at risk of reoffending, consistent with the rehabilitative purposes of the Act to prevent further delinquent behavior").

Thus, while respondent was treated in a more protective manner through the juvenile court process than he would have been in criminal proceedings, he is still subject to SORA's independent regulations. Moreover, Respondent minimizes the fact that the legislature has amended SORA to give juveniles a chance to get off the registry after relatively few years (5 years for felonies/2 years for misdemeanors). 730 ILCS 150/3-5. Our Supreme Court has found that these amendments, together with the restricted dissemination of registry information significantly reduce the impact of the minor's registration requirement. *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 203 (2009).

Ultimately, whether to consider the *IJJC Report's* recommendations or academic views or even consider other state models to engage in further legislative activity on SORA or the Notification Law are not matters of constitutional magnitude or within the court's role. Preventing future victims of sexual harm remains a rational legislative goal and SORA and the Notification Law remain a reasonable means to prevent future sexual harm.

IV. SORA AND THE NOTIFICATION LAW COMPORT WITH PROCEDURAL DUE PROCESS. (Responding to Arguments I.B. & part of II.A)

Respondent and *amici* argue that the "offense-based classification system" violates procedural due process and argues that courts instead must make an "individualized determination" of risk in juvenile cases before subjecting a juvenile to the registry. (R.Br.23-25) However, even if Respondent can establish that he has some limited

constitutionally-protected privacy or liberty interest, he cannot show that this interest is violated by the procedures already in place; nor can he show that additional procedures of "individualized assessment" are constitutionally required in every instance. Procedural due process considerations do not require individualized considerations prior to imposing a registration requirement. *See Connecticut Dept of Public Safety v. Doe*, 538 U.S. 1, 8 (2003) ("states are not barred by principles of 'procedural due process' from drawing such [categorical registration] classifications)"; *Cf. In re M.A.*, 2015 IL 118049, ¶¶44 (categorical registration of juveniles in Violent Offender registry comports with procedural due process).

A. Eighth Amendment And Out-Of-State Jurisprudence Is Inapplicable

Respondent imports the eighth amendment principles gleaned from the juvenile death penalty and life-without-parole cases of *Roper v. Simmons*, 543 U.S. 551, 574-75 (2005) (eighth and fourteenth amendments forbid death penalty for offenders under 18 at time of offense); *Graham v. Florida*, 560 U.S. 48, 74-75 (2010) (eighth amendment forbids life sentence for juvenile convicted of non-homicide offense); and *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (eighth amendment forbids mandatory life sentence for juvenile convicted of homicide).[4] (R.Br.23) But eighth amendment principles have no place in a procedural due process analysis. As our Supreme Court recently noted in *People v. Patterson*, 2014 IL 115102, while the United States Supreme Court has "emphasized the distinctive nature of juveniles, the applicable constitutional standards differ considerably between due process and eighth amendment analyses. A ruling on a specific flavor of constitutional claim may not justify a similar ruling brought pursuant to another

[4] Respondent also cites to *J. D. B. v. North Carolina*, 131 S.Ct. 2394, 2403 (U.S.2011) a *Miranda* custody analysis, an issue not relevant here. (R.Br.23)

constitutional provision." *Id.* at ¶97, citing *People v. Davis*, 2014 IL 115595, ¶45. *See also People v. Pacheco*, 2013 IL App (4th) 110409, ¶¶62-63 (declining to extend *Miller* to due process arguments concerning excluded juvenile jurisdiction scheme); *People v. Salas*, 2011 IL App (1st) 091880, ¶¶77, 80 (refusing to apply *Roper* and *Graham* to juvenile transfer proceeding).

Respondent next turns to Ohio and Pennsylvania courts to contend that those states construing their own registries in light of their own constitutional principles mandate that Illinois must do the same or be "[i]n defiance of *Miller*. (R.Br.23-25, citing cases) However, as previously argued, states have considerable discretion in their statutory registration schemes. Justice McMorrow made this observation in *J.W.:* "laws in other jurisdictions which limit registration and notification requirements with respect to juveniles are the result of policy determinations made by the governing bodies of those states . . . [and] the authority to determine appropriate public policy for this state is vested in our legislature and not with this court"). 204 Ill. 2d at 84 (McMorrow, J., specially concurring). Thus again, Illinois need not imitate any other state's scheme to meet constitutional standards when every Illinois court has rejected these challenges on the basis that registries are not "punitive." *People v. Cardona*, 2013 IL 114076, ¶24 (SORA "is not punishment"); *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 203 (2009) (SORA registry not punishment and therefore eighth amendment not applicable). *Cf. United States v. Young*, 585 F.3d 199, 204-05 (5th Cir. 2009) (citing cases and agreeing with the 4th, 6th, 8th, 9th, 10th and 11th Circuits that have found federal sex offender registration law to be civil and not punitive). Respondent's argument must fail because SORA, as it is written, provides all the process due to a juvenile adjudicated delinquent for committing a sex offense.

B. **Procedural Due Process**

Procedural due process claims challenge the constitutionality of the specific procedures used to deny a person's *life, liberty, or property. People ex rel. Birkett v. Konetski,* 233 Ill. 2d 185, 201 (2009). Due process is a flexible concept, and "'not all situations calling for procedural safeguards call for the same kind of procedure.'" *Lyon v. Department of Children & Family Services*, 209 Ill. 2d 264, 272 (2004), quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Courts consider the following factors in evaluating a procedural due process claim: the interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Lyon*, 209 Ill. 2d at 277, citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Respondent identifies his protected liberty interest as a juvenile delinquent's right to privacy and right to be free from the restraints of registering, simply because the crime was committed while a juvenile. (Resp. Br. 14, "[t]he laws dramatically affect a juveniles right to pursue happiness by infringing upon his honor and good name"). He also proposes that this "right" demands an additional protection in the form of a "particularized assessment" of whether he should be required to register under SORA. But as the People have previously argued, Respondent's alleged heightened constitutional "freedom from governmental surveillance" does not exist and his "privacy" right as a juvenile has been rejected multiple times by our highest court and cannot serve as a protected interest demanding additional process.

In reality, "[t]he fundamental requirements of due process are notice of the

proceeding and an opportunity to present any objections" (*Konetski,* 233 Ill. 2d at 201), Here, no one could possibly dispute that Respondent (and all other juveniles) received both. The record confirms, and Respondent does not dispute, that he was given full and adequate notice of all the charges against him and all of the subsequent proceedings. Throughout, he was represented by appointed counsel who, among other things, advocated zealously on his behalf, thoroughly cross-examined the State's witnesses, and opposed the State's evidence. Respondent had the statutory right to present evidence and call witnesses on his behalf, was protected at all times by the standard of proof beyond a reasonable doubt, and had the right to appeal any finding other than acquittal. He also had the opportunity to argue that, based on his unique individual characteristics (like he now argues, *i.e.*, the offense was an aberration, and it is "low-risk" to reoccur), the court should not make him a ward of the court and close the case. *See* 705 ILCS 405/5-620; 705 ILCS 405/5-705(1) (court may conclude that it is unnecessary to impose a sentence on respondent, decide not to make respondent a ward of the court and close the case). In short, Respondent here received the full spectrum of procedural safeguards "before being required to register" under SORA. *Konetski*, 233 Ill. 2d at 202; *People v. Cardona*, 2013 IL 114076, ¶21. In this appeal, Respondent no longer contests the evidence proving his guilt for aggravated criminal sexual abuse, nor does he challenge the finding of wardship.

Even if Respondent has some liberty interest that is implicated by SORA and the Notification Law, he has been accorded adequate process. See *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) ("due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme"). Respondent cannot show that such an interest is violated by the procedures already in place; nor can he show that additional procedures providing "individualized assessment" are constitutionally

required in every instance. Respondent does not address the United States Supreme Court authority on this point which states that a pre-deprivation hearing is not required where it is not material to the scheme of a state's registration law. *See Connecticut Dep't of Pub. Safety*, 538 U.S. at 4, 8 (no violation of procedural due process where Connecticut registry did not provide for a hearing, because an individual who asserts a right to a hearing under procedural due process must show that the facts he seeks to establish in that hearing are relevant under the statutory scheme). *See also In re J.R.*, 341 Ill. App. 3d 784, 797 (1st Dist. 2003); *People v. Logan*, 302 Ill. App. 3d 319, 332 (2d Dist. 1998). A review of the *Mathews v. Eldridge* factors shows that no additional process is due. 424 U.S. at 335.

1. Private Interest. The concerns Respondent raised when asserting a liberty interest – about his reputation and potential impacts on his future educational or vocational opportunities – are also relevant to the private interest affected by the official action, the first *Mathews* factor. As the People have argued, the effects on these potential future opportunities are too speculative to satisfy the "plus" part of the stigma-plus test discussed above. Even if Respondent's concerns lend some weight to the first factor, the balance of the remaining factors shows that the extent of the procedures provided in SORA pass constitutional muster.

2. Risk of error/probable value of additional safeguards. As to the second *Mathews* factor, the risk of an erroneous deprivation is minimal. Respondent contends that the risk of erroneous deprivation is strong (R.Br.26), but because SORA registration is required upon adjudication of guilt for a qualifying offense, and nothing more, there is no additional finding whose accuracy can be questioned. And our Supreme Court has already found that the juvenile procedures leading to adjudication satisfy procedural due

process. In *Konetski*, the Court considered whether additional process (a jury trial) was required before a juvenile could be required to register in SORA. 233 Ill. 2d 185. The Court held that because juveniles received several "important procedural safeguards," including the right to notice, the right to counsel, the right to confront witnesses, the privilege against self-incrimination, and the standard of proof beyond a reasonable doubt, no further process was due prior to mandating automatic registration in SORA as a result of the adjudication. *Id.* at 201-02, citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 533 (1971). Because the prior adjudication here occurred through a proceeding that itself complied with due process, the rights to adequate notice and a fair adjudication have already been satisfied. No further process is required.

The General Assembly has also limited dissemination so that juvenile information will never appear on the public registry. 730 ILCS 152/121. Additionally, Illinois has a procedure in place to guard against factual errors in the registry, because the Illinois Administrative Code provides that a registrant may appeal directly to the Illinois State Police, the administrator of SORA, to request an administrative hearing. *See* 20 Ill.Admin.Code §1200.30 (setting out review procedures); *Honzik v. Dep't of State Police*, 2013 IL App (3d) 120103 (administrative decision to extend SORA registration period reversed based upon factual error).

3. Government's interest and administrative burdens. Illinois has two interests at stake: the State's interest in public safety, especially for children, is compelling and promoted by the maintenance and dissemination of the SORA registry; and Illinois has a fiscal and administrative interest in reducing the cost and burden of additional court proceedings related to sex offenders. *Mathews*, 424 U.S. at 348 ("Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a

factor that must be weighed").

In arguing that the goal of public safety could be better served through a risk assessment process, Respondent and *Amici* essentially concede that whether Illinois interests would be furthered by a risk assessment is a policy question. (Deft.Br.28-30) As such, these are policy arguments, not constitutional ones. Defendant's cost-benefit ratio type of analysis and his argument that SORA could be more discerning in its impact is one that should more properly be directed at the legislature. (Deft.Br.29) That is exactly what the Supreme Court did in the recent case of *In re M.A.*, 2015 IL 118049, in affirming the constitutionality of the Violent Offender registry, noting that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines ***." *Id.* at ¶70 and *see id.* at ¶81. (Burke, J., specially concurring) (inviting the legislature to consider ameliorative changes like those applicable to juveniles in SORA). *See also People v. P.H.*, 145 Ill.2d 209, 233 (1991) ("[w]hether [a mandatory juvenile transfer law] is the most effective means [of combating violent juvenile crime] is not relevant" to its constitutionality); *People v. Pacheco*, 2013 IL App (4th) 110409, ¶67 ("[W]e cannot find a statute unconstitutional simply because we believe it creates bad policy. 'In relation to the judicial branch, the General Assembly, which speaks through the passage of legislation, occupies a superior position in determining public policy.'"), quoting *Reed v. Farmers Ins. Group,* 188 Ill.2d 168, 175 (1999).

Thus, even if there is a liberty impairment, it is diminished by the procedural safeguards in place during the adjudicatory process; the probable value of the additional procedures would not outweigh the fiscal and administrative burdens required; and Respondent has failed to establish that additional process is constitutionally required.

V. PROPORTIONATE PENALTY ANALYSIS IS NOT IMPLICATED BY SORA OR THE NOTIFICATION LAW. (Responding to Arguments I.C. & II.B)

Respondent argues that the "2013 SORNA[5]" violates the eighth amendment to the United States Constitution and the proportionate penalty clause of the Illinois Constitution. (RBr.30) He concedes that the United States Supreme Court has held that "SORNA" laws are not punitive in *Smith v. Doe*, 538 U.S. 84, 96-106 (2003), but he limits *Smith* to adults and argues that juveniles "are different." (R.Br.30) He similarly concedes that the Illinois Supreme Court has already held that juvenile "SORNA" laws are not punitive, but he distinguishes *Konetski*, 233 Ill.2d at 207, on the basis that it "merely cited to older decisions" and argues that the Court has not applied the *Mendoza-Martinez* factors to the 2013 version of SORA, which he claims is "much more onerous." (R.Br.31-32) Again, Respondent also turns to out-of-state caselaw for support. (R.Br.32)

However, as the People have argued throughout this brief, Illinois Courts have repeatedly found that SORA does not impose punishment. Respondent has not been subjected to the criminal penalty in SORA which is triggered only upon a violation of the regulations.[6] For this reason alone, his argument fails. Respondent's attempt to graft proportionate penalty principles to the analysis of SORA and the Notification Law must be flatly rejected by this Court.

A. Eighth Amendment Analysis Is Not Implicated In This Case

Illinois courts have refused to extend eighth amendment scrutiny to claimed

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[5] There is no "2013" SORNA. SORA became applicable to Respondent on October 9, 2015, the date of his sentence. (CL.365) Of the challenged SORA provisions, §150/3-5 has been amended since 2013 (*see* P.A.97-1098 (eff. 7/1/2014) (mental health professionals who present risk assessments in termination hearings). The relevant Notification Law (§152/121) became effective in 2006. *See* P.A. 94-168, § 10 (eff. Jan.1, 2006); 95-331, § 1080 (eff. Aug. 21, 2007) (reenacted without changes).

[6] There is no penalty provision in §121 of the Notification Law. 730 ILCS 152/121.

violations involving non-punitive statutes because, "a constitutional challenge raised under one theory cannot be supported by decisional law based purely on another provision." *People v. Patterson*, 2014 IL 115102, ¶97 (automatic juvenile transfer statute); *see also People v. Pacheco*, 2013 IL App (4th) 110409, ¶¶62-63 (declining to extend eighth amendment analysis to due process arguments concerning excluded juvenile jurisdiction scheme); *People v. Salas*, 2011 IL App (1st) 091880, ¶¶77, 80 (refusing to apply eighth amendment proportionality analysis to juvenile transfer proceeding). This court should follow Illinois jurisprudence and decline to extend eighth amendment or Illinois proportionality analysis to SORA.

Moreover, Illinois courts have repeatedly found that SORA is not a punitive statute. *People v. Cardona*, 2013 IL 114076, ¶24 ("it is worth repeating that sex offender registration is not punishment"); *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 203 (2009) ("This court has repeatedly held, though, that [SORA's] requirements do not constitute punishment . . . [SORA] is a regulatory statute intended to foster public safety"). Again, it is important to note that "the appellate court must follow the law as declared by our supreme court." *Rockford Financial Systems, Inc. v. Borgetti*, 403 Ill. App. 3d 321, 331 (2d Dist. 2010); *People v. Fountain*, 2012 IL App (3d) 090558, ¶ 23 ("As an intermediate appellate court, we are bound to honor our supreme court's conclusion on [an] issue unless and until that conclusion is revisited by our supreme court or overruled by the United States Supreme Court."). Respondent's suggested improvements in the statutory scheme should be directed at the legislature as matters of policy.

While it is true, as Respondent claims, that SORA has evolved over the years (R. Br.32), the evolution of SORA indicates the legislative goal of a broad application of the regulation of those whose conduct poses a risk of sexual harm to the public in light of the

reality of societal challenges in the digital age. In fact, a review of the changes in SORA reflects a studied and careful modification of SORA to adapt to societal needs and challenges, and not a turn towards punishment. For example, Respondent complains that the scope of "who must register" has expanded since 1998. (R.Br. 32) However, this reflects the legislature's growing recognition that certain offenders present a danger of future harm of sexual crimes to children and adults. *See* e.g., *People v. Johnson*, 225 Ill. 2d 573, 588 (2007) (noting that SORA requires registration for "precursor" crimes where there is a high risk of sexual exploitation to children).

Respondent also claims that –in person registration and a shortened, and perhaps more frequent, registration period turn the 2013 "SORNA" into punishment. (RBr.32) But the legislature's shortening of the timeframe to register rationally relates to the increased ability of offenders to move about in the state and the rational concern with closely monitoring their whereabouts. There is no "punishment" in this change. The same is true of Respondent's complaint that sex offenders must provide more personal and social media information than the "1998" SORA required. (RBr.32) This is no doubt because we have become an increasingly digital and untethered society over the last 15 years and the legislature has sought to better monitor registrants by requiring various forms of identification and documentation that substantiates the location of registrants. To permit sex offenders to register without any proof of identification and documentation of their identifying information undermines the tracking and monitoring function, an essential purpose of SORA, and does not render the 2013 "SORNA" punitive. Respondent also argues that the legislature has increased the administrative fee due for registrants (R.Br.32), but fails to note that there is a waiver if the registrant is unable to pay. 730 ILCS 150/3-6(c). Thus, this change does not evince a punitive purpose either. Finally, Respondent complains

that SORA has increased the penalty structure for failure to comply with its provisions. (R.Br.32) That is true. However, the legislature increased the penalty in 2004 to give more "teeth" to compliance, and this fact also does not evince a punitive purpose. *See* P.A. 93-979 (eff. Aug. 20, 2004).

Whether viewed individually or cumulatively, the changes in SORA are rationally related to the original purpose of the reporting statute as noted in *Malchow,* 193 Ill.2d 413, and *Smith,* 538 U.S. 84. These are the relevant and controlling authority and defendant's attempt to bypass the analysis in those cases, simply because of certain changes to SORA must be rejected. The fact that a civil statute has some punitive aspects does not transform it into a penal statute.

Respondent recognizes that Illinois does not operate on a blank slate in determining whether SORA is a regulation or punishment, but he blithely sweeps away the fact that the Illinois Supreme Court has ruled and found SORA constitutional several times, and those rulings are *stare decisis*, by claiming that the 2013 "SORNA" has not been specifically analyzed by the Illinois Supreme Court (R.Br.32-33). Yet, he does not address that the 2012 version of SORA has been analyzed by this Court, and as the People have noted, there has been only one irrelevant change to SORA since 2013. *See supra*, fn.5.

In *People v. Fredericks*, 2014 IL App (1st) 122122, this Court applied the *Mendoza-Martinez* framework to the 2012 version of SORA to find that lifetime registration for a defendant who had a prior sex offense and then committed a later felony did not convert SORA into punishment in violation of *ex post facto* prohibitions. *Id.* at ¶¶58-60. This Court's conclusion was the same as that reached by the Illinois Supreme Court in *People v. Malchow*, 193 Ill.2d 413, 421 (2000) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (concluding that the Notification Law was non-penal). Consistent

with the decisions of Illinois authorities, Respondent's argument that the "2013 SORNA" is punitive should be rejected.[7]

B. Application of *Mendoza-Martinez* Framework to the "2013 SORNA" Does Not Change Its Fundamental Purpose Or Nature As A Civil Regulation

The application of the intent-effects test identified in *Mendoza-Martinez,* is a two-step inquiry of statutory construction. First, the "focus of the inquiry is upon whether the [Illinois] legislature, in passing the statute, meant the statute to establish civil proceedings. If the intent was to enact a statutory scheme that is nonpunitive and civil, the inquiry becomes whether that scheme is so punitive either in effect or purpose so as to negate the legislature's intent to deem it civil." *People v. Cornelius*, 213 Ill. 2d 178, 208 (2004), citing *Smith v. Doe*, 538 U.S. 84, 92 (2003). From the earliest versions of SORA, the purpose was to create a method of protection from the increasing incidence of sexual assault and sexual abuse. *See People v. Adams*, 144 Ill. 2d 381, 387 (1991). Accordingly, Illinois reviewing courts have repeatedly construed the provisions of SORA as non-punitive civil regulations that are not related to the length or nature of the criminal sentence. *See People v. Cardona*, 2013 IL 114076, ¶24 (SORA registration is not punishment); *Konetski*, 233 Ill. 2d at 203 (SORA's requirements "do not constitute punishment . . . it is a regulatory statute"); *In re J.W.*, 204 Ill. 2d 50, 73 (2003) (same); *Malchow,* 193 Ill. 2d at 420 (same).

In the second step of the inquiry, the *Mendoza-Martinez* framework examines seven factors: (1) whether the sanction involves an affirmative disability or restraint; (2) whether the sanction has been historically regarded as punishment; (3) whether the sanction comes into play only on a finding of scienter; (4) whether operation of the

[7] Unlike juveniles like Respondent, adults like Fredericks cannot petition for early termination of registration in SORA.

sanction will promote retribution and deterrence; (5) whether the behavior to which the sanction applies is already a crime; (6) whether an alternative purpose to which the sanction may rationally be connected is assignable to it; and (7) whether the sanction appears excessive in relation to the alternative purpose assigned. *People v. Fredericks*, 2014 IL App (1st) 122122, ¶58 citing *Malchow*, 193 Ill. 2d at 421 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

The *Mendoza-Martinez* factors are "neither exhaustive nor dispositive . . . but are useful guideposts." *Smith*, 538 U.S. at 97 (internal quotation marks and citations omitted); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 n.7 (1984) (list of considerations is "neither exhaustive nor dispositive"). Illinois has adopted these guideposts as analyzed in *Smith* in its analysis of the Notification law. *Cornelius*, 213 Ill. 2d 178 (applying *Smith v. Doe*, 538 U.S. 84, majority analysis to conclude that the Notification Law is non-punitive under federal and Illinois constitutions); *see also Malchow*, 193 Ill. 2d at 421 (applying *Mendoza-Martinez* test). As a result, Respondent must show by the "clearest proof" that the effects of SORA and the Notification Law are sufficiently punitive to overcome the General Assembly's preferred categorization that it is a civil statute. *Malchow*, 193 Ill. 2d at 421, citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). A review of the *Mendoza-Martinez* factors follows:

(1) **Whether the sanction involves an affirmative disability or restraint.** Generally, this factor has referred to physical restraint. *See e.g.*, *Smith*, 538 U.S. at 111 (Stevens, J., dissenting in part and concurring in part) (analysis "begins with a consideration of the impact of the statutes on the registrants' freedom); *Hendricks*, 521 U.S. at 357 (a person has a constitutionally protected interest in avoiding physical restraint, but indefinite detention under civil commitment statute did not render civil law punitive). In

Cornelius, the Supreme Court found that the Notification Law did not place an affirmative disability or restraint on sex offenders as it did not restrict their movements or activities. 213 Ill. 2d at 209, citing *Smith*, 538 U.S. at 100 (noting that under Alaska's version of SORA offenders remained free to change jobs or residences); *People v. Logan*, 302 Ill. App. 3d 319, 329 (2d Dist. 1998) (no affirmative restraint in the physical act of registering).

Regular, mandatory in-person appearances are consistent with the goal of public safety and do not limit a registrant's freedom. Clearly, in-person appearances cannot be the equivalent of "probation" or "mandatory supervised release" conditions as Respondent claims. (R.Br.33-34) Illinois reviewing courts have already determined that lifetime registration is not an affirmative restraint. *People v. Downin*, 394 Ill. App. 3d 141, 146 (3d Dist. 2009). Illinois is free to recognize that in-person appearance is not an affirmative restraint and the act of registering is no more onerous than showing up at the required times in person at the Secretary of State's office to get a driver's license. *See Logan*, 302 Ill. App. 3d at 329 (finding registration requirement to be *de minimis*). Appearing in-person is rationally related to ensuring that the registrant is actually the sex offender who is required to register and cannot be equated with physical restraint or a loss of freedom.

(2) **Whether the sanction has been historically regarded as punishment.** Respondent argues that registration is similar to "conditions of supervised release or parole." (R.Br.35) Bypassing Illinois authority, Respondent relies on a case from Indiana (*Wallace v. State*, 905 N.E.2d 371 (Ind.2009), but his reliance suffers from the fact that Indiana follows the *Smith* dissent unlike Illinois which follows the majority. In *Smith*, 538 U.S. 84, the majority Court explained:

> The [lower] Court of Appeals held that the registration system is parallel to probation or supervised release in terms of the restraint

> imposed. This argument has some force, but, after due consideration, we reject it. Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction. By contrast, offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision. Although registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so. A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense.

Smith at 101-102 (internal citations omitted). *Smith* construed the Alaska version of SORA that provided for lifetime registration for an aggravated sex offense and required offenders to notify police if they moved, and if they failed to comply with the law, registrants were subject to criminal prosecution. *Id.* at 90. Illinois SORA is comparable in that no supervising officer is assigned to monitor a registrant and a registrant does not have to seek permission of law enforcement before undertaking various activities, nor can any officer seek to "revoke" registration. Thus, SORA does not resemble punishment.

(3) Whether the sanction comes into play only on a finding of scienter. Respondent cites conflicting state caselaw of Indiana and Maine (Deft.Br.28-29, citing *Gonzalez v. State*, 980 N.E.2d 312, 318 (Ind.2013) and *State v. Letalien*, 985 A.2d 4, 21 (Me.2009), but there is more on-point guidance. In *Smith*, the Supreme Court concluded that the scienter factor in the Alaska SORA statute was entitled to "little weight" in its analysis because "[t]he regulatory scheme applies only to past conduct, which was, and is, a crime." *Smith*, 538 U.S. at 105. Illinois follows this analysis and thus this factor does not weigh in favor of concluding that SORA is punitive in nature. Respondent concedes this point. (R.Br.35)

(4) Whether operation of the sanction will promote retribution and deterrence. SORA remains non-punitive where it has a rational connection to a legitimate non-punitive purpose - public safety. *See Smith*, 538 U.S. at 102-03 (public safety is a legitimate purpose of registration law). "Where a legislative restriction is an incident of the state's power to protect the health and safety of its citizens, the restriction will be considered to evidence an intent to exercise that regulatory power, and not a purpose to add to a punishment." *People v. Leroy*, 357 Ill. App. 3d 530, 538 (5th Dist. 2005), citing *Smith*, 538 U.S. at 93-94. Respondent argues that SORA has a retributive effect and is therefore punitive. (R.Br.35) It is true that SORA can operate to deter future crime, but a deterrent effect does not negate the overall remedial and regulatory nature of an act and deterrence can serve both criminal and civil goals. As the Supreme Court has observed, "[t]o hold that the mere presence of a deterrent purpose renders such sanctions criminal ... would severely undermine the Government's ability to engage in effective regulation." *Smith*, 538 U.S. at 102. Thus, this factor does not override the clear regulatory purpose of SORA.

Illinois has carefully limited its scope to sex offenses and sexually-motived crimes against children. For example in 2006, Illinois moved out of SORA those violent crimes that were beyond SORA's regulatory aims and created a separate violent offender registry. 730 ILCS 154/1 *et seq*. And Illinois has added a termination provision to SORA for juveniles adjudicated guilty of sex offenses who pose no risk of harm (such as no-force sex between teens), thus recognizing the need to limit the scope of SORA with regard to youthful offenders. 730 ILCS 150/3-5 (permitting a hearing after 5 years if a felony or 2 years if adjudication is of equivalent misdemeanor sex offense). Clearly, Illinois has carefully addressed and limited the scope of SORA and this factor does

support that SORA has a non-punitive effect.

(5) Whether the behavior to which the sanction applies is already a crime. Respondent again turns to Maine and Oklahoma for support (R.Br.36, citing *Letalien*, 985 A.2d at 22; and *Starkey v. Okla. Dept. of Correc.*, 305 P.3d 1004, 1028 (Okla.2013)), however, like the third factor, there is clear guidance from the Supreme Court as it concluded that this factor is of "little weight." *Smith*, 538 U.S. at 105. *Malchow* did find that this was the only factor in favor of defendant (193 Ill.2d at 423), but SORA is triggered at the time of conviction/adjudication, because recidivism is the statutory concern. The duties imposed by SORA are not predicated upon a present violation but a concern for recidivism. No doubt this is why *Smith* declared that this factor is entitled to "little weight."

(6) Whether an alternative purpose is assignable. Respondent concedes that SORA has a legitimate public safety purpose, but argues that this factor is entitled to little weight (R.Br.36) From its inception the rationale for SORA has been clear: "the welfare and protection of minors has always been considered one of the State's most fundamental interests." *People v. Huddleston*, 212 Ill. 2d 107, 133 (2004). This factor weighs against finding SORA to be punitive in nature.

(7) Whether the sanction appears excessive in relation to the alternative purpose assigned. Respondent ignores the fact that Illinois follows the majority opinion in *Smith* and again cites to an Indiana case that adopted the dissent in *Smith*, 538 U.S. at 111(Ginsburg, J., dissenting). (R.Br., citing *Wallace*, 905 N.E.2d at 383) *Smith* found that the legislature could reasonably regulate the grave concerns of recidivism of sex offenders as a class because "[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release," but may occur "as late as 20 years

following release." *Smith*, 538 U.S. at 104, citing National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, *Child Sexual Molestation: Research Issues* 14 (1997). Thus, SORA is not excessive and this factor weighs in favor of the State.

Having considered each of the seven factors, it is clear that the impact of SORA does not transform the civil regulation into a criminal one. In *Malchow*, the Court found that four of the first five *Mendoza-Martinez* factors and the final two factors weighed in favor of finding that the Notification Law did not impose punishment; only the fifth factor - whether the Notification Law applied to behavior that is already criminal - weighed in favor of defendant. *Id.* at 421-24. The in-person reporting duties were a feature of the 1998 SORA at issue in *Malchow,* 193 Ill.2d at 417, and therefore cannot be considered an affirmative restraint, and the increase in the length or duration of reporting in the "2013 SORNA" is relatively minor when balanced against the remaining factors and is not alone sufficient to overcome the high threshold "clearest proof" to overcome the legislature's intent that SORA and the Notification Law remain a civil regulation. *See Smith,* 538 U.S. at 92. Thus, review of the *Mendoza-Martinez* factors does not change the conclusion that while SORA has evolved, it remains a non-punitive regulation.

C. The Illinois Proportionate Penalty Clause Is Not Implicated

Respondent argues that SORA is "particularly harsh and unconstitutionally disproportionate," under the Illinois proportionate penalty clause, citing *People v. Miller*, 202 Ill.2d 328 (2002). (R.Br.49) Respondent apparently analogizes his situation to the minor who merely acted as a lookout and yet faced life imprisonment through the convergence of several statutes directly applied to him. However, in *Miller*, the Court made clear that it reached this conclusion because "the convergence of the Illinois transfer statute, the accountability statute, and the multiple-murder sentencing statute

eliminate[d] the court's ability to consider any mitigating factors such as age or degree of participation." 202 Ill. 2d at 341-42 (holding 730 ILCS 5/5-8-1(a)(1)(c)(ii) (mandatory natural life sentence) violated the proportionate penalties clause of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 11)). In *Miller*, unlike Respondent, the convergence of the statutes actually applied to result in lifetime imprisonment. Respondent has not been subjected to imprisonment as a result of SORA or the Notification Law and thus, proportionate penalty analysis is not implicated. The lines drawn by *Miller* are clear and Respondent does not fall within the gambit of a *Miller*-type analysis.

D. Given the Warnings and Notices, Our Supreme Court Has Held That No Scienter Is Required To Criminally Penalize A Violation Of The SORA

Respondent finally argues that SORA is unconstitutional as it "could potentially punish purely innocent behavior. (R.Br.41, citing *In re K.C.*, 186 Ill.2d 542 (1999)(criminal trespass to vehicle) and *People v. Zaremba*, 158 Ill. 2d 36 (1994)(theft statute)) However, our Supreme Court has already held given that a registrant knows or should know of his duties under SORA, and therefore has a culpable mental state of knowledge of the law that triggers his duties under the SORA, no further scienter is required to criminally penalize a noncompliant registrant for a violation of the SORA. *People v. Molnar*, 222 Ill. 2d 495, 522 (2006) ("we find the legislature intended to create an absolute liability offense for violating the Registration Act").

This is because offenders who do not register increase the risk to the public safety. *People v. Marsh*, 329 Ill. App. 3d 639, 648 (1st Dist. 2002)(offenders who fail to register avoid monitoring and may be freer to reoffender against future victims). *Molnar* found that given SORA's warnings and repeated notices, the legislature intended to establish

strict liability for a failure of some of its penalty provisions and such a determination was constitutional. *Molnar*, 222 Ill.2d at 523-24; 730 ILCS 150/10; 720 ILCS 5/4-9.

SUMMARY

In sum, what Respondent is trying to do here—turn SORA and the Notification Law into penal statutes and then have them declared *facially* unconstitutional—is inconsistent with every Illinois Court decision touching upon SORA and the Notification Law. As a result, for support Respondent relies predominantly on out-of-state cases dealing with other, unrelated reporting statutes that have little to no persuasive authority when it comes to *Illinois'* reporting and notification scheme. Similarly, he continually points to *dissenting* opinions from the United States Supreme Court, where the majority opinions do not support his cause. Put simply, he has no authority to support his claim that SORA or the Notification Law are facially unconstitutional or *penal* statutes in violation of proportionate penalties/eighth amendment principles.

Review of SORA and the Notification Law, under established constitutional guidelines, disclose that they are regulatory, not punitive, that operate constitutionally by providing all the necessary process due, and by being rationally related to the legitimate goal of public safety. Categorical registration infringes on no fundamental liberty or privacy interests and the limited dissemination is rational on their face and as applied to this Respondent. They are not punitive and therefore do not qualify as "cruel and unusual" punishment, or implicate, much less violate, the proportionate penalties clause.

CONCLUSION

The People of the State of Illinois respectfully request that this Honorable Court uphold the juvenile court's judgment in every respect, and affirm Respondent's adjudication of delinquency and his duty to register as a juvenile sex offender.

Respectfully Submitted,

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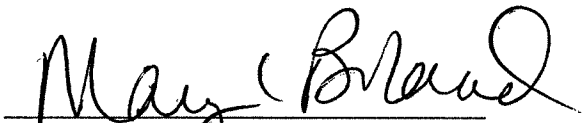
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages 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 49 pages.

By: 

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