No. 122034

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. MARC A. PEPITONE, Defendant-Appellee.	)	On Appeal from the Appellate Court of Illinois, Third District, No. 3-14-0627 There on Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, No. 13 CM 844 The Honorable Carmen Goodman, Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE ACTION

Defendant Marc A. Pepitone was convicted of being a child sex offender knowingly present in a public park, in violation of 720 ILCS 5/11-9.4-1(b). The Appellate Court vacated defendant's conviction, finding that the statute was facially unconstitutional because it violated substantive due process rights.

No question is presented on the pleadings.

ISSUE PRESENTED FOR REVIEW

Whether keeping child sex offenders out of public parks bears a rational relationship to the State's legitimate interest in protecting children from sex crimes.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315, 317, 604(a)(2), and 612(b)(2). On May 24, 2017, this Court allowed the People's petition for leave to appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

720 ILCS 5/11-9.4-1 states in relevant part:

(a) For the purposes of this Section:

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

> "Public park" includes a park, forest preserve, bikeway, trail, or conservation area under the jurisdiction of the State or a unit of local government.
>
> * * *
>
> (b) It is unlawful for a sexual predator or a child sex offender to knowingly be present in any public park building or on real property comprising any public park."

The Fourteenth Amendment to the United States Constitution states, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Article I, Section 2 of the Illinois Constitution states, in relevant part, "No person shall be deprived of life, liberty or property without due process of law."

STATEMENT OF FACTS

Defendant, a child sex offender, is found in a public park near his illegally parked van.

Around 4:30 p.m. one day in early March 2013, Officer Steven Alexander of the Bolingbrook Police Department noticed a van parked sideways across three parking spaces in the Indian Boundary Park. R195.[1] In the park were tennis and basketball courts, soccer and baseball fields, and two pavilions. R195-96. The Bolingbrook schools had recently let out for the day. R202.

Alexander ran the van's registration and discovered that it was owned by defendant, a convicted child sex offender. R196. Defendant had been

[1] "A_," "C_," and "R_" refer, respectively, to the appendix to this brief, the common law record, and the report of proceedings.

convicted of predatory criminal sexual assault of a child in 1999 in Will County case No. 98 CF 389. C12; C26.

Defendant was with his dog approximately twenty feet from the van. R197. Defendant approached, asked if everything was okay with the van, related that he was a child sex offender, and advised that he was unaware that he was prohibited from entering public parks. *Id.* Alexander did not see any children or other people in the parking lot or in the immediately visible surroundings. R200-01. Alexander did not know how long defendant had been there or whether he had visited other areas in the park. R201.

A jury finds defendant guilty of being a child sex offender knowingly present in a public park.

Defendant was charged with being a child sex offender knowingly present in a public park, in violation of 720 ILCS 5/11-9-4-1(b) (2013). C3. Defendant moved to dismiss, arguing that the statute was unconstitutional on its face because it violated substantive due process under the Fourteenth Amendment to the United States Constitution and Article I, Section II of the Illinois Constitution. C12; R32. The circuit court denied the motion. C46; R41.

At trial, the parties stipulated that defendant was a child sex offender and that his victim in the Will County case was under eighteen years of age at the time of the offense. R203. After the People rested, defendant moved for a directed verdict, asserting that the statute was unconstitutional; the circuit court denied the motion. R207, 214. Defendant also objected to the

constitutionality of the statute during the jury instruction conference. R219, 222-23, 234. Defendant did not testify. R252.

The jury found defendant guilty. C49, 51-52; R279. Defendant moved for a new trial, arguing, among other matters, that the statute was unconstitutional. C91. The circuit court denied the motion. C94; R285. The court sentenced defendant, who also had a prior residential burglary conviction, to twenty-four months of conditional discharge and 100 hours of community service. C93; R295-96. Defendant moved to reconsider the community service portion of his sentence, although he had completed it by the time the motion was heard, and to file a notice of appeal and appoint the appellate defender. C96; R307, 310. The court granted defendant's motion, and a notice of appeal was filed that same day. C100-04.

The appellate court reverses in a divided opinion.

The appellate court reversed, finding the statute facially unconstitutional. A10. The court recognized that the rational basis test applied because the statute did not affect a fundamental right, but determined that the statute was not reasonably related to the State's interest in protecting the public because it criminalized substantial amounts of "innocent conduct," such as walking a dog. A6-9.

Justice Carter dissented, explaining that as "the majority itself notes, to satisfy the rational basis test, the means adopted in the statute do not have to be the best means of accomplishing the legislature's objectives." A11.

"By keeping sex offenders who have committed sex offenses against children away from areas where children are present, the legislature could have rationally sought to avoid giving those sex offenders an opportunity to reoffend." *Id.*

STANDARD OF REVIEW

This Court reviews matters of law, such as the lower court's determination regarding the constitutionality of a statute, de novo. *People v. Rizzo*, 2016 IL 118599, ¶ 23.

ARGUMENT

Sex crimes pose a serious threat to communities. As part of an evolving statutory scheme to address risks posed by those who have sexually violated children, section 9.4-1 of the Vulnerable Victim Offenses Article makes it a misdemeanor for a child sex offender to knowingly be present in a public park. 720 ILCS 5/11-9.4-1(b). The appellate court majority below found the statute facially unconstitutional because it criminalized "innocent conduct." But the majority mistakenly (1) searched for an unconstitutional application of the statute rather than a constitutional one, and (2) failed to realize that "innocent conduct" refers not to inherently non-blameworthy conduct, but instead to activity wholly unrelated to the legislation's purpose.

A defendant raising a facial challenge to a statute must rebut the strong presumption of constitutionality by clearly showing that no set of circumstances exists under which the statute would be valid. Under the applicable rational basis test, the Court does not assess the wisdom of

legislative policy decisions, but upholds a statute as long as it bears a rational relationship to a legitimate purpose.

Here, the General Assembly rationally concluded that keeping child sex offenders away from parks furthered the legitimate goal of protecting vulnerable children from sex offenses. Courts and legislatures agree that sex offenders have a troubling recidivism rate. And children often play, either alone or in small groups, in parks, which contain secluded areas and opportunities for isolation. Moreover, studies and case law both demonstrate the high number of sex offenses that occur in public parks. The General Assembly may enact prophylactic legislation to prevent such intolerably risky situations. For these reasons, courts in this State and other jurisdictions have rejected substantive due process challenges to the statute and similar legislative enactments. This Court should do so as well.

I. A Defendant Raising a Facial Substantive Due Process Challenge Carries a Heavy Burden.

"As this [C]ourt has *often* emphasized, 'Constitutional challenges carry the heavy burden of successfully rebutting the strong judicial presumption that statutes are constitutional.'" *People v. Rizzo*, 2016 IL 118599, ¶ 23 (emphasis in original) (quoting *People v. Patterson*, 2014 IL 115102, ¶ 90). "That presumption applies with equal force to legislative enactments that declare and define conduct constituting a crime." *Id.* "To rebut the presumption, the party challenging the statute must clearly establish a constitutional violation." *People v. Boeckmann*, 238 Ill. 2d 1, 6 (2010).

"A statute is facially invalid only if there is no set of circumstances under which the statute would be valid." *In re M.A.*, 2015 IL 118049, ¶ 39; *see also Rizzo*, 2016 IL 118599, ¶ 45 ("If any state of facts can reasonably be conceived of to justify the enactment, it must be upheld."). "Consequently, a facial challenge to the constitutionality of a legislative enactment is the most difficult challenge to mount successfully." *M.A.*, 2015 IL 118049, ¶ 39.

When, as here, neither a suspect classification nor a fundamental liberty interest is involved, rational basis scrutiny applies. *Rizzo*, 2016 IL 118599, ¶ 45; *see also Doe v. City of Lafayette, Ind.*, 377 F.3d 757, 772-73 (7th Cir. 2004) (right to enter park not fundamental). This test acknowledges that risk assessment and policy judgments based on empirical evidence are reserved to the legislature by the federal and state constitutions. Thus, a "statute will be upheld under the rational basis test as long as it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable." *M.A.*, 2015 IL 118049, ¶ 55.

The appellate court determined, and defendant has never contested, that protecting children from sex offenders is a legitimate purpose. The only question presented here is whether preventing child sex offenders from entering public parks is rationally related to that interest.

II. Courts Do Not Judge the Wisdom of Legislative Policy Decisions.

"When applying the rational basis test, the [C]ourt is highly deferential to the findings of the legislature." *Rizzo*, 2016 IL 118599, ¶ 45;

see also Boeckmann, 238 Ill. 2d at 7 ("Legislation must be upheld if there is a conceivable basis for finding it is rationally related to a legitimate state interest."). 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.'" *M.A.*, 2015 IL 118049, ¶ 70 (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 393 (1976) (*per curiam*)); *see also Moline Sch. Dist. No. 40 Bd. of Educ. v. Quinn*, 2016 IL 119704, ¶ 28 ("Of course, the fact that a law might be ill-conceived does not, in itself, create a constitutional problem for us to fix, for whether a statute is wise and whether it is the best means to achieve the desired result are matters for the legislature, not the courts."). And the "legislature's judgments in drafting a statute are not subject to judicial fact finding and may be based on rational speculation unsupported by evidence or empirical data." *Boeckmann*, 238 Ill. 2d at 7 (quotation omitted).

This is true even when legislation creates "harsh results." *Hayashi v. Ill. Dept. of Fin. & Prof'l Regulation*, 2014 IL 116023, ¶ 32. *Hayashi* upheld a law allowing revocation of the license of a health professional convicted of a crime requiring registration as a sex offender. *Id.* Although the law "permanently barr[ed] plaintiffs from using their medical licenses or practicing their chosen professions," "it is not a matter for this [C]ourt to question the wisdom of the General Assembly in establishing licensing requirements, nor to determine whether it has chosen the best available

means to achieve its desired result." *Id.* Because there was "no question that the means chosen by the legislature is rationally related to the goal of protecting the public health," plaintiffs did not allege a substantive due process violation. *Id.* The statute at issue here is just as rationally related to its legitimate governmental purpose; therefore, defendant's substantive due process challenge must fail.

III. The Legislature Rationally Chose to Bar Child Sex Offenders From Public Parks.

The statute prohibits a child sex offender from being knowingly present in any public park, plainly defining "child sex offender" and "public park." 720 ILCS 5/11-9.4-1(a), (b). The purpose of the statute is "to protect users of public parks from child sex offenders and sexual predators who use the attributes of a park to their advantage to have access to potential victims." 96th Ill. Gen Assem., Senate Proceedings, March 16, 2010, at 55 (Statement of Senator Althoff). Senator Althoff highlighted recidivism rates, noting that "[c]onvicted sex offenders are four times more likely to reoffend than other offenders." *Id.* Moreover, "[p]ublic parks offer many opportunities for sexual predators and child sex offenders to have easy access to potential victims" because "[c]hildren and lone adults frequently use parks for recreational activities" and "parks have many obscured views and other distractions that . . . offer opportunities for sex offenders to access potential victims." *Id.* Meanwhile, the legislature tailored the law to exclude offenders who did not pose special dangers in this context, specifically "those convicted

of criminal sexual abuse involving consensual sex when [the] accused is under seventeen and the victim is between nine and sixteen years of age and when the victim is thirteen to sixteen years of age and accused is less than five years older." *Id.*; *see also* 720 ILCS 5/11-9.3(d) (defining "child sex offender"); 720 ILCS 5/11-9.4-1(a) ("child sex offender" has meaning from Section 11-9.3(d) but excludes offenses under subsections (b) and (c) of Section 11-1.50 (criminal sexual abuse by person under seventeen)).

The statute is only the latest in the General Assembly's decades-long process of fine-tuning its response to the recidivism of child sex offenders. As noted in *People v. Stork*, 305 Ill. App. 3d 714, 721 (2d Dist. 1999), the original bill that introduced Section 11-9.3, which prohibited child sex offenders from being present in school zones, noted the "high recidivism rate of child sex offenders," House Bill 157 (90th Ill. Gen. Assem., House Bill 157, 1997 Sess.). And "Senator Hendon explained that that the bill 'would just make it harder for child sex offenders to be in the schools and get access to our children.'" *Stork*, 305 Ill. App. 3d at 721 (quoting 90th Ill. Gen. Assem., Senate Proceedings, May 14, 1997, at 11 (Statement of Senator Hendon)). *Stork* upheld that law against a due process challenge. *Id.* at 720-23. Indeed, "our legislature has responded again and again to the propensity of sex offenders to repeat their crimes and to increases in the incidence of sexual assault and abuse cases." *People v. Huddleston*, 212 Ill. 2d 107, 137 (2004).

The General Assembly's concern regarding recidivism rates is not merely rational, it is also widely accepted by courts and legislatures. No less an authority than the Supreme Court has concluded that the risk of recidivism for sex offenders is "frightening and high." *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quotation omitted); *see also Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (sex offenders pose "serious threat" to communities) (quotation omitted); *McKune v. Lile*, 536 U.S. 24, 33 (2002) (plurality) ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault."). And "every state in the nation has enacted a version of 'Megan's Law,' requiring . . . registration and monitoring of sex offenders who are released into the community," in addition to addressing "this substantial risk of child sex offender recidivism in many different ways." *Huddleston*, 212 Ill. 2d at 138. The threat can be particularly acute for minors. *See McKune*, 536 U.S. 24, 32 (2002) (plurality) ("As in the present case, the victims of sexual assault are most often juveniles."); *see also People v. Wealer*, 264 Ill. App. 3d 6, 16 (2d Dist. 1994) (recognizing that government's "legitimate interest in deterring and prosecuting recidivist acts committed by sex offenders" is "especially compelling" because "sex offenders frequently target children as their victims").

Even if there are policy debates on the precise level of risk posed by child sex offenders and how to manage that risk, "legislatures may respond to

what they reasonably perceive as a 'substantial risk of recidivism.'" *Huddleston*, 212 Ill. 2d at 138 (quoting *Smith,* 538 U.S. at 103). And while this Court would uphold the statute under the rational basis test even if the General Assembly's belief that public parks present particular dangers were merely "rational speculation unsupported by evidence," *Boeckmann*, 238 Ill. 2d at 7, it is not mere conjecture that child sex offenders might seek victims in public parks. The Seventh Circuit addressed a challenge to a city's ban of a child sex offender from all public parks following the discovery that the offender had been "cruising" by a park in search of children. *Lafayette*, 377 F.3d at 773. In upholding the ban against a substantive due process challenge, the court noted "the reality that children, some of the most vulnerable members of society, are susceptible to abuse in parks," concluding that "it is hard to see how the City's ban is anything but rational." *See Brown v. City of Michigan City, Indiana*, 462 F.3d 720, 733 (7th Cir. 2006) (upholding ban of child sex offender from parks under "highly deferential" rational basis review, where plaintiff had been seen at park near family and watching beach patrons through binoculars).

And in *People v. Diestelhorst*, 344 Ill. App. 3d 1172, 1177-78 (5th Dist. 2003), the defendant, who had multiple convictions for child sex offenses, drove to public parks and communicated with minors participating in high school sports practices. In upholding a predecessor to the present statute against a substantive due process challenge, the Fifth District noted that it

was "intended to protect children from known sex offenders, who have a notoriously high recidivism rate." *Id.* at 1184.

Case law from Illinois courts provides further evidence that parks have provided the setting for numerous sexual assaults, including those of minors. *See People v. Garner*, 347 Ill. App. 3d 578, 580 (1st Dist. 2004) (aggravated criminal sexual abuse of minor where defendant picked up victim in park before taking her to a motel); *People v. Westbrook*, 262 Ill. App. 3d 836, 840 (1st Dist. 1992) (aggravated criminal sexual assault of thirteen-year-old girl in which defendant used van to take victim to park, where assault occurred); *People v. Israel*, 181 Ill. App. 3d 851, 854 (2d Dist. 1989) (aggravated criminal sexual assault of eight-year-old girl in park); *People v. Maxwell*, 89 Ill. App. 3d 1101, 1103 (3d Dist. 1980) (indecent liberties with a child in park); *People v. Ross*, 99 Ill. App. 2d 454, 455 (1st Dist. 1968) (contributing to the sexual delinquency of a child and alleged rape in state park); *see also People v. Foggy*, 121 Ill. 2d 337, 339 (1988) (aggravated criminal sexual assault in park); *People v. Rodriguez*, 364 Ill. App. 3d 304, 306 (2d Dist. 2006) (aggravated criminal sexual assault in park); *People v. Kinney*, 294 Ill. App. 3d 903, 904 (4th Dist. 1998) (aggravated criminal sexual assault in park); *People v. Westfield*, 207 Ill. App. 3d 772, 773 (1st Dist. 1990) (criminal sexual assault in park); *People v. Cox*, 197 Ill. App. 3d 1028, 1030-31 (1st Dist. 1990) (aggravated criminal sexual assault; defendant dragged victim to park); *People v. Leonhardt*, 173 Ill. App. 3d 314, 318 (1st Dist. 1988) (rape in forest

preserve); *People v. Bell,* 132 Ill. App. 3d 354, 356 (1st Dist. 1985) (rape in school park); *People v. Buckner,* 121 Ill. App. 3d 391, 392 (1st Dist. 1984) (aggravated kidnapping and alleged rape in park).

And though statistics are unnecessary, *see Boeckmann*, 238 Ill. 2d at 7, they do demonstrate that public parks are frequently sites of sex offenses against minors. Even the study cited by the appellate court found that "fields/woods" are common sites of sexual violence against minors. *See* A10 (citing Howard N. Snyder, Nat'l Center for Juv. Just., *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* 6 (2000), *available at* http://www.bjs.gov/content/pub/pdf/saycrle.pdf). This classification, i.e., "fields/woods," includes areas that are defined as public parks under the statute. *See* 720 ILCS 5/11-9.4-1(a) ("'Public park' includes a park, forest preserve, bikeway, trail, or conservation area under the jurisdiction of the State or a unit of local government."). And a more recent Special Report from the Bureau of Justice Statistics confirmed that the highest percentage of sexual assaults of females outside of their homes occurs in "locations such as . . . a park, field, or playground not on school property." Michael Planty, Ph.D., Lynn Langton, Ph.D., Christopher Krebs, Ph.D., Marcus Berzofsky, Dr.P.H., and Hope Smiley-McDonald, Ph.D., Female Victims of Sexual Violence, 1994-2010, Bureau of Justice Statistics Special Report, available at https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf at 4, Table 2. And,

accounting for unreported offenses or those that do not result in arrests or convictions, the General Assembly could rationally infer that both the real recidivism rates and the number of offenses in parks are higher than reported.

The United States Supreme Court undertook a similar analysis in upholding a federal sex offender registration statute. *United States v. Kebodeaux*, 133 S. Ct. 2496, 2503 (2013). "There is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals." *Id.* (citing Dept. of Justice, Bureau of Justice Statistics, P. Langan, E. Schmitt, & M. Durose, Recidivism of Sex Offenders Released in 1994, p. 1 (Nov. 2003) (released sex offenders four times more likely to be rearrested for sex crime; within first three years following release, over five percent of released sex offenders were rearrested for sex crime)). The Court acknowledged that there "is also conflicting evidence on the point." *Id.* But the Necessary and Proper Clause "gives Congress the power to weigh the evidence and to reach a rational conclusion, for example, that safety needs justify postrelease registration rules." *Id.*

Here, too, the General Assembly could weigh the evidence and rationally conclude that keeping child sex offenders out of public parks protects children. Thus, under rational basis review, the statute must be upheld.

IV. State and Federal Courts Have Upheld This and Similar Statutes.

Before the divided decision below, two other districts of the Illinois Appellate Court unanimously rejected substantive due process challenges to the statute. In *People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶ 84, the First District upheld the statute against a substantive due process challenge, recognizing that "by keeping sex offenders who have committed offenses against children away from areas where children are present (*e.g.,* school property and parks) . . . , the legislature could've rationally sought to avoid giving certain offenders the opportunity to reoffend." The court rightly rejected any argument that the statute was "over-inclusive" as irrelevant under rational basis review. *Id.* ¶¶ 83-84; *see also id.* ¶ 83 ("Even a law that is unwise, improvident, or out of harmony with a particular school of thought is not necessarily irrational.") (internal quotations omitted). The Fifth District similarly upheld the statute against a substantive due process challenge, rejecting the defendant's suggestions that the General Assembly could have accomplished its objective by other means, because "'it is well settled that the rational basis test does not require that the statute be the best means of accomplishing the legislature's objectives.'" *People v. Pollard*, 2016 IL App (5th) 130514, ¶ 42 (quoting *In re J.W.*, 204 Ill. 2d 50, 72 (2003)).

Courts in other jurisdictions have upheld analogous laws. The North Carolina Supreme Court rejected a substantive due process challenge to a similar law, citing the same statistics the legislature considered here.

Standley v. Town of Woodfin, 661 S.E.2d 728, 731 (N.C. 2008) (upholding statute banning sex offenders from public parks, noting that "released sex offenders are four times more likely to be rearrested for subsequent sex crimes than other released offenders," citing U.S. Dep't of Justice study). *See also Shaw v. Patton*, 823 F.3d 556, 574 (10th Cir. 2016) (Oklahoma statute prohibiting sex offenders from living within 2,000 feet of school, playground, park, or child care center was "rationally designed to reduce sex offenders' temptations and opportunities to re-offend"); *Doe v. Miller*, 405 F.3d 700, 716 (8th Cir. 2005) (Iowa statute prohibiting sex offenders from living within 2,000 feet of school or child care facility was rationally designed to reduce recidivism by reducing temptation for sex offenders).

Indeed, this Court has upheld similar laws under even greater levels of scrutiny. *People v. Minnis*, 2016 IL 119563, applied intermediate scrutiny to reject a First Amendment challenge to a law that required a sex offender to disclose his or her internet identities and websites and made that information available to the public. In assessing the government interest, this Court affirmed that "'[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.'" *Id.* ¶ 37 (quoting *New York v. Ferber*, 458 U.S. 747, 757 (1982)). And "[a]lthough there is considerable debate over the degree to which treatment of sex offenders may be effective, it *is* clear that state legislatures may respond to what they reasonably perceive as a substantial risk of recidivism." *Id.*

(internal quotation omitted) (emphasis in original). *Minnis* rejected the "defendant's characterization" of the law as "poor policy," explaining that "[o]ur role is not to determine how wise legislation may be, but rather to determine its constitutionality." *Id.* ¶ 40 (quotation omitted). And the legislature, which "is in a better position than the judiciary to gather and evaluate data bearing on complex problems," "is entitled to conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism." *Id.* ¶ 41; *see also M.A.* 2015 IL 118049, ¶¶ 56, 60 (upholding youth violent offender reporting database against as-applied challenge where crimes were violent felonies whose victim was a youth and purpose of law was to protect public from such offenders); *People v. Adams*, 144 Ill. 2d 381, 390 (1991) (upholding registration law for repeat child sex offenders because it bore a direct relationship to protecting children). This Court should join the vast majority of courts upholding this and similar statutes under rational basis review and even more stringent levels of scrutiny.

V. The Appellate Court Majority Misapplied Rational Basis Review and Misapprehended the Term "Innocent Conduct."

The majority determined that the statute was unconstitutional because it criminalized "innocent conduct." A6. ("Of particular significance in the disposition of this case is a line of cases from our supreme court in which statutes were struck down on substantive due process grounds because they were found to sweep too broadly in that they criminalized innocent conduct."). In so holding, the majority made two crucial errors: (1) it

searched for an unconstitutional application of the statute rather than a constitutional one; and (2) it failed to realize that "innocent conduct" refers not to inherently non-blameworthy conduct, but instead to activity wholly unrelated to the legislation's purpose, at the same time mistaking prophylactic legislation for criminalizing "innocent" conduct.

First, the majority wrongly looked for a reason to invalidate the statute. The appellate court "acknowledge[d] that under the rational basis test, . . . '[i]f there is any conceivable set of facts that show a rational basis for the statute, the statute will be upheld.'" A5 (quoting *M.A.*, 2015 IL 119049, ¶ 55). Yet the majority then concluded that because it could conceive of "innocent conduct," such as walking a dog, that could be criminalized under the statute, the legislature was irrational for enacting it. A9. The appellate court thus misapplied rational basis review in a facial challenge. Legislation must be upheld if courts can conceive of any lawful application, not if courts fail to conceive of any *un*lawful application, and reversal is warranted on this basis alone.

Second, the majority also fundamentally misunderstood the meaning of "innocent conduct." As this Court explained in *People v. Hollins*, 2012 IL 112754, ¶ 28, "the term 'innocent conduct' mean[s] conduct not germane to the harm identified by the legislature, in that the conduct was wholly unrelated to the legislature's purpose in enacting the law." That is, "innocent conduct" is not conduct that is intrinsically non-blameworthy, but rather is

conduct bearing no rational link to the ill that the legislature sought to cure. Thus, *Hollins* upheld a child pornography statute against an as-applied challenge even though the child was seventeen and thus able to consent to sex under Illinois law. This Court found irrelevant the defendant's argument that the photographs were meant to be "private" and held that it was rational to criminalize distribution of such materials, explaining that "there is no guarantee private photographic images will always remain private." *Id.* at ¶ 25. It was a "reasonable, rational approach" to set the age of consent to the photograph higher than the age of consent to sex.

Conversely, *People v. Madrigal*, 241 Ill. 2d 463, 471 (2011), held unconstitutional an identity theft law that barred a person from knowingly using any "personal identification information . . . for the purpose of gaining access to any record of the actions taken, communications made or received, or other activities or transactions of that person, without the prior express permission of that person." 720 ILCS 5/16G-15(a)(7). This statute made it a felony to do a Google search of someone's name, to use the Internet to check on a neighbor's marathon time, to call an employer to see if a friend had returned from vacation, or to write a biography or family genealogy. *Madrigal*, 241 Ill. 2d at 471-72. Such conduct, which was "not related to the statute's purpose," made up a majority of the proscribed activity, such that the statute which was not "a rational way of addressing the problem of identity theft." *Id.* at 473. *Madrigal*'s thrust was not that the General

Assembly erred in assessing the dangers posed by identity theft or the link between identity theft and computer use; rather, no reasonable jurist could discern a rational connection between the danger of identity theft and a ban on all Google searches using someone's name.

Like *Madrigal*, the cases relied on by the majority simply demonstrate that although a statute need not be narrowly tailored to survive rational basis scrutiny, it may not be so imperfectly tailored as to be irrational. In *People v. Wick*, 107 Ill. 2d 62, 66 (1985) (cited A6), in an attempt to reduce injuries to firefighters and police officers caused by arson, the General Assembly passed an aggravated arson law that imposed increased punishment when first responders were injured. But the law did not punish "arson" and was "not limited to arsonists"; instead, it criminalized any use of fire or explosives meant to damage a building, such as a farmer demolishing a deteriorating barn to make room for a new one. *Id.* The proscribed conduct thus bore no reasonable relationship to arsonists who caused injury to firefighters or police officers. *Id.*; *see also People v. Wright*, 194 Ill. 2d 1 (2000) (statute designed to prevent vehicle theft made it Class 2 felony to possess incomplete certificate of origin, salvage, title, junking or display, including failure to record color); *In re K.C.*, 186 Ill. 2d 542, 551 (1999) (cited A6) (statute designed to prevent damage to cars criminalized decoration of bride and groom's car for wedding or getting in traffic accident). In these

cases, the statutes predominantly and irrationally affected conduct unrelated to the State's interest.

The majority also mistakenly concluded that because defendant was walking a dog while illegally in the park, the statute criminalized dog walking. A9. But the conduct being criminalized is a convicted child sex offender's knowing presence in a public park — that defendant was walking a dog was merely incidental to that criminal conduct. That a defendant engages in "innocent" conduct along with illegal conduct does not mean that the former is criminalized. For instance, a person commits criminal trespass to real property by entering the land of another if there is sufficient notice that entry is forbidden. 720 ILCS 5/21-3. If a person trespasses while whistling, the statute does not also criminalize whistling. In the same way, the statute here criminalizes a convicted child sex offender's presence in a park, not the incidental activity of walking his dog.

The majority's true concern appears to have been that the law criminalized behavior prophylactically — i.e., that it did not wait until child sex offenders were further down the road toward reoffending. *See* A7-8 (citing past version of statute that prohibited approaching minors or being in park when minors were present, and criticizing current statute because it is not "*aimed* at preventing a substantial step toward the commission of a sex offense against a child or any offense that would result in an individual qualifying as a sexual predator" (emphasis original)). But the General

Assembly often legislates prophylactically. Driving while intoxicated is illegal not because it is in itself harmful, but because it creates an increased likelihood of car accidents. The General Assembly need not conduct an individual assessment of the level of intoxication each driver needs to become dangerous. *See* 625 ILCS 5/11-501(a)(1), (2) (prohibiting driving with blood alcohol level 0.08 or higher or while under influence of alcohol). Similarly, the legislature may prohibit possession of firearms in courthouses to protect the public from armed violence even though possession of a firearm is not itself a crime or a substantial step toward the commission of one. *See* 430 ILCS 66/65(a)(4) (concealed carry act excludes courthouses); 720 ILCS 5/24-1(c)(1.5) (unlawful use of weapon in courthouse is Class 3 felony). Prohibiting child sex offenders from being in public parks is rational prophylactic legislation, especially considering how often parks have been the scene of sex offenses in Illinois. *See supra* Section III.

Because this is a facial challenge, the statute must be upheld if the Court can conceive of any set of facts justifying the legislation. The situation here — a convicted child sex offender with a dog, highly attractive to many children, in a large, mostly empty park, shortly after schools let out for the day, with his van nearby — is not "innocent conduct," but instead precisely the type of conduct that legislators intended to prohibit because of its inherent dangers.

The General Assembly rationally believed that child sex offenders had high rates of recidivism and that they should not be present in parks, where children often play and which present opportunities for offenders to isolate their victims. Therefore, defendant's facial substantive due process challenge must fail.

CONCLUSION

This Court should reverse the judgment of the appellate court.

September 6, 2017

Respectfully submitted,

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Attorney General of Illinois

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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 twenty-four pages.

/s/ Eldad Z. Malamuth
ELDAD Z. MALAMUTH
Assistant Attorney General

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E-FILED
9/6/2017 10:00 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

2017 IL App (3d) 140627

Opinion filed February 10, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARC A. PEPITONE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois. Appeal No. 3-14-0627 Circuit No. 13-CM-844 The Honorable Carmen Goodman, Judge, presiding.

JUSTICE McDADE delivered the judgment of the court, with opinion.
Presiding Justice Holdridge concurred in the judgment and opinion.
Justice Carter dissented, with opinion.

OPINION

¶ 1 The defendant, Marc A. Pepitone, was convicted of being a child sex offender in a public park (720 ILCS 5/11-9.4-1(b) (West 2012)) and was sentenced to 24 months of conditional discharge, 100 hours of public service, and $400 in fines and costs. On appeal, Pepitone argues that (1) section 11-9.4-1(b) is unconstitutional on its face because it bears no reasonable relationship to protecting the public and (2) section 11-9.4-1(b) violates the *ex post facto* clause because his prior conviction occurred before section 11-9.4-1(b) took effect. We hold that section 11-9.4-1(b) is facially unconstitutional and therefore reverse the circuit court's judgment.

¶ 2 FACTS

¶ 3 On March 8, 2013, Bolingbrook police officer Steven Alexander was on patrol in Indian Boundary Park, which was maintained by the Bolingbrook Park District. Alexander noticed a green van parked across three parking spots, so he ran the registration on the vehicle. Alexander learned that the vehicle was registered to Pepitone, who had previously been convicted of a child sex offense. While Alexander was looking in the vehicle to determine if the defendant was inside, Pepitone returned with the dog he had been walking and asked the officer if something was wrong with the vehicle. Alexander told Pepitone that he was forbidden to be on park property. Pepitone stated that he was unaware of that ban. Alexander ultimately arrested Pepitone for the criminal offense of being a sex offender in a public park (720 ILCS 5/11-9.4-1(b) (West 2012)). A first violation of the statute is a Class A misdemeanor; a second or subsequent violation is a Class 4 felony (720 ILCS 5/11-9.4-1(d) (West 2012)).

¶ 4 Pepitone was charged and filed a motion to dismiss alleging the statute was unconstitutional. The motion was denied.

¶ 5 At the jury trial on April 30, 2014, in addition to Alexander's testimony, the State introduced a certified copy of Pepitone's 1999 conviction for predatory criminal sexual assault of a child, for which he had been sentenced to six years of imprisonment. The jury found him guilty of being in the park, and he was sentenced to 24 months of conditional discharge, required to perform 100 hours of community service, and ordered to pay specified fines.

¶ 6 Pepitone moved for a new trial and reconsideration of the community service portion of his sentence. The circuit court denied the motion for a new trial and granted the motion to reconsider sentence. The defendant then appealed.

¶ 7 ANALYSIS

¶ 8 Pepitone's first argument on appeal is that section 11-9.4-1(b) is unconstitutional on its face because it bears no reasonable relationship to protecting the public. He has not alleged that a fundamental liberty interest is affected, and he seeks rational basis review. He states:

> "the specific issue this Court must address under this argument is whether an all-out banishment, of all child sex offenders, from all public parks, including forest preserves and all conservation areas, at all times, regardless of the presence or even likely presence of persons under the age of 18, or of any person whatsoever, and for all remaining years of a child sex offender's life, is a reasonable means of achieving the legislature's stated goal of 'protect[ing] users of public parks from child sex offenders and sexual predators.' "

His claim is that section 11-9.4-1(b) sweeps too broadly and must, therefore, be struck down.

¶ 9 Pepitone alleges a violation of substantive due process. Our supreme court has stated:

> "When confronted with a claim that a statute violates the due process guarantees of the United States and Illinois Constitutions, courts must first determine the nature of the right purportedly infringed upon by the statute. [Citation.] Where the statute does not affect a fundamental constitutional right, the test for determining whether the statute complies with substantive due process is the rational basis test. [Citation.] To satisfy this test, a statute need only bear a rational relationship to the purpose the legislature sought to accomplish in enacting the statute. [Citation.] Pursuant to

> this test, a statute will be upheld if it 'bears a reasonable relationship to a public interest to be served, and the means adopted are a reasonable method of accomplishing the desired objective.' [Citation.]" *In re J.W.*, 204 Ill. 2d 50, 66-67 (2003).

¶ 10 Section 11-9.4-1(b) of the Criminal Code of 2012 provides that "[i]t is unlawful for a sexual predator or a child sex offender to knowingly be present in any public park building or on real property comprising any public park." 720 ILCS 5/11-9.4-1(b) (West 2012). "Public park" is defined as including "a park, forest preserve, bikeway, trail, or conservation area under the jurisdiction of the State or a unit of local government." 720 ILCS 5/11-9.4-1(a) (West 2012). "Sexual predator" includes individuals who have been convicted of certain sex offenses, including predatory criminal sexual assault of a child (720 ILCS 5/11-9.4-1(a) (West 2012); 730 ILCS 150/2(E) (West 2012)), which is Pepitone's prior conviction.

¶ 11 It is clear that section 11-9.4-1(b) is meant to protect the public—especially children—from sexual predators and child sex offenders,[1] and the defendant does not dispute the existence of a legitimate government interest in this statute. The question we must answer is whether the legislature's total ban of persons previously convicted of a sex offense against a minor from all public park buildings and all public parks, as defined in the statute, at all times, without limitation, is a reasonable method of protecting the public.

¶ 12 The constitutionality of section 11-9.4-1(b) has been addressed twice before by other districts of the appellate court.[2] In *People v. Avila-Briones*, 2015 IL App (1st) 132221, the First

[1]We note that certain minor offenders are excluded from the definition of "child sex offender" for the purposes of the statute. 720 ILCS 5/11-9.4-1(a), (b) (West 2012).

[2]Following oral argument in this case, the State sought leave to file, as additional authority, the supreme court's brand new decision in *People v. Minnis*, 2016 IL 119563. We allowed the filing, and the defendant has responded. We find the decision is not instructive in our case. *Minnis* involved a first amendment challenge

District considered, in relevant part, a defendant's more encompassing substantive due process constitutional challenge to the Sex Offender Registration Act (730 ILCS 150/1 *et seq.* (West 2012)), the Sex Offender Community Notification Law (730 ILCS 152/101 *et seq*. (West 2012)), and several other statutes applicable to sex offenders, which included section 11-9.4-1(b). *Avila-Briones*, 2015 IL App (1st) 132221, ¶¶ 1, 22. The majority of the substantive due process analysis in *Avila-Briones* concerned whether fundamental rights were involved (*id.* ¶¶ 71-80) and only included the following statement with regard to whether statutes like section 11-9.4-1(b) were rationally related to a legitimate state interest: "by keeping sex offenders who have committed offenses against children away from areas where children are present (*e.g.*, school property and parks) *** the legislature could have rationally sought to avoid giving certain offenders the opportunity to reoffend" (*id.* ¶ 84).

¶ 13 In *People v. Pollard*, 2016 IL App (5th) 130514, the Fifth District considered the same substantive due process constitutional challenge reviewed by the *Avila-Briones* court. *Id.* ¶¶ 1, 19. When deciding whether statutes like section 11-9.4-1(b) were rationally related to a legitimate state interest, the *Pollard* court simply adopted the above-quoted rationale from *Avila-Briones*. *Id.* ¶ 42.

¶ 14 We are not persuaded by the rationale used in *Avila-Briones* and *Pollard*, which we perceive to be incomplete and truncated analyses of the issue. While we acknowledge that under the rational basis test, "[a] statute need not be the best means of accomplishing the stated objective" and "[i]f there is any conceivable set of facts that show a rational basis for the statute, the statute will be upheld" (*In re M.A.*, 2015 IL 118049, ¶ 55), we also recognize that "[a]lthough this standard of review is quite deferential, it is not 'toothless' " (*People v. Jones*, 223 Ill. 2d 569,

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subjected to intermediate basis review; it applied, with specificity, to each individual offender; and it required analysis under a completely different standard of review.

596 (2006)). As our supreme court stated in *M.A.*, to pass constitutional muster under rational basis review, a statute must not be arbitrary or unreasonable. *M.A.*, 2015 IL 118049, ¶ 55.

¶ 15 Of particular significance in the disposition of this case is a line of cases from our supreme court in which statutes were stuck down on substantive due process grounds because they were found to sweep too broadly in that they criminalized innocent conduct. In *People v. Wick*, 107 Ill. 2d 62 (1985), an aggravated arson statute that did not require an unlawful purpose in setting a fire was invalidated by the supreme court. *Id.* at 66. The *Wick* court held that the statute swept too broadly because it criminalized innocent conduct; under the statute, a farmer could be prosecuted for demolishing a deteriorated barn by fire if a firefighter was standing nearby and was injured by the fire. *Id.*

¶ 16 In *People v. Zaremba*, 158 Ill. 2d 36 (1994), the supreme court struck down a theft provision that criminalized obtaining or controlling property in law enforcement custody when law enforcement represents that the property was stolen. *Id.* at 39-40. The *Zaremba* court held that the provision did not require a culpable mental state and therefore criminalized innocent conduct (*id*. at 42), including, as the defendant pointed out, an evidence technician who was given stolen property by law enforcement for safekeeping (*id.* at 38-39). Thus, the court held that the statute was not reasonably related to its purpose of aiding law enforcement officers attempting to break up fencing operations. *Id.* at 42.

¶ 17 The supreme court struck down a statute that imposed absolute liability, *inter alia*, on anyone who damaged or removed any part of a vehicle without permission or who tampered with or entered a vehicle without permission to do so. *In re K.C.*, 186 Ill. 2d 542, 545-50 (1999). The court held that the statute criminalized innocent conduct, including, for example, a person who entered someone else's vehicle simply to turn off headlights that had been left on, people who

decorated a bride or groom's car for a wedding, and a person who got into a car accident. *Id.* at 552-53. In so ruling, the court acknowledged that "a statute violates the due process clauses of both the Illinois and the United States Constitutions if it potentially subjects wholly innocent conduct to criminal penalty without requiring a culpable mental state." *Id.* at 551.

¶ 18 In *People v. Wright*, 194 Ill. 2d 1 (2000), the supreme court considered a statute that criminalized the knowing failure to maintain records related to the acquisition and disposition of vehicles and vehicle parts. *Id.* at 21. The court held that the statute criminalized innocent conduct, including a lapse in record keeping that was due to disability, family crisis, or incompetence and struck it down. *Id.* at 28.

¶ 19 The supreme court also invalidated a statute that criminalized operating a vehicle that an individual knew contained a false or secret compartment or installing, creating, building, or fabricating such a compartment. *People v. Carpenter*, 228 Ill. 2d 250, 268 (2008). The court held that the statute criminalized innocent conduct because while it was aimed at punishing people who concealed firearms or contraband in false or secret compartments, it did not require the contents of the compartment to be illegal. *Id.* at 269. In so ruling, the court noted that the intent to conceal something from law enforcement need not entail illegal conduct and that individuals have a reasonable expectation of privacy with regard to their possessions and the containers in which those possessions are kept. *Id.* at 269-70.

¶ 20 These cases, while very different in their facts, are significant for our purposes because the statutes at issue, like section 11-9.4-1(b), contain no culpable mental state. They also reach countless types of innocent conduct, much like walking a dog as Pepitone was doing at the time he was arrested. In addition, the instant statute cannot be reasonably construed as *aimed* at preventing a substantial step toward the commission of a sex offense against a child or any

offense that would result in an individual qualifying as a sexual predator (see 730 ILCS 150/2(E) (West 2010)). Mere presence in a public park building or public park, without more, is not unlawful conduct.[3]

¶ 21 Further, the legislature has attempted to actually fit statutes in other instances within the purview of their stated government interest, including the related predecessor provision to the statute at issue in this case. The abandoned provision read:

> "It is unlawful for a child sex offender to knowingly be present in any public park building or on real property comprising any public park *when persons under the age of 18 are present in the building or on the grounds and to approach, contact, or communicate with a child under 18 years of age*, unless the offender is a parent or guardian of a person under 18 years of age present in the building or on the grounds." (Emphasis added.) 720 ILCS 5/11-9.4(a) (West 2010) (repealed by Pub. Act 96-1551 (eff. July 1, 2011)).

Without commenting on the constitutionality of this and other similar statutes, we note that at least the predecessor provision actually attempted to tie the child sex offender's presence to times when children were also present. See also *People v. Stork*, 305 Ill. App. 3d 714, 722 (1999) (holding that a statute prohibiting child sex offenders from being in school zones without permission proscribed only that specific conduct and did not reach innocent conduct as well). The legislature made no such attempt in section 11-9.4-1(b). The predecessor statute not only

[3]We will not address it because the defendant has not raised it, but we note that there may also be potential eighth amendment problems with section 11-9.4-1(b) based on the punishment of status, as opposed to the punishment of conduct. See *Robinson v. California*, 370 U.S. 660, 666 (1962); *Powell v. Texas*, 392 U.S. 514, 532-34 (1968); *Doe v. City of Lafayette*, 377 F.3d 757, 782-84 (7th Cir. 2004) (Williams, J., dissenting, joined by Rovner and Wood, JJ.).

limited the prohibition against being in the park to times when children are present on the premises, it also required that the offender "approach, contact, or communicate with" the child.

¶ 22 By contrast, the sweep of the current iteration of the statutory prohibition is extraordinary. At most, section 11-9.4-1(b) could be premised on a vague notion that a child or other "target" may be present in a public park building or on public park property. But the presence of such a person in a public park building or public park is certainly not guaranteed, and, in light of the particular circumstances, may not even be likely. Section 11-9.4-1(b) is an outright ban on all individuals with certain sex offense convictions from public park buildings and public park property without any requirement that anyone—particularly a child—be actually, or even probably, present. The statute also obviously makes no attempt to assess the dangerousness of a particular individual, which is the major distinguishing factor between this case and cases such as *Doe v. City of Lafayette*, 377 F.3d 757, 773-74 (7th Cir. 2004), in which the defendant was the only individual banned from a park and the banishment occurred only after the defendant had admitted to being at a park and having sexual urges toward minors. Rather, the statute places individuals who are highly unlikely to recidivate in the same category as serial child sex offenders.

¶ 23 Further, the statute also criminalizes substantial amounts of innocent conduct, including the walking of a dog. As appellate counsel for the defendant pointed out during oral arguments, the list of activities that routinely occur in public park buildings or on public park property, and in which individuals subject to this statute's ban cannot partake is extensive. These can include attending concerts, picnics, rallies, and Chicago Bears games at Soldier Field; or expeditions to the Field Museum, the Shedd Aquarium, the Art Institute, the Adler Planetarium, or the Museum of Science and Industry, all of which are public buildings on park land; bird-watching;

photography; hunting; fishing; swimming at a public beach; walking along riverwalks; cycling on bike trails; hiking at Starved Rock; and the list goes on and on. We believe that this statute contains the type of overly broad sweep that doomed the statutes in *Wick, Zaremba, K.C.*, *Wright*, and *Carpenter*. As our supreme court stated in *Wright*, "statutes that potentially punish innocent conduct violate due process principles because they are not reasonably designed to achieve their purposes." *Wright*, 194 Ill. 2d at 25.

¶ 24 Accordingly, we hold that section 11-9.4-1(b) is facially unconstitutional because it is not reasonably related to its goal of protecting the public, especially children, from individuals fitting the definition of a child sex offender or a sexual predator.[4] See, *e.g.*, *People v. Falbe*, 189 Ill. 2d 635, 640 (2000) (holding that a "statute must be reasonably designed to remedy the evils which the legislature has determined to be a threat to the public health, safety and general welfare"). Nor is it drafted in such a way as to effect that goal without arbitrarily stripping a wide swath of innocent conduct and rights he has as a citizen and taxpayer from a person who has paid the penalty for his crime and is compliant with "collateral consequences" requirements established by the General Assembly.

¶ 25 Our ruling on the defendant's first argument obviates the need to address his second argument that section 11-9.4-1(b) violates the *ex post facto* clause.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of Will County is reversed.

¶ 28 Reversed.

[4] An example of the tenuous link between public parks and sex offenses committed by strangers against children can be seen in reports from the United States Bureau of Justice Statistics; for example, in a study published in 2000, 77% of sexual assaults against minors occurred in a residence and of the 23% that occurred outside a residence, the most common locations "were roadways, fields/woods, schools, and hotels/motels." Howard N. Snyder, Nat'l Center for Juv. Just., *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* 6 (2000), *available at* http://www.bjs.gov/content/pub/pdf/saycrle.pdf. In addition, only 7% of sexual assaults of minors were perpetrated by strangers. *Id.* at 10.

¶ 29 JUSTICE CARTER, dissenting.

¶ 30 I respectfully dissent from the majority's decision in the present case. I would find that section 11-9.4-1(b) of the Criminal Code of 2012 (Code) (720 ILCS 5/11-9.4-1(b) (West 2012)) is not facially unconstitutional. I would, therefore, affirm the trial court's judgment.

¶ 31 In its analysis, the majority cites the decisions on this issue from two other districts of the appellate court in the *Avila-Briones* case and the *Pollard* case. The appellate court in those cases found that section 11-9.4.1(b) of the Code did not violate substantive due process and was not facially unconstitutional. See *Avila-Briones*, 2015 IL App (1st) 132221, ¶¶ 86, 94; *Pollard*, 2016 IL App (5th) 130514, ¶¶ 43-44. I would follow the same analysis here and would reach the same conclusion. In my opinion, and contrary to the decision of the majority, the means adopted in the section 11-9.4-1(b) are a reasonable method of accomplishing the legislature's desired objective of protecting the public from sex offenders. See *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 84; *Pollard*, 2016 IL App (5th) 130514, ¶ 42.

¶ 32 As the majority itself notes, to satisfy the rational basis test, the means adopted in the statute do not have to be the best means of accomplishing the legislature's objectives. See *Avila-Briones*, 2015 IL App (1st) 132221, ¶¶ 83-84; *Pollard*, 2016 IL App (5th) 130514, ¶ 42. Rather, as long as the statute has a rational relationship to the government objectives, it is valid even if it is to some extent overinclusive or underinclusive. See *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 83; *Pollard*, 2016 IL App (5th) 130514, ¶ 42. By keeping sex offenders who have committed sex offenses against children away from areas where children are present, the legislature could have rationally sought to avoid giving those sex offenders an opportunity to reoffend. See *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 84; *Pollard*, 2016 IL App (5th) 130514, ¶ 42; see also *Doe*, 377 F.3d at 773. Whether the statute could be more finely-tuned to accomplish that goal is a

question for the legislature, not for the courts. See *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 84; *Pollard*, 2016 IL App (5th) 130514, ¶ 42.

¶ 33 Because I believe that section 11-9.4-1(b) of the Code satisfies the requirements of substantive due process and is not facially unconstitutional, I dissent from the majority's decision in this case, which reaches the opposite conclusion. I would affirm the defendant's conviction and sentence.

STATE OF ILLINOIS)
)SS
COUNTY OF WILL)

FILED
14 JUN 16 PM 12: 08
CLERK. CIRCUIT COURT
WILL COUNTY. ILLINOIS

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

People
Plaintiff

vs

Mark Pepitone
Defendant

CASE NO: 13 CM 844

COURT ORDER

This cause coming to be heard on Defendant's Motion for a New Trial, Defendant present in person and by counsel, it is hereby ordered:

Motion for a new trial is denied

Attorney or Party, if not represented by Attorney
Name ARD Mackey
ARDC # _____
Firm Name _____
Attorney for _____
Address _____
City & Zip _____
Telephone _____

Dated: June 11, 2014

Entered: Daron Healy
Judge

PAMELA J. MCGUIRE, CLERK OF THE CIRCUIT COURT OF WILL COUNTY

White – Court Yellow – Plaintiff Pink – Defendant **17 D Revised (06/06)**

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, OR)
Village or City of _____, Plaintiff)
Mark Vs. Pepitone, Defendant) Case No. 13 CM 844

ORDER OF CONDITIONAL DISCHARGE

ON THIS DAY, 6/11/14, the defendant having appeared in person (and by counsel) and having (pled guilty to/been found guilty of) the charge(s) of, 3rd Offender Pos. in Public Park Class A Misdemeanor(s)/Felony, and the court being fully advised of the premises, does hereby enter judgment(s) of conviction and places the defendant on 24 months Conditional Discharge subject to the following conditions:

1. Shall pay total fines, fees and costs (including bond fee) in the amount of $ 400. JHMD
   a. ☐ $25 shall go to AAIM Drunkbusters.
   b. If not otherwise specified, payment of fines, fees, and costs are due at least 14 (fourteen) days prior to the status date scheduled in Courtroom 305 / 314
2. Shall pay Restitution in the amount of $_____ on or before _____ to the Clerk of the Circuit Court for the benefit and use of _____.
3. Defendant's bond of $_____ is to apply toward payment of Restitution, if any, and then toward payment of fines, fees, and costs. Restitution shall be paid before any fines, fees and costs.
4. Shall not possess a firearm or other dangerous weapon.
5. Shall not violate any criminal statute of any jurisdiction.
6. ☐ Shall serve _____ days in the Will County Jail (Straight Time/Day for Day credit to apply), with credit for____ days actually served. Mittimus Issues/ Is Stayed until _____.
7. ☒ Shall perform 100 hours of community service work for a non-profit organization at a rate of 25 hours per month, and file written proof of completion. All community service work is subject to verification and any individual presenting or attempting to present false proof of community service work is subject to prosecution.
8. ☐ Shall attend a Victim Impact Program and file written proof of completion.
9. ☐ Shall obtain a drug & alcohol evaluation, file proof of same, and comply with the recommendations therein.
10. ☐ Shall complete _____ counseling and aftercare, and file written proof of completion.
11. ☐ Shall attend and successfully complete an Anger Management Program and file written proof of completion.
12. ☐ Shall have no contact with _____.
13. ☐ Shall refrain from having in his/her body the presence of any illicit drug prohibited by the Cannabis Control Act, or the Illinois Controlled Substances Act, unless prescribed by a physician, and [ ] Shall submit on any status date requested by the court samples of his/her blood/urine, or both, for tests to determine the presence of any illicit drug.
14. ☐ Shall appear at the Circuit Clerk's Office, Room 228, 14 West Jefferson Street, Joliet, Illinois 60432 between the hours of 8:30 am through 4:30 pm on _____ to show proof of payment of fines, fees, and costs and/or proof of community service work. **As to the status date scheduled in Room 228 only**: (1) if defendant **only** owes fines, fees and costs and pays **all** monies due at least 14 (fourteen) days prior to the status date, defendant's presence will be waived for the status date set above, (2) if defendant owes community service work **and** fines, fees and costs, if defendant pays **all** monies due **and** completes **all** community service work prior to the status date, defendant can bring in proof of same between the hours of 8:30 am through 4:30 pm on any court business day prior to the scheduled status date set above and, if defendant is in full compliance, defendant's presence will be waived for the status date set above.
    Note: A status date in courtroom 305 or 314 is also scheduled. If defendant has been ordered to Room 228 and is in full compliance with this order, defendant will not need to appear for the status date scheduled in Room 305 or 314 set forth in paragraph 15 below.
15. ☒ Shall appear in courtroom ~~305 / 314~~ 304 at 9:00 am on 9-10-14 for status on compliance with this order.
16. _____

This cause is hereby continued until 6/8/15 for termination of conditional discharge at 4:30 pm on said date.

DEFENDANT IN CUSTODY ON THIS CASE? _____ YES X NO

Dated 6/11/14 ENTER Carmen Goodman

ASA/Municipal Prosecutor _____

Defendant's Attorney APD Mark J. _____ Defendant _____

FILED
CLERK, CIRCUIT COURT
WILL COUNTY, ILLINOIS
JUN 11 PM 12:07

White - Court Yellow - Defendant Pink - Prosecutor Conditional Discharge Order Rev. 5/2013

06/16/14 08:42:40 WCCH

STATE OF ILLINOIS)
)SS
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

State
Plaintiff
vs
Marc Pepitone
Defendant

CASE NO: 13 CM 844

COURT ORDER

This Matter Coming Before this Honorable Court upon Defendant's Motions, It is Hereby Ordered that:

(1) Defendant's Motion to Reconsider Sentence is granted;

(2) Defendant's Motion for the appointment of the Appellate Defender is Hereby Granted for purposes of Appeal.

FILED
AUG 13 2014
WILL COUNTY CIRCUIT CLERK
BY

Attorney or Party, if not represented by Attorney
Name Nicholas Plattos, APD
ARDC #
Firm Name
Attorney for △ Marc Pepitone
Address
City & Zip
Telephone (815) 727-8666

Dated August 20
Entered
Judge

PAMELA J. MCGUIRE, CLERK OF THE CIRCUIT COURT OF WILL COUNTY

08/15/14 11 06 46 WCCH

White – Court Yellow – Plaintiff Pink – Defendant **17 D Revised (06/06)**

NOTICE OF APPEAL

APPEAL TAKEN FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN WILL COUNTY, ILLINOIS

APPEAL TAKEN TO THE APPELLATE COURT, THIRD JUDICIAL DISTRICT, ILLINOIS

The People of the State of Illinois

Plaintiffs-Appellees,
-vs-
Marc A Pepitone
Defendant-Appellant

Case No 13CM844 (People vs Marc Pepitone)

FILED
2014 AUG 14 P 2 55
CLERK, CIRCUIT COURT
WILL COUNTY, ILLINOIS

☐ Joining Prior Appeal / ☑ Separate Appeal / ☐ Cross Appeal
(Mark One)

An appeal is taken from the Order of Judgment described below

(1) Court to which appeal is taken is the Appellate Court

(2) Name of Appellant and address to which notices shall be sent
NAME Marc A Pepitone
ADDRESS 101 Park Lawn St Bolingbrook, IL 60440

(3) Name and address of Appellant's Attorney on appeal
NAME Peter A Carusona, Deputy Defender
Office of the State Appellate Defender
Third Judicial District
770 E Etna Rd
Ottawa, Illinois 61350
If Appellant is indigent and has no attorney, does he/she want one appointed?
Yes

(4) Date of Judgment or Order June 11, 2014
(a) Sentencing Date June 11, 2014
(b) Motion for New Trial June 11, 2014
(c) Motion to Vacate Guilty Plea N/A
(d) Other
Motion to reconsider - granted on August 13, 2014

(5) Offense of which convicted
Presence of a Child Sex Offender in a Public Park

(6) Sentence
24 months of conditional discharge/fines and costs/100 hours of community service work

(7) If appeal is not from a conviction, nature of order appealed from

(8) If the appeal is from a judgment of a circuit court holding unconstitutional a statute of the United States or of this state, a copy of the court's findings made in compliance with Rule 18 shall be appended to the notice of appeal

NHWN
(Signed)
(May be signed by appellant, attorney, or clerk of circuit court)

PAMELA J. McGUIRE
Clerk of the Circuit Court

cc State's Attorney
Attorney General

NOAPL

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STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On September 6, 2017, the foregoing **Brief and Appendix of Plaintiff-Appellant** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses of the persons named below:

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maustill@ilsaap.org

Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen copies of the Brief and Appendix to the Clerk of the Supreme Court of Illinois, Supreme Court Building, 200 East Capitol Avenue, Springfield, Illinois 62701.

/s/ Eldad Z. Malamuth
ELDAD Z. MALAMUTH
Assistant Attorney General