No. 122034

IN THE
SUPREME COURT OF ILLINOIS

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

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

ELDAD Z. MALAMUTH
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2235
emalamuth@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

ORAL ARGUMENT REQUESTED

E-FILED
12/13/2017 2:20 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

POINTS AND AUTHORITIES

Page(s)

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

ARGUMENT

I. Rational Basis Review Does Not Evaluate the Wisdom of Legislation.

The law governing defendant's facial challenge to 720 ILCS 5/11-9.4-1(b) is clear. "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). "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.

When, as here, neither a suspect classification nor a fundamental liberty interest is involved, rational basis scrutiny applies. *Rizzo*, 2016 IL 118599, ¶ 45. A "statute will be upheld under the rational basis test as long as it bears a rational relationship to a legitimate legislative purpose." *M.A.*, 2015 IL 118049, ¶ 55.

"When applying the rational basis test, the [C]ourt is highly deferential to the findings of the legislature." *Rizzo*, 2016 IL 118599, ¶ 45. A rational basis is not negated if the statute creates "harsh results," *Hayashi v. Ill. Dept. of Fin. & Prof'l Regulation*, 2014 IL 116023, ¶ 32, if it produces imperfect fits, or even if it "might be ill-conceived," *Moline Sch. Dist. No. 40 Bd. of Educ. v. Quinn*, 2016 IL 119704, ¶ 28.

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

The question here is whether prohibiting the child sex offenders identified by the statute from entering public parks is rationally related to the legitimate purpose of protecting children from sex offenses. The General Assembly was rational to believe that the child sex offenders posed a significant threat to reoffend and that parks, where children often play in areas that provide opportunities for isolation, present inherent dangers. That some or even many child sex offenders may not reoffend or that parks may at times be free of children is immaterial.

Defendant seeks to modify the rational basis test in several ways, but none is convincing. Moreover, while statistics are unnecessary to prove that a legislative enactment has a rational basis, a recent federal report demonstrates that such statistics do support the General Assembly's reasoning. Finally, a closer look at amicus's "stories" of child sex offenders demonstrates both that the statute is rational and that the legislative process provides the avenue for addressing any policy disagreements.

II. This Court Should Reject Defendant's Invitations to Alter Rational Basis Review.

A. The First Amendment overbreadth doctrine is irrelevant.

Defendant tries to import First Amendment overbreadth principles as a "third step" in the rational basis test, but since he did not raise a First Amendment claim below, and does not raise one now, the overbreadth doctrine is irrelevant. In the trial court, defendant did not challenge his conviction based on the First Amendment, asserting only a substantive due

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

process violation. C12-17.[1] Nor did he raise a First Amendment argument in the appellate court. Indeed, following oral argument, the People filed this Court's decision in *People v. Minnis*, 2016 IL 119563, as supplemental authority, but the appellate court found it "not instructive" because it "involved a first amendment challenge" and "required analysis under a completely different standard of review." A4-5. Before this Court, defendant raises only a substantive due process claim and concedes that, as no fundamental right is involved, rational basis review applies. Def. Br. 4.

Because there is no First Amendment challenge, the overbreadth doctrine is irrelevant. The "'First Amendment overbreadth doctrine . . . represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court.'" *Minnis*, 2016 IL 119563, ¶ 14 (quoting *Bates v. State Bar,* 433 U.S. 350, 380 (1977)). This "expansive remedy" is available only "in the first amendment context" "out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech." *Id.*; *see also People v. Clark*, 2014 IL 115776, ¶ 11 (explaining how First Amendment overbreadth doctrine differs from "typical facial challenge").

[1] "C_" refers to the common law record; "Def. Br. _" refers to defendant's appellee's brief; and "Peo. Br. _" and "A_" refer to the People's opening brief before this Court and its appendix, respectively.

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

The United States Supreme Court has "not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) (differentiating between "First Amendment protection" and "highly permissive rational-basis review").

This Court too has explained that the "fact that the statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Davis v. Brown*, 221 Ill. 2d 435, 442–43 (2006) (internal quotation marks and brackets omitted); *see also People v. Relerford*, 2017 IL 121094, ¶¶ 50-51 (explaining "the overbreadth doctrine permits a party to challenge a statute as a facial violation of the first amendment" and has "limited application"). Defendant has never raised a First Amendment challenge and the overbreadth doctrine, unique to that area of the law, is therefore irrelevant.

B. Courts uphold legislation under rational basis review if it is rationally related to a legitimate state interest.

Not only is the First Amendment overbreadth doctrine irrelevant, there is no "third step" to rational basis review. *See* Def. Br. 22. The United States Supreme Court has repeatedly held that statutes not affecting fundamental rights must be sustained if they are (1) rationally related to (2) a legitimate government interest. *See Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring) ("Under our rational basis standard of

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

review, 'legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.'") (quoting *City of Cleburne, Texas v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985)); *Heller v. Doe*, 509 U.S. 312, 320 (1993) (statute upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose"); *Lyng v. Int'l Union*, 485 U.S. 360, 375 (1988) (Marshall, J., dissenting) ("The rational basis test contains two substantive limitations on legislative choice: legislative enactments must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals.").

This Court too has explained that where "the means chosen by the legislature is rationally related to" a legitimate state purpose, plaintiffs "have not alleged a substantive due process violation." *Hayashi*, 2014 IL 116023, ¶ 32; *see also M.A.*, 2015 IL 118049, ¶ 60 ("[T]here is a rational relationship between M.A.'s registration and the protection of the public. Consequently, we find that the Violent Offender Act does not violate M.A.'s right to substantive due process"); *People v. Boeckmann*, 238 Ill. 2d 1, 7 (2010) ("Legislation must be upheld if there is a conceivable basis for finding it is rationally related to a legitimate state interest.").

To elucidate the rational basis test, courts frequently use additional words and phrases. After delineating the test, for instance, this Court has reasoned that legislation will be upheld if it is "neither arbitrary nor

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

unreasonable" and if "the means adopted are a reasonable method of accomplishing the desired objective." *M.A.*, 2015 IL 118049, ¶ 55. This does not, however, introduce new "steps" in the analysis requiring proof that legislation must (3) not be arbitrary, (4) unreasonable, and must be (5) a reasonable method of accomplishing the desired objective. Rather, this Court simply provided context and gloss to understand the two-step rational basis test that "requires a determination of whether the statute bears a rational relationship to a legitimate government purpose." *Id.* ¶ 36.

C. Knowledge is an appropriate mental state on which to base criminal liability.

Defendant argues that the statute violates substantive due process because it does not require a culpable mental state beyond mere knowledge. Def. Br. 20-23. But this Court recently reaffirmed that criminal liability may be based on even a less culpable mental state: "substantive due process does not categorically rule out negligence as a permissible mental state for imposition of criminal liability." *Relerford*, 2017 IL 121094, ¶22; *see also id.* ("the appellate court's conclusion that due process does not permit criminal liability based on negligent conduct is unfounded"). The Criminal Code specifically includes knowledge as a permissible mental state. 720 ILCS 5/4-5. Indeed, defendant's proposed requirement that the mental state be something more than "knowing" would wipe out not only all requirements for child sex offenders, including registration, but a whole variety of crimes.

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

Defendant's error stems from his misapprehension of the "innocent conduct" doctrine. As the People's opening brief explained, this concept protects against legislation that prohibits conduct bearing no rational link to the ill that the legislature sought to cure. *See* Peo. Br. 18-24; *see also 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"). As the conduct here is precisely what legislators intended to prohibit because of its inherent dangers, *see* Peo. Br. 18-24, the innocent conduct doctrine is inapposite.

D. Legislators need not seek out statistics.

While defendant recognizes that it "may be so" that the General Assembly need not rely on statistical data, at the same he suggests that statistics "cannot and must not be ignored." Def. Br. 8. This argument contravenes the long-established rule that legislation "may be based on rational speculation unsupported by evidence or empirical data." *Boeckmann*, 238 Ill. 2d at 7 (quotation omitted). Nor does defendant find any support for his proposed approach in the prohibition against legislating based on "vague, undifferentiated fears" in *Cleburne* (cited Def. Br. 8).[2]

[2] *Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016), the other case cited by defendant, *see* Def. Br. 8, addressed the Ex Post Facto clause and not the rational basis test or a substantive due process analysis, and thus merits no further discussion here.

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

At issue in *Cleburne* was whether a city could require a special use permit for a facility for people with intellectual disabilities when other care and multiple-dwelling facilities were freely permitted without such permits. 473 U.S. at 447-48. As justification, the city cited the "negative attitude of the majority of property owners" nearby and "the fears or elderly residents in the neighborhood." *Id.* at 448. The Court held that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently." *Id.* The city also asserted concern that students from a nearby junior high school "might harass" the people with intellectual disabilities. *Id.* at 449. But denying a permit based on "such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation." *Id.* "The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded." *Id.* at 450.

The question, according to the *Cleburne* Court, was "whether it is rational to treat the mentally retarded differently." *Id.* at 449. Would the people with intellectual disabilities "threaten legitimate interests of the city" in a way that other residents would not? *Id.* at 448. The Court answered no: "the record does not reveal any rational basis for believing that [they] would pose any special threat." *Id.*; *see also id.* at 450 ("this record does not clarify how . . . the characteristics of" the people with intellectual disabilities

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

"rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes").

Fear of the intellectually disabled is not the same as fear of convicted child sex offenders. A rational basis exists for believing the latter threaten interests that other residents do not. Child sex offenders have been convicted of serious crimes. It is rational to believe that they are more likely to commit sex offenses against children than the population at large — in fact, that is not in dispute. *Cleburne*'s "vague, undifferentiated fears" language is irrelevant.

III. The Statute Passes Rational Basis Review and Would Do So Even If Legislative Consideration of Statistics Were Required.

A. The statute is reasonable under the established standard.

Even if there is a separate "third step" to the rational basis inquiry requiring that the method used be "reasonable," the statute passes that test as that term is used in the rational basis review. "A statute need not be the best means of accomplishing the stated objective." *M.A.,* 2015 IL 118049, ¶ 55. Indeed, "the fact that a law might be ill-conceived does not, in itself, create a constitutional problem for us to fix." *Moline Sch. Dist.*, 2016 IL 119704, ¶ 28. The "law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Okla.*, *Inc.*, 348 U.S. 483, 487-88 (1955). "The problems of government are practical

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific." *Heller,* 509 U.S. at 321. As discussed above, legislation "may be based on rational speculation unsupported by evidence or empirical data." *Boeckmann*, 238 Ill. 2d at 7 (quotation omitted).

Under this applicable deferential standard of review, the statute is rational and reasonable. As part of a decades-long response to child sex offenses, the General Assembly prohibited a child sex offender from being knowingly present in any public park "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). And contrary to defendant's assertion that the General Assembly legislated "irrespective of a sex offender's likelihood to re-offend, and without considering the nature of the particular prior crime," Def. Br. 5, 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

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

offenses under subsections (b) and (c) of Section 11-1.50 (criminal sexual abuse by person under seventeen)).

The choice to guard against recidivism of child sex offenders is not unique to Illinois — "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." *People v. Huddleston*, 212 Ill. 2d 107, 138 (2004). Indeed, the North Carolina Supreme Court rejected a substantive due process challenge to a similar statute banning sex offenders from public parks. *Standley v. Town of Woodfin*, 661 S.E.2d 728, 731 (N.C. 2008). It is widely recognized that "the victims of sexual assault are most often juveniles." *McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality)); *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").

Debates on the precise level of risk posed by child sex offenders and how to manage that risk are out of place in courts because "legislatures may respond to what they reasonably perceive as a 'substantial risk of recidivism.'" *Huddleston*, 212 Ill. 2d at 138 (quoting *Smith v. Doe,* 538 U.S. 84, 103 (2003)). The "'judiciary may not sit as a superlegislature to judge the

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

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*)).

Here, it is rational to believe that child sex offenders might be more likely to commit sex offenses against children than the population at large and that parks, where children often play in areas that provide opportunities for isolation, present inherent dangers. Thus, two other districts of the Illinois Appellate Court unanimously rejected substantive due process challenges to the statute. *People v. Pollard*, 2016 IL App (5th) 130514; *People v. Avila-Briones*, 2015 IL App (1st) 132221. The statute passes rational basis review.

B. The statistics show the wisdom of targeting parks.

While statistics are unnecessary, they corroborate the strong anecdotal evidence that public parks are frequent sites of sex offenses against minors. According to the Bureau of Justice Statistics, the "most common non-resident locations for sexual assaults of juveniles were roadways, fields/woods, schools, and hotels/motels." *See* 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), at 6; *see* 720 ILCS 5/11-9.4-1(a) ("'Public park' includes a park, forest preserve, bikeway, trail, or

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

conservation area under the jurisdiction of the State or a unit of local government."). A more recent report confirmed that the highest percentage of sexual assaults of females outside of their homes occurs in "locations such as . . . a park, field, or playground not on school property." 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.

Defendant questions whether these statistics indicate that parks are "common" sites of sex offenses, asserting (1) that most sex offenses occur in the victim's "own home or at the home of a friend," and (2) that the list of non-residential sites includes more than just parks, such as in commercial spaces and on public transportation. Def. Br. 12-15. These arguments do not negate the statute's rational basis. Even assuming it had the power to do so, the General Assembly need not first ban child sex offenders from all homes, commercial spaces, and public transportation before it turns to schools and parks. "The legislature need not deal with all conceivable evils at once; it may proceed one step at a time." *People v. Anderson*, 148 Ill. 2d 15, 31 (1992).

Further, defendant's analysis of the cases the People cited where sex offenses occurred in parks shows the danger of inventing "statistics." *See* Peo. Br. 13-14. Defendant reasons that the thirteen cases spanned a thirty-nine-year period and that therefore these cases "indicate that, on average, a

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

sex offense occurs in a park once every three years." Def. Br. 16. These cases indicate nothing of the kind. This was not a comprehensive calculation of all sex offenses in Illinois public parks, but selected results from a single Westlaw search of reported appellate cases. What these cases indicate is that there is evidence easily accessible to the General Assembly that sex offenses in parks pose a serious threat. The statistics confirm that parks (and schools) are among the best non-residential locations to target to protect children from child sex offenders.

C. The true reoffense rate is unknown, but statistics demonstrate that the problem is substantial.

Defendant and amicus National Association for Rational Sexual Offense LAWS (NARSOL)[3] understate the risks posed by child sex offenders. The statistics they cite underestimate the dangers posed by child sex offenders in a number of ways: (1) failing to recognize the gap between recidivism and reoffense rates; (2) failing to consider that each reoffender could commit multiple crimes; (3) cherry-picking analyses with low recidivism rates; and (4) using artificially shortened timelines.

Nobody knows the true reoffense rate for child sex offenders. A judicious review of the relevant statistics is included in a report by the United States Department of Justice's Office of Justice Programs, specifically

[3] While NARSOL claims to provide "unbiased analysis," NARSOL Br. 1, its membership includes sex offenders and their families whose primary goals include limiting sex offender registry and restriction laws. *See* https://narsol.org/about-us/vision-mission-and-goals.

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, titled the Sex Offender Management Assessment and Planning Initiative (SOMAPI) (2014) (available at https://www.smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf). SOMAPI explained that "recidivism remains a difficult concept to measure, especially in the context of sex offenders," because of factors including the "surreptitious nature of sex crimes" and "the fact that few sexual offenses are reported to authorities." SOMAPI Chapter 5, p. 89. However, there is "there is universal agreement in the scientific community that the observed recidivism rates of sex offenders are underestimates of actual reoffending." SOMAPI Chapter 5, p. 101.

The gap between recidivism and reoffense rates results from at least two causes. First, only a small percentage of sex offenses are reported, a problem exacerbated when the victims are children because "the likelihood that a sexual assault will be reported to law enforcement decreases with the victim's age." SOMAPI Chapter 5, p. 90; *see also* SOMAPI Chapter 5, p. 98 ("While unreported crime affects all recidivism research, it is particularly problematic in recidivism studies of child-molesting offenders as several studies have demonstrated that the likelihood that a sexual assault will be reported to law enforcement decreases with the victim's age.").

Second, only a small subset of reported sex offenses results in arrests. SOMAPI Chapter 5, p. 90. Various studies of self-reported offenses indicate

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

that less than five percent of offenses result in arrests or any official record. SOMAPI Chapter 5, p. 91; *see also* SOMAPI Chapter 3, p. 61 ("Over 25 years of research (including victim and offender studies) have shown that only 1–3 percent of offenders' self-admitted sexual offenses are identified in official records.").

Thus, "[d]ue to the frequency with which sex crimes are not reported to police, the disparity between the number of sex offenses reported and those solved by arrest, and the disproportionate attrition of certain sex offenses and sex offenders within the criminal justice system, researchers widely agree that observed recidivism rates are underestimates of the true reoffense rates of sex offenders." SOMAPI Chapter 5, p. 91; *see also* SOMAPI Chapter 5, p. 101; *see also* SOMAPI Chapter 5, p. 90 (because official recidivism rates "reflect only offenses that come to the attention of authorities, they are a diluted measure of reoffending").

Defendant and NARSOL fail to account for such disparities. Indeed, the state studies cited by NARSOL do not even rely on arrest rates, but define recidivism only as convictions that occur in that state. *See* https://doc.wi.gov/DataResearch/RecidivismReincarceration/SexualOffenderRecidivismReport.pdf (defining recidivism as "a crimnal offense that results in a new conviction and sentence to WI DOC custody or supervision").

Defendant also twists the numbers in other ways. Citing the BJS study, he writes that "non-sex offender released prisoners [are] 16 times more

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

likely to commit a sex offense than child sex offenders." Def. Br. 11. This "statistic" seems impossible to believe — and indeed it is incorrect. The report explicitly makes this point: "Compared to the 9,691 sex offenders and to the 262,420 non-sex offenders, released child molesters were more likely to be rearrested for child molesting." https://www.bjs.gov/content/pub/pdf/rsorp94.pdf at 1.

Defendant appears to be referencing the fact that 3,328 non-sex offenders were rearrested for a sex crime after release. 3,328 is approximately sixteen times 209, the number of released sex offenders rearrested for a sex crime against a child. But defendant erroneously fails to account for the fact that more than twenty seven times as many non-sex offenders than sex offenders were released (262,420 compared to 9,691).

Released sex offenders accounted for 17% of sex crimes against children, even though they accounted for only 3.6% of the population (9,691 released sex offenders compared to 262,420 released non-sex offenders). Put another way, more than one in six of the relevant sex crimes against children were committed by a released sex offender while such offenders accounted for less than one twenty-eighth of the relevant population. The released sex offenders were much more likely to commit sex crimes against children; there simply were far fewer of them. And released sex offenders with a prior arrest for child molesting were far more likely to be arrested for child molesting

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

than sex offenders with no such arrest. *See* https://www.bjs.gov/content/pub/pdf/rsorp94.pdf at 24-25.

The numbers cited by defendant and NARSOL also fail to account for another factor: offenders often commit more offenses than the one they are arrested or convicted for. A single reoffender can have multiple victims or attack one victim multiple times. One study found that child molesters in treatment report having committed an average of eighty-eight crimes each. *See* Underwood, R., Patch, P., Cappelletty, G., Wolfe, R. (1999), *Do sexual offenders molest when other persons are present? A preliminary investigation. Sexual Abuse: A Journal of Research and Treatment*, 11(3), 243-247.

Further, SOMAPI addressed a number of metaanalyses, which combine the results of multiple studies and thus provide more comprehensive and reliable data than any single study. These large scale analyses found recidivism numbers significantly higher than those that defendant and NARSOL use.

One "metaanalysis produced an average sexual recidivism rate of 10.9 percent for treated offenders and 19.2 percent for untreated comparison offenders, based on an average followup period of 4.7 years." SOMAPI Chapter 5, p. 94. "Another metaanalysis found that [t]he average sexual recidivism rate based on an average followup period of 46 months was 12.3 percent for treated sex offenders and 16.8 percent for untreated sex offenders." SOMAPI Chapter 5, p. 94 (internal quotation marks omitted).

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

"Still another metaanalysis found an average sexual recidivism rate of 11.1 percent for treated sex offenders and 17.5 percent for untreated sex offenders based on an average followup period of slightly more than 5 years." SOMAPI Chapter 5, p. 94 (internal quotation marks omitted). A fourth "meta-analysis involved 61 studies and a combined sample of 28,972 sex offenders. The researchers found an average sexual recidivism rate of 13.4 percent based on an average followup period of 4 to 5 years." SOMAPI Chapter 5, p. 95.

In contrast to the arguments of defendant and NARSOL, SOMAPI found that recidivism rates rose significantly with time. "Studies employing longer followup periods consistently report higher rates of recidivism." SOMAPI Chapter 5, p. 101; *see also id. (*"short followup periods and small sample sizes limit the generalization of certain findings"). In one study published in 2004, "sexual recidivism rates increased from 14 percent after 5 years of followup to 24 percent after 15 years of followup." SOMAPI Chapter 5, p. 95. In another, the "5-year sexual recidivism estimate for all sex offenders in the analysis was 14 percent. The 10-year and 15-year sexual recidivism rate estimates for all sex offenders were 20 percent and 24 percent, respectively," and "the 20-year sexual recidivism rate for the sample was 27 percent." SOMAPI Chapter 5, p. 94.

Even the Human Rights Watch (HRW) article referenced by defendant found that fourteen percent of sex offenders will be rearrested or convicted for

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

a new sex crime within four to six years and twenty-four percent will be recidivists over a fifteen-year period. *See* https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us.

In addition, the statistics support the General Assembly's decision to target child sex offenders in order to protect children. "As might be expected, child molesters were more likely than any other type of offender — sexual or nonsexual — to be arrested for a sex crime against a child following release from prison." SOMAPI Chapter 5, p. 98. The available information indicates that child sex offenders have significant reoffense rates. In one study, "For all child molesters in the analysis, the researchers found 5-year, 10-year, and 15-year sexual recidivism rates based on new charges or convictions of 13 percent, 18 percent, and 23 percent, respectively." SOMAPI Chapter 5, p. 98-99. And the rates might be much higher: "One study [b]ased on the 25-year followup period, . . . found a sexual recidivism rate of 52 percent (defined as those charged with a subsequent sexual offense) for the 115 child molesters." SOMAPI Chapter 5, p. 99 (internal quotation marks omitted). "The strongest predictors of sexual recidivism are factors related to sexual criminality, such as a demonstrated sexual interest in children [and] a history of prior sexual offenses." SOMAPI Chapter 5, p. 101. And pedophilia "may or may not lead to child sexual abuse, but when it does lead to abuse, it is a strong predictor of repeated offending." SOMAPI Executive Summary, p. X; *see also* SOMAPI Chapter 3, p. 56 ("pedophilia is a strong predictor of sexual recidivism").

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

Again, the statistics support the statute's focus on child sex offenders, who have previous convictions for sex offenses against children.

Of course, courts must be careful regarding statistics and what conclusions to draw from them. For instance, despite reforms in sex assault law, "most of the data suggests no significant change in the rate at which victims report sex assault, the frequency with which officers conduct an investigation or make an arrest, or the percentage of sex-assault indictments that result in convictions." Buller, T., *Fighting Rape Culture with Noncorroboration Instructions*, 53 Tulsa L. Rev. 1, 6 (2017). That does not mean that such reforms, such as eliminating barriers to prosecution, including spousal rape as a form of sexual assault, and promulgating rape shield laws, were irrational.

Similarly, even if NARSOL and defendant were right about the results of studies conducted *since* widespread sex offense registries and restrictions, they are ignoring an obvious hypothesis: that the laws are working. Lower reoffense rates in recent years could be the result of the very laws that NARSOL and defendant now seek to eliminate.

In sum, even though statistics are unnecessary, they support the General Assembly's concern regarding reoffense rates. Under rational basis review, the statute must be upheld.

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

IV. The Illinois Voices for Reform Brief Demonstrates that the Statute Is Rational and that Policy Disagreements Belong in the Legislature.

The Illinois Voices for Reform (IVR) amicus brief provides four "stories" designed to elicit sympathy for child sex offenders or their families. The IVR brief fails to address the rational basis test, which is not violated by imperfect fits in particular cases. Further, cursory investigation reveals that IVR omitted salient details of these handpicked illustrations that reveal their stories are more complicated than suggested:

Daniel Hough: In 2008, Jenna Hough, his wife, sought and was granted an emergency order of protection against him on behalf of her children, resulting in the following docket sheet entry: "Petitioner, Jenna Hough sworn testimony given. The Court questions the witness. Based on the testimony presented, the Court finds that irreparable injury may have occurred had the Respondent been given notice of this hearing. Further, the Court finds abuse exists." *Hough v. Hough*, 2008 OP 277 (LaSalle Cty. Cir. Ct.), September 11, 2008 docket entry. Thus, years after the initial crime, there was a judicial finding of "abuse" and potential for "irreparable injury" against Daniel Hough's own children in an action brought by his wife.

Wayne Greiter: he was convicted of abduction after luring an eleven-year old child into his car[4] and in October 2016, in reference to arrested teens

[4] *See* sex offender registry entry available at http://www.isp.state.il.us/sor/offenderdetails.cfm?SORID=E96D7670&CFID=

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

in Alabama, tweeted "hope all those coward Lefty's [sic] get bent over in prison real good." https://twitter.com/WGreiter/status/783126212835020800.

Tammy Bond: Bond was a special education teacher who had a two-month long sexual relationship with a teenage boy she tutored, *see* http://inthesetimes.com/article/18862/rethinking-prisons-rethinking-sex-offender-registries, and performed sex acts with him ten to fifteen times, *see* http://www.news-gazette.com/news/local/2013-05-09/urbana-teacher-arraigned-sex-charges.html. The boy's guardian first discovered that Bond was allowing the boy to drive her car and asked her to stop, and it was only after that continued that the guardian contacted police and the abuse came to light. *See* http://www.news-gazette.com/news/local/2013-12-11/ex-uhs-teacher-admits-sex-abuse-involving-student.html.

Bond's story not only illustrates that child sex offenses are often difficult to discover even when they are ongoing, but that there are policy debates in the legislature and executive branches of government, the branches best equipped — and constitutionally directed — to weigh the costs and benefits of various approaches. Bond actively participates in legislative efforts to change the law, including participating in the public comment portion of the Illinois State Commission on Criminal Justice and Sentencing Reform. *See* http://inthesetimes.com/article/18862/rethinking-prisons-rethinking-sex-offender-registries. Rather than undercutting the People's

---

47905037&CFTOKEN=a095a78d87d5f27-C5BF5D5E-98AF-9A32-08E5A4B8C97DD0AF&jsessionid=ec30c701aae1c25794526b5a2120411c117c.

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

argument, IVR's brief underscores the statute's rational basis and further supports the conclusion that these policy questions are matters for the General Assembly.

CONCLUSION

This Court should reverse the judgment of the appellate court.

December 13, 2017

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

ELDAD Z. MALAMUTH
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2235
emalamuth@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

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, and the certificate of service, is 5,547 words.

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

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM

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 December 13, 2017, the foregoing **Reply Brief 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:

Katherine M. Strohl
514 East Main Street
Ottawa, Illinois 61350
Katherine.m.strohl@gmail.com

Paul M. Debbeling
P.M. Dubbeling, PLLC
210 North Columbia Street
Chapel Hill, North Carolina 27514
paul.dubbeling@gmail.com

James W. Glasgow
Colleen Griffin
Will County State's Attorney's Office
57 North Ottawa Street, Third Floor
Joliet, Illinois 60432
cgriffin@willcountyillinois.com

Adele D. Nicholas
Law Office of Adele D. Nicholas
Chicago, Illinois 60630
adele@civilrightschicago.com

Lawrence M. Bauer
Mark A. Austill
State's Attorneys Appellate Prosecutor
628 Columbus Street, Suite 300
Ottawa, Illinois 61350
maustill@ilsaap.org

Mark G. Weinberg
Law Office of Mark G. Weinberg
3612 North Tripp Avenue
Chicago, Illinois 60641
mweinberg@sbcglabal.net

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

SUBMITTED - 278973 - Eldad Malamuth - 12/13/2017 2:20 PM