IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DOES 1-4 and JANE DOE,	)	
	)	
	)	No. 16 C 4847
Plaintiffs,	)	
	)	Judge Charles R. Norgle
v.	)	
	)	
LISA MADIGAN, Attorney General of the State of Illinois.	)	
	)	
Defendant.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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Plaintiffs John Does 1-4 and Jane Doe, individually, by their undersigned attorneys, respond to Defendants' Motion to Dismiss as follows:

I. Introduction

Defendants' Motion to Dismiss should be denied in its entirety. In this brief, Plaintiffs seek to show that none of the four arguments that Defendants make in their motion offers a legitimate basis for dismissal. The four arguments addressed and refuted are as follows: (1) Defendants' argument that Plaintiffs lack standing to challenge the constitutionality of the challenged provisions; (2) Defendants' contention that the challenged provisions are not constitutionally vague but "clearly defined," both on their face and as applied; (3) Defendants' assertion that the challenged provisions do not interfere with Plaintiffs' First Amendment right to freely exercise their religion; and (4) Defendants' contention that the challenged statutes do not impermissibly burden Plaintiffs' fundamental right to participate in the education and upbringing of their children.

II. Legal Standard

In ruling on a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) the court "takes all well-pleaded allegations of the complaint as true and views them in the light most favorable to the plaintiff." *Santiago v. Walls*, 599 F.3d 749, 756 (7th Cir. 2010). To satisfy the "notice pleading standard of Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must merely provide 'a short and plain statement of the claim,' which is sufficient to 'give the defendant fair notice of what the ... claim

is and the grounds upon which it rests.'" *Smith v. Dart*, 803 F.3d 304, 309 (7th Cir. 2015) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007)).

III. Argument

A. Defendants' Fact-Based Arguments Are Premature on a Motion to Dismiss

As a threshold matter, many of Defendants' arguments are premature at the motion to dismiss stage. A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency of the complaint and not the merits of the case." *McReynolds v. Merrill Lynch & Co., Inc.*, 694 F.3d 873, 878 (7th Cir. 2012). Thus, arguments that turn on disputed factual questions "cannot be resolved on a motion to dismiss." *Carmody v. Bd. of Trustees of University of Illinois*, 747 F. 3d 470, 477 (7th Cir. 2014).

Here, Defendants make numerous claims about how law enforcement "should" interpret the challenged statutes based on dictionary definitions of certain words, the legislative history of the statutes, and what they see as the appropriate way to read the statutes' ambiguous language. See, *e.g.*, Dkt. 28 (Defendants' Motion to Dismiss) at 7 ("Section 9.3(c-2) requires that the event must be one 'involving children.' This language indicates that the event should be one that centers around children or is primarily for children, rather than requiring merely that children be present.")

As set forth in the complaint, it is the experience of sex offenders throughout Illinois that law enforcement officials have not interpreted the challenged statutes so narrowly and that there is substantial disagreement among law enforcement bodies concerning the meaning of these statutes due to their ambiguous and open-

ended language. In short, the parties have a dispute of fact that cannot be resolved at the motion to dismiss stage. Discovery (including arrest reports and court records showing how these statutes have been interpreted by various enforcement bodies, training materials used by the Defendants and by local police departments to instruct authorities about enforcement of these statutes, and the testimony of officials who have authority to enforce these statutes) will shed light on the parties' dispute. See, *e.g. Volling v. Antioch Rescue Squad*, 999 F. Supp. 2d 991, 1007 (N.D. Ill. 2013) (denying motion to dismiss and finding that "[plaintiffs] are entitled to discovery on ... issues that are implicated by the allegations.")

B. Plaintiffs Have Standing to Bring this Lawsuit

Defendants contend that Plaintiffs (with one limited exception) lack standing to challenge the provisions at issue either as-applied or facially, because they have never been prosecuted or threatened with prosecution under the challenged provisions. Dkt. 28 at 10–12. Defendants' assertion is incorrect. To successfully allege injury-in-fact to establish standing,[1] a plaintiff must contend that he has suffered an invasion of a legally protected interest which is: (1) concrete and particularized, and (2) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Plaintiffs have alleged both elements.

First, the challenged provisions affect Plaintiffs' personal life, family life, religious life, social life and mental wellbeing on a daily basis. As a result of these provisions, Plaintiffs refrain from engaging in numerous activities (both

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[1] Defendants do not challenge Plaintiffs' standing due to the causation and redressability elements of standing and so these matters are not addressed in this brief.

constitutionally protected activities and otherwise) and cause Plaintiffs to live in constant fear of violating the law and subjecting themselves to arrest and prosecution. See, Dkt. 1, Complaint, ¶¶ 27–29, 34–38, 43–51, 56–58, 62–64 (setting forth facts relevant to each plaintiff). On a daily basis, Plaintiffs are put in the untenable position of having to choose either to play it safe and refrain from engaging in certain activities that may come under the scope of the statute's strictures or risk enforcement action against them, which would result in severe penalties, including felony prosecution and a prison sentence.

One of the principle rationales for the fair notice requirement underlying the void for vagueness doctrine is that "uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than [they would] if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotation marks and ellipses omitted). This concern is present when the behavior from which citizens might refrain is merely desirable, such as conducting commercial business, see *United States v. American Tobacco Co.*, 221 U.S. 106, 179-180 (1911), but it is especially significant when the behavior is constitutionally protected, such as performing abortions, see *Doe v. Bolton*, 410 U.S. 179, 191 (1973), or engaging in protected speech. See *Grayned*, 408 U.S. at 108.[2]

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[2] Plaintiffs' fears cannot be said to be anything but well-founded. Plaintiffs are part of a despised minority; it is no exaggeration to say that no group is more unpopular than sex offenders in our society. See, *Does v. Snyder*, No. 15-1536 (6th Cir. Aug. 25, 2016) (observing that "[society] brands registrants as moral lepers solely on the basis of a prior conviction.") Moreover, it is certainly not farfetched to think that prosecutors avidly seek to prosecute this population. As a result, the vaguely defined criminal statutes at issue become traps for the unwary. Accordingly, Plaintiffs must "over-police" themselves and

In addition, the fact that Plaintiffs have not been prosecuted certainly does not demonstrate that these ambiguous statutes do not pose a real and continuing risk to Plaintiffs. Under the law, the very existence of these vague statutes constitutes a threat that they will be enforced. See *Bauer v. Shepard*, 620 F.3d 704, 708 (7th Cir. 2010) ("the existence of a statute implies a threat to prosecute.").

Moreover, there is nothing conjectural or hypothetical about the injury Plaintiffs have suffered because of the challenged statutes. As alleged in the complaint, Plaintiffs have been told by policing authorities that certain of the activities that they seek to engage in (but do not out of fear of arrest) are prohibited by the challenged provisions. See, Dkt. 1 at ¶ 25, 36. And public arrest records show that individuals have in fact been arrested and prosecuted by law enforcement authorities for engaging in activities that Plaintiffs refrain from and which Defendants now argue in their Motion Dismiss are permissible. See Group Exhibit 1 attached hereto.[3]

Defendants reference one case — *Brandt v. Vill. of Winnetka, Ill.*, 612 F.3d 647, 650 (7th Cir. 2010) — to support their assertion that Plaintiffs lack standing because they have not been prosecuted under the challenged provisions. Dkt. 28 at

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undertake every precaution to refrain from a violation of these laws. As Justice Jackson wrote, "If the prosecution is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted." Robert H. Jackson, The Federal Prosecutor, 24 J. Am. Jud. Soc'y 18 (1940).

[3] A court may take judicial notice of these public court records. See *Henson v. CSC Credit Servs.,* 29 F.3d 280, 284 (7th Cir.1994) (finding public court documents judicially noticeable).

11. Defendants' reliance on *Brandt* is sorely misplaced. In *Brandt*, the Court actually found that the plaintiff had standing to sue, *id*. at 650, and only found that it was premature to grant plaintiff a declaratory judgment in the case, and this was so because, contrary to the facts here, the plaintiff had not proved that he had exercised any restraint due to the statute's vagueness. *Id.* at 648-649. ("[Plaintiff] has not identified any person whom he would have invited but for the risk that he would be hit with a bill that the candidate's committee wouldn't pay.") Here, Plaintiffs have identified an abundance of activities, locals, events and celebrations that they have had to forego due to the vagueness of the challenged provisions.

Based on the above, Plaintiffs have alleged an injury-in-fact sufficient to establish standing to sue.

C. Plaintiffs Seek to Make Both As-Applied and Facial Challenges

Prior to undertaking a textual analysis of the provisions to establish their inherent vagueness, it is first necessary to address the issue of whether Plaintiffs can challenge these provisions both as applied and facially. Plaintiffs seek to challenge the contested provisions on both these grounds, and Defendants do not contest Plaintiffs' ability to challenge the provisions as applied or facially (assuming standing). But Defendants do offer what appears to be an improper legal test to hold a statute void for vagueness. Noting that facial challenges are "disfavored," Defendants assert that "a plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the Act would be valid." Dkt. 28 at 13. But this misstates the law.

In *Johnson v. United States*, 135 S.Ct. 2551 (2015), the Supreme Court recently explained that due-process vagueness challenges are not so limited:

> In all events, although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.

Id. at 2560-2561 (citing and describing various cases that support this proposition) (emphasis in original).[4]

Relatedly, there can be no serious doubt that "[w]hen vagueness permeates the text of" a penal law "infring[ing] on constitutionally protected rights," "it is subject to facial attack." *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999). This principle is relevant here because Plaintiffs claim that certain of the provisions at issue infringe upon both their First Amendment rights to freely exercise their religions and their substantive due process right to meaningfully participate in and direct the education and upbringing of their children. Accordingly, Plaintiffs seek to make as applied and facial challenges to these constitutional claims.

D. A Fair Reading of the Challenged Provisions Reveals They Are Not "Clearly Defined," as Defendants Claim

The challenged provisions are void for vagueness as applied and on their face. All four provisions, as written, are likely to deter law-abiding citizens from engaging in conduct which may or may not be prohibited by their provisions and

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[4] Plaintiffs acknowledge that this area of law involving facial challenges under a void for vagueness theory is not particularly clear. See *Johnson,* 135 S.Ct. 2551 (2015) (Alito, J., dissenting) (Part III (A)). See also, Andrew E. Goldsmith, "The Void-for-Vagueness Doctrine in the Supreme Court, Revisited," 30 Am. J. Crim. L. 279, 309 ("Even if one considers only the jurisprudence addressing facial review that has arisen in the vagueness context—ignoring similar questions in other doctrines—the Court's stance on the issue is unclear.")

fail to provide law enforcement officials with adequate guidance concerning the precise scope of the activities they aspire to proscribe.

1. 720 ILCS 5/11-9.3(c), which prohibits a child sex offender from knowingly being present at any "facility providing programs or services exclusively directed toward persons under the age of 18," is void for vagueness.

Plaintiffs contend that this provision is vague because it is unclear if it prohibits Plaintiffs from being present at certain facilities that, though not necessarily exclusively focused on serving children, provide programs or services that cater exclusively to children, such as a public library that has a children's library (Dkt. 1 ¶27); a restaurant that has an arcade area (Dkt. 1 ¶46-47); a movie theatre that shows G-rated movies (*Id.*); and churches that have day care services or Sunday school lessons. Dkt. 1 ¶56-57.[5]

The State argues that the statute is clear, contending that none of the above locations are off-limits to Plaintiffs and that the plain language of the provision applies only to "facilities" that "exclusively provide services to children." The State asserts: "the plain language of Section 9.3(c) clearly prohibits child sex offenders from being present at any facility that only provides programs or services directed to minors, such as a children's museum, a Girl Scout camp, or a dance studio that only offers classes to children." Dkt. 28 at 15.

The State's interpretation depends on its rewriting the Statute by altering its grammatical structure. That is, to arrive at this interpretation of the law, the State

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[5] One might also add a hospital that has a pediatric wing, a gym that provides day care for patrons' children, or a music school that provides separate lessons to children and adults.

must rewrite the Statute so that the word "exclusively" modifies "facility" and not "programs" or "services." But neither the Defendants nor the court can re-write statutory language. See *Swain v. Pressley*, 430 U.S. 372, 378–79 n. 11, (1977) (courts are not authorized to rewrite law so it will pass constitutional muster). If the Illinois legislature intends for the presence restrictions to apply only to facilities that "exclusively serve minors," the legislature should write a statute that says that. That is not what 720 ILCS 5/11-9.3(c) says on its face.

To support its tortured interpretation, the State references the legislative history associated with the Statute's passage. Dkt. 28 at 5-6. The State's reliance on the legislative history is inappropriate for two reasons. First, in determining whether a statute is vague in the constitutional sense, the test is whether the language on its face conveys sufficiently definite warning as to the proscribed conduct when read by a person of "ordinary intelligence." *Hill v. Colorado*, 530 U.S. 703, 732 (2000); see also *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 478-479 (7th Cir. 2012). No person of ordinary intelligence should be expected to refer to a statute's legislative history to interpret its meaning.

Second, the State's reliance on the legislative history points to its need to clarify the text as written, thereby confirming the very ambiguity of the text whose meaning the State asserts is clear.

2. 720 ILCS 5/11-9.3(c-2), which makes it unlawful for a child sex offender "to participate in a holiday event involving children under 18 years of age," is void for vagueness

Plaintiffs contend that 720 ILCS 5/11-9.3(c-2) is unclear because it is uncertain what "participate" means; which "holidays" come under its terms; and what the phrase "involves children" means. As a result, Plaintiffs are afraid to attend, and consistently refrain from attending, various events, including one's grandchild's birthday party; a Fourth of July parade; and one's family's annual Fourth of July picnic. Dkt. 1 at ¶43.

The State argues that the Statute is clear, contending it does not bar any of the above-mentioned activities and that the plain language of the Statute merely "bars a child sex offender from actively participating in a holiday event that centers around or is primarily for children." Dkt. 28 at 15.

In its effort to define the scope of the Statute's terms, the State admits that the terms "participate" and "holiday" are not defined in the Statute. *Id*. at 7. It then reads the phrase "involving children" to mean "centers around or is primarily for children." (*id*. at 7, 8). Having so rewritten the statute, the Stare concludes that "[T]his provision would bar child sex offenders from participating in an Easter egg hunt, but not from a family Fourth of July picnic." *Id.* at 8.

There are at least four reasons the State's argument should be rejected. First, in concluding that the Statute precludes Plaintiffs from participating in an Easter Egg Hunt but not from a Fourth of July picnic, the State contradicts its assertion elsewhere in its brief where its says that "the statute does not actually bar any of

the activities [John Doe 3 seeks to attend]," including his grandchild's birthday party." *Id*. at 15.

A children's birthday party (perhaps more than any event imaginable) "centers around or is primarily for children." One can't help but ask: if the State's own analysis of the Statute leads it to contradict itself as to what events Plaintiffs can attend, why wouldn't Plaintiffs and law enforcement officers also be confused about the meaning and scope of the statue?

Second, the State in its effort to offer a narrowing construction of the Statute opts to interpret the phrase "involving children" to mean "centers around or is primarily for children." But isn't it equally logical and reasonable for one to interpret the phrase "involving children" to mean "including children"? This alternative interpretation severely enhances the restrictions imposed by the Statute and results in Plaintiffs' refraining from attending a host of holiday events. Defendants offer no reason for the Court to conclude that this is not a perfectly reasonable interpretation of the Statute.

Third, while the State tries to save the Statute by defining "involving children" to mean "centers around or is primarily for children," this attempt at a narrowing construction is as incomprehensible as the Statute itself. What does "primarily" mean? Is a Fourth of July parade primarily for kids? Is a Thanksgiving parade primarily for kids? Is a family Christmas dinner party where gifts are exchanged primarily for kids? How should Plaintiffs and law enforcement determine whether something is primarily for kids? By the number of kids versus

adults in attendance? Even accepting Defendants' interpretation of the law as correct, the statute is still impermissibly vague and open to interpretation.

Fourth, publicly available arrest records demonstrate the vagueness of the term "participate" in this statute. As set forth in Ex. 1, one individual was arrested and charged with a felony for merely being in the same building while another member of his household distributed Halloween candy. *Id.* at 1-2. This supports Plaintiffs' contention that the challenged provisions are vague and confusing—for they show that even among law enforcement authorities there is no agreement as to their proper scope and meaning. As Justice Scalia put it (in a case involving vague terms in the RICO statute), "How can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?" *Sorich v. U.S.*, 129 S.Ct. 1308, 1346 (2009) (citations omitted)[6]

3. 720 ILCS 5/11-9.3(b), which makes it unlawful for a child sex offender to "knowingly loiter within 500 feet of a school building or real property comprising any school while persons under the age of 18 are present in the building or on the grounds," is void for vagueness

Plaintiffs contend that 720 ILCS 5/11-9.3(b) is unclear because the definition of "loitering" is vague and open ended. As a result, Jane Doe is unsure whether she can visit other churches, since her presence in these churches might violate Section

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[6] The enforcement decisions are relevant for another reason: In *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972), the Supreme Court stated that, when assessing whether a statute is vague, it looks to "the words of the ordinance itself, to the interpretations the court below has given to analogous statutes, and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it."

9.3(b), which prohibits "loitering" within 500 feet of a school. Dkt. 1 at ¶63. Jane Doe would also like to attend another church that holds religious services in a school auditorium, but believes that doing so would also violate Sections 9.3(b). *Id.* ¶ 64. And John Doe 2 challenges either Section 9.3(b) based on his desire to pick up his great-granddaughter at a school bus stop. Dkt. 1 ¶ 37.

Defendants defend the constitutionality of the provision because "school" and "loiter" are both defined in the statute, (Dkt. 28 at 13), but that avoids the issue, which is the imprecise definition of the term "loiter."

"Loitering" is defined in the statute to include "[s]tanding, sitting idly, whether or not the person is in a vehicle, or remaining in or around school or public park property," as well as "[e]ntering or remaining in a building in or around school property, other than the offender's residence." 720 ILCS 5/11-9.3(d)(11). But what does "sit idly" mean? Does "idle" imply not having a legitimate and recognizable purpose? Is watching one's own granddaughter play at a park "sitting idly"? Is picking up and/or dropping off your child from school "sitting idly"? Both of these actions have a clear and legitimate purpose and thus presumably do not qualify as "idle," but the meaning of the term "sitting idly" is so unclear as to make this all a high-stakes guessing game for the Plaintiffs who can be arrested and imprisoned if they misinterpret the statute.

Moreover, how are law enforcement officers to determine a person's purpose? This statute has the same problems that the Supreme Court cautioned against in *City of Chicago v. Morales*, 527 U.S. 41 (1999), where the Court struck down an

ordinance prohibiting criminal street gang members from "loitering." A plurality of the court found that the definition of the term "loiter" was ambiguous. The ordinance in *Morales* defined "loiter" as "to remain in any one place with no apparent purpose." *Id*. at 56. The plurality reasoned, "It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an 'apparent purpose.'" *Id*. at 57.

Here, too, it is just as difficult for any law enforcement personnel to determine if someone is "sitting idly" within 500 feet of a school or park or had a legitimate purpose for doing so. Accordingly, the definition of "loiter" is so vague as to prevent ordinary people using common sense from being able to determine whether Plaintiffs are, in fact, prohibited from engaging in the conduct from which they have refrained.

Illinois courts themselves acknowledge the confusion with this statute. In *People v. Howard*, 2016 IL App (3d) 130959, 2016 WL 156701 (Ill. App. Ct. 3d Dist. 2016), the court held that the statute makes it very clear that a sex offender who is not a parent may not remain in a restricted school zone for any purpose, lawful or unlawful, while children under age 18 are present, but the court found that the statute was unclear with regard to whether a parent who is classified as a sex offender is allowed to be present in or near a school. In fact, the dissent in *Howard* stated that the loitering statute at issue should be held to be unconstitutional, reasoning that a *mens rea* needed to be read into its definition.

4. 720 ILCS 5/11-9.4-1(c), which makes it unlawful for a child sex offender to "knowingly loiter on a public way within 500 feet of a public park building or real property comprising any public park," is void for vagueness

720 ILCS 5/11-9.4-1(c) is marred by the same problem as 720 ILCS 5/11-9.3(b) (see above), since both Statutes have the same definition of loitering: "[s]tanding, sitting idly, whether or not the person is in a vehicle or remaining in or around public park property." 720 ILCS 5/11-9.4-1(a).

As explained above, the phrase "sitting idly" is vague and unclear. Simply put, if one has a valid reason to be within 500 feet of a school or park, for instance a parent dropping off and/or picking up his or her child, does this qualify as "sitting idly"? And, relatedly, if, as Plaintiffs believe, a person's purpose is relevant to determining whether one is "loitering," then law enforcement must determine what a person's purpose might in fact be—an impossible task that makes the law constitutionally suspect, as explained by the Supreme Court in *Morales*.[7]

E. The Challenged Provisions Interfere with Plaintiffs' First Amendment Rights

Plaintiffs challenge two of the statutes as violating the First Amendment, both as applied and facially. In particular, Plaintiffs challenge 720 ILCS 5/11-9.3(b)

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[7] Plaintiffs are not proceeding with their vagueness challenge to 720 ILCS 5/11-9.4-1(b). This provision was originally identified in Plaintiffs' Complaint as being challenged along with 720 ILCS 5/11-9.4-1(c). Dkt. 1, ¶1. However, Defendants have confirmed that the phrase "public parks" has an extremely broad meaning and restricts Plaintiffs (and all others subjected the Statute) from large swaths of public space and buildings, including, but certainly not limited to, "playgrounds, playing golf at a park-district owned golf course … [and] museums such as the Field Museum or the Museum of Science and Industry that are on public park property." Def. Brief at 9. Plaintiffs are still challenging the constitutionality of 720 ILCS 5/11-9.4-1(b) as a violation of their substantive due process rights. See, §III(F), below.

because it interferes with Plaintiff Jane Doe's ability to attend church services. Dkt. 1 at ¶64. Plaintiffs also challenge the constitutionality of 720 ILCS 5/11-9.3(c) because it, too, interferes with First Amendment religious freedoms, including the rights of Jane Doe who lives in fear that she will be arrested because the church she has attended has a youth ministry that provides activities for minors (such as youth Bible study, children's church, and nursery during church service) (Dkt.1, ¶62); and John Doe 4 who is deterred from and refrains from engaging in certain activities at his church, including attending Sunday services, because the Church has nursery for children of church members and also has weekly youth ministries and services for children. (Dkt. 1, ¶¶54–57). Taking each of these two provisions in turn, Plaintiffs show that they interfere with Plaintiffs' First Amendment rights.

1. 720 ILCS 5/11-9.3(b) Interferes with First Amendment Rights

Defendants admit that 720 ILCS 5/11-9.3(b) infringes upon Jane Doe's fundamental right to practice her religion. Dkt. 28 at 23. But the State defends the infringement by claiming it is merely an "incidental" burden on her First Amendment freedoms because Jane Doe is able to worship at other churches — "a church that holds its services in a building that is not also a school." *Id*. at 23. This defense, however, is legally unsupportable and premature at the motion dismiss stage.

First, the argument that one can have one's First Amendment rights obstructed in one place because they can be exercised elsewhere has been forcefully rejected by many Courts, including the Seventh Circuit. See *Ezell v. City of Chicago*,

651 F.3d 684, 697 (7th Cir. 2011) ("In the First Amendment context, the Supreme Court long ago made it clear that one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place," adding "It's hard to imagine anyone suggesting that Chicago may prohibit the exercise of a free-speech or religious-liberty right within its borders on the rationale that those rights may be freely enjoyed in the suburbs.") (quotations omitted).

The argument is also premature because it turns on factual questions. Neither the Court nor Defendants can speculate at this stage in the proceedings that there are other suitable churches available to Jane Doe such that her religious observances are not seriously burdened.

2. 720 ILCS 5/11-9.3(c) Interferes with First Amendment Rights

Both Jane Doe and John Doe 4 are deterred from exercising their First Amendment protected rights due to 720 ILCS 5/11-9.3(c)'s prohibition on their being "present at," "volunteer[ing] at" or being "associated with" a "facility providing programs or services exclusively directed toward persons under the age of 18." As a result, their fundamental right to attend church is abridged by the statute. The State's defense is that 720 ILCS 5/11-9.3(c) does not actually restrict Plaintiffs from being at their church. Their argument is that Plaintiffs' misread the scope of 720 ILCS 5/11-9.3(c)'s restrictions. Dkt. 28 at 23. ("Again, however, Section 9.3(c) does not actually bar child sex offenders from attending or volunteering at church, and so this … challenge likewise fails."). But the Defendants' argument, as

explained more fully above, depends on their rewriting the Statute by altering its grammatical structure.

F. The Challenged Statutes Violate Substantive Due Process Rights

Defendants also seek to dismiss Plaintiffs' claim that 720 ILCS 5/11-9.3 (b) and 720 ILCS 5/11-9.4-1(b) and (c) violate Plaintiffs' substantive due process rights. Defendants do not deny that parents have a fundamental right to make decisions about the care, custody, and upbringing of their children; however, they claim that the restrictions at issue here do not unduly restrict parents' fundamental rights. See Dkt. 28 at 18–20. In fact, as the analysis below shows, the challenged restrictions severely impact parents' ability to carry out routine and necessary parental responsibilities. As case law makes clear, the challenged presence restrictions amount to an unconstitutional burden on parents' fundamental rights because they interfere with children's education and development and disrupt normal, everyday parent-child interactions. Specifically, 720 ILCS 5/11-9.3 (b) bars parents from participating in basic parental duties and responsibilities such as dropping off and picking up their kids at school, and greatly diminish the ability of offenders' children to participate in school activities, extra curricular activities and school trips. Likewise, 720 ILCS 5/11-9.4-1(b) and (c) ban parents who are classified as child sex offenders from taking their children to developmentally-appropriate places like city museums, concerts, parks, and bike paths. The statutes impose a life-long ban on offenders' ever enjoying (or even walking past) the lakefront, as well many other everyday activities. The restrictions significantly and needlessly disrupt

the relations between parent and child. There is nothing discrete and superficial about these disruptions; whole lives are disrupted by them.

1. A Facial Challenge is Appropriate Here

Defendants argue that Plaintiffs lack standing to challenge these statutes on substantive due process grounds because none of them are parents of school-aged children and "facial challenges are disfavored." Dkt. 28 at 13. However, this is precisely the type of case where the Supreme Court has held a facial challenge is appropriate. See, *Morales*, 527 U.S. at 55 (1999) (plurality) (finding that a facial challenge was appropriate against "a criminal law that contains no *mens rea* requirement and infringes on constitutionally protected rights") (internal citation omitted).

2. Parents Have a Fundamental Right to Participate in Their Children's Upbringing

The Supreme Court has called a parents' right to make decisions about the care, custody, and control of their children "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). See also *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of parents in the up-bringing of their children is now established beyond debate as an enduring American tradition.") The education and upbringing of children are "among the associational rights this Court has ranked as of basic importance in our society,

rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

The Sixth Circuit has reaffirmed this principal in the context of laws that, like those at issue here, impose geographic exclusion zones. In *Johnson v. Cincinnati*, 310 F.3d 484 (6th Cir. 2002), the court considered whether a geographic ban which prevented a grandmother from participating in her grandchildren's upbringing violated substantive due process. The grandmother had been charged with a drug crime. That charge triggered an automatic ban from certain "drug exclusion zones," which, like the statutes at issue here, prevented the plaintiff from visiting her grandchildren and walking them to school. The court found that the exclusion zone "plainly infringed on [the plaintiff's] right to participate in the rearing of her grandchildren." *Id.* at 505. The geographic exclusion zone at issue in *Johnson*—like the exclusion zones here—created an encumbrance, rather than an absolute barrier to being a part of the grandchildren's lives. Yet the court still found that the statue violated the plaintiff's fundamental rights.

Similarly, a New Jersey court has said that geographical exclusion zones implicate fundamental parenting rights:

> The geographical restrictions on where the plaintiff … [may] 'loiter,' substantially intrude[s] upon significant family matters involving private and personal choices about how to raise and care for children, and decision-making about where to reside [by restricting] … a low-risk offender from accompanying his children to the school bus stop, going into a school or to a public park with his children, for fear of being charged with 'loitering.'

Elwell v. Twp. of Lower, 2006 WL 3797974 at *15 (N.J. Super. Ct.. 2006). These cases make clear that exclusion zones violate fundamental parenting rights where they interfere with offenders' ability to raise care for their children.

3. The Restrictions Imposed by the Challenged Presence Restrictions Severely Curtail Parents' Ability to Participate Meaningfully in their Children's Upbringing

720 ILCS 5/11-9.3(b) prohibits "loitering" within 500 feet of a school when children under 18 are present; 720 ILCS 5/11-9.4-1(b) and (c) prohibit offenders from being in or within 500 feet of any park property. The statutes contain no exemptions for parents who are with their own children in these exclusion zones. The practical effect of these prohibitions is extremely onerous. They ban parents from a host of normal duties such as taking one's own child to and from school, attending a child's extra-curricular activities such as sporting events, school plays, science fairs and graduation ceremonies, observing a Little League game or other sporting event in a park, or going to any educational museum that is on park district property. These restrictions can hardly be said to be minor or incidental burdens on parents subject to the statutes—they affect every aspect of their ability to participate in their children's lives.

Contrary to Defendants' contention that parents' rights are not burdened by a restriction on their ability to observe their children's "nonacademic extracurricular events" (see Dkt. 28 at 20), such activities are as fundamental to a child's education and upbringing as school itself. See, *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822,

844 (2002) (Ginsburg, J. dissenting) ("While extracurricular activities are ... not required for graduation, they are part of the school's educational program. ... Participation in such activities is a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience. ... [Extracurricular] activities ... afford opportunities to gain self-assurance, to come to know faculty members ... and to acquire positive social supports and networks.") (internal quotations omitted). Depriving parents of the right to participate in these central events is a far greater restriction on parental rights than the ability to walk a grandchild to school, which the Sixth Circuit held to be an unconstitutional infringement in *Johnson*.

While the protection of children is, of course, an important goal, the constitution does not tolerate government actions that impose grossly disproportionate burdens on fundamental rights in service of that worthy goal. It is hard to see how a restriction that prohibits parents from transporting their own children to school is a legitimate response to the risks these statutes are intended to address. See, Ex. 1 at 3-4 (police report showing criminal investigation of parent who registered child for school and dropped child off at school); see also, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 683 (1995) (Justice O'Connor, dissenting) ("It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis. But we must also stay mindful that not all government responses to such times are hysterical overreactions; some crises are

quite real, and when they are, they serve precisely as the compelling state interest that we have said may justify a measured intrusion on constitutional rights. The only way for judges to mediate these conflicting impulses is to do what they should do anyway: stay close to the record in each case that appears before them, and make their judgments based on that alone. Having reviewed the record here, I cannot avoid the conclusion that the District's suspicionless policy of testing all student athletes sweeps too broadly, and too imprecisely, to be reasonable under the Fourth Amendment.") These restrictions, which interfere in every aspect of normal child-parent relations, amount to legislators' indulging society's hysteria over the dangers posed by this population.

V. Conclusion

For the reasons stated above, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss in its entirety.

Respectfully submitted,

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