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

JACOB WINTER,	)	
	)	
Plaintiff,	)	
	)	No. 18 CV 3667
v.	)	
	)	Judge Tharp
LEO P. SCHMITZ, in his official capacity	)	Magistrate Judge Finnegan
as Director of the Illinois State Police,	)	
	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND A PERMANENT INJUNCTION

Defendant Leo P. Schmitz, the Director of the Illinois State Police ("ISP"); by his attorney, Lisa Madigan, Attorney General of Illinois, submits the following memorandum in opposition to Plaintiff's motion for summary judgment and a permanent injunction (Dkt. 14).

INTRODUCTION

Plaintiff Jacob Winter, a resident of Illinois, was convicted of a sex crime in Michigan. Under 730 ILCS 150-2 (E-10) ("Section E-10"), a provision of the Illinois Sex Offender Registry Act ("SORA"), Plaintiff is designated as a "sexual predator" on the Illinois Sex Offender Registry because he committed a sex offense in another state and he was required to register as a sex offender in that state. Plaintiff alleges that Section E-10 violates his equal protection rights because an offender who was convicted of a similar crime in Illinois would not be designated a sexual predator. However, because the challenged provision does not affect a fundamental right or discriminate against a suspect class, the rational basis test applies here. Requiring that all out-

of-state sex offenders register for life is a rational means of serving the State's legitimate interests in protecting the public from sex offenders and ensuring that Illinois does not become a magnet for sex offenders from other jurisdictions. "'Sex offenders are a serious threat in this Nation.' ... and '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 sex assault.'" *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1, 4 (2003), *quoting McKune v. Lile*, 536 U.S. 24, 32-33 (2002). The courts have upheld the creation of public sex offender registries by the States' legislatures as a means to protect their communities from sex offenders and to help apprehend repeat offenders. *Id*. Thus, under the "highly deferential" rational basis standard, Section E-10 must be upheld. Plaintiff's motion for summary judgment should accordingly be denied, and Defendant's motion should be granted.

BACKGROUND

Plaintiff Jacob Winter is a resident of Alsip, Illinois. Defendant's Answer (Dkt. 19) ¶ 9. In May 2017, Plaintiff pled guilty to the Michigan offense of Criminal Sexual Conduct – Fourth Degree. *Id*. ¶ 11. In Michigan, this offense is referred to as a "high court misdemeanor," punishable by up to two years of imprisonment. *Id*. Plaintiff alleges that, as a "Tier I" offender, Michigan requires him to register on a non-public sex offender registry for 15 years. *Id*. ¶ 13; *see also* Declaration of Jacob Winter (Dkt. 14-1) ¶ 4. Under 730 ILCS 150-2 (E-10) ("Section E-10"), Plaintiff is designated as a "sexual predator" on the Illinois Sex Offender Registry because he committed a sex offense in another state and he was required to register as a sex offender in that state. Illinois law bars sexual predators from "knowingly be[ing] present in a public park" or "knowingly loiter[ing] on a public way within 500 feet" of a public park building or any public park. 720 ILCS 5/11-9.4-1(b) and (c). Plaintiff alleges that he wishes to take his

children to a park, register his children for sports leagues or other events that take place on park property, or participate in family events that take place on park property, but that he is unable to do so because of his designation as a sexual predator. Dkt. 14-1 ¶ 9.

The elements of the Michigan offense of Criminal Sexual Conduct - Fourth Degree (Michigan Penal Code §750.520e) are similar to the elements of the Illinois offense of Criminal Sexual Abuse (720 ILCS 5/11-1.50(a)). Dkt. 19 ¶ 14. The Michigan Criminal Sexual Conduct – Fourth Degree statute provides that: "A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist: . . . (b) force or coercion is used to accomplish the sexual contact." 750.520e(1)(b). Michigan law defines sexual contact as follows:

> "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for (i) revenge, (ii) to inflict humiliation, or (iii) out of anger.

Michigan Penal Code § 750.520a(q). Under Illinois law, a person who has been convicted of Criminal Sexual Abuse (720 ILCS 5/11-1.50(a)), is required to register as a sex offender, but is not designated as a "sexual predator" based solely on that conviction. *Id.* ¶ 17.

Plaintiff's complaint includes a single count asserting that Section E-10 violates his equal protection rights. Dkt. 1 ¶¶ 25-28. Plaintiff alleges that the "difference in treatment between individuals who committed their offenses in Illinois and those who committed their offenses elsewhere is not rationally related to a legitimate state interest and thus fails rational basis review." *Id.* ¶ 28.

ARGUMENT

I. Plaintiff is Not Entitled to Summary Judgment because Section E-10 Does Not Violate Plaintiff's Equal Protection Rights.

Plaintiff alleges that Section E-10 violates his equal protection rights because he is designated as a sexual predator under the Sex Offender Registry Act ("SORA"). Dkt. 1 ¶¶ 25-28. However, Plaintiffs' equal protection challenge fails because sex offenders are not a suspect class and the challenged section survives rational basis review.

A. Section E-10 does not interfere with a fundamental right or discriminate against a suspect class.

Unless a statute "interferes with a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." *Kadrmas v. Dickinson Pub. Sch.,* 487 U.S. 450, 457-58 (1988). Plaintiff does not allege that Section E-10 interferes with any fundamental right, nor does he allege that sex offenders are a suspect class. Plaintiff effectively concedes that the rational basis test applies, as he alleges that Section E-10 "is not rationally related to a legitimate state interest and thus fails rational basis review." Dkt. 1 ¶ 28; *see also* Dkt. 14 at 6 n.5.

B. Section E-10 is rationally related to a legitimate governmental interest.

When a statute does not implicate fundamental rights or a suspect class, courts look to whether the statute is "rationally related to legitimate government interests." *Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005), *quoting Washington v. Glucksberg,* 521 U.S. 702, 728 (1997). The rational basis standard is "highly deferential" and courts hold legislative acts unconstitutional under a rational basis standard in "only the most exceptional circumstances." *Moore*, 410 F.3d at 1345. Plaintiff argues that, "even when a suspect class is not affected by a statute, courts must carefully apply rational basis review where, as here, a statutory classification

has the effect of harming a politically unpopular group." Dkt. 14 at 9. But Plaintiff points to no case where the court applied a "more searching form of rational basis review" (*id*. at 10) when analyzing a statute affecting sex offenders like Plaintiff. The one case involving sex offenders that Plaintiff cites in this section, *Does 1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), did not involve an equal protection claim or rational basis review. In contrast, the Seventh Circuit recently rejected the argument that heightened scrutiny should apply to statutes affecting sex offenders. *Vasquez v. Foxx*, 895 F.3d 515, 524-25 (7th Cir. 2018). Instead, the Seventh Circuit has consistently applied a very deferential standard when evaluating statutes affecting sex offenders. As the Seventh Circuit recently explained when denying a sex offender's challenge to an Indiana statute barring him from entering a polling site located at a school:

> [The rational basis] standard is very deferential to the state: we must uphold the statute even if it is unwise, improvident, or out of harmony with a particular school of thought. . . . To win, [the plaintiff] must negate every conceivable basis which might support [the statute]. This is a notoriously heavy legal lift.

Valenti v. Lawson, 889 F.3d 427, 430 (7th Cir. 2018) (quotations and internal citations omitted). *See also Vasquez*, 895 F.3d at 525 ("But our role is not to second-guess the legislative policy judgment by parsing the latest academic studies on sex-offender recidivism."); *Brown v. City of Michigan City, Indiana*, 462 F.3d 720, 734 (7th Cir. 2006) ("Rational-basis review is highly-deferential. . . . To find that a government action violates the requirements of substantive due process in this context, it must be utterly lacking in rational justification.") (quotations omitted).

In this case, Section E-10 affects sex offenders who were convicted outside the state of Illinois. The purpose of SORA is to protect the public from sex offenders. *See, e.g.*, *In re J.W.*, 787 N.E.2d 747, 761 (Ill. 2003). The Seventh Circuit has held that the State's interest in protecting children from sex offenders is "not merely legitimate but compelling." *Brown,* 462 F.3d at 734. As the Seventh Circuit has observed, children are "some of the most vulnerable

members of society," and the government "has a duty to shield them, ex ante, from the *mere risk* of child abuse or molestation." *Id.* (internal quotation omitted, emphasis in original).

However, other states vary significantly with regard to how they prosecute and punish sex crimes. *See, e.g.,* Candace Kruttschnitt, William D. Kalsbeek, & Carol C. House, Eds.; Panel on Measuring Rape and Sexual Assault in Bureau of Justice Statistics Household Surveys; *Estimating the Incidence of Rape and Sexual Assault*, 25 (National Academies Press 2014)[1] ("Understanding and measuring the crimes of rape and sexual assault are difficult because statutes related to these crimes differ considerably among the 50 states, the District of Columbia, U.S. territories, federal jurisdictions, and the Uniform Code of Military Justice."); Asaph Glosser, Karen Gardiner, Mike Fishman, *Statutory Rape: A Guide to State Laws and Reporting Requirements*, 5-10 (Office of the Ass't Secretary for Planning & Eval. in the U.S. Dep't of Health and Human Serv. 2004)[2] (detailing the substantial variation in states' statutory rape laws).

Given the wide variation in other state's treatment of sex crimes, some of these states may not classify a particular sex crime the same way that Illinois would. This case provides an example of this variability: the Michigan offense of Criminal Sexual Conduct - Fourth Degree (Michigan Penal Code §750.520e) is a "high court misdemeanor" punishable by up to two years of imprisonment, and in fact Mr. Winter was sentenced to only 90 days in a county jail. Dkt. 1 ¶ 12; Dkt. 14-1 ¶ 4. In contrast, the equivalent Illinois offense of Criminal Sexual Abuse (720 ILCS 5/11-1.50(a)) is a Class 4 felony, which carries a sentence of "not less than one year and not more than 3 years," although probation may be granted in appropriate cases. 720 ILCS 5/11-1.50(d); 730 ILCS 5/5-4.5-45(a) and (d); *see* Dkt. 1 ¶ 14. As a convicted felon, Plaintiff would

[1] The complete book is available online at https://www.nap.edu/catalog/18605/estimating-the-incidence-of-rape-and-sexual-assault .An excerpt is attached as Exhibit A.

[2] The complete report is available online at https://aspe.hhs.gov/system/files/pdf/75531/report.pdf . An excerpt is attached as Exhibit B.

have lost the right to hold municipal public office for life (65 ILCS 5/3.1-10-5(b)), the right to hold constitutional public office until his sentence was served (730 ILCS 5/5-5-5(b)), his federal firearms rights (18 USC § 922(g)(1)), and the right to vote until release if he had been sentenced to prison (730 ILCS 5/5-5-5(c)). Given the variability of other states' treatment of sex crimes, and the State's legitimate interest in protecting the public from sex offenders, it was rational for the Legislature to classify all out-of-state sex offenders as sexual predators to ensure that the public is protected.

Section E-10 also survives rational basis review for another reason. A number of other states, include Missouri and Tennessee, require lifetime registration for *all* sex offenders. *See* § 589.400 R.S. Mo.; Tenn. Code Ann. § 40-39-207. It is not uncommon for sex offenders to "shop around," seeking to move to the most favorable jurisdictions. *See* Dariya Tsyrenzhapova, "Missouri's dubious exports: Sex offenders," *Columbia Missourian* (May 3, 2018).[3] It is rational for Illinois to want to avoid becoming a magnet jurisdiction for sex offenders from other states with more stringent sex offender registration requirements. *See Doe v. Jindal*, No. 15-1283, 2015 WL 7300506, at *9-10 (E.D. La. Nov. 18, 2015) ("Doe interprets his fundamental right to travel as allowing a sex offender easily to escape the registration requirement imposed by his jurisdiction of conviction by moving to a state which would have imposed a more lenient registration condition if it had originally prosecuted the offender. The Constitution does not require this result.").

It would be constitutional to apply the more stringent requirements from other states to out-of-state offenders who move to Illinois under principles of reciprocity or comity. *See, e.g., Doe v. Jindal*, 2015 WL 7300506, at *9 (Louisiana's registration statute, which applied

[3] Available online at https://www.columbiamissourian.com/news/state_news/missouri-s-dubious-export-sex-offenders/article_88ffd8d2-2d41-11e8-8f69-1f8feab817ee.html.

"whichever [registration] period is longer," was rationally related to "Louisiana's interest in preventing sex offenders from subverting the purposes of their court-ordered registration requirements."). However, it would be an administrative nightmare for Illinois to keep up with and apply registration rules from more than fifty other jurisdictions. It is therefore rational for Illinois to apply lifetime registration as a default for out-of-state offenders to ensure that sex offenders from states that have lifetime registration for all sex offenders are not treated more leniently than they would be treated in their original jurisdiction.

At least one court has applied this rationale in upholding a similar distinction between in-state and out-of-state sex offenders. In *Creekmore v. Attorney Gen. of Texas*, 341 F. Supp. 2d 648 (E.D. Tex. 2004), the plaintiff in that case had been convicted under the Uniform Code of Military Justice ("UCMJ") and was required to register in Texas. However, he argued individuals convicted in Texas of similar offenses were not required to register. *Id*. at 663. The court held that the Plaintiff was not similarly situated to individuals convicted under the Texas Penal Code ("TPC"), and thus was not deprived of equal protection. *Id*. at 663-64. The plaintiff's action took place outside of Texas and thus could not necessarily have been prosecuted under the TPC. There was a rational basis for Texas to treat individuals convicted in Texas differently from individuals convicted in another jurisdiction. *Id*. While the Texas legislature could "easily keep track of" changes to the TPC, "[s]uch is not the case when dealing with sex offenses from fifty-plus other jurisdictions. It would be unreasonable to require the legislature to keep track of changes in law in those jurisdictions." *Id*. at 664.[4] Similarly, in this case it would be

[4] *Creekmore* also involved a procedural due process claim. The court held that for offenders convicted in Texas of reportable crimes, procedural due process requirements are met through their original trials that resulted in convictions. 341 F. Supp. 2d at 665. But Creekmore received no advance notice, no opportunity for hearing, and no opportunity to appeal determinations affecting his duty to register, duration of his registration, or frequency of registration. *Id*. at 664. The court found that plaintiff had a "colorable claim that his military offenses did not have

unreasonable to expect the Legislature to keep track of changes in laws in out-of-state jurisdictions.

Plaintiff cites to a single case, *Hoffman v. Village of Pleasant Prairie*, 249 F. Supp. 2d 951 (E.D. Wis. 2017), in which the court "struck down a statute that drew distinctions between sex offenders based on where they lived at the time of their offense." Dkt. 14 at 7. However, *Hoffman* is distinguishable because the defendant in that case failed to offer *any* justification for its distinction between various groups of sex offenders:

> Thus, the Court would likely be compelled to find the Ordinance constitutional if the Village had offered any evidence providing such a justification, even as late as its briefing on the instant motion. It did not, and this failure leaves the Court no choice but to conclude that the Ordinance violated Plaintiffs' equal protection rights in making an irrational domicile-based distinction between [offenders].

249 F. Supp. 2d at 962. Here, in contrast, Defendant has offered multiple reasons why the challenged provision advances the State's legitimate interests. *Hoffman* therefore provides no support for the Plaintiff's case.

Plaintiff may argue that the result in his particular case is overly harsh. But the rational basis test "does not require that a rule be the least restrictive means of achieving a permissible end." *Scariano v. Justices of Supreme Court of State of Ind.,* 38 F.3d 920, 925 (7th Cir. 1994). As the Illinois Appellate Court observed in upholding Illinois sex offender registration statutes:

> But under rational-basis review, a statute is not fatally infirm merely because it may be somewhat underinclusive or overinclusive. . . . Even a law that is unwise, improvident, or out of harmony with a particular school of thought is not necessarily irrational. . . . And the law need not be in every respect logically consistent with its aims to be constitutional.

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elements substantially similar to Texas offenses requiring registration."*Id.* at 665-66. Thus, plaintiff was entitled to due process when state officers determined whether his offenses were substantially similar in their essential elements to reportable Texas offenses. *Id*. at 666. In this case, however, Mr. Winter has not alleged a procedural due process claim. In fact, Winter's claim hinges on his assertion that the Michigan offense of Criminal Sexual Conduct - Fourth Degree (Michigan Penal Code §750.520e) is equivalent to the Illinois offense of Criminal Sexual Abuse (720 ILCS 5/11-1.50(a)). Dkt. 1 ¶ 14.

People v. Avila-Briones, 49 N.E.3d 428, 450 (Ill. Ct. App. 2015) (quotations omitted); *see also People v. Pollard*, 2016 IL App (5th) 130514, ¶ 42 ("Although [SORA] may be overinclusive, thereby imposing burdens on offenders who pose no threat to the public because they will not reoffend, there is a rational relationship between the registration, notification, and restrictions of sex offenders and the protection of the public from such offenders."). Because Section E-10 is rationally related to its purpose of protecting the public from sex offenders, Plaintiff's equal protection claim should be dismissed.

C. Section E-10 does not conflict with other sections of SORA.

Finally, Plaintiff argues that Section E-10 is irrational because it "is redundant of, and oftentimes in conflict with, other sections of SORA." Dkt. 14 at 7. Specifically, Plaintiff argues 730 ILCS 150/2(A)(1)(a) ("Section A(1)(a)") of SORA defines "sex offender" to include individuals convicted of sex offenses in other states, while 730 ILCS 150/2(E) ("Section E") defines "sexual predator" to include individuals convicted of out-of-state offenses that are "substantially equivalent to any offense listed in subsection (E) or (E-5) of this Section," *e.g.*, criminal sexual assault. *Id.* at 8, *quoting* 730 ILCS 150/2(E). Plaintiff argues that, to the extent that an out-of-state sex offender would already be designated a sexual predator based on the nature of his out-of-state conviction, Section E-10 is redundant to Section E. *Id.* And with regard to out-of-state sex offenders who would not be designated a sexual predator pursuant to Section E, Plaintiff argues that Section E-10 conflicts with Section (A)(1)(a).

Two statutes conflict when conduct compelled by one would violate the other. *State v. Mikusch*, 138 Ill. 2d 242, 247 (1990); *Cohen v. McDonald's Corp.*, 347 Ill. App .3d 627, 634 (1st Dist. 2004) ("conflicts arise when it is physically impossible to comply with both [statutes]"). Courts "presume the legislature envisions a consistent body of law when it enacts new legislation," and also "presume the legislature is aware of all previous enactments when it enacts

new legislation." *Ill. Native Am. Bar Ass'n*, 368 Ill. App. 3d 321, 327-28 (1st Dist. 2006). In this situation, the more specific and more recent provision controls. *See, e.g.*, *Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324, 346, 898 N.E.2d 631, 644 (2008).

In this case, even if we assume that Section E-10 conflicts with Section A(1)(a) and Section E, Section E-10 controls as the most recent and more specific provision. Section E-10 was enacted in August 26, 2011 and became effective on January 1, 2012. *See* P.A. 97-578 § 5. In contrast, Section A(1)(a) became effective June 1, 1996 (*see* P.A. 89-428, Art. 1 § 97), and Section E became effective on July 1, 1999. *See* P.A. 91-48 § 5. Thus, Section E-10 is substantially more recent than Section A(1)(a) and Section E.

Section E-10 is also more specific than Section A(1)(a) and Section E. Section E-10 provides that a "person required to register in another State due to a conviction, *adjudication or other action of any court* triggering an obligation to register" is defined as a sexual predator and required to register accordingly. 730 ILCS 150/2(E-10). In contrast, Section A(1)(a) and Section E only required out-of-state offenders to register if they were *convicted* in another state. For example, before Section E-10 was passed, a deferred judgment on a sex offense in another state would not have triggered a registration requirement in Illinois, even though the offender was required to register in the other state. After Section E-10, such offenders are required to register in Illinois as long as they are required to register in the state where they committed their offense. Thus, since Section E-10 is more specific and more recent, it controls over the earlier-enacted provisions.

Finally, Section E-10 is not redundant to Section E because, as just discussed, it imposes registration requirements on individuals who were not "convicted" but are nevertheless required to register in another state. But even if Section E-10 is partially redundant to Section E, that does

not make it irrational. "Redundant provisions are not unusual in statutes." *Pietras v. Curfin Oldsmobile, Inc.*, No. 05 C 4624, 2005 WL 2897386, at *5 (N.D. Ill. 2005), *citing Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). And to the extent that Section E-10 and Section E are redundant, the more recent provision should control.

II. Plaintiff Has Not Established that He is Entitled to an Injunction.

A. Plaintiff has not established irreparable harm.

Plaintiff has not shown that he is suffering irreparable harm from Section E-10. First, as discussed above, Plaintiff has not shown that Section E-10 violates his equal protection rights. Second, while he complains that he is prohibited from taking his minor children to a park (Dkt. 14 at 11), that is, effectively, a challenge to 720 ILCS 5/11-9.4-1, not to Section E-10. The Illinois Supreme Court recently held that "there is a rational relation between protecting the public, particularly children, from sex offenders and prohibiting sex offenders who have been convicted of crimes against minors from being present in public parks across the state." *People v. Pepitone*, 2018 IL 122034 ¶ 31.

Finally, Plaintiff alleges that he suffers increased stigma from being designated a "sexual predator," as compared to the stigma that attaches based on his being listed on the sex offender registry at all. Dkt. 14 at 11. But while Mr. Winter fears that people will assume that the "sexual predator" designation means that he committed an offense against a child (Dkt. 14-1 ¶ 9), that fear is unfounded when the registry clearly states that his "victim was 40 years of age."[5] And in any case, Plaintiff cites no case that establishes that stigma alone is sufficient to establish

[5] *See* Sex Offender Registry entry for Jacob A. Winter, available online at https://www.isp.state.il.us/sor/offenderdetails.cfm?SORID=E17B3144&CFID=80791879&CFTOKEN=3b83ea0dbf5ed66-449E6E65-F5E1-B949-A9EB3C3DE8167479&jsessionid=ec30153eac89905cab592f397fd6175572e5 .

irreparable harm. *See, e.g., Hamlyn v. Rock Island Cty. Metro. Mass Transit Dist*., 964 F. Supp. 272, 274 (C.D. Ill. 1997).

B. The balance of harms counsels against issuing a permanent injunction.

Moreover, the balance of harms counsels against the issuance of a permanent injunction. As discussed above, Section E-10 serves the legitimate governmental interests of protecting the public from sex offenders and ensuring that Illinois does not become a magnet for sex offenders from other jurisdictions. Section E-10 also serves the important governmental interest of ensuring that sex offenders who are required to register in another state are also required to register in Illinois. If Section E-10 were invalidated, then numerous individuals who were required to register in another state due to a deferred judgment or other adjudication would no longer be required to register in Illinois. Plaintiff's breezy statement that the "state is free to pass a law requiring those individuals to register" (Dkt. 14 at 13) makes short shrift of the important public interests at stake in this case. Because those public interests outweigh the Plaintiff's asserted harms, the Court should decline to issue a permanent injunction in this case.

CONCLUSION

For these reasons, Defendant respectfully requests that the Court deny Plaintiff's motion for summary judgment and a permanent injunction.

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

/s/ *Sarah H. Newman*
Thomas A. Ioppolo
Sarah H. Newman
Assistant Attorneys General
General Law Bureau
100 W. Randolph, 13th floor
Chicago, Illinois 60601
Tel: (312) 814-7198
Tel: (312) 814-6131
tioppolo@atg.state.il.us
snewman@atg.state.il.us

Counsel for Defendant Leo P. Schmitz