Exhibit A

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

PAUL MURPHY, et al.,	)	
	)	
Plaintiffs,	)	No. 16 CV 11471
	)	
v.	)	Judge Virginia M. Kendall
	)	
LISA MADIGAN, Attorney General of Illinois, and JOHN BALDWIN, Director of the Illinois Department of Corrections	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

The defendants, Lisa Madigan, Attorney General of Illinois and John Baldwin, Director of the Illinois Department of Corrections, by their attorney, the Illinois Attorney General, submit the following memorandum of law in support of their motion to dismiss.

BACKGROUND

Plaintiffs are prisoners convicted of sex-related offenses and are serving time in the Illinois Department of Corrections ("IDOC"). Complaint (Dkt. 1) ¶¶ 12-18. Plaintiffs allege they are part of a group of 4,000 offenders in the same category. *Id*. ¶ 121. Plaintiffs allege a variety of claims in connection with Illinois laws setting terms of Mandatory Supervised Release (MSR) for sex offenders. Because MSR involves release from incarceration while still remaining under supervision by the Illinois Prisoner Review Board ("PRB"), it is the "rough equivalent" to parole. *Sims v. Walker,* No. 10 C 5266, 2011 WL 2923859 at *1 (N.D. Ill. July 12, 2011).

Illinois law provides that when a person is sentenced to a period of incarceration "the parole or mandatory supervised release term shall be written as part of the sentencing order." 730 ILCS 5/5-8-1(d). For persons committing certain kinds of felony sex offenses, "the term of mandatory supervised release shall range from a minimum of 3 years to a maximum of the natural life of the defendant." 730 ILCS 5/5-8-1(d)(4). The MSR period is an indeterminate sentence. *People v. Rinehart*, 2012 IL 111719 at ¶¶ 29-30 (2012).

For sex offenses involving victims under age 18, or for repeat offenders involving certain sex offenses, the MSR period is four years, the first two of which the offender must serve in an electronic home detention program. 730 ILCS 5/5-8-1(d)(5).

A person released on MSR must comply with a list of conditions imposed by the Prisoner Review Board: "The conditions of parole, aftercare release, or mandatory supervised release shall be such as the Prisoner Review Board deems necessary to assist the subject in leading a law-abiding life." 730 ILCS 5/3-3-7(a). Besides the standard mandatory conditions, such as not

possessing a firearm and consenting to visits by a parole agent, *see id.*, sex offenders may be subject to additional restrictions. 730 ILCS 5/3-3-7(b-1). Some of these conditions may depend on additional approvals by the Department of Corrections. A sex offender may be required to reside only at a location approved by the Department of Corrections, *id.* at (b-1)(1), and comply with all requirements of the Sex Offender Registration Act. *Id.* at (b-1)(2). In effect then, the sex offender's release on MSR may be subject to the dual oversight of the Prisoner Review Board and Department of Corrections. The PRB may approve the release for a certain date, but the release is effected only with the Department's approval as to living conditions, and other possible conditions.

Once released on MSR, sex offenders serving extended mandatory supervised release terms may request discharge from supervision, "supported by a recommendation by the releasee's supervising agent and an evaluation of the release completed no longer than 30 days prior to the request for discharge from supervision." 730 ILCS 5/3-14-2.5(d).

PLAINTIFFS' LEGAL CLAIMS

Plaintiffs claim is as follows. MSR sentences for sex offenders are indeterminate, and potentially lifelong. Dkt. 1 ¶¶ 21-22. Release on MSR is subject to conditions that the prisoner is often unable to meet, such as to find a suitable "host site" acceptable to the Department of Corrections. *Id*. ¶¶ 28-32. When a prisoner has an MSR that is a determinate, fixed term of years, and is unable to meet the conditions required for supervised release, the offender can in effect "max-out" of his sentence and MSR term by remaining incarcerated for the full MSR period. *Id.* ¶ 60. But that is not the case if somebody has a lifelong MSR sentence. Remaining in prison after the original sentence of incarceration is completed earns no credit, in effect provides no "benefit" or forward movement for the prisoner if he cannot find a living situation that complies with the

Department of Corrections' requirements and sex offender laws which limit where sex offenders can live (not close to schools, parks, etc.). *Id*. ¶ 61. Sex offenders are also subject to restrictions on their access to the Internet, and this too is alleged to be a serious obstacle to their release, because most homes will have computers or Internet access of some sort. *Id*. ¶ 52-52.

Plaintiffs further allege that they cannot seek to shorten the duration of the MSR, or convert it to a fixed term, without a report from their supervising agent, which none of them are in a position to have until released from incarceration. *Id*. ¶ 23.

All of the named plaintiffs are alleged to be in this situation, or will be in the future—having completed a determinate sentence of incarceration, but still incarcerated because unable to meet the terms of MSR. There are some variations, however, in the facts alleged among the seven plaintiffs. Five have completed their sentences of incarceration, while two have not:

- Paul F. Murphy: Convicted in 2011 of aggravated child pornography. Approved for release on March 14, 2014, by the PRB but is still incarcerated. *Id*. ¶¶ 12, 63.
- Stanley Meyer: Convicted in 2008 of criminal sexual assault. Approved for release on May 12, 2011, by the PRB but is still incarcerated. *Id*. ¶¶ 13, 77.
- J.D. Lindenmeier: Convicted in 2007 of predatory criminal sexual assault (*id*. ¶ 83), where the victim was under the age of 18.[1] Approved for release on July 18, 2011, by the PRB but is still incarcerated. Dkt. 1 ¶¶ 14, 83.
- Keenon Smith: Convicted in 2012 of criminal sexual assault with the use of force, and aggravated criminal sexual assault, where the victim was 12 years of age.[2] The Complaint alleges Smith was approved for release on November 4, 2016, by the PRB

[1] This information is publicly available in the Illinois Sex Offender Registry, *see* https://www.isp.state.il.us/sor/offenderdetails.cfm?SORID=E07A1669&CFID=27579764&CFTOKEN=bd89de011946b3fe-493576FE-98A9-190C-63A8CFA134288F38&jsessionid=ec3095df4a8f684c5507633445282560615a . This Court may take judicial notice of publicly available information regarding plaintiffs' criminal convictions. *Palay v. United States*, 349 F.3d 418, 425 (7th Cir. 2003) ("[I]n resolving a motion to dismiss, the district court is entitled to take judicial notice of matters in the public record.").

[2] This information is publicly available in the Illinois Sex Offender Registry, *see* https://www.isp.state.il.us/sor/offenderdetails.cfm?SORID=E15A2427&CFID=27580013&CFTOKEN=bd7e6363487ca78d-493AB950-A7D1-866D-3FBF676620EBEAAE&jsessionid=ec3095df4a8f684c5507633445282560615a

but is still incarcerated. Dkt. 1 ¶¶ 91-92. However, Smith was released on MSR on January 24, 2017.[3]

- Jasen Gustafson: Convicted in 2013 of aggravated child pornography. Dkt. 1 ¶ 103. Approved for release on October 19, 2014, by the PRB but is still incarcerated. *Id*. ¶ 16.

- Alfred Aukema: Convicted in 2013 of criminal sexual assault involving the use of force, where the victim was under the age of 18.[4] Scheduled to complete five-year sentence in September 2017, believes he will be unable to find suitable host site when released from incarceration. Dkt. 1 ¶ 17.

- Kevin Tucek: Convicted in 2014 of criminal sexual assault on a family member under the age of 18.[5] Scheduled to complete eight-year sentence in July 2020, believes he will never be able to find suitable host site when released from incarceration

Id. ¶¶ 12-18.

The five counts of Plaintiffs' Complaint seek declaratory and injunctive relief "prohibiting Defendants from continuing enforcement" of these allegedly unconstitutional policies and practices. Dkt. 1 ¶¶ 134, 142, 147, 156, 159. In Count I, captioned "Substantive Due Process," plaintiffs allege that the MSR system and the conditions it imposes require the affected prisoners "to spend the duration of their MSR term incarcerated" (*id*. ¶ 131), that the "unmeetable conditions result in life imprisonment" (*id.* ¶ 132), and that the system "results in a prison sentence that exceeds the sentence imposed by the sentencing court." *Id.* ¶ 133. Plaintiffs allege that this punishment "shocks the conscience because it is far out of proportion to the offense." *Id.* ¶ 134.

[3] This information is publicly available on the IDOC's website, *see* https://www.idoc.state.il.us/subsections/search/inms_print.asp?idoc=M50744 .

[4] This information is publicly available in the Illinois Sex Offender Registry, *see* https://www.isp.state.il.us/sor/offenderdetails.cfm?SORID=E13B4508&CFID=27580646&CFTOKEN=8100ff0d3b58d01d-494CFA73-CFB1-864D-A3CECB5E35847C57&jsessionid=ec3095df4a8f684c5507633445282560615a .

[5] This information is publicly available on the IDOC's website, *see* https://www.idoc.state.il.us/subsections/search/inms_print.asp?idoc=M49089 .

Count II alleges an equal protection violation. The theory asserted is that indigent prisoners do not have the resources to find an acceptable host site, "mak[ing] it impossible for an indigent person sentenced to a 'three to life' term of MSR to be released from prison." *Id.* ¶ 137. Plaintiffs further allege that life imprisonment is not the only way to serve the government's interest in knowing the whereabouts of indigent sex offenders. *Id.* ¶ 141.

Count III is captioned "Fourteenth Amendment Procedural Due Process—Void for Vagueness." In this count, plaintiffs challenge some of the terms used in 730 ILCS 5/3-3-7 (b-1)(12), such as a prohibition on living "near" parks and schools, and "places where minor children congregate." *Id.* ¶ 146. Plaintiffs seek declaratory and injunctive preventing the application of these statutes. *Id.* ¶ 147.

A second Count III (at page 31) is captioned "Fourteenth Amendment Procedural Due Process." It alleges that the Department of Corrections misuses its discretion when it denies host site placement to offenders based on considerations involving the offender's access to the Internet and smart phones. *Id.* ¶ 153. Plaintiffs allege that the exercise of unreviewable discretion violates due process. *Id.* ¶ 155.

Count IV, titled "Eighth Amendment," alleges that the "[i]mposition of an effective life sentence on prisoners entitled to release on MSR simply because they cannot find [approved] housing . . . is grossly disproportionate and without reasonable justification." *Id.* ¶ 159. Plaintiffs seek an injunction against defendants "from continuing the unconstitutional policies and practices identified herein." *Id.*

ARGUMENT

"[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). In reviewing the sufficiency of a complaint under this standard, the court must accept as true all well-pleaded factual allegations. *McCauley v. City*

of Chicago, 671 F.3d 611, 616 (7th Cir. 2011). However, legal conclusions and "conclusory allegations merely reciting the elements of the claim are not entitled to this presumption of truth." *Id.*

I. AUKEMA AND TUCEK'S CLAIMS ARE NOT RIPE FOR REVIEW, AND SMITH'S CLAIMS ARE MOOT.

As a preliminary matter, Alfred Aukema and Kevin Tucek's claims should be dismissed because they are not ripe for review by this court. As part of the "case or controversy" requirement of Article III, a party must suffer injury or come into immediate danger of suffering an injury before challenging a statute. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Essentially, the ripeness requirement "prevent[s] the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). The ripeness requirement prevents courts from interfering with legislative enactments before it is necessary to do so, and enhances judicial decision-making by ensuring that cases present courts with an adequate record for effective review. *Id*. Ripeness requires the weighing of two factors: (1) the hardship to the parties of withholding court consideration; and (2) the fitness of the issues for judicial review. *Id*. at 149.

As a preliminary matter, neither Aukema nor Tucek have suffered injury or come into immediate danger of suffering injury. *See Kirby v. Siegelman*, 195 F.3d 1285, 1290 (11th Cir. 1999). These plaintiffs have not yet completed their sentences of incarceration (Dkt. 1 ¶¶ 17-18), and we do not know what their situation will be and what housing options will be available for them when and if they are approved by the PRB for mandatory supervised release. As such, their claims are a hypothetical and speculative. *See Lucien v. Jockisch*, 133 F.3d 464, 469 (7th Cir. 1998) (holding that it was "improper" to address the merits of a constitutional challenge to a statute which "has not been, and may never be, applied to" the plaintiff). Moreover, Aukema and

Tucek face no hardship from denying review of their claims at this point, as they will remain in IDOC at least until they complete their sentences, regardless of how this case is resolved. Accordingly, Aukema and Tucek's claims should be dismissed because they are not ripe for review.

Additionally, Smith's claims should be dismissed as moot because he was released on MSR on January 24, 2017. *See* note 3 above. Because Smith has already been released, the relief sought in this case would have no effect on him. Smith's claims should therefore be dismissed as moot. *Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 492 (7th Cir. 2011).

II. PLAINTIFFS' CHALLENGE TO THE DURATION OF THEIR CONFINEMENT CANNOT BE BROUGHT IN A SECTION 1983 ACTION.

The complaint, in all the different theories it puts forward, nevertheless raises one common, fundamental point: plaintiffs are incarcerated, and they seek not to be. Plaintiffs allege that they are being denied release from incarceration because of a flawed MSR system which makes it difficult or impossible to comply with the conditions for release imposed by the Department of Corrections. Plaintiffs attack the sentence they have received. They attack the duration of their confinement behind the walls of a correctional facility and allege they should be afforded the much less restrictive status of being supervised in the free community. This form of relief falls within the scope of habeas corpus, not Section 1983.

The relief plaintiffs seek is barred in a Section 1983 case. "[A] prisoner in state custody cannot use a § 1983 action to challenge the fact or duration of his confinement." *Wilkinson v. Dotson,* 544 U.S. 74, 78 (2005). It makes no difference if the relief sought in the § 1983 action seeks damages or some other form of equitable relief and does not explicitly seek release from custody, as long as "success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Id.* at 82. It has been established under *Heck v. Humphrey,* 512 U.S.

477 (1994), and subsequent cases, that Section 1983 cannot be used to seek relief (damages or equitable) "for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid" unless the defendant can establish that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a . . . tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87. If "a judgment in favor of the plaintiff would necessarily imply the invalidity of the conviction or sentence[,] . . . the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487. If the complaint is actually a challenge to the conviction or the sentence, then it is barred under *Heck.*

In *Graham v. Broglin,* 922 F.2d 379, 381 (7th Cir. 1991), the Court noted:

> If a prisoner seeks by his suit to shorten the term of his imprisonment, he is challenging the state's custody over him and must therefore proceed under the habeas corpus statute with its requirement of exhausting state remedies, while if he is challenging merely the conditions of his confinement his proper remedy is under civil rights law, which (with an inapplicable exception) does not require exhaustion.

Id. at 380-81. The court in *Broglin* recognized that there are cases on the border, where it is not totally clear on which side of the line the particular case will fall. The court noted:

> The difficult intermediate case is where the prisoner is seeking not earlier freedom, but transfer from a more to a less restrictive form of custody. *We know that if a prisoner claims to be entitled to probation or bond or parole, his proper route is habeas corpus, even though he is seeking something less than complete freedom.*

Id. at 381 (emphasis added). The court summarized with a "generalization:"

> If the prisoner is seeking what can fairly be described as a quantum change in the level of custody—whether outright freedom, or freedom subject to the limited reporting and financial constraints of bond or parole or probation, or to the run of the prison in contrast to the approximation to solitary confinement that is disciplinary segregation—then habeas corpus is his remedy.

Id. In *Broglin*, the change in custody was to a work release program. The court found that work release fell more on the conditions side, involving a change of location or program rather than a significantly greater bid for freedom, less than the "quantum change" that would be on the habeas side of the line. *Id.* at 381.

Courts have had numerous opportunities to explain the line between Section 1983 and habeas. If the plaintiff's challenge is merely to parole procedures, but not necessarily seeking release, then a Section 1983 case can be maintained even if release is the prisoner's ultimate goal. That was the situation in *Wilkinson*, where the prisoners challenged the application of harsher parole guidelines alleged to be an *ex post facto* violation and parole board proceedings which allegedly denied one of them an adequate opportunity to speak. 544 U.S. at 77. Neither prisoner directly sought an injunction seeking speedier release or a court order that would have necessarily implied the unlawfulness of the State's custody. *Id*. at 81. Similarly, in *Murdock v. Walker*, No. 08-C-1142, 2014 WL 916992, at *5 (N.D. Ill. March 10, 2014), the Court found that the plaintiffs were challenging the "procedures used to deny them their release." The suit was "not simply about challenging the fact or duration of one's confinement, seeking immediate release from prison, or shortening one's confinement." *Id.*

On the other hand, as the Supreme Court held in *Edwards v. Balisok*, 520 U.S. 641, 645 (1997), some allegations of procedural irregularities in hearing processes would necessarily imply the invalidity of the sentence. *Edwards* arose in the context of a prison disciplinary hearing in which the prisoner alleged that hearing processes, including the hiding of exculpatory witness statements, led to the denial of good-conduct credits. *Id*. at 646-47. Even though the prisoner did not explicitly ask for restoration of good-time credits, the court found that the claim was barred by *Heck*. *Id*. at 648-49.

Other cases fall more clearly within the *Heck* prohibition. A prisoner's claim for termination of his MSR is considered a "quantum change" from a restricted form of custody to unsupervised freedom, and thus not available in a Section 1983 suit. *Belk v. State of Illinois*, No. 13-cv-841, 2013 WL 5346470 at *3 (S.D. Ill. Sept. 24, 2013), *quoting Broglin*, 922 F.2d at 381. *See also Sims*, 2011 WL 2923859 at *3 (citing *Heck*, noting "MSR is the rough equivalent of parole"); *Lacy v. Unknown Parole Agent*, No. 12 C 9407, 2012 WL 6217529 at *2 (N.D. Ill. Dec. 12, 2012) (*Heck* prohibits plaintiff from challenging PRB decision to revoke his MSR); *Rounds v. Unknown Party*, No. 16-cv-712, 2016 WL 4123671 at *2 (S.D. Ill. Aug. 3, 2016) (Section 1983 claim regarding revocation of MSR barred by *Heck*); *Pickens v. Moore*, 806 F. Supp. 2d 1070, 1074 (N.D. Ill. 2011); *King v. City of Highland Park*, No. 07-15341, 2008 WL 723514 at *3-4 (E.D. Mich. March 17, 2008).

Even though plaintiffs have submitted a five count complaint with different legal theories, all the counts depend on the same facts and repeat the same theme: that individuals are being faced with lengthy, open-ended periods of incarceration even though they should be on the much less restricted status of mandatory supervised release. Several of the plaintiffs allege they have been unconstitutionally incarcerated from as long ago as 2011, and should be on MSR status instead. It is clear that a move from imprisonment to supervised freedom in the community is the type of "quantum change" that falls on the habeas side of the equation. As Judge Posner noted in *Broglin*, and as numerous other cases attest, claims of entitlement to probation, bond, parole (and parole's rough equivalent, mandatory supervised release) fall within the *Heck* rule. 922 F.2d at 381. Plaintiffs claim that despite completion of their sentence of incarceration, the conditions imposed on them represent a "Kafkaesque nightmare" from which they cannot escape. Dkt. ¶ 1. Plaintiffs are not complaining about a procedure separate and apart from the

fact of their incarceration. They are not complaining about "fixing" a procedure, which if changed, may or may not lead to their release. That was the situation in *Wilkinson.* Their whole complaint is about seeking release from incarceration. The complaint falls clearly within the *Heck* rule. "Few things implicate the validity of continued confinement more directly than the allegedly improper denial of parole." *Butterfield v. Bail,* 120 F.3d 1023, 1024 (9th Cir. 1997). If plaintiffs were to prevail on any count, it would necessarily require invalidation of their criminal sentences, at least for the four plaintiffs who have completed their terms of incarceration yet find themselves still incarcerated.[6]

A closer look at the theories of the complaint further demonstrate that the complaint is a multi-pronged attack aiming at the same relief: invalidation of the way a fixed term of incarceration interacts with an indeterminate, and potentially lifelong, term of mandatory supervised release. Count I, based on substantive due process, does not challenge any specific procedure. It alleges that "the multiple layers of prohibitions" create "unmeetable conditions," Dkt. 1 ¶ 131, and imposes a punishment that "shocks the conscience." *Id.* ¶ 134. Count I overlaps significantly with Count IV, which also alleges a disproportionate punishment under the Eighth Amendment. Dkt. 1 ¶ 158-59. Claims of disproportionate punishments clearly fall within *Heck. Sims,* 2011 WL 2923859 at *2 (Eighth Amendment claim regarding revocation of MSR, barred by *Heck*); *Bell v. City of Boise,* 993 F.Supp.2d 1237, 1239 (D. Idaho 2014); *Mauro v. Freeland,* 735 F.Supp.2d 607, 622 n.50 (S.D. Texas 2009) (Eighth Amendment claim of disproportionate sentence "clearly barred under *Heck*").

The remaining counts, were they to succeed, would also result in invalidation of the criminal sentences. Count II alleges that release on MSR involves a liberty interest and that the

[6] As discussed above, Aukema and Tucek's claims are not yet ripe because they have not yet completed their sentences of incarceration and have not been approved by the PRB for mandatory supervised release, while Smith's claims are moot because he was released on MSR in January 2017.

MSR decision discriminates against persons on the basis of wealth, because indigent persons cannot find host sites as easily as those with financial resources. Plaintiffs allege that this discriminatory system results in a "severe and permanent deprivation of liberty." Dkt.1 ¶ 142. The alleged direct loss of liberty is at the heart of the claim. *See also Conkleton v. Raemisch*, 603 Fed. Appx. 713, 716 (10th Cir. 2015) (equal protection challenge to parole denial barred by *Heck*). The second Count III, captioned "Fourteenth Amendment Procedural Due Process," alleges that decisions to deny MSR are based on a "misuse of discretion" and "misuse of authority" by the Department of Corrections, which imposes blanket prohibitions of host sites where someone may have a computer or smart phone with Internet capability, and that such decisions are not based in Illinois law. Again, this is not an attack predicated merely on a faulty procedure, the correction of which might or might not lead to a different release decision. This is an attack going directly to the design of the program and the alleged wrongful and arbitrary decision-making process of the Department of Corrections, which leads to the alleged loss of liberty. It is more substantive due process than procedural. The claim directly implicates the sentence. Finally, in the first Count III, plaintiffs allege that the parole conditions stated in 730 ILCS 5/3-3-7(b-1), which prohibit living "near" parks, schools, day care centers, swimming pools., beaches, theatres, or other places where minor children congregate," are unconstitutionally vague. Vague parole conditions directly impact the sentence, and are routinely the subject of habeas petitions. *See, e.g., Birzon v. King*, 469 F.2d 1241, 1242-43 (2d Cir. 1972); *Panko v. McCauley*, 473 F. Supp. 325, 327 (E.D. Wis. 1979). As such, the vagueness challenge is barred under *Heck*.

In summary, whether viewed with an emphasis on the factual allegations, or with an emphasis on the particular legal theories chosen by plaintiffs, the conclusion is the same: the suit

seeks to invalidate criminal sentences, making the plaintiffs' claims the exclusive province of habeas corpus under *Heck*. The claims should be dismissed without prejudice.

III. PLAINTIFFS' CLAIMS ALSO FAIL ON THE MERITS.

While plaintiffs' claims cannot be brought under Section 1983, their claims also fail to state a claim on the merits and should be dismissed for this reason as well.

A. Count I, Plaintiffs' Substantive Due Process Claim, Fails to State a Claim Because It Is Duplicative of Plaintiffs' Eighth Amendment Claim.

In Count I, captioned "Substantive Due Process," plaintiffs allege that the MSR system results in an effective life sentence, and that this punishment "shocks the conscience because it is far out of proportion to the offense." Dkt. 1 ¶¶ 131-34. However, Plaintiffs substantive due process claim is duplicative of their Eighth Amendment claim, which also alleges a disproportionate punishment (Dkt. 1 ¶ 158-59), and should accordingly be dismissed. As the Supreme Court held in *Albright v. Oliver*, 510 U.S. 266, 273 (1994), "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." Thus, courts have dismissed substantive due process claims like Plaintiffs' that are based on the constitutionality of criminal punishments, holding that these claims are properly analyzed under the Eighth Amendment. *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) ("[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."); *United States v. Strong*, 40 F. App'x 214, 218 (7th Cir. 2002) ("The Eighth Amendment addresses the constitutionality of criminal punishments, however, and where

a specific constitutional amendment provides an explicit textual source of protection against a particular government action, that Amendment, not the more generalized notion of substantive due process, is the guide for analyzing the claim."); *Vera-Natal v. Hulick*, No. 05 C 1500, 2005 WL 3005613, at *9 (N.D. Ill. Nov. 7, 2005); *Marsh v. Gilmore*, 52 F. Supp. 2d 925, 928 (C.D. Ill. 1999); *United States ex rel. Smith v. Nelson*, No. 96 C 5589, 1997 WL 441309, at *5-6 (N.D. Ill. July 28, 1997). Plaintiffs' substantive due process claim should likewise be dismissed.

B. Count II, Plaintiffs' Equal Protection Claim, Fails to State a Claim Because Poverty Is Not a Suspect Class and the Challenged Statutes and Regulations Easily Survive Rational Basis Review.

In Count II, plaintiffs allege that the statutes and policies at issue in this case violate the equal protection rights of indigent prisoners. Plaintiffs allege that because indigent prisoners do not have the resources to find an acceptable host site, it is "impossible for an indigent person sentenced to a 'three to life' term of MSR to be released from prison." Dkt. 1 ¶ 137. However, Plaintiffs' equal protection challenge fails because poverty or indigence is not a suspect class, and the challenged statutes and policies easily survive rational basis review.

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). Plaintiffs do not allege that the challenged statutes and policies interfered with any fundamental right, but rather assert that the statutes discriminate against indigent prisoners. However, indigence is not a suspect class, and the fact that a statute has "different effects on the wealthy and the poor" does not, in itself, require strict scrutiny. *Id*. at 458; *see also Pennington v. Golonka*, 439 F. App'x 553, 555 (7th Cir. 2011) ("Poverty. . . is not a suspect class."). Plaintiffs effectively concede that the rational basis test applies, as they allege

that "the statutory and regulatory schemes at issue" lack a "sufficiently rational connection between the legislative purpose and the means used to achieve that purpose." Dkt. 1 ¶ 142.

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. In this case, all members of the class are convicted sex offenders, and many have been convicted of serious sexual offenses against children. Dkt. 1 ¶¶ 21, 119. 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." *Brown v. City of Michigan City, Indiana*, 462 F.3d 720, 734 (7th Cir. 2006) (internal quotation omitted, emphasis in original). In this case, it is rational for the Legislature and the IDOC to conclude that it cannot adequately supervise convicted sex offenders who do not have a fixed residence, and that, consequently, the IDOC should not release offenders who do not have an appropriate host site.

In their Complaint, plaintiffs assert that the State has "alternative means" of "knowing the whereabouts of indigent individuals approved for release on MSR," *i.e.*, that the State may subject those individuals to electronic monitoring with GPS. Dkt. 1 ¶ 241. 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.

People v. Avila-Briones, 49 N.E.3d 428, 450 (Ill. Ct. App. 2015) (quotations omitted), *appeal denied*, 48 N.E.3d 1093 (Ill. 2016); *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 the statutes and regulations at issue in this case are rationally related to their purpose of protecting children from abuse, Plaintiffs' equal protection claim should be dismissed.

C. Count III, Plaintiffs' Void for Vagueness Claim, Fails to State a Claim Because the Provision Has a Plainly Legitimate Sweep and Plaintiffs May Seek Administrative Guidance Before Violating the Provision.

In Count III, plaintiffs allege that some of the terms used in 730 ILCS 5/3-3-7(b-1)(12), such as a prohibition on living "near" parks and schools, and "places where minor children congregate," are unconstitutionally vague because these terms are undefined. Dkt. 1 ¶ 146. The challenged provision is as follows:

> (b-1) In addition to the conditions set forth in subsections (a) and (b), persons required to register as sex offenders pursuant to the Sex Offender Registration Act, upon release from the custody of the Illinois Department of Corrections or Department of Juvenile Justice, may be required by the Board to comply with the following specific conditions of release:
>
> . . .
>
> (12) not reside near, visit, or be in or about parks, schools, day care centers, swimming pools, beaches, theaters, or any other places where minor children congregate without advance approval of an agent of the Department of Corrections or the Department of Juvenile Justice and immediately report any incidental contact with minor children to the Department.

730 ILCS 5/3-3-7(b-1)(12). "A condition of supervised release is unconstitutionally vague if it would not afford a person of reasonable intelligence with sufficient notice as to the conduct prohibited." *United States v. Schave*, 186 F.3d 839, 843 (7th Cir. 1999). But "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *United States v. Williams*, 553 U.S. 285, 304 (2008), *quoting Ward v. Rock Against Racism,* 491 U.S. 781, 794 (1989). Count III should be dismissed because the challenged provision has a "plainly legitimate sweep," and because Plaintiffs have the opportunity to seek approval from the IDOC prior to any violation.

Because plaintiffs are purporting to bring this case as a class action, they are necessarily raising a facial challenge to 730 ILCS 5/3-3-7(b-1)(12). Plaintiffs bear a heavy burden in a facial vagueness challenge. In *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442 (2008), a First Amendment election case, the Supreme Court cited with approval the test of *United States v. Salerno,* 481 U.S. 739 (1987), 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, *i.e.,* that the law is unconstitutional in all its applications. The Court in *Washington State Grange* noted that "While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep.'" 552 U.S. at 449, *quoting Glucksberg,* 521 U.S. at 739-40 and n.7 (1997 (Stevens, J., concurring in judgment).

Facial challenges of this type are disfavored, as the Court held in *Washington State Grange*, because "[c]laims of facial invalidity often rest on speculation" and "raise the risk of premature interpretation of statutes on the basis of factually barebones records." 522 U.S. . at 450. Facial challenges are contrary to the general rule that courts should "not anticipate a

question of constitutional law in advance of the necessity of deciding it," *id.*, and "facial challenges threaten to short circuit the democratic process by preventing laws from being implemented in a manner consistent with the Constitution." *Id.* at 451. Plaintiffs' constitutional challenge to 730 ILCS 5/3-3-7(b-1)(12) would not invalidate this provision in just one application, but in their entirety.

In this case, the challenged provision has a "plainly legitimate sweep." At minimum, it is clear that the provision would prohibit sex offenders from residing in homes that are directly adjacent to the prohibited locations. Moreover, other statutes prohibit all child sex offenders from residing within 500 feet of schools, playgrounds, day care centers, or facilities "providing programs or services exclusively directed toward persons under 18 years of age" 720 ILCS 5/11-9.3(b-5), (b-10). Whatever the outer boundaries of "near," the challenged provision would clearly prevent plaintiffs from living within 500 feet of the prohibited locations. Because the challenged provision has a "plainly legitimate sweep," plaintiffs' facial challenge must fail.

Plaintiffs also claim that the challenged provision is vague because it does not define "any other places where minor children congregate." Dkt. 1 ¶¶ 47 and n.1, 146. Plaintiffs cite to a recent Fourth Circuit Court of Appeals' decision, *Doe v. Cooper*, 842 F.3d 833, 842-43 (4th Cir. 2016), which invalidated a North Carolina statute that prohibited sex offenders from "knowingly be[ing] . . . at any place where minors gather for regularly scheduled educational, recreation, or social programs" (N.C. Gen. Stat. § 14-208.18(a)(3) ("N.C. Subsection (a)(3)"). However, the district court in *Cooper* held that another provision of the North Carolina statute, which prohibited sex offenders from "knowingly be[ing] . . . [o]n the premises of any place intended primarily for the use, care, or supervision of minors" (N.C. Gen. Stat. § 14-208.18(a)(1) ("N.C. Subsection (a)(1)") was *not* unconstitutionally vague, in part because the provision was

"informed by [a] specific list of examples," which included "schools, children's museums, child care centers, nurseries, and playgrounds." *Cooper*, 842 F.3d at 839-40. N.C. Subsection (a)(3) was vague in part because it contained no such list of examples, and the list provided in N.C. Subsection (a)(1) could not be read into N.C. Subsection (a)(3). *Id.* at 845.

In this case, the challenged provision includes a list of facilities that sex offenders are prohibited from residing near, which includes parks, schools, day care centers, swimming pools, beaches, and theaters. 730 ILCS 5/3-3-7(b-1)(12). This "specific list of examples" provides context and shows that "any other places where minor children congregate" was intended to apply to similar facilities. Thus, the Fourth Circuit's decision supports a finding that the challenged provision is not unconstitutionally vague.

Finally, the provision provides its own remedy for any confusion: an offender in doubt as to whether a host site fulfills the conditions of the challenged provision may seek "advance approval of an agent of the Department of Corrections." 730 ILCS 5/3-3-7(b-1)(12). The plaintiffs' ability to seek administrative guidance before any violation "suffice[s] to clarify a standard" that might have "an otherwise uncertain scope." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 504 (1982). Plaintiffs' void-for-vagueness challenge should accordingly be dismissed.

D. Count III, Plaintiffs' Procedural Due Process Claim, Fails to State a Claim Because Plaintiffs Were Not Denied Any Process.

Plaintiffs' second Count III, "Fourteenth Amendment Procedural Due Process," alleges that the Department of Corrections misuses its discretion when it denies host site placement to offenders based on considerations involving the offender's access to the Internet and smart phones. Dkt. 1 ¶ 153. Plaintiffs fail to state a procedural due process claim because they had notice and an opportunity to be heard with respect to the IDOC's decisions.

"The basic requirements of due process are notice and an opportunity to be heard." *Crayton v. Duncan*, No. 15-CV-399, 2015 WL 2207191, at *6 (S.D. Ill. May 8, 2015). Plaintiffs clearly had notice of the IDOC's alleged policy prohibiting sex offenders from serving at their MSR at host sites with computers or smart phone access. Dkt. 1 ¶ 153. As the Court found in *Murdock*:

> The undisputed evidence is sex-offender parolees subject to the turnaround practice are put on notice that IDOC must approve their host site location before they can be released, and further notified if/when their host site location is not approved. The Court, therefore, finds that the turnaround practice provides sufficient "notice" under the due process clause.

2014 WL 916992, at *12. The plaintiffs in this case are members of the class in *Murdock*, *see* 2014 WL 916992, at *1 n.1, and this conclusion is therefore binding on them. *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 370 (7th Cir. 2012). Plaintiffs also had an opportunity to be heard regarding the application of this policy to their cases, in that they were able to file grievances within the prison system.[7] "[T]he fact that this procedure has not had a favorable outcome does not mean that [plaintiffs were] denied due process." *Crayton*, 2015 WL 2207191, at *6.

While Plaintiffs are entitled to a hearing when their MSR is revoked, it is the PRB, not the IDOC, that is responsible for conducting this hearing. *Murdock*, 2014 WL 916992, at *9. As the *Murdock* court found:

> If the Defendants, all IDOC employees, had no role in the alleged constitutional violation, they cannot be held liable for any conduct that may have contributed to it. Accordingly, because the PRB is the only entity instilled with the overall authority to authorize a hearing officer to conduct a preliminary hearing, and there is no evidence establishing that the remaining Defendants had any direct personal role or influence on any alleged failure to conduct a preliminary hearing, the Plaintiffs' claim on this ground fails.

[7] Plaintiffs do not allege in their complaint that they have filed any grievances regarding any of their claims. To the extent Plaintiffs have failed to exhaust their administrative remedies prior to initiating this cause of action, their claims are barred by the Prison Litigation Reform Act, 42 U.S.C. § 1997e.

Id. Because Plaintiffs' second Count III does not identify any process that Plaintiffs were denied, this claim should be dismissed.

E. Count IV, Eighth Amendment Fails to State a Claim Because Plaintiffs Were Not Denied Any Process.

Count IV, titled "Eighth Amendment," alleges that the "[i]mposition of an effective life sentence on prisoners entitled to release on MSR simply because they cannot find [approved] housing . . . is grossly disproportionate and without reasonable justification." Dkt. 1 ¶ 159.

The United States Constitution does not require strict proportionality between a crime and its punishment. *See Harmelin v. Michigan*, 501 U.S. 957, 965 (1991); *United States v. Marks*, 209 F.3d 577, 583 (6th Cir. 2000). "Consequently, only an extreme disparity between crime and sentence offends the Eighth Amendment." *Marks*, 209 F.3d at 583. Sentences that are "prescribed under the sentencing guidelines and within the statutory maximum generally are not grossly disproportionate" and do not constitute cruel and unusual punishment. *Strong*, 40 F. App'x at 217; *see also United States v. Washington*, 109 F.3d 335, 338 (7th Cir.1997) ("The cruel and unusual punishments clause of the Eighth Amendment permits life imprisonment for a single drug crime.").

In this case, the named plaintiffs were not sentenced to life in prison, and the allegations do not show that Plaintiffs have "effectively" been given a life sentence. Indeed, Smith's release from prison just three months after he was approved for release (*see* note 3 above) shows that plaintiffs' allegations are not plausible. But even if the statutes and regulations at issue did result in an "effective life sentence," that would not violate the Eighth Amendment. Aggravated Criminal Sexual Assault and Predatory Sexual Assault are Class X felonies even on the first conviction, and may be punished with a sentence of up to natural life in prison. 720 ILCS 5/11-1.30; 720 ILCS 5/11-1.40. If the offender previously committed other sex crimes, Criminal

Sexual Assault may be also be a Class X felony resulting in a life sentence. 720 ILCS 5/11-1.20. And Aggravated Child Pornography, Manufacture of Child Pornography, and Dissemination of Child Pornography may all be Class X felonies, carrying the possibility of imprisonment for 30 or even 60 years. 720 ILCS 5/11-20.1. In all these cases, then, an "effective life sentence" would be within the statutory maximum and therefore not grossly disproportionate to their crimes. For these reasons, Plaintiffs' Eighth Amendment claim should also be dismissed.

CONCLUSION

Wherefore, Defendants Lisa Madigan and John Baldwin respectfully request that this Court dismiss Plaintiffs' Complaint and order any further just and proper relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the aforementioned document was filed through the Court's CM/ECF system on February 17, 2017. Parties of record may obtain a copy through the Court's CM/ECF system. The undersigned certifies that no party of record requires service of documents through any means other than the CM/ECF system.

/s/ *Sarah H. Newman*