No. _____

IN THE
SUPREME COURT OF ILLINOIS

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

PETITION FOR APPEAL AS A MATTER OF RIGHT OR, ALTERNATIVELY, FOR LEAVE TO APPEAL

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PRAYER FOR APPEAL AS A MATTER OF RIGHT OR, ALTERNATIVELY, FOR LEAVE TO APPEAL

Pursuant to Supreme Court Rules 317 and 612(b), the People of the State of Illinois seek to appeal as a matter of right from the judgment of the Appellate Court of Illinois, Third District, which facially invalidated a statute as unconstitutionally irrational under due process — specifically, 720 ILCS 5/11-9.4-1(b), which makes it a misdemeanor for those who were previously convicted of certain sex crimes against children to enter public parks. *See* A1, 10 (*People v. Pepitone*, 2017 IL App (3d) 140627, ¶¶ 1, 24).[1] Rule 317 entitles parties to an appeal in this Court "as a matter of right" when "a statute of the United States or of this state has been held invalid" by an appellate court. *See, e.g., People v. Ligon*, 2016 IL 118023, ¶ 1 (illustrating appeal-as-of-right procedure). Here, because the Third District unambiguously invalidated § 11-9.4-1(b) on its face, Rule 317 affords the People a right to appeal.

Alternatively, and in any event, leave to appeal as a matter of the Court's discretion is warranted under Rules 315(a), 604(a)(2), and 612(b), because the appellate court is split on the question whether § 11-9.4-1(b) satisfies the rational-basis test. *Compare* A1-10 (statute is irrational), *with People v. Pollard*, 2016 IL App (5th) 130514, ¶¶ 1, 19, 42 (statue is rational), *and People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶¶ 1, 22, 84 (same). The importance of this constitutional question and the need for further guidance are illustrated by Justice Carter's dissent here, *see* A11-12, and by out-of-state cases upholding similar laws, *see, e.g., Standley v. Town of Woodfin*, 661 S.E.2d 728, 731-32 (N.C. 2008).

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[1] "A__" refers to the page number of the appendix.

Until this Court resolves the question, police and sex offenders will face uncertainty in assessing whether the statute is enforceable in their home counties.

STATEMENT REGARDING JUDGMENT AND REHEARING

On February 10, 2017, the Appellate Court of Illinois, Third District, issued its published opinion. A1. The People did not petition for rehearing.

POINTS RELIED UPON IN SEEKING REVIEW

1. Section 11-9.4-1(b) survives rational-basis review.

2. To the extent that this Court wishes to retain Illinois's "wholly innocent conduct" test for due process claims, that test does not invalidate the statute.

STATUTE INVOLVED

§ 11-9.4-1. Sexual predator and child sex offender; presence or loitering in or near public parks prohibited.

(a) For the purposes of this Section:

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

"Public park" includes a park, forest preserve, bikeway, trail, or conservation area under the jurisdiction of the State or a unit of local government.

* * *

"Sexual predator" has the meaning ascribed to it in subsection (E) of Section 2 of the Sex Offender Registration Act.

(b) It is unlawful for a sexual predator or a child sex offender to knowingly be present in any public park building or on real property comprising any public park.

* * *

> (d) Sentence. A person who violates this Section is guilty of a Class A misdemeanor, except that a second or subsequent violation is a Class 4 felony.

720 ILCS 5/11-9.4-1 (2016).

STATEMENT OF FACTS

In 1999, defendant was convicted of predatory criminal sexual assault of a child, for which he received a six-year prison sentence. A2. In 2013, defendant entered Bolingbrook's Indian Boundary Park, where police found him walking a dog. *Id.* A jury found him guilty under 720 ILCS 5/11-9.4-1(b) ("park provision" or "public-park provision") of being a child sex offender in a public park. *Id.* He was sentenced to 24 months of conditional discharge, 100 hours of public service, and $400 in fines and costs. A1-2.

Defendant appealed, and the Third District reversed. A1. Over Justice Carter's dissent, and in an acknowledged departure from the holdings of two other appellate districts, the majority facially invalidated the park provision as irrational and thus inconsistent with substantive due process. *See generally* A1-12. The Third District declined to address defendant's related *ex post facto* challenge, which was premised on the fact that his conviction for a qualifying sex offense predated the park provision's enactment. A1, 10.

ARGUMENT

I. The Public-Park Provision Satisfies the Rational-Basis Test.

As a class, sex offenders pose a "serious threat" to communities. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (quotation omitted). And it is no surprise that legislators pay special attention to the danger associated with sex offenders whose victims were children. Accordingly, our General Assembly, like legislatures across the United

States, has developed an evolving statutory scheme to manage the risks posed by offenders who have sexually violated children.

Here, defendant challenges the public-park provision of that scheme, 720 ILCS 5/11-9.4-1(b) and (d), which makes it a misdemeanor for certain child sex offenders to knowingly enter or remain in a public park. The Third District majority, invoking substantive due process, struck down the park provision as irrational. A10. Two other appellate districts (and the dissent here) have taken a contrary view. *See* A11-12 (Carter, J., dissenting); *Pollard*, 2016 IL App (5th) 130514, ¶ 42 (statute is rational); *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 84 (same); *cf. Standley*, 661 S.E.2d at 731-32 (upholding similar North Carolina law). Thus, this Court should allow an appeal under Rule 317 to review the Third District's invalidation of the statute, and under Rule 315 to resolve the district split.

When neither a suspect classification (like race or sex) nor a fundamental liberty interest is involved, due process permits legislatures — not courts — to decide both how to extrapolate risks from the available evidence and how much risk to tolerate. Thus, the due process question in a rational-basis challenge is whether, given the limitations of the evidence reasonably available to legislators, the statute bears a rational relationship to legitimate government objectives. *People v. Cornelius*, 213 Ill. 2d 178, 203-04 (2004).

By design, the rational-basis test is hard for challengers to satisfy. After all, though judgments based on specific legal rules are the province of the judiciary, the State and Federal Constitutions reserve nearly all policy judgments based on disputed empirical evidence and risk-assessment for legislatures. Here, even setting aside the People's right to

an appeal under Rule 317, leave to appeal is warranted under Rule 315 in order to decide whether the First and Fifth Districts were right to leave the legislature's policy judgment intact, or whether instead the Third District was right to upend it.

The park provision is rationally related to at least two legislative goals: protecting children and helping offenders avoid undue opportunities to re-offend. Indeed, legal orthodoxy holds that sex offenders' risk of recidivism is "frightening and high." *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002) (plurality opinion)). And the importance of protecting children from such offenders is plain.

To be sure, some observers may quarrel about the statistics on recidivism, the strength of the inferences legislators may draw from them, and the best way to balance protection of Illinois's children against sex offenders' power of choice. But such quarrels are quintessential policy disputes on which reasonable minds may differ. Moreover, the General Assembly could rationally infer that the available data on recidivism understate the risk. For instance, because reported recidivism rates reflect post-release arrests or convictions, and because re-offenders almost certainly are not caught every time they re-offend, the "real" recidivism rate can be higher. Given uncertainty about the size of the gap between reported and real recidivism rates, it would be difficult to call a legislature's assessment irrational.

Besides, what counts as "high" or "low" recidivism may depend on the offense at issue. A recidivism rate in the single digits for shoplifting, for example, might seem low enough that few civil restrictions should follow shoplifters around once their custody ends.

But a similar recidivism rate for sexual violations of children could strike rational legislators as intolerably high and worthy of serious risk-management efforts.

Further, there is nothing irrational about focusing legislative attention on a group that is thought to have high recidivism rates. Even if a large percentage of child victims were attacked by first-time offenders rather than by prior offenders, any given prior offender is nonetheless much likelier to attack a child than is any other given member of the public. In this sense, the General Assembly's restrictions on child sex offenders are well-targeted.

Moreover, absent clear data about the role that public parks play in sex offenses against children, there is no basis for second-guessing the General Assembly's commonsense assessment of the plausible dangers. *Contra* A10 & n.4 (stressing that statistics do not establish strong link between parks and sex offenses). Indeed, the Seventh Circuit has emphasized the "reality" that "children, some of the most vulnerable members of society, are susceptible to abuse in parks." *Doe v. City of Lafayette*, 377 F.3d 757, 773 (7th Cir. 2004) (en banc). And elected governments have a judicially recognized "duty" to "shield" children, "ex ante, from the *mere risk* of child abuse or molestation." *Brown v. City of Michigan City*, 462 F.3d 720, 734 (7th Cir. 2006). From the perspective of a rational legislator, many parks present a dual hazard: play areas where children congregate and can easily be met, coupled with nearby secluded areas where children may be taken for private encounters. The potential danger includes not only assaults against children while in parks, but also offenders' surveillance of and social contact with park-going children whom they may later decide to assault elsewhere. The public-park provision reduces these risks by giving offenders a

bright-line rule that they can easily follow (and police can enforce) to avoid logistically convenient temptations to re-offend.

The Third District understood that at least some sex offenders' access to parks may be restricted, but disputed the General Assembly's judgment about how to decide whose access should be restricted and when. A8-9. Yet the Third District's preference for individualized risk assessment, or for a different bright-line rule than the one selected by the General Assembly, does not make the existing rule irrational.

To start, individualized risk assessments carry not only benefits but also significant costs. Offender-specific review to determine which prior violators of children may receive public-park privileges would require either a new bureaucracy or the expansion of an old one, thus necessitating new personnel, training, and revenue allocations. Moreover, a policy-maker would still need to determine what level of assessed risk is acceptable for park privileges and how often offenders are entitled to a re-assessment. Most likely, those policy choices (and the outcomes in particular cases) would then be subject to frequent litigation by dissatisfied offenders. These administrative burdens are among the many factors that a legislature may rationally consider when deciding between individualized assessments and a bright-line rule for a given class of offenders.

Individual assessment aside, the Third District hinted at the possibility of relying exclusively on a different bright-line rule than the one the legislature chose here. *See* A8-9. For instance, a legislature might rationally restrict offenders from accessing parks only when children are plainly present, or else task an administrative agency with deciding, park-by-park, which parklands are safe enough to tolerate child sex offenders. Yet a park-specific

rule may be difficult to craft and administer. *City of Lafayette*, 377 F.3d at 773-74 ("The City cannot reasonably anticipate what parts of the park system children will be located in at all times, and, on this record, we have no basis on which to question its judgment that children are vulnerable throughout the park system."). And in relatively large parks, it may be hard for sex offenders and police to discern whether children are present until the offender is well inside the park and quite near the children. Other parks, meanwhile, may be occupied by children during most opening hours — thus rendering them effectively unavailable to covered offenders in any event. So, the broader rule selected by the General Assembly is rational.

And though a narrower rule limiting sex offenders to evening access might ensure that those who have violated children are in the parks during only those hours when the fewest children are present, those same hours may also be the ones when there are the fewest friendly adults around to provide safety and surveillance for children who do show up. Meanwhile, although a *day*time-access-only rule might make it harder for offenders to lure children into a secluded spot, it would do so at the expense of channeling offenders into the parks during hours when they will be exposed to the greatest number of children. For these reasons, twenty-four-hour coverage in the park provision is rational.

Finally, the Third District stressed that the public-park provision restricts a sex offender's choices even if he has no present intent to sexually violate a child. *See* A7. But there is nothing irrational about establishing this prophylactic rule. Just as legislatures may rationally forbid felons as a class (including many non-violent felons) from possessing guns at all, *see Lewis v. United States*, 445 U.S. 55, 67 & n.9 (1980) (decided before gun rights

were declared fundamental, but never disavowed on the felon-related point), the General Assembly could rationally take steps to limit the opportunity of those who have previously sexually violated a child to stray along the path to cultivating another potential victim. The legislature need not require police to wait until an inchoate crime of sexual violence is detected.

For offenders and police alike, a prophylactic rule like the public-park provision here is helpful, readily understood, and easily administered. Because that statutory provision was struck down, this Court should allow an appeal under Rule 317 as a matter of right. Alternatively, leave to appeal should be granted under Rule 315 so that this Court can resolve the district split on whether the General Assembly's choice of a prophylactic regulation is rational enough to satisfy due process.

II. Illinois's "Wholly Innocent Conduct" Test Does Not Otherwise Doom the Public-Park Provision; Regardless, the Innocent-Conduct Label Should Be Abandoned Because It Is Misleading.

In addition to traditional rational-basis review, the Third District invoked Illinois's "wholly innocent conduct" doctrine to justify rejecting the legislature's policy judgment here. A6-10. Specifically, the Third District thought that walking one's dog in a park with no present intent to molest a child is "innocent," even though the statute prohibits that conduct for someone who sexually violated a child in the past. A7. Rule 317 aside, this Court should grant review under Rule 315 to clarify the scope and meaning of the innocent-conduct test for due process challenges.

"Wholly innocent conduct" is a term of art in Illinois, and its meaning is narrower than the words might otherwise suggest. It is not a blanket license for courts to identify

conduct as intrinsically "innocent" and unpunishable. Rather, conduct is "wholly innocent" if, granting the legislature the benefit of every rational inference it has drawn about how the world works, no reasonable observer could find a rational link between the forbidden conduct and the ill that the legislature sought to cure. *People v. Hollins*, 2012 IL 112754, ¶¶ 26-28. The wholly-innocent-conduct doctrine has no work to do when a litigant merely thinks the legislature is mistaken about the costs and benefits of particular conduct. *See id.* at ¶ 28 (innocent conduct is "conduct not germane to the harm identified by the legislature, in that the conduct was wholly unrelated to the legislature's purpose in enacting the law").

So, for example, in *People v. Madrigal*, this Court struck down a statute whose clear purpose was to prevent identify theft, yet whose plain terms barred ordinary Google searches by everyday Illinoisans. 241 Ill. 2d 463, 467, 471-73 (2011). *Madrigal*'s thrust was not that the General Assembly erred in its assessment of the dangers posed by identity theft or the link between identity theft and computer use; rather, it was that reasonable jurists could not discern any rational connection between the danger of identify theft and a ban on *all* Illinoisans conducting *any* Google search for ordinary information about other people. The statute's breadth resembled a severe drafting error, such that a reasonable legislator who otherwise shared the drafter's worldview would be shocked to realize that no exception had been carved out for the putatively innocent conduct of an ordinary Google search.

Here, by contrast, defendant's allegedly innocent conduct — walking a dog in a public park even though he was previously found guilty of sexually violating a child — is conduct that the General Assembly made a considered decision to forbid. No legislator who agreed with the statute's policy or read its text before voting on it would be surprised to learn

that it covered defendant. The statute is internally consistent, and anyone who shares the legislature's overall perspective would find defendant's conduct verboten, not innocent.

Beyond that, this case illustrates the confusion that continues to spring from judicial use of the words "wholly innocent conduct." Taken out of context, these words inevitably invite jurists to ask whether legally guilty conduct (i.e., conduct barred by statute) is nonetheless morally unblameworthy. Yet due process and the separation of powers, when rightly understood, confine judicial review to a narrower question: whether the statue is rational enough, on its own terms, to furnish due process of law. *See* A11-12 (Carter, J., dissenting).

Thus, this Court should consider abandoning the "wholly innocent conduct" label and discouraging its further use in Illinois courts. Indeed, because there is no basis in constitutional text or history for using the wholly-innocent-conduct test to reach any result that could not otherwise be reached by the more conventional rational-basis test, this Court should consider setting aside the wholly-innocent-conduct test entirely.

In sum, this Court should grant leave to appeal under Rule 315 in order to clarify — and perhaps reconsider — the boundaries of the wholly-innocent-conduct test. And in any event, the Third District's use of that test to invalidate a statute entitles the People to appeal as a matter of right under Rule 317.

CONCLUSION

The People of the State of Illinois ask this Court to grant leave to appeal from the Third District's judgment as a matter of right or, alternatively, as a discretionary matter.

March 17, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this petition conforms to the requirements of Rules 315(c), 315(d), and 341(a). The length of this petition, excluding the appendix and certificate of service, is fourteen pages.

s/ Matthew P. Becker
MATTHEW P. BECKER
Assistant Attorney General

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

PROOF OF FILING AND SERVICE

The undersigned deposes and states that on March 17, 2017, the foregoing **Petition for Appeal as a Matter of Right or, Alternatively, for Leave to Appeal** was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system, and three copies were served upon the following by placement in the United States mail at 100 West Randolph Street, Chicago, Illinois 60601, in envelopes bearing sufficient first-class postage:

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Additionally, upon the petition's acceptance by the Court's electronic filing system, the undersigned will mail an original and twelve copies to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

***** **Electronically Filed** *****

122034

03/17/2017

Supreme Court Clerk

****

/s/ Matthew P. Becker
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APPENDIX

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2017 IL App (3d) 140627

Opinion filed February 10, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

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

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

OPINION

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

¶ 2 FACTS

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

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

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

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

¶ 7 ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¶ 26 CONCLUSION

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

¶ 28 Reversed.

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

¶ 29 JUSTICE CARTER, dissenting.

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

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

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

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

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