Exhibit 1

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

JOHN DOES 1-4 and JANE DOE, Plaintiffs, v. LISA MADIGAN, Attorney General of the State of Illinois and LEO P. SCHMITZ, Director of the Illinois State Police, Defendants.	)	No. 16 CV 4847 Judge Charles R. Norgle

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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Defendants Lisa Madigan, the Illinois Attorney General; and Leo P. Schmitz, the Director of the Illinois State Police; by their attorney, the Illinois Attorney General, submit the following Memorandum of Law in Support of Their Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. BACKGROUND

Plaintiffs are five convicted child sex offenders. Dkt. 1 ¶¶ 5-9. Plaintiffs challenge four provisions of the Illinois Criminal Code that regulate where convicted child sex offenders are allowed to be present: 720 ILCS 5/11-9.3(b), 720 ILCS 5/11-9.3(c), 720 ILCS 5/11-9.3(c-2), and 720 ILCS 5/11-9.4-1. *Id.* ¶ 1. Plaintiffs claim that these provisions are unconstitutionally vague, violate their fundamental rights, and are overbroad so as to impermissibly interfere with their First Amendment rights, both on their face and as applied to Plaintiffs. *Id.* ¶¶ 72, 76, 80.

John Doe 1 is 58 years old; in 2012 he pled guilty to one count of aggravated possession of child pornography. *Id.* ¶ 22. He claims that Section 9.3(c), which prohibits child sex offenders from knowingly being present at any "facility providing programs or services exclusively directed toward persons under the age of 18," prohibits him from visiting the public library. *Id.* ¶ 27. He also would like to play golf at park-district owned golf courses, but believes that doing so might violate Section 9.4-1, which prohibits child sex offenders from being present in public parks. *Id.* ¶ 29.

John Doe 2 is 77 years old; he pled guilty to one count of indecent solicitation of a child in 2000. *Id.* ¶ 30. He believes that he may be violating Section 9.4-1 if he visits his daughter's house, which is within 500 feet of a "small set of playground equipment." *Id.* ¶¶ 33, 35. He alleges that Romeoville police told him that he is not permitted to visit his daughter's house because of its proximity to a park. *Id.* ¶ 36. He also claims that Romeoville police have

prohibited him from picking up his great granddaughter from her bus stop because doing so violated 720 ILCS 5/11-9.3 (*id.* ¶ 37), though he does not specify which provision this action purportedly violates.

John Doe 3 is 50 years old; he pled guilty to one count of attempted child luring in 2001. *Id.* ¶ 39. He seeks to go to his grandchildren's birthday parties, his town's Fourth of July parade, and his family's annual Fourth of July picnic, but believes that doing so may violate Section 9.3(c-2), which prohibits child sex offenders from "participat[ing] in a holiday event involving children." *Id.* ¶¶ 43-44. He also seeks to take his grandchildren to restaurants that have play areas or arcade areas for children, as well as children's movies, but believes that doing so might violate Section 9.3(c). *Id.* ¶¶ 46-47. Finally, he would like to take his grandchildren to museums that are on park district property, but believes that doing so might violate Section 9.4-1. *Id.* ¶¶ 49-50.

John Doe 4 is 52 years old; he pled guilty to aggravated criminal sexual abuse in 2005. *Id.* ¶ 52. He would like to be involved in certain activities at his church, including attending Sunday services, participating in a weekly support group, and volunteering to help maintain the grounds of the church when children are not present. *Id.* ¶ 56. He alleges that he is deterred from engaging in these activities because he fears they would violate Section 9.3(c). *Id.* ¶ 57.

Jane Doe is 48 years old; she pled guilty to aggravated criminal sexual abuse in 2014. *Id.* ¶ 59. She currently attends a church, but believes that her presence in the church might violate Section 9.3(c). *Id.* ¶ 62. She also visits other churches, but believes that her presence in these churches might violate Section 9.3(b), which prohibits loitering within 500 feet of a school. *Id.* ¶ 63. Finally, she would like to attend another church that holds religious services in a school auditorium, but believes that doing so would also violate Sections 9.3(b) and 9.3(c). *Id.* ¶ 64.

With one limited exception, Plaintiffs lack standing to challenge Sections 9.3(b), 9.3(c), 9.3(c-2), and 9.4-1. Moreover, Plaintiffs' vagueness, substantive due process, and First Amendment challenges all fail. Plaintiffs' Complaint should thus be dismissed in its entirety.

II. OVERVIEW OF THE CHALLENGED PROVISIONS

The Plaintiffs' constitutional challenges center on certain provisions of Article 11 of the Illinois Criminal Code relating to child sex offenders. Because any vagueness challenge has to be evaluated in light of the meaning of the statutory words in their full context, *see Koons Buick Pontiac GMC v. Nigh*, 543 U.S. 50, 60 (2004), an overview of these provisions may be helpful.

A. Child Sex Offender's Presence in Schools Prohibited - 720 ILCS 5/11-9.3(b)

The first provision challenged by Plaintiffs is 720 ILCS 5/11-9.3(b):

> (b) It is unlawful for a child sex offender to knowingly loiter within 500 feet of a school building or real property comprising any school while persons under the age of 18 are present in the building or on the grounds, unless the offender is a parent or guardian of a student attending the school and the parent or guardian is: (i) attending a conference at the school with school personnel to discuss the progress of his or her child academically or socially, (ii) participating in child review conferences in which evaluation and placement decisions may be made with respect to his or her child regarding special education services, or (iii) attending conferences to discuss other student issues concerning his or her child such as retention and promotion and notifies the principal of the school of his or her presence at the school or has permission to be present from the superintendent or the school board or in the case of a private school from the principal. In the case of a public school, if permission is granted, the superintendent or school board president must inform the principal of the school where the sex offender will be present. Notification includes the nature of the sex offender's visit and the hours in which the sex offender will be present in the school. The sex offender is responsible for notifying the principal's office when he or she arrives on school property and when he or she departs from school property. If the sex offender is to be present in the vicinity of children, the sex offender has the duty to remain under the direct supervision of a school official.

Thus, Section 9.3(b) prohibits child sex offenders from loitering within 500 feet of a school when children are present, except in certain defined circumstances. A child sex offender may be present at a school if he or she is a parent or guardian of a child attending the school and he or

she either: (1) is attending a meeting or conference about his or her child and notifies the principal of his or her presence at the school; or (2) obtains prior permission to be present from the superintendent or school board (for public schools) or the principal (for private schools). 720 ILCS 5/11-9.3(b); *see also Doe v. Paris Union School Dist. No. 95*, No. 05-cv-2249, 2006 WL 44304, at *1 (C.D. Ill. Jan. 9, 2006). "Loitering" is defined in the statute to include "[s]tanding, sitting idly, whether or not the person is in a vehicle, or remaining in or around school or public park property," as well as "[e]ntering or remaining in a building in or around school property, other than the offender's residence." 720 ILCS 5/11-9.3(d)(11). A school is defined as a public or private preschool, elementary school, or secondary school. 720 ILCS 5/11-9.3(d)(15).

B. Child Sex Offender's Presence Prohibited in Facilities Providing Programs or Services Exclusively Directed Toward Children - 720 ILCS 5/11-9.3(c)

The second provision challenged by Plaintiffs is 720 ILCS 5/11-9.3(c). While Plaintiffs apparently only challenge part (i) of the provision (*see* Dkt. 1 ¶ 14), we include the full provision here to provide context:

> (c) It is unlawful for a child sex offender to knowingly operate, manage, be employed by, volunteer at, be associated with, or knowingly be present at any: (i) facility providing programs or services exclusively directed toward persons under the age of 18; (ii) day care center; (iii) part day child care facility; (iv) child care institution; (v) school providing before and after school programs for children under 18 years of age; (vi) day care home; or (vii) group day care home. This does not prohibit a child sex offender from owning the real property upon which the programs or services are offered or upon which the day care center, part day child care facility, child care institution, or school providing before and after school programs for children under 18 years of age is located, provided the child sex offender refrains from being present on the premises for the hours during which: (1) the programs or services are being offered or (2) the day care center, part day child care facility, child care institution, or school providing before and after school programs for children under 18 years of age, day care home, or group day care home is operated.

The plain language of Section 9.3(c)(i) prohibits child sex offenders from being present at any facility that *only* provides programs or services directed to minors, such as a children's museum,

a Girl Scout camp, or a dance studio that only offers classes to children. Contrary to Plaintiffs' assertions, this provision does *not* bar child sex offenders from being present in any facility that provides programs or services to children, but also provides other programs or services to adults. Thus, contrary to Plaintiffs' assertions, this provision does not bar child sex offenders from going to public libraries (Dkt. 1 ¶¶ 24-27), restaurants with play areas or arcades such as McDonald's or Chuck E. Cheese (*id.* ¶ 46); movie theaters that show children's movies (*id.* ¶ 46), or churches (*id.* ¶¶ 57-58, 62). This narrow construction is supported by the context of the provision. Since Sections 9.3(c)(ii) – (vii) also focus on day care centers, before and after school programs, and other types of child care facilities, it makes sense to construe Section 9.3(c)(i) as similarly focusing on child-centered facilities.

This construction is also supported by the legislative history of the provision. First, when Senator O'Malley introduced this provision for a vote in 1999, he twice emphasized that this provision covered facilities that exclusively provide programs to children:

> Amendment No. 4 was suggested to me by Senator Emil Jones. It expands the list of places where a child sex offender is prohibited. It includes facilities providing programs or services **exclusively directed** towards persons under the age of eighteen. It also prohibits a child sex offender from knowingly operating, managing, working, volunteering or being associated with any facility **providing programs or services exclusively for** persons under the age of eighteen.

Ill. S. Tr., 1999 Reg. Sess. No. 25 (emphasis added).

Moreover, in 2013 the legislature passed a separate provision, which provides that a child sex offender may not "knowingly be present" in "a playground or recreation area within any publicly accessible privately owned building" and "approach, contact, or communicate with a child," unless "the offender is a parent or guardian of a person under 18 years of age present in the building or on the grounds." 720 ILCS 5/11-9.3(a-10). While this provision is not challenged in this lawsuit (Dkt. 1 ¶ 1), it prohibits a child sex offender from being present within the play

area or arcade area of restaurants like McDonalds or Chuck E. Cheese (Dkt. 1 ¶ 46) *and* approaching, touching, or talking to a child when the offender's own child is not present. In the legislative debate for this provision, Senator Cunningham emphasized that, at the time, no provision covered this behavior:

> As everyone knows, it's currently illegal for a registered sex offender to be in a public park or playground if children are present and to approach or try to communicate with these – with those children. House Bill 3023 would expand that protective umbrella to include playgrounds and play lots on private property that are publicly accessible, like a McDonald's Playland for instance. This bill's an initiative of the Cook County Sheriff's Office. They had an incident in unincorporated Elk Grove Township, where a registered sex offender was hanging out in a McDonald's Playland. They received complaints from a number of parents there and – went and consulted with the State's Attorney and the statute book and **saw that there was really nothing they could do about it**. This bill would correct that problem.

Ill. S. Tr., 2013 Reg. Sess. No. 50 (emphasis added). If, as Plaintiffs contend, Section 9.3(c) already prohibited child sex offenders from being present in the McDonald's Playland (Dkt. 1 ¶ 46), then the Legislature would not have needed to pass Section 9.3(a-10) to address this situation.

Finally, in 2009, Senator Viverito introduced Senate Bill 1294. This bill provided that child sex offenders could not "knowingly be present at any portion or area of a public library facility designated . . . for use primarily by children under the age of 18, as well as any program in the public library facility directed towards children under the age of 18." Ill. S.B. 1294, 96th Gen. Assem. (2009). While this bill did not pass, the fact that it was introduced provides further assurance that 720 ILCS 5/11-9.3(c) does not apply to public libraries.

C. Child Sex Offender's Participation in Holiday Events Involving Children Prohibited - 720 ILCS 5/11-9.3(c-2)

The third provision challenged by Plaintiffs is 720 ILCS 5/11-9.3(c-2):

> It is unlawful for a child sex offender to participate in a holiday event involving children under 18 years of age, including but not limited to distributing candy or other items to children on Halloween, wearing a Santa Claus costume on or preceding Christmas, being employed as a department store Santa Claus, or wearing an Easter Bunny costume on or preceding Easter. For the purposes of this subsection, child sex offender has the meaning as defined in this Section, but does not include as a sex offense under paragraph (2) of subsection (d) of this Section, the offense under subsection (c) of Section 11-1.50 of this Code. This subsection does not apply to a child sex offender who is a parent or guardian of children under 18 years of age that are present in the home and other non-familial minors are not present.

The statute does not define "holiday," but the Merriam-Webster Dictionary defines "holiday" as "a special day of celebration; a day when most people do not have to work."[1] Thus a "holiday" indicates a special day that is widely celebrated and does not include family birthdays. Dkt. 1 ¶ 43. The statute also does not define "participate," but the Merriam-Webster Dictionary defines "participate" as "to be involved in doing something with others; to take part in an activity or event with others."[2] Moreover, the examples given in Section 9.3(c-2)—giving candy to children on Halloween, dressing up as Santa Claus, or wearing an Easter Bunny costume—all involve taking an active role in a holiday event. Thus, the provision does not bar a child sex offender from merely attending a general Fourth of July parade. Dkt. 1 ¶ 43.

Finally, Section 9.3(c-2) requires that the event must be one "involving children." This language indicates that the event should be one that centers around children or is primarily for children, rather than requiring merely that children be present. First, if the legislature intended to ban child sex offenders from participating in any holiday event where children are *present*, it

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[1] *See* http://www.merriam-webster.com/dictionary/holiday (last visited July 25, 2016).
[2] *See* http://www.merriam-webster.com/dictionary/participate (last visited July 25, 2016).

could have said so directly. *See, e.g.*, 720 ILCS 5/11-9.3(b) (prohibiting child sex offenders from being within 500 feet of a school "while persons under the age of 18 are present in the building or on the grounds"); 720 ILCS 5/11-9.3(c-5) (prohibiting child sex offenders from operating, being employed by, or being "associated with" a county fair "when persons under the age of 18 are present"). Second, the examples given in the provision—giving candy to children on Halloween, dressing up as Santa Claus, or wearing an Easter Bunny costume—all involve events that are centered around or are primarily for children. Thus, this provision would bar child sex offenders from participating in an Easter egg hunt, but not from a family Fourth of July picnic. Dkt 1 ¶ 43.

D. Child Sex Offender's Presence in Public Parks Prohibited - 720 ILCS 5/11-9.4-1

The final provision challenged by Plaintiffs is 720 ILCS 5/11-9.4-1(b) and (c):

> (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.
>
> (c) It is unlawful for a sexual predator or a child sex offender to knowingly loiter on a public way within 500 feet of a public park building or real property comprising any public park. For the purposes of this subsection (c), the 500 feet distance shall be measured from the edge of the property comprising the public park building or the real property comprising the public park.

The statute defines "public park" to include any "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). Thus, the statute applies to publicly owned or controlled parks, playgrounds, and park buildings, but does not apply to privately-owned playgrounds (although 720 ILCS 5/11-9.3(a-10) may apply in those situations). The statute defines "loiter" to include "[s]tanding, sitting idly, whether or not the person is in a vehicle or remaining in or around public park property." 720 ILCS 5/11-9.4-1(a). Thus, a child sex offender may not remain on public

playgrounds, play golf at a park-district owned golf course (Dkt. 1 ¶ 29), or visit museums such as the Field Museum or the Museum of Science and Industry that are on public park property. *Id.* ¶ 49.

In addition to visiting public parks, the statute also prohibits child sex offenders from loitering "on a public way within 500 feet" of a public park. 720 ILCS 5/11-9.4-1(c). While "public way" is not defined in the statute, this term has a recognized plain meaning under Illinois law. "[A] public way is defined as any passageway (as an alley, road, highway, boulevard, turnpike) or part thereof (as a bridge) open as of right to the public and designed for travel." *People v. Dexter*, 768 N.E.2d 753, 756 (Ill. App. Ct. 2002). The way must be controlled and maintained by government authorities, and not merely privately owned land that has been made available for public use. *Id.* Thus, a child sex offender may visit a private home that is within 500 feet of a public park, as long as he does not loiter in the streets or sidewalks around the home. Dkt. 1 ¶ 33-35.

III. LEGAL STANDARD

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) does not test whether the plaintiff will prevail on the merits but instead whether the claimant has properly stated a claim. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). 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.*

IV. ARGUMENT

A. Plaintiffs Lack Standing to Challenge these Provisions, with One Limited Exception

To establish standing for their facial challenges, the Plaintiffs must demonstrate that they have "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder.' *Schirmer v. Nagode*, 621 F.3d 581, 586 (7th Cir. 2010), *quoting Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979). "When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Id.*, *quoting Babbitt*, 442 U.S. at 298-99.

It is easier to establish standing where the challenged statute arguably impinges upon free speech. "[W]hen an ambiguous statute arguably prohibits certain protected speech, a reasonable fear of prosecution can provide standing for a First Amendment challenge." *Id.* In order to establish standing for a First Amendment claim, a plaintiff must show "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder." *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 590-91 (7th Cir. 2012). For First Amendment challenges, the credible threat of prosecution can be established by the existence of the criminal statute itself. *Id.* at 591.

In this case, the only plaintiff with standing to raise a First Amendment challenge is Jane Doe, who challenges Section 9.3(b) based on her desire to attend church services in a school. Dkt. 1 ¶ 63-64. Plaintiffs lack standing to raise their other First Amendment challenges because the activities they seek to pursue clearly fall outside the scope of the challenged statute.

Schirmer, 621 F.3d at 587. While both Jane Doe and John Doe 4 allege First Amendment challenges to Section 9.3(c) (Dkt. 1 ¶¶ 56-57, 62), neither of these Plaintiffs have standing to bring these challenges. As discussed in Part II.B above, attending church services, participating in weekly support groups at churches, and volunteering to maintain the grounds of a church clearly fall outside the scope of Section 9.3(c). John Doe 1 similarly lacks standing to bring a First Amendment challenge to Section 9.3(c) (Dkt. 1 ¶ 27) because Section 9.3(c) does not prohibit a child sex offender from visiting public libraries.

Plaintiffs have not established any credible threat of prosecution with respect to any of the other provisions. The only allegation that comes close to a threat of prosecution with respect to the other statutes is John Doe 2's allegation that Romeoville police have told him he is prohibited from visiting his daughter under Section 9.4-1 due to its proximity to a park. Dkt. 1 ¶ 36. But, again, a plaintiff lacks standing if his activities clearly fall outside the statute's scope. John Doe 2's visits to his daughter's home clearly fall outside the scope of Section 9.4-1 because, as discussed in Part II.D above, visiting his daughter does not require loitering on a public way. To the extent John Doe 2 challenges either Section 9.3(b) or Section 9.4-1 based on his desire to pick up his great-granddaughter at a school bus stop (Dkt. 1 ¶ 37), he does not explain why he believes that activity would be prohibited. Thus, this allegation is not sufficient to establish whether his conduct would fall within any of the challenged provisions.

Similarly, Plaintiffs also lack standing to bring their as-applied challenges because the State has not sought to enforce any of the challenged provisions against them. *See Brandt v. Vill. of Winnetka, Ill.*, 612 F.3d 647, 650 (7th Cir. 2010) ("[I]t is hard to see how a court can evaluate an as-applied challenge sensibly until a law *is* applied, or application is soon to occur and the way in which it works can be determined.").

In sum, while Jane Doe has standing to raise a facial First Amendment challenge to Section 9.3(b), none of the Plaintiffs have standing to raise a facial or as-applied challenge to Sections 9.3(c), 9.3(c-2), or 9.4-1. Accordingly, this Court should dismiss Counts I and II with respect to all four challenged provisions, and should dismiss Count III with respect to Sections 9.3(c), 9.3(c-2), and 9.4-1.

B. The Challenged Provisions Are Not Unconstitutionally Vague.

"A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010). The courts consider whether a statute is vague as applied to the particular facts at issue, for "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). When a statute "interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id.* at 499. 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).

Plaintiffs claim that the four challenged provisions are unconstitutionally vague, both on their face and as applied to Plaintiff's conduct. Dkt. 1 ¶ 72. Both challenges fail.

1. Facial Challenges are Disfavored.

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 Washington v. Glucksberg*, 521 U.S. 702, 739-40 and n.7 (1997) (Stevens, J., concurring in judgment).

Facial challenges of this type are disfavored, as the Court held in *Washington 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. Plaintiff's constitutional challenge to these four provisions would not invalidate these provisions in just one application, but in their entirety.

2. The Challenged Provisions are Valid Both on Their Face and As Applied.

In this case, each of the four challenged provisions has a clearly defined core of meaning, a "plainly legitimate sweep," and are therefore valid on their face. These provisions are also clear as applied to Plaintiffs' conduct.

First, Section 9.3(b) prohibits "knowingly loitering within 500 feet" of a school, and both "school" and "loiter" are defined in the statute. As the Illinois Appellate Court observed,

> [T]he statutory scheme clearly delineates one very small restricted area, a 500–foot zone surrounding school property. Section 11–9.3(b) also prohibits certain conduct during a specific time period, that is, when children under 18 are present. Finally, we observe the statute at issue allows some sex offenders to be present in the restricted school zone and during the restricted time period with the permission of certain persons in authority.

People v. Howard, 48 N.E.3d 227, 235 (Ill. Ct. App. 2016). The Illinois Appellate Court concluded that "[t]he statute makes it very clear that a sex offender who is not a parent may not remain in the restricted school zone for any purpose, lawful or unlawful, while children under age 18 are present." *Id.* at 236. *See also People v. Stork*, 713 N.E.2d 187, 194 (Ill. Ct. App. 1999) ("The statute restricts child sex offenders from a readily identifiable area. . . . Furthermore, the statute is limited to those times when persons under the age of 18 are present within the school zone. We believe these items provide objective criteria in the statutory proscription that lack the potential for arbitrary and discriminatory enforcement."). Thus, Section 9.3(b) has a clearly defined core meaning and is thus valid on its face.

Of the Plaintiffs, only Jane Doe has offered an as-applied challenge to Section 9.3(b).[3] She alleges that she would like to attend another church that holds religious services in a school auditorium, but believes that doing so would also violate Section 9.3(b). *Id.* ¶ 64. Jane Doe is correct that Section 9.3(b) prohibits her from attending a religious service in a school auditorium if children are present in the school, but this clear prohibition does not make the statute vague—just the opposite. Jane Doe also alleges that her presence in certain other churches may also violate Section 9.3(b) (*id.* ¶ 63), but "school" is defined in the statute as a public or private preschool, elementary school, or secondary school—not a Sunday school or other program providing religious instruction. 720 ILCS 5/11-9.3(d)(15).

Section 9.3(c)(i) prohibits child sex offenders from "knowingly being present" at any "facility providing programs or services exclusively directed toward persons under the age of 18." Plaintiffs allege that they are uncertain as to whether this language prohibits them from

[3] John Doe 2 alleges that he is prohibited him from picking up his great-granddaughter from her bus stop because doing so violates 720 ILCS 5/11-9.3 *(id.* ¶ 37), but he does not specify which challenged provision of the statute this action purportedly violates or explain why it would do so.

visiting public libraries (Dkt. 1 ¶ 27), visiting restaurants with play areas or arcade areas for children (*id*. ¶¶ 46-47), movie theaters that show children's movies (*id*.), and churches. *Id*. ¶¶ 56-57, 62. As discussed in Part II.B above, this provision does not actually bar any of these activities; thus, it is not vague as applied to Plaintiffs. But even if it did, the plain language of Section 9.3(c) clearly prohibits child sex offenders from being present at any facility that *only* provides programs or services directed to minors, such as a children's museum, a Girl Scout camp, or a dance studio that only offers classes to children. Thus, even if the provision were vague as applied to Plaintiffs, Section 9.3(c) has a plainly legitimate sweep and is therefore valid on its face.

Section 9.3(c-2) prohibits child sex offenders from "participat[ing] in a holiday event involving children." The statute gives four examples of actions that are prohibited under this provision: giving candy to children on Halloween, dressing up as Santa Claus during the Christmas season, working as a department store Santa Claus, or wearing an Easter Bunny costume during the Easter season. *Id*. Because these four actions are clearly prohibited, the statute has a clearly defined core meaning and is thus valid on its face.

John Doe 3 is the only Plaintiff to challenge Section 9.3(c-2). He alleges that he wants to go to his grandchildren's birthday parties, his town's Fourth of July parade, and his family's annual Fourth of July picnic, but believes that doing so may violate Section 9.3(c-2). As discussed in Part II.C above, though, the statute does not actually bar any of these activities. Rather, the plain language of the statute bars a child sex offender from actively participating in a holiday event that centers around or is primarily for children. Accordingly Plaintiffs' as-applied challenge to Section 9.3(c-2) also fails.

It is important to remember that these are hypothetical situations: John Doe 3 does not allege that he has been arrested or even threatened with arrest for any of these activities. Even if there were some uncertainty as to how Section 9.3(c-2) might apply to these hypothetical situations, that would not make the statute vague. Courts take a realistic approach—statutes are not subject to wholesale invalidation because there may be marginal applications in some imagined fact situations. One could imagine such scenarios for many statutes no matter how carefully drafted. "While there is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question...because we are condemned to the use of words, we can never expect mathematical certainty from our language." *Hill v. Colorado*, 530 U.S. 703, 733 (2000), quoting *Am. Communication Ass'n v. Douds*, 339 U.S. 882, 912 (1950) and *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (internal quotation marks omitted).

Finally, Section 9.4-1 prohibits sexual predators and child sex offenders from being present within a public park or from "knowingly loiter[ing] on a public way within 500 feet of a public park. As discussed in Part II.D above, "public park" and "loiter" are defined in the statute, while "public way" has a recognized plain meaning under Illinois law. Thus, the statute has a clearly defined core meaning: a child sex offender may not be present in a public park, such as publicly-maintained playground, nor may a child sex offender stand or sit idly on a public street or sidewalk that is within 500 feet of a public park. Because the statute has a plainly legitimate sweep, it is valid on its face.

Moreover, Section 9.4-1 is clear as applied to Plaintiffs. The statute clearly bars Plaintiffs from playing golf at a park-district owned golf course (Dkt. 1 ¶ 29) or visiting museums such as the Field Museum or the Museum of Science and Industry that are on public park property. *Id.* ¶

49. John Doe 2 alleges that he believes he may be violating Section 9.4-1 if he visits his daughter's house, which is within 500 feet of a "small set of playground equipment." *Id.* ¶¶ 33, 35. However, the provision does not apply in this situation. First, it is unclear from the Complaint if this "small set of playground equipment" is a "public park" as defined in Section 9.4-1. But even if it is a public park, the statute only prohibits John Doe 2 from being present in the park and from loitering **in the public way** within 500 feet of the park. As long as John Doe 2 goes directly to his daughter's house without loitering on the street and sidewalk, he can visit his daughter's home without violating Section 9.4-1.[4]

C. Plaintiffs' Substantive Due Process Claim Fails.

Both the Supreme Court and the Seventh Circuit have "emphasized how limited the scope of the substantive due process doctrine is." *Lee v. City of Chicago*, 330 F.3d 456, 467 (2003) (internal quotation marks and citations omitted); *see also Glucksberg*, 521 U.S. at 720. Substantive due process is not a blanket protection against government interference. *Lee*, 330 F.3d at 467. "Unless a governmental practice encroaches on a fundamental right, substantive due process requires only that the practice be rationally related to a legitimate government interest, or alternatively phrased, that the practice be neither arbitrary nor irrational." *Id.*, *citing Glucksberg*, 521 U.S. at 728. These fundamental rights must be "deeply rooted in this Nation's history and tradition" and the asserted liberty must be carefully described. *Glucksberg*, 521 U.S. at 720-21. The narrow category of recognized "fundamental rights" includes the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to refuse unwanted lifesaving medical treatment. *Id.*

[4] In contrast, John Doe 2 could not reside in his daughter's home without violating 720 ILCS 5/11-9.3(b-10), which prohibits child sex offenders from knowingly residing within 500 feet of any playground.

Although Plaintiffs here allege that the challenged provisions violate their right to "organize their family affairs" (Dkt. 1 ¶ 76), the alleged impositions resulting from these facially neutral statutes do not come close to the types of familial decisions that have been recognized as fundamental rights. Facially neutral statutes that incidentally restrict child sex offenders' ability to take their grandchildren or great-grandchildren to school, parks, and museums (Dkt. 1¶¶ 37, 49-50) do not impact a fundamental right.[5]

When a statute does not implicate fundamental rights, 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 Glucksberg*, 521 U.S. at 728. 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. As the Seventh Circuit has observed, "the reality is that children, some of the most vulnerable members of society, are susceptible to abuse in parks," 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). Banning child sex offenders from schools, public parks, facilities that exclusively provide services to children, and from participating in holiday events involving children is a rational way to protect children from abuse and molestation. Plaintiffs implicitly concede as much, as they do not even allege that the challenged provisions are irrational. *See* Dkt. 1 ¶¶ 73-76.

[5] The federal courts have generally declined to hold that non-custodial grandparents have a fundamental right to visit their grandchildren. *See, e.g., Rees v. Office of Children and Youth*, 744 F.Supp.2d 434, 455 (W.D. Penn. 2010); *Miller v. California*, 355 F.3d 1172, 1176 (9th Cir. 2004); *Ellis v. Hamilton*, 669 F.2d 510, 513 (7th Cir.1982). But even if such a fundamental right existed, the challenged provisions would not impinge on it. Plaintiffs are free to visit their grandchildren whenever they wish—they just cannot visit with them in parks or schools.

Laws restricting sex offenders' access to specific public locations have been routinely upheld in the face of due process challenges. *See, e.g., Doe v. City of Lafayette, Indiana*, 377 F.3d 757, 768-774 (7th Cir. 2004) (finding no fundamental right to enter parks, but holding that even if strict scrutiny standard applied, city's actions banning sex offender from parks did not violate due process because of compelling interest in protecting children); *Brown*, 462 F.3d at 734 (finding no fundamental right to enter parks and upholding ban of child molester from parks under rational basis standard); *Doe v. Miller*, 405 F.3d 700, 709-16 (8th Cir. 2005) (holding that statute prohibiting sex offenders from residing near schools offended neither liberty interest relating to matters of marriage and family nor due process because statute is a rational way of protecting children).

Indeed, the Illinois Appellate Court recently held that Sections 9.3(b) and 9.4-1 did not violate child sex offenders' fundamental rights and that all four of the provisions challenged here were rationally related to their purpose of protecting children from child sex offenders:

> Although we recognize that the Statutory Scheme at issue may be over-inclusive—that is, it may impose burdens on individuals who pose no threat to the public because they will not reoffend—it still has a rational relationship to protecting the public. . . . [B]y keeping sex offenders who have committed offenses against children away from areas where children are present (*e.g.*, school property and parks) and out of professions where they could come in contact with children (*e.g.*, driving an ice cream truck, being a shopping-mall Santa Claus) or vulnerable people (*e.g.*, driving an emergency services vehicle), the legislature could have rationally sought to avoid giving certain offenders the opportunity to reoffend. Whether or not the Statutory Scheme is a finely-tuned response to the threat of sex-offender recidivism is not a question for rational-basis review; that is a question for the legislature.

People v. Avila-Briones, 49 N.E.3d 428, 436, 448-51 (Ill. Ct. App. 2016). Other Illinois state and federal courts have similarly held that the challenged provisions do not violate child sex offenders' substantive due process rights. *See People v. Pollard*, 2016 IL App (5th) 130514, ¶¶ 34-36, 38-44 (holding that 720 ILCS 5/11–9.3 and 720 ILCS 5/11–9.4–1 did not violate

offenders fundamental rights and finding that there is "a direct relationship between the residency, employment, and presence restrictions of sex offenders and the protection of children"); *Stork*, 713 N.E.2d at 720-21 (holding that there was no fundamental right to transact business on school grounds and finding that Section 9.3(b) was rationally related to its purpose of "reducing the risk that school children will fall prey to sexual predators"); *Doe v. Paris Union School Dist. No. 95*, No. 5-cv-2249, Order at 3 (C.D. Ill. May 8, 2006) (attached as Exhibit A hereto) (holding in ruling on motion for preliminary injunction that school district could deny permission under Section 9.3(b) to child sex offender to attend a "May Fete" because "the liberty to direct the upbringing and education of children does not extend to attendance at nonacademic extracurricular events"). Accordingly, Plaintiffs' substantive due process claim should be dismissed.

D. The Challenged Provisions Do Not Impermissibly Interfere with Plaintiffs' First Amendment Rights.

Finally, Plaintiffs allege that the challenged provisions are overbroad so as to substantially interfere with their First Amendment liberties. Dkt. 1 ¶ 78-80. However, the challenged provisions do not impermissibly interfere with Plaintiffs' First Amendment rights, either on their face or as applied.

Under the First Amendment overbreadth doctrine, a law "may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange*, 552 U.S. at 449 n.6, *quoting New York v. Ferber*, 458 U.S. 747, 769-71 (1982) and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). The doctrine "seeks to strike a balance between competing social costs"—on the one hand, the risk that an overbroad statute will deter some people from engaging in constitutionally protected speech, and on the other, the "obvious harmful effects" of

invalidating a law that is perfectly constitutional in many of its applications. *Williams*, 553 U.S. at 292. "Invalidation for overbreadth is strong medicine that is not to be casually employed." *Id.* at 293. Thus, to maintain the "appropriate balance," the Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.* at 292.

"The first step in an overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams*, 553 U.S. at 293. Once the limits of the statute's coverage have been mapped, the question becomes whether those limits are appropriately tailored to the governmental purpose that the statute serves. *See Ward*, 491 U.S. at 799.

When a statute may burden First Amendment rights, the applicable level of scrutiny depends on whether the statute is content-based or content-neutral. Content-based regulations on speech are subject to strict scrutiny, *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015), while content-neutral regulations are subject to intermediate scrutiny. *Holder*, 561 U.S. at 27. The challenged provisions are content-neutral because to the extent they may affect sex offenders' rights of free speech, association, or religion, they do so "without reference to the ideas or views expressed." *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 643 (1994). The challenged provisions are therefore subject to intermediate scrutiny.

Under intermediate scrutiny, the challenged provisions are constitutional if they are "narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward*, 491 U.S. at 798*; see also Holder*, 561 U.S. at 26-27 ("[A] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to

further those interests."). "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interest." *Turner Broad. Sys.*, 512 U.S. at 622. "'Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.*, *quoting Ward*, 491 U.S. at 799 (internal quotation marks omitted).

"The risk of recidivism posed by sex offenders is 'frightening and high,'" *Smith v. Doe*, 538 U.S. 84, 103 (2003), *quoting McKune v. Lile*, 536 U.S. 24, 34 (2002)); *see also McKune*, 536 U.S. at 33 ("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 sexual assault."), *citing* U.S. Dep't of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders*, 27 (1997); U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners released in 1983*, 6 (1997)). Moreover, empirical research on child molesters has shown that, "[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release," but may occur "as late as 20 years following release." *Smith*, 538 U.S. at 104.

The purpose of the challenged provisions is to protect children from recidivist child sex offenders, and this government interest is "compelling." *City of Lafayette*, 377 F.3d at 768-774; *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling."). Accordingly, the Supreme Court has upheld legislation "aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Ferber*, 458 U.S. at 757.

In this case, the challenged provisions are narrowly tailored to effect the State's compelling interest in protecting children from recidivist sex offenders. Each of the challenged

provisions is facially neutral; none of these provisions include any reference of the content of prohibited speech. Plaintiffs raise four First Amendment allegations, but each of these challenges fail. First, John Doe 1 alleges that Section 9.3(c) bars him from visiting public libraries, in violation of his First Amendment right to free speech. Dkt. 1 ¶ 27. However, as discussed in Part II.B above, Section 9.3(c) does not actually bar child sex offenders from being present at public libraries, and so this overbreadth challenge fails. Second, both John Doe 4 and Jane Doe allege that Section 9.3(c) also bars them from attending church. *Id*. ¶¶ 56-57, 62, 64. Again, however, Section 9.3(c) does not actually bar child sex offenders from attending or volunteering at church, and so this overbreadth challenge likewise fails. Third, Jane Doe alleges that her presence in certain other churches may also violate Section 9.3(b) (*id*. ¶ 63), but the definition of "school" in the statute does not include a Sunday school or other program providing religious instruction. 720 ILCS 5/11-9.3(d)(15). Thus, this overbreadth challenge also fails.

Plaintiff's final overbreadth challenge is Jane Doe's allegation that Section 9.3(b) prevents child sex offenders from attending church services that take place within school buildings. *Id*. ¶ 64. But while Section 9.3(b) places some incidental limits on child sex offenders' choice of places to worship, it does not substantially limit those choices. For example, both John Doe 4 and Jane Doe allege that they are able to worship at a church of their choice without violating Section 9.3(b). *Id*. ¶¶ 54-57, 61-62. Section 9.3(b) does not prevent child sex offenders from attending a church that holds its services in a building that is not also a school. Thus, while Section 9.3(b) does incidentally impinge on child sex offenders' First Amendment rights, it is nevertheless narrowly tailored to effect the compelling state interest of protecting school children from sexual predators while they are at school because this goal "would be achieved less effectively absent the regulation." *Turner Broad. Sys*., 512 U.S at 622. Accordingly, Plaintiff's

overbreadth challenge to Section 9.3(b) also fails. *See Love Church v. City of Evanston*, 671 F. Supp. 508, 512 (N.D. Ill. 1987) (holding that zoning ordinance was not overbroad because it did not prevent plaintiffs from worshipping in other locations).[6]

V. CONCLUSION

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

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Respectfully submitted,

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[6] Plaintiffs do not allege that the challenged provisions place "a substantial burden on the observation of a central religious belief or practice." *Hernandez v. C.I.R.*, 490 U.S. 680, 699, (1989). Even if they did, however, such a claim would fail for two reasons. First, Section 9.3(b) places only an incidental burden on Plaintiffs' freedom of religion. *See Love Church*, 671 F. Supp. at 512 (holding that zoning ordinance did not unduly burden plaintiffs' freedom of religion because it did not prevent them from worshipping in other locations). Moreover, even if the burden were substantial, the State's compelling interest in protecting school children from sexual predators while they are at school more than justifies that burden.

Exhibit A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JANE DOE #1, JANE DOE #2, and JOHN DOE #2, by JOHN DOE, their father and next friend,	)	05-2249
Plaintiffs,	)	
v.	)	
PARIS UNION SCHOOL DISTRICT NO. 95 and COMMUNITY UNIT SCHOOL DISTRICT NO. 4,	)	
Defendants.		

ORDER

This case, commenced by John Doe ("Doe") in November 2005, arises from recent amendments to certain Illinois statutes regulating the presence of child sex offenders on or near school grounds.

Doe is the parent of three school-age children, all minors. The amended statutes require child sex offenders to obtain permission before entering school grounds when minors are present, and to comply with certain other requirements if permission is granted. Doe had sought and been denied permission to attend his children's school events – concerts, sporting events and practices, etc. He filed a complaint against the defendants, Paris Union School District No. 95 ("the high school") and Community Unit School District No. 4 ("the elementary school"), alleging violations of his constitutional rights. He also sought a preliminary injunction allowing him to attend these events.

Doe proceeded under a fictional name until the court granted the defendants' motions for him to proceed under his true name. After a hearing on January 4, 2006, the court denied the motion for preliminary injunction. Doe sought and was granted leave to file an amended complaint adding Jane Doe #1, Jane Doe #2 and John Doe #2, (collectively, "the children") as plaintiffs. The amended complaint, filed on April 20, 2006, named Doe only as father and next friend of his minor children.[1] The amended complaint was accompanied by a motion for the children to proceed under fictional names [#49] and a motion for preliminary injunction [#50].

[1] Doe may decide for himself whether he wishes pursue any claims on his own behalf. The motion to compel him to comply with the court's order and motion for sanctions [#47] is denied.

The high school responded by filing a motion to strike the amended complaint, motion for preliminary injunction and motion to proceed under fictional names. The high school argued that Doe had not complied with the court's order to file an amended complaint under his true name, and even if he added the children under fictional names, he should not be allowed to conceal his true identity. Doe is no longer a party to this case, and the children, as minors, need not reveal their identity. The motion to proceed under fictional names [#49] is granted; the motion to strike [#52] is denied.

The motion for preliminary injunction sought an order allowing the children's father to be present at the May Fete and high school graduation for Jane Doe #1, and the eighth grade graduation for John Doe #2. The motion did not state whether Doe had sought and been denied permission to attend these specific events. The court ordered the plaintiffs to file a statement of facts addressing these issues, and the defendants were ordered to respond to the plaintiffs' statement of facts.

I. May Fete

To succeed on the motion, Doe must show that (1) he has a likelihood of success on the merits; (2) there exists no adequate remedy at law; (3) Doe will suffer irreparable harm if the injunction is not granted, and the harm to him outweighs the harm to the defendants if the injunction is granted; and (4) the injunction will not harm the public interest. *Joelner v. Village of Washington Park*, 378 F.3d 613, 619 (7th Cir. 2004). If Doe meets this threshold burden, the court must weigh the factors against one another on a "sliding scale" analysis. *Joelner*, 378 F.3d at 619.

At the January 4, 2006, hearing, the court determined that the plaintiff was long on blanket assertions but short on facts to support the original motion. Notably, the court never learned the nature of the sex offense for which Doe was convicted, a fact about which counsel was questioned and for which no answer was given. *See* Jan. 9, 2006, Order, p. 3. This fact goes directly to the balancing of the interests of Jane Doe #1 as to her father's presence at the May Fete, on the one hand, and, on the other, the potential harm to the public interest if he were to attend the event.

The plaintiffs allege in their complaints that the defendants told Doe he was "not a risk." Compl. ¶ 25; Amd. Compl. ¶ 25. The high school denied the allegation in its answer to the original complaint.[2] Neither defendant has filed an answer to the amended complaint. The description of the May Fete suggests an event during which the attendees move about the room during the course of the evening. Monitoring an individual's movement during an event of this

[2] The elementary school never answered this allegation. Its answer was filed in three separate documents [#16, #17, #18], each consisting of one page which, when viewed as a whole, do not constitute a complete answer to the complaint. It is ordered to file a complete answer to the amended complaint within five (5) days of the date of this order.

sort is considerably more difficult than monitoring the individual during an event where attendees remain seated, as at graduation.

Moreover, the court concludes that denial of permission to attend the May Fete does not rise to the level of a constitutional violation. The Fourteenth Amendment to the United States Constitution protects liberty interests against arbitrary and capricious denial without due process of law. *Griswold v. Connecticut*, 381 U.S. 479, 502 (1965). Justice White stated in his concurring opinion,

> [T]he liberty entitled to protection under the Fourteenth Amendment includes the right "to marry, establish a home and bring up children," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) and "the liberty . . . to direct the upbringing and education of children," *Pierce v. Society of Sisters*, 268 U.S. 510, 534- 535 (1925) and that these are among "the basic civil rights of man." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). These decisions affirm that there is a "realm of family life which the state cannot enter" without substantial justification. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

Griswold, 381 U.S. at 502.

Even if the high school's decision to deny permission for Doe to attend the May Fete amounts to an arbitrary and capricious decision, the liberty to direct the upbringing and education of children does not extend to attendance at nonacademic extracurricular events. Under the relevant statutes, a parent need not seek permission to attend parent-teacher conferences -- and rightly so, because such conferences relate directly to a child's academic success. The May Fete does not.

II. Graduations

Unlike the May Fete, however, graduation ceremonies are directly related to, and the culmination of, a child's academic success. The distinction is not lost on the high school. Its administrative procedures, promulgated after the passage of the amended statutes, specify that individuals to whom the statute applies will not be allowed on school property "at school related athletic and extra-curricular activities and events *for any reason* when persons under the age of 18 are present." Amd. Compl. ¶ 15. The rules further state, "The Board of Education and/or Superintendent may, on a case by case basis, without establishing a practice or precedence for future requests, allow offenders to be present on school property for graduation ceremonies."[3]

[3] Doe made a specific request, through counsel on or about April 12, 2006, for permission to attend the eighth grade graduation. The elementary school had not acted on the request as of May 4, 2006. *See* Crowder Aff. 2 [#58]. Counsel states that a formal request was made for the high school graduation; the school board will consider that request at its May 8, 2006 meeting. *See* Crowder Aff. 1-2 [#59].

Amd. Compl. ¶ 15. The high school plainly recognizes the importance of parental attendance at graduation ceremonies -- an academic rite of passage appropriately honored by parental attendance.[4]

Neither defendant has yet denied the request for the plaintiffs' father to attend their graduation ceremonies. Consequently, the court cannot rule on the motion as it pertains to the those events.

The plaintiffs may refile the motion for preliminary injunction if the requests are denied. In that event, counsel shall file an updated statement to include the facts surrounding Doe's conviction as a child sex offender and the nature of the crime committed. This information is critical to the weight the court must give to the competing interests on a motion for preliminary injunction.

In response, the defendants must state the specific rationale for denying Doe's request so the court can determine whether the decision was arbitrary and capricious. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (*quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The legislature has codified a procedure to be followed for case-by-case exemptions, recognizing that local officials are in the best position to make such judgments. If the statute specifies a procedure but the answer is always a categorical "no," the procedure is meaningless, and the arbitrary and capricious denial of such requests may well result in a due process violation.

CONCLUSION

For the foregoing reasons, the motion for preliminary injunction [#50] is denied. The court grants the plaintiff leave to refile the motion if one or both of the graduation requests is denied. The motion to compel Doe to comply with the court's order and motion for sanctions [#47] is denied. The motion to proceed under fictional names [#49] is granted; the motion to strike [#52] is denied. The defendants shall file their answers to the amended complaint within five (5) days of the date of this order.

Entered this 8th day of May, 2006.

s\Harold A. Baker

HAROLD A. BAKER
UNITED STATES DISTRICT JUDGE

[4] *See* this court's January 9, 2006 order [#36].