Case No. 15-41456

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

AURELIO DUARTE, WYNJEAN DUARTE, INDIVIDUALLY AND AS NEXT FRIEND TO S.D., AND BRANDI DUARTE,

Plaintiffs-Appellants

v.

CITY OF LEWISVILLE, TEXAS,

Defendant-Appellee

On Appeal from the United States District Court
Eastern District of Texas
Sherman Division

APPELLANTS' BRIEF

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January 26, 2016

CERTIFICATE OF INTERESTED PARTIES

This is to certify that, in the opinion of the undersigned counsel for Appellee, the persons listed below may have an interest in the outcome of this case. These representations are made in order that the Judges of the Court may evaluate possible disqualification or recusal.

U.S. Magistrate and District Judge

Hon. Christine A. Nowack
U.S. Magistrate, Presiding under 28 U.S.C. § 636 (b)(1)(B); and,

Hon. Amos L. Mazzant, U.S. District Judge

Parties

Plaintiffs/Appellants:

Aurelio Duarte;

Wynjean Duarte, Individually and as Next Friend to S.D., a Minor; and

Brandi Duarte.

Defendant/Appellee:

The City of Lewisville, Texas

Attorney for Plaintiffs/Appellants

Richard Scott Gladden,

Attorneys for Defendants/Appellees

Wm. Andrew Messer, and
Brett Gardner.

/s/*Richard Gladden*

STATEMENT REGARDING ORAL ARGUMENT

According to one crime-victim advocacy group, there are currently **86, 217 persons** in Texas required to register as sex offenders (as of December 31, 2015). See, *Parents for Megan's Law and the Crime Victim Center*, http://www.parentsformeganslaw.org/public/meganReportCard.html (Table)(last visited 1/26/2016). Municipal sex offender residency restriction ordinances, such as the one challenged by Appellants in the present case, are triggered solely by Texas' state-law requirement that persons with a "reportable sex offense" conviction register with local authorities. Like Texas' registration requirement, municipal residency restriction ordinances are imposed without regard to whether a registrant currently poses, or has ever posed, a risk of recidivism based on a lack of sexual control. Since publication of a review of the then-recent surge of local residency restriction ordinances in Texas at the end of the last decade, Dallas, *Not in My Backyard: The Implications of Sex Offender Residency Restriction Ordinances in Texas and Beyond*, 41 Tex.Tech.Law Rev. 1235, 1246, 1269 (2009), the number of Texas cities that have enacted sex offender residency restriction ordinances has grown exponentially, and this has resulted in registrants, as a class, being effectively banished registrants from entire cities and towns across the State.

The District Court's judgment in this case, which ruled that Appellant Aurelio Duarte and the Duarte Family Appellants do not hold a "private interest" that is cognizable as a constitutionally protected "liberty interest" within the meaning of *Mathews v. Eldridge*, 424 U.S. 319 (1976), involves an important question of federal constitutional law under the Fourteenth Amendment that should be, but has not been, decided by either the Fifth Circuit Court of Appeals or the Supreme Court of the United States. For this reason, and because Appellants believe the Court would be aided by oral argument in this case, they request oral argument.

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APPELLANTS' BRIEF

TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

COME NOW Aurelio Duarte; Wynjean Duarte, Individually and as Next Friend to S.D., a Minor; and, Brandi Duarte; Appellants in the above captioned and numbered cause, and, pursuant to the Federal Rules of Appellate Procedure, and the Local Rules of the United States Court of Appeals for the Fifth Circuit, files this *Appellants' Brief on Appeal* and in this connection would respectfully show unto the Court as follows:

JURISDICTIONAL STATEMENT

The Appellants filed their Original Complaint in the United States District Court for the Eastern District of Texas, Sherman Division, on March 26, 2012, pursuant to Title 42 U.S.C. Section 1983 ("Section 1983").[1] The District Court exercised jurisdiction under Title 28 U.S.C. Section 1331, and Plaintiff seeks appellate review of the District Court's final judgment

[1] See, **District Clerk's Record**, page **15-41456.14** (*Plaintiff's Original Complaint*)(Dkt.# 1), **Record Excerpt 6**. Hereinafter, citations to the Clerk's Record on Appeal will refer to a volume number of the District Clerk's Record in Roman numerals, and the pagination decimals assigned by the District Clerk's record on appeal, e.g., "**15-41456.14**" = "**CR I, 14**." Record Excerpts will be assigned the abbreviation "**Rec.Ex.**," followed by the tab number after which a specific record excerpt appears (in Plaintiff's separately bound Record Excerpts, e.g., "**Rec.Ex., __**"). No hearings were conducted or recorded in the District Court so no reporter's record is included in the record on this appeal.

entered on September 28, 2015,[2] pursuant to Title 28 U.S.C. Section 1291. On October 26, 2015, Plaintiffs timely filed notice of appeal from the District Court's order and final judgment,[3] and this appeal followed.

ISSUES ON APPEAL

1) *Whether Appellant Aurelio Duarte holds a Constitutionally Protected Liberty Interest that is Infringed by Enforcement of Appellee City's "Sex Offender Residency Restriction Ordinance," the Nature of Which Liberty Interest Required the District Court to Apply the Analysis Established by Mathews v. Eldridge, When Determining Whether the Ordinance Violated his Federal Constitutional Right to Procedural Due Process?*[4]

2) *Whether Appellant Aurelio Duarte together with his Wife and Children (Appellants Wynjean Duarte, Individually and as Next Friend to S.D., and Brandi Duarte), hold a Constitutionally Protected Liberty Interest in "Family Consortium" that is Infringed by Enforcement of Appellee City's Sex Offender Residency Restriction*

[2] CR IV, 1384, *District Court Memo. Op*., 1 (Dkt.#95); and, CR IV, 1402, *District Court Final Judgment*, 1 (Dkt.#96); **Rec.Ex., 3**.
[3] CR IV, 1403, *Pltfs. Notice of Appeal* (Dkt.#97); **Rec.Ex., 2**.
[4] CR IV, 1371-1378, *Pltfs. Objections to Mag.'s Report*, 4-11 (Dkt.#94), **Rec.Ex, 5**; CR IV, 1392-1398, *District Court Memo. Op*., 9-15 (Dkt.#95), **Rec.Ex., 3**. The Appellants in their written objections to the Magistrate's report and recommendation expressly abandoned several constitutional claims not raised on this appeal. CR IV, 1370, *Pltfs. Objections to Mag.'s Report*, 3 (Dkt.#94), **Rec.Ex., 5**.

Ordinance, the Nature of Which Liberty Interest Required the District Court to Apply the Analysis Established by Mathews v. Eldridge, When Determining Whether the Ordinance Violated their Federal Constitutional Right to Procedural Due Process?[5]

3) *Whether the District Court Erred When Ruling Appellant Aurelio Duarte's Equal Protection Claim must Fail as a Matter of Law Because, under the Deferential Rational Basis Test Applicable this Claim, the Disparate Treatment Provided by Appellee City's Sex Offender Residency Restriction Ordinance, Between Persons under Community Supervision, and Appellant Aurelio Duarte (Who is Not under Community Supervision), "Rationally Advances" or is "Related to" a Legitimate Governmental Purpose*?[6]

STATEMENT OF THE CASE

A) Prior Proceedings

The Appellants (hereafter "Plaintiffs") filed their Original Complaint in the United States District Court for the Eastern District of Texas, Sherman Division, on March 26, 2012, pursuant to 42 U.S. C. Section 1983.[7] In their complaint Plaintiffs alleged *inter alia* that a "Sex Offender Residency

[5] CR IV, 1371-1378, *Pltfs. Objections to Mag.'s Report*,4-11 (Dkt.#94), **Rec.Ex., 5**; CR IV, 1399-1400, *District Court Memo. Op*., 16-17 (Dkt.#95), **Rec.Ex., 3**.
[6] CR IV, 1378-1381, *Pltfs. Objections to Mag.'s Report*, 9-14 (Dkt.#94), **Rec.Ex., 5**; CR IV, 1387-1392, *District Court Memo. Op*., 4-9 (Dkt.#95), **Rec.Ex., 3**.
[7] CR I, 14, *Plaintiff's Original Complaint*, 1 (Dkt.#1); **Rec.Ex., 6**.

Restriction Ordinance" ("SORRO") enacted by Appellee City of Lewisville, Texas ("Defendant City") deprived them of various constitutionally protected liberty interests without procedural due process. As relief, Plaintiff's complaint sought nominal damages, compensatory damages, and equitable relief.[8]

By its literal terms, the SORRO enacted by Defendant City prohibits Plaintiff Aurelio Duarte from residing, temporarily or permanently, anywhere within the city limits of Lewisville, Texas, that "is within 1,500 feet of any premises where children commonly gather."[9] As a direct consequence, enforcement of Defendant's SORRO prohibits Aurelio's wife, Plaintiff Wynjean Duarte, and Aurelio's two daughters, S.D. and Brandi, from living together with Aurelio as a family unit anywhere within the city limits of Lewisville that "is within 1,500 feet of any premises where children commonly gather." Violation of the ordinance provides for punishment by a fine not to exceed five hundred dollars ($500.00) for every day that the violation "shall continue or exist."[10]

[8] CR I, 29, *Plaintiff's Original Complaint,* 16 (Dkt.#1); **Rec.Ex., 6**.
[9] CR II, 580, *Exhibit 1 Appended to Def. City's Second MSJ,* 3 (Dkt.#70-3), **Rec.Ex., 7**.
[10] CR II, 582, *Exhibit 1 Appended to Def. City's Second MSJ,* 5 (Dkt.#70-3), **Rec.Ex., 7**.

On a prior appeal, this Court reversed the District Court's ruling that Appellants did not have "standing" to bring their claims.[11] On remand to the District Court, Defendant City of Lewisville filed a motion for summary judgment on the merits;[12] and the U.S. Magistrate, presiding under 28 U.S.C. § 636 (b)(1)(B), entered a report on August 21, 2015, recommending that Defendant's motion for summary be granted.[13] The Plaintiffs on September 4, 2015, timely filed objections to the Magistrate's recommendation confined to the issues presented on this appeal;[14] and on September 28, 2015, the District Court, in a memorandum opinion, adopted the Magistrate's recommendation on *de novo* review and contemporaneously entered a final judgment dismissing all of Plaintiffs' claims with prejudice.[15] On October 26, 2015, Plaintiffs timely filed notice of appeal from the District Court's order and final judgment,[16] and this appeal followed.

[11] *Duarte v. City of Lewisville*, 759 F.3d 514 (5th Cir. 2014).
[12] CR II, 537, *Def. City's Second MSJ* (Dkt.#70). This motion for summary judgment is to be distinguished from an earlier motion for summary judgment filed by Defendant on November 30, 2012 (Dkt.# 26)(SEALED MOTION), which for purposes of clarity will be cited hereinafter as *Defendant City's "First" MSJ*.
[13] CR IV, 1320, *Magistrate's Report and Recommendation*, 1 (Dkt.#91); **Rec.Ex., 4**.
[14] CR IV, 1368, *Pltfs. Objections to Mag.'s Report*, 1 (Dkt.#94); **Rec.Ex., 5**.
[15] CR 1384, *District Court Memo. Op.*, 1 (Dkt.#95); CR IV, 1402, *District Court Final Judgment*, 1 (Dkt.#96); **Rec.Ex, 3**.
[16] CR IV, 1403, *Pltfs. Notice of Appeal* (Dkt.#97); **Rec.Ex., 2**.

B) Statement of Facts

In 2004, Plaintiff Aurelio Duarte was indicted by a Dallas County Grand Jury for the Third Degree felony offense of Online Solicitation of a Minor, in violation of Texas Penal Code, Section 15.031, alleged to have been committed on May 28, 2004.[17] On May 19, 2006, Plaintiff Aurelio Duarte was found guilty, after a trial by jury on that offense, in the 282nd Judicial District Court of Dallas County, Texas, Cause No. F-0427036. For this offense Plaintiff Aurelio Duarte was sentenced to eight (8) years confinement in the Institutional Division of the Texas Department of Criminal Justice, but on the recommendation of the jury, his sentence to confinement was suspended and he was placed on community supervision for a term of ten (10) years.[18]

On June 5, 2007, Plaintiff Aurelio Duarte's community supervision was revoked by the 282nd Judicial District Court of Dallas County, Texas, and he was sentenced to a term of confinement of three (3) years in the Institutional Division of the Texas Department of Criminal Justice.[19]

[17] CR IV, 1321, *Magistrate's Report and Recommendation*, 2 (Dkt.#91); **Rec.Ex., 4**.
[18] Ibid.
[19] Ibid.

Plaintiff Aurelio Duarte's sentence to confinement in this case was fully discharged in June of 2010.[20]

In June of 2010, following the discharge of his sentence arising from his conviction for Online Solicitation of a Minor in May of 2006, Plaintiff Aurelio Duarte returned to the City of Lewisville, Texas, where he had resided with his wife and children prior to revocation of his community supervision and institutional confinement in 2007.[21] In large part due to the Duarte family's deep roots in City of Lewisville community, Plaintiff Aurelio Duarte, with the assistance of his wife Wynjean, commenced efforts at that time to secure residential premises in the City of Lewisville where he, along with Wynjean, his older daughter Brandi Duarte, and his minor daughter S.D., could make a home together.[22]

Not long after commencing his efforts to secure residential premises in the City of Lewisville, Plaintiff Aurelio Duarte was informed that the Defendant City had enacted an ordinance that all but prohibited him from residing at any location within the city limits of the City of Lewisville, with

[20] CR IV, 1321, *Magistrate's Report and Recommendation*, 2 (Dkt.#91); **Rec.Ex., 4**.
[21] CR IV, 1324-1327, *Magistrate's Report and Recommendation,* 5-8 (Dkt.#91); **Rec.Ex., 4**. See also, CR I, 232, *District Court's Order on Defs. Motion to Dismiss* (Oct. 23, 2012)(Dkt.#20)(sustaining Plaintiff Aurelio Duarte's objections to Magistrate's first report, but dismissing claims alleged by Plaintiffs Wynjean, S.D., and Brandi Duarte for lack of "standing.").
[22] CR I, 355-359 (Plaintiff Wynjean Duarte Affidavit)(Dkt.#39-1); CR I, 366-368 (Plaintiff Aurelio Duarte Affidavit)(Dkt.#39-3), **Rec.Ex., 8**.

or without his family. The "sex offender residency restriction ordinance" in question, Article III, Chapter 8, Sections 8-41 through 8-46 of the City of Lewisville Code of Ordinances (Ordinance No. 3533-01-2008, § II, *eff.* 1-28-08)(hereafter Defendant's "SORRO"), became effective on January 28, 2008,[23] and remains in force at the time of the filing of this brief.

After learning of Defendant City's SORRO, Plaintiff Aurelio Duarte exhaustively sought to purchase or lease suitable residential premises in the Defendant City of Lewisville but was legally foreclosed from doing so due solely to Defendant City of Lewisville's enactment of its SORRO. It is undisputed that for approximately 18 months, beginning in February 2010 through August of 2011, Plaintiff Aurelio Duarte's wife, Wynjean, on behalf of Aurelio, contacted the Lewisville Sex Offender Registrar, Lisa Peck ("Peck"), at least nine times in order to ensure that certain residences within the City of Lewisville, should they be purchased or leased as a residence by Aurelio and his family, would not violate Defendant's SORRO.[24] It is also undisputed that on at least six of these occasions Peck informed Plaintiff Aurelio Duarte, through his wife, that the residences they intended to

[23]CR II, 580, *Exhibit 1 Appended to Def. City's Second MSJ* (Dkt.#70-3), **Rec.Ex., 7**.
[24]CR IV, 1325-1326, *Magistrate's Report and Recommendation,* 6-7 (Dkt.#91), **Rec.Ex., 4**, citing CR II, 543-544, *Def. City's Second MSJ* (Dkt.#70).

purchase or lease were prohibited by the Defendant City's SORRO.[25] Of the three residential premises which were "approved" by Defendant City during this period after inquiry by Wynjean Duarte (1102 Eastwood, 555 Ferguson and 660 Pine Street, between February 2010 and August 2011), two of these residences (1102 Eastwood, and 660 Pine Street) became unavailable (either as the result of an intervening purchase or as the result of a lease by third parties) during the period of time between the inquiry by Wynjean Duarte and the subsequent "approval" by Peck.[26] The third residence, at 555 Ferguson, was "approved" by Peck several months prior to Plaintiff Aurelio Duarte's release from Institutional Confinement, but Peck warned Aurelio's wife, Wynjean, not to lease or purchase the residence at 555 Ferguson because, until Aurelio was released and established his residence at that location, he would be unable to avail himself of the "grandfather clause" contained in the SORRO in the event a "church" or other place "where children commonly gather" was erected in the interim.[27]

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[25] As reflected by Defendant's Exhibit 7, attached to Defendant's first motion for summary judgment (Dkt.#26-7)(SEALED MOTION)(filed Nov. 30, 2012), email correspondence establishes that Plaintiff Aurelio Duarte, through Wynjean, was informed he was prohibited from residing at the following addresses within the City of Lewisville: 120 Ridgeway Circle; "all of Edwards St.," including 449 Edwards Street; 1006 Kingston Drive; 1201 Kingston Drive; 915 Boxwood Drive; and, 1019 Woodmere Drive.

[26] *Def. City's First MSJ*, 7 (Dkt.# 26)(SEALED MOTION)(filed Nov. 30, 2012), citing excerpts from the Depositions of Wynjean Duarte and Aurelio Duarte.

[27] CR I, 317 (Excerpts from Plaintiff Wynjean Duarte Deposition)(Dkt.#33-1).

Prior to filing Plaintiffs' original complaint (on March 26, 2012), Plaintiffs Aurelio and Wynjean Duarte ultimately determined further efforts to purchase or lease suitable residential premises within the City of Lewisville would be an exercise in futility. At that time, Plaintiffs Aurelio and Wynjean Duarte, together with their two teenage daughters, resigned themselves, subject to judicial intervention, to remaining in a "residence" that consisted of a 275 Square foot motel room located on the service road of Interstate 35W in Lewisville, where they had established and maintained their residence since Aurelio's release from confinement in June of 2010. A geographical map in the record, created by Defendant City but not made available to Plaintiffs prior to suit, depicts the extreme limitations on housing available to Plaintiffs within the City of Lewisville as the result of Defendant's SORRO.[28]

SUMMARY OF ARGUMENT

For purposes of clarity Plaintiffs have separated their claims into two categories: those raised by Plaintiff Aurelio Duarte, and those raised by Aurelio together with his wife and two teenage daughters, Wynjean, S.D. and Brandi Duarte, respectively, who will collectively be referred to as the "Duarte Family Plaintiffs." In the first category, Plaintiff Aurelio Duarte

[28] CR II, 762 (Dkt.#71-5)(dated Aug. 1, 2012), Exhibit 9 Appended to *Def. City's Second MSJ* (Dkt.#70), *see*, **Rec.Ex. 9.**

contends that the District Court erred when ruling that he does not hold a "private interest" within the meaning of *Mathews v. Eldridge,* 424 U.S. 319 (1976), that is constitutionally protected under the Fourteenth Amendment, and which required the District Court to apply and determine, in accordance with *Mathews v. Eldridge*, whether he was deprived of procedural due process by enforcement of Defendant's SORRO **(Issue One)**(prohibition against residency within areas restricted by SORRO).[29] Additionally, Plaintiff Aurelio Duarte contends the District Court erred when failing to rule that Defendant's SORRO, by its disparate and unequal treatment of registered offenders, does not violate his constitutional right to Equal Protection under the Fourteenth Amendment **(Issue Three)**(disparate treatment between registrants who are on, and who are not on, community supervision).[30]

In the second category of claims, Plaintiff Aurelio Duarte together with his Wife and two biological Daughters (Plaintiffs Wynjean Duarte, Individually and as Next Friend to S.D., a Minor; and Brandi Duarte Children)(the "Duarte Family Plaintiffs"), contend that the District Court erred when ruling that they do not hold a "private interest" within the meaning of *Mathews v. Eldridge,* 424 U.S. 319 (1976), that is

[29] *Infra*, this Brief, at 13.
[30] *Infra,* this Brief, at 34.

constitutionally protected under the Fourteenth Amendment, and which required the District Court to apply and determine, in accordance with *Mathews v. Eldridge,* whether they were deprived of procedural due process by enforcement of Defendant's SORRO (**Issue Two**)(interference with "family consortium" and harm resulting from prohibition against residency, as family unit, within areas restricted by SORRO).[31]

STANDARDS FOR APPELLATE REVIEW

The purpose of summary judgment under Federal Rule 56 is to isolate and dispose of factually insufficient claims or defenses.[32] Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[33] A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[34] The substantive law identifies which facts are material. The party moving for summary judgment has the burden to show

[31] *Infra,* this Brief, at 28.
[32] *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986).
[33] FED. R. CIV. P. 56 (c).
[34] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

that there is no genuine issue of fact and that it is entitled to judgment as a matter of law.[35]

If the movant bears the burden of proof on a claim or defense on which it is moving for summary judgment, it must come forward with evidence that establishes "beyond peradventure *all* of the essential elements of the claim or defense."[36] Once the movant has carried its burden, the nonmovant "must set forth specific facts showing that there is a genuine issue for trial."[37] The nonmovant must adduce affirmative evidence.[38]

In considering a motion for summary judgment, the court cannot make credibility determinations, weigh evidence, or draw inferences for the movant.[39] The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in the nonmovant's favor.[40] These standards apply to the Court of Appeals' *de novo* review of a District Court grant of summary judgment.[41]

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[35] Id., 477 U.S. at 250.
[36] *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).
[37] FED. R. CIV. P. 56 (e).
[38] *Anderson v. Liberty Lobby, Inc., supra*, 477 U.S. at 257.
[39] Id., 477 U.S. at 255.
[40] Ibid.
[41] *Humana Health Plan, Inc. v. Nguyen*, 785 F.3d 1023, 1026 (5th Cir. 2015).

ARGUMENT

ISSUE ONE: *Whether Appellant Aurelio Duarte holds a Constitutionally Protected Liberty Interest that is Infringed by Enforcement of Appellee City's "Sex Offender Residency Restriction Ordinance," the Nature of Which Liberty Interest Required the District Court to Apply the Analysis Established by Mathews v. Eldridge, When Determining Whether the Ordinance Violated his Federal Constitutional Right to Procedural Due Process?*[42]

In Plaintiffs' original complaint, and consistently thereafter, Plaintiff Aurelio Duarte alleged that under the Fourteenth Amendment he holds "a constitutionally protected liberty interest, to reside at the location of his choice, including but not limited to a location anywhere within the City of Lewisville, Texas."[43]The procedural due process claims asserted by Plaintiff Aurelio Duarte (as well as the related claims raised by the Duarte Family Plaintiffs, discussed hereafter) are, Plaintiff contends, governed by the three considerations for determining "what process is due" under the framework

[42] CR III, 1114, 1138-1143, *Pltfs. Resp. in Opp. to Def's Second MSJ* (Dkt.# 84); CR IV, 1371-1378, *Pltfs. Objections to Mag.'s Report*, 4-11 (Dkt.#94), **Rec.Ex., 5**; CR IV, 1392-1398, *District Court Memo. Op.*, 9-15 (Dkt.#95), **Rec.Ex., 3**.

[43] CR I, 20-21, *Plaintiffs' Original Complaint,* 7-8 (Dkt.# 1)(filed 3/26/12), **Rec.Ex., 6**; CR III, 1114, 1138-1143, *Pltfs. Resp. in Opp. to Def's Second MSJ* (Dkt.# 84); CR IV, 1371-1378, *Pltfs. Objections to Mag.'s Report,* 4-11 (Dkt.#94), **Rec.Ex., 5**.

set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). That framework, *id.*, 424 U.S. at 335, requires a Court to consider:

> 1) The nature of "the private interest that will be affected by the official action";
>
> 2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and
>
> 3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

In its report recommending that Defendant's motion for summary judgment be granted on this claim, the Magistrate found that "to the extent that A. Duarte's argument is that the application of the Ordinance to him deprives him of a fundamental right – the right to live where he wishes to live – without notice and a hearing, this argument fails."[44] The Magistrate's report did not consider, however, whether Plaintiff Aurelio Duarte possesses a "private interest" that may constitute a cognizable "liberty interest" under the Fourteenth Amendment, which would then require procedural protection under *Mathews v. Eldridge*, *supra*. Noting this objection by Plaintiffs, on *de novo* review as required by 28 U.S.C, Section 28 U.S.C Section 636 (C), the District Court ruled that Plaintiff Aurelio Duarte possesses no "private

[44] CR IV, 1356, *Magistrate's Report and Recommendation*, 37 (Dkt.# 91), **Rec.Ex., 4**.

interest" that requires further analysis under *Mathews v. Eldridge*, *supra*.[45] In this regard the District Court erred.

The primary error in the District Court's analysis is its failure to distinguish between what may be classified as a "fundamental" constitutional right under the Fourteenth Amendment, and what may be, under *Mathews v. Eldridge*, a "private interest" that may constitute a cognizable "liberty interest" under the Fourteenth Amendment requiring procedural protection. Moreover, from the outset of this case, and continuously thereafter, Plaintiffs have claimed private interests in the latter (*in addition to* the former) category;[46] and the District Court's internally inconsistent statements which suggest that Plaintiffs "modified" the nature of their procedural due process claims during the course of this litigation,[47] are plainly contradicted by the record.[48]

From its initial error in failing to perceive the constitutional distinction between what may be classified as a "fundamental" constitutional

[45] CR IV, 1392-1396, *District Court Memo. Op*., 9-13 (Dkt.#95), **Rec.Ex., 3**.
[46] CR I, 20-21, *Pltfs. Original Complaint,* 7-8 (Dkt.# 1)(filed 3/26/12), **Rec.Ex., 6**; CR III, 1114, 1138-1143, *Pltfs. Resp. in Opp. to Def's Second MSJ* (Dkt.# 84); CR IV, 1371-1378, *Pltfs. Objections to Mag.'s Report,* 4-11 (Dkt.#94), **Rec.Ex., 5**.
[47] CR IV, 1393, *District Court Memo. Op*., 10 (Dkt.#95), **Rec.Ex., 3**.
[48] CR I, 20-21, *Pltfs. Original Complaint,* 7-8 (Dkt.# 1)(filed 3/26/12), **Rec.Ex., 6**; CR III, 1114, 1138-1143, *Pltfs. Resp. in Opp. to Def's Second MSJ* (Dkt.# 84); CR IV, 1372, *Pltfs. Objections to Mag.'s Report,* 5 (Dkt.#94), **Rec.Ex, 5** ("the existence of a 'liberty interest' does not depend on whether the interest claimed is a 'fundamental' one under the Constitution").

right under the Fourteenth Amendment, and what may be, under *Mathews v. Eldridge*, a "private interest" constituting a cognizable "liberty interest" under the Fourteenth Amendment, the District Courts analysis strayed still farther afield. Relying on the three–Member plurality opinion in *Kerry v. Din*, --- U.S. ---, 135 S.Ct. 2128 (2015), the District Court ruled that Plaintiff Aurelio Duarte has not alleged a "private interest" cognizable as a "liberty interest" within the meaning of *Mathews v. Eldridge, supra,* because he failed to demonstrate that his asserted "private interest" (in establishing a residence free from the constraints of Defendant's ordinance) was "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty or justice would exist" without its recognition.[49] Again, the District Court's reliance on the plurality opinion in *Kerry v. Din*, *supra*, not only overlooked that it was relying on a plurality opinion (evoking a legal contention not concurred in by a majority of the Court), but also failed to perceive the legal significance of the "private interest" asserted by Plaintiff Aurelio Duarte and its proper inclusion as a "liberty interest" cognizable under *Mathews v. Eldridge*.

[49]CR IV, 1396, *District Court Memo. Op*., 13 (Dkt.#95), **Rec.Ex., 3**, *quoting Kerry v. Din*, *supra*, 135 S.Ct. at 2135 (Plurality Opinion)(Scalia, J., joined by Roberts, C.J. and Thomas, J.).

No majority opinion of the United States Supreme Court has ever limited by definition the term "private interest," within the meaning of *Mathews v. Eldridge*, *supra*, to the contours of "substantive" and "fundamental" constitutional rights "deeply rooted in this Nation's history and tradition." To the contrary, the Supreme Court has determined that lesser private interests than those asserted by Plaintiffs constitute "private interests" which warrant constitutional protection through procedural due process. For example, "private interests" which the Supreme Court has found subject to procedural due process include, but are not limited to, a "private interest" in the continuance of residential utility service by a governmental provider, *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1 (1978), and a "private interest" in maintaining a license to operate a motor vehicle. *Bell v. Burson*, 402 U.S. 535 (1971). Neither of those "private interests" could fairly be described as "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist" without their recognition.[50] By effectively banishing categorically a subset of persons from an entire municipality for residential purposes (including Plaintiff Aurelio Duarte), Defendant's

[50]CR IV, 1396, *District Court Memo. Op.*, 13 (Dkt.#95), **Rec.Ex., 3**, *quoting Kerry v. Din*, *supra*, 135 S.Ct. at 2135 (Plurality Opinion)(Scalia, J., joined by Roberts, C.J. and Thomas, J.).

blanket exclusion through enforcement of its SORRO operates to infringe upon a legitimate "private interest" held by Plaintiff within the meaning of *Mathews v. Eldridge*.

The effect of Defendant's SORRO on Plaintiffs' private interests is considerable. As noted by the Magistrate in its report and recommendation, and as stated by Plaintiffs in their objections to the Magistrate's report and recommendation, the number of unoccupied residential units within the City of Lewisville available for purchase or lease by Plaintiff Aurelio Duarte (outside of the zone created by Defendant's SORRO) constituted only .025 percent of the total number of residential properties in Lewisville (39, 967 residential units).[51] A geographical map in the record, created by Defendant City but not made available to Plaintiffs prior to suit, depicts the extreme limitations on housing available to Plaintiffs within the City of Lewisville as the result of Defendant's SORRO.[52]

Plaintiff also believes it important for the Court of Appeals to recognize that there is a significant legal difference between any claim to a "private interest" against governmental collection and disclosure of "public information" on the one hand, which occurs with the "sex offender

[51] CR IV, 1327, *Magistrate's Report and Recommendation*, 8 (Dkt.# 91), **Rec.Ex., 4;** CR IV, 1373, *Pltfs. Objections to Mag.'s Report*, 6 (Dkt.#94), **Rec.Ex., 5**.
[52] CR II, 762 (Dkt.#71-5)(dated Aug. 1, 2012), Exhibit 9 Appended to *Def. City's Second MSJ* (Dkt.#70), *see*, **Rec.Ex. 9.**

registration" statute addressed in *Smith v. Doe*, 538 U.S. 84, 87 (2003), and the more significant private interest impacted by governmental prohibitions that restrict where a person may live ("residency restriction" ordinances). One can safely assume it was for precisely this reason that the Court in *Smith v. Doe* pointedly observed that the "registration" statute before it did not interfere with, much less prohibit, where a sex offender registrant wished "to live." *Smith v. Doe, supra*, 538 U.S. at 87.

Furthermore, Plaintiff Aurelio Duarte, having fully discharged his criminal sentence and having thereby "paid his debt to society," is not under community supervision or on parole, and is therefore not subject to any form of governmental restraint, other than Defendant's SORRO, which would diminish his private interest in choosing the location of his residence. On a continuum from lesser to greater entitlements to liberty, a person no longer on community supervision or parole is vested with *more* liberty than is a person who is under restrictions associated with community or parole. Conversely, a person no longer on community supervision or parole may be vested with a *lesser* degree of liberty than a person who has never been convicted of a criminal offense.[53] But even were a person no longer on

[53] *But see, cf., Doe v. Harris*, 772 F.3d 563, 572 (9th Cir. 2014)(ruling that sex offender registrants who are not on probation or parole "enjoy the full protection of the First Amendment.").

community supervision or parole vested with a degree of liberty *identical* to that held by a person on community or parole; "blanket" residency restrictions, such as the kind imposed on Plaintiff by Defendant's SORRO, have been ruled an unconstitutional violation of protected "private interests" held by parolees. As recently determined by the Supreme Court of California, even persons on parole after conviction for commission of reportable sex offenses hold a federally protected "liberty interest" that is infringed by "blanket" sex offender residency restriction provisions. As that Court ruled:

> "Blanket enforcement of the residency restrictions against these parolees has severely restricted their ability to find housing in compliance with the statute, greatly increased the incidence of homelessness among them, and hindered their access to medical treatment, drug and alcohol dependency services, psychological counseling and other rehabilitative social services available to all parolees, while further hampering the efforts of parole authorities and law enforcement officials to monitor, supervise, and rehabilitate them in the interests of public safety. It thus has infringed their liberty and privacy interests, however limited, while bearing no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators, and has violated their basic constitutional right to be free of unreasonable, arbitrary, and oppressive official action."[54]

[54] *In Re Taylor*, 343 P.3d 867, 869 (Cal. 2015). For other cases wherein courts have ruled constitutionally protected liberty interests have been violated by sex offender residency restriction provisions, see, *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009)(declaring violation of Federal and State *Ex Post Facto* provisions); *Mikaloff v. Walsh*, No. 5:06-cv-96, 2007 WL 2572268 (N.D. Ohio, Sept. 4, 2007)(declaring violation of Federal *Ex Post Facto* Clause); and, *State v. Pollard*, 908 N.E.2d 1145 (Ind. 2009)(violation of State *Ex Post Facto* provision).

Speaking to the "grave societal and constitutional implications posed by judicial toleration of such "blanket" residency restriction ordinances, the Supreme Judicial Court of Massachusetts has further observed:

> "[W]e note the grave societal and constitutional implications of the *de jure* residential segregation of sex offenders. Except for the incarceration of persons under the criminal law and the civil commitment of mentally ill or dangerous persons, the days are long since past when whole communities of persons, such Native Americans and Japanese-Americans, may be lawfully banished from our midst."[55]

In the present case, resolution of Plaintiff Aurelio Duarte's procedural due process claim was pretermitted by the District Court's unduly narrow and erroneous interpretation of the scope of "private interests" potentially entitled to procedural protections under *Mathews v. Eldridge*. Thus, with regard to this and the remaining factors provided in *Mathews v. Eldridge*, the District Court ruled:

> "[E]ven if the Court were to apply the three-factor test from *Mathews*, Plaintiff's argument would still fail. Factor one requires the Court to ascertain the nature of the private interest that will be affected by the action, which the Court has already

[55] *Doe v. City of Lynn*, 36 N.E.3d 18, 25 (Mass. 2015). According to one crime-victim advocacy group, there are currently **86, 217 persons** in Texas required to register as sex offenders (as of December 31, 2015). See, *Parents for Megan's Law and the Crime Victim Center* (Table), http://www.parentsformeganslaw.org/public/meganReportCard.html (last visited 1/26/2016). Since publication of a review of the then-recent surge of residency restriction ordinances in Texas at the end of the last decade, Dallas, *Not in My Backyard: The Implications of Sex Offender Residency Restriction Ordinances in Texas and Beyond*, 41 Tex.Tech.Law Rev. 1235, 1246, 1269 (2009), the number of Texas cities that have enacted sex offender residency restriction ordinances has grown exponentially.

> determined is not a liberty interest afforded constitutional protection. Factor two requires to Court [sic] to consider the risk of an erroneous deprivation of the interest through the procedures used. The Court finds that the risk is low, considering that there is no liberty interest at stake of which Plaintiff could be deprived. Factor three requires the Court to look at the government's interest that additional safeguards or procedural requirements would entail. The Court has no information regarding this factor to look at, but, in any event, this factor is irrelevant given the lack of a protected liberty interest. Plaintiff's objection is overruled."[56]

Plaintiff Aurelio Duarte contends that the private interest he claims is a constitutionally protected liberty interest within the meaning of the Fourteenth Amendment, as defined by *Mathews v. Eldridge*, and that the Court of Appeals must therefore reverse the District Court's ruling to the contrary and remand this case with directions that the District Court consider the two remaining factors pertinent to Plaintiff's procedural due process claims in accordance with *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The Plaintiff does not view it appropriate, under these circumstances, for the Court of Appeals at this juncture to consider the remaining two *Mathews v. Eldridge* factors itself, and thereby resolve Plaintiff's procedural due process claims in the first instance. In the alternative, should the Court of Appeals deem it appropriate to consider the merits of Plaintiff's claim under the

[56] CR IV, 1396 n.6, *District Court Memo. Op*., 13 n. 6 (Dkt.#95), **Rec. Ex., 3**.

remaining two factors stated in *Mathews v. Eldridge*, he would submit the following additional argument.

A) *The Risk of an Erroneous Deprivation.*

The governmental aim expressed by Defendant when enacting its SORRO, as is manifest from the preamble to the ordinance, was to ensure that children remain safe from a risk perceived by Defendant that they could be sexually abused by persons required to register as sex offenders under State law.[57]

The Defendant has consistently conceded, however, that enforcement of its SORRO does not require, and in the present case did not require, any pre-deprivation form of procedural due process to determine whether Plaintiff Aurelio Duarte currently poses (or has ever posed) any threat to anyone by reason of a lack of sexual control.[58] It remains a disputed question of fact and scientific opinion whether sex offenders generally present a higher rate of recidivism than other offenders,[59] and enforcement of Defendant's SORRO affords Plaintiff neither a pre-deprivation or a post-deprivation opportunity to be heard on the question of whether he currently

[57] CR IV, 1323, *Magistrate's Report and Recommendation*, 4 (Dkt.# 91), **Rec. Ex., 4**.
[58] CR I, 57; *Def. City's MTD*, 20 (Dkt.# 6)("The ordinance does not require an individual showing of dangerousness."); CR IV, 564; *Def. City's Second MSJ* (Dkt.#70)(same).
[59] Tewksbury, Jennings & Zgoba, *Sex Offenders: Recidivism and Collateral Consequences*, 56 (Nat'l. Institute of Justice, Washington, D.C., Sept. 2011) (reporting results of five prior scientific studies finding that "sex offenders have relatively low rates of recidivism, typically significantly lower than nonsex offenders.")

poses (or has ever posed) any threat to anyone by reason of a lack of sexual control.

No one could reasonably assert that each and every person who is required to register as a sex offender under Texas law, following his or her commission of a reportable sex offense involving a child, invariably poses a threat to children by reason of a lack of sexual control either presently, or foreverafter. The risk of an unjustified and erroneous deprivation of liberty under this procedural scheme is thus high, insofar as Defendant's SORRO is intended to ensure that children remain safe from a perceived risk that they could be sexually abused by persons required to register as sex offenders under Texas law. When a private interest protected by procedural due process exists, extra-judicial legislative declarations, which designate an entire category of persons inimical to public safety, cannot operate to nullify the procedural due process analysis required by *Mathews v. Eldridge, supra*.

B) ***The Government's Interest, including the Function Involved and the Fiscal and Administrative Burdens that Additional or Substitute Procedural Requirements would entail.***

The third and final procedural due process inquiry under *Mathews v. Eldridge,* involves identification of the governmental "interests" and "functions" involved, and assessment of "the fiscal and administrative

burdens that the additional or substitute procedural requirement[s] would entail" (in order to mitigate the risk of an erroneous deprivation of liberty).[60] These inquiries do not operate to save a residence restriction ordinance, such as Defendant's SORRO, that otherwise fails under the first two criteria noted above.

When enacting its SORRO the Defendant was exercising its police-power "function" related to its general interest in preserving public safety. As for the "administrative burdens that additional or substitute requirements would entail," Defendant has never asserted that providing a pre-deprivation opportunity to be heard would impose an unreasonable fiscal or administrative burden on it, and the District Court concluded it had "no information regarding this factor" before it on this question.[61] Even had Defendant asserted that providing a pre-deprivation opportunity to be heard would impose an unreasonable fiscal or administrative burden, however, Defendant could not persuasively establish that is the case.

Even in the parole context, federal courts have ruled that administrative burdens associated with providing procedural due process to parolees, including the right to notice and an opportunity to be heard prior to imposing sex offender conditions of parole (confined to inquiry into an

[60] *Mathews v. Eldridge, supra*, 424 U.S.at 335.
[61] CR IV, 1396 n. 6, *District Court Memo. Op.*, 13 n. 6 (Dkt.#95), **Rec.Ex., 3**.

offender's potential lack of sexual control), are insubstantial for purposes of constitutional analysis.[62] Similarly, in *Bell v. Burson*, 402 U.S. 535 (1971), the Supreme Court found that neither "fiscal" nor "administrative burdens" justified dispensing with procedural due process, even in relation to the far less significant liberty interest involved in the suspension of a person's driver's license.

Perhaps most relevant to this question is that fact that some Texas municipalities, including those having far less fiscal resources than Defendant City of Lewisville, have enacted sex offender residency restriction ordinances that provide registrants with a post-deprivation opportunity to be heard concerning whether, under their particular circumstances, enforcement of the ordinance is appropriate. Thus, for example, in the small town of West Lake Hills, Texas (with a population of approximately 3,300 residents), that city's SORRO provides for a public "exemption" hearing before the City Council itself, wherein the Council considers and makes written findings concerning not less than eleven (11)

[62] *See, e.g.*, *Meza v. Livingston*, 623 F.2d 782, 793 (W.D. Tex. 2009), *aff'd*, 607 F.3d 392, 403 (5th Cir. 2010). The Plaintiff recognizes that, unlike the plaintiff in *Meza*, he has been convicted of a reportable sex offense under Texas law, and therefore would not necessarily be entitled, was he on parole, to the hearing required by *Meza*, *supra*. However, this distinction has no bearing under the third factor in *Mathews v. Eldridge*, which is confined to assaying what, if any, "administrative" or "fiscal" burdens would result from additional or substitute procedural safeguards. Those burdens, if any, would be identical regardless of Plaintiff's legal status.

specific inquiries. Based on the results of those findings, the West Lake Hills City Council then has discretion to grant a registrant exemption from its SORRO's strictures "when, in its opinion, undue hardship will result from compliance or an individualized recidivist assessment indicates an exemption should be granted."[63] While these procedures are admittedly more elaborate than would be required to satisfy procedural due process under the Fourteenth Amendment, implementation of those procedures, by a city more than 30 times smaller than Defendant City of Lewisville, supports Plaintiff's contention that affording him a pre-deprivation opportunity to be heard, on the question of whether he currently poses (or has ever posed) any threat to anyone by reason of a lack of sexual control, would not impose an unreasonable fiscal or administrative burden on Defendant.[64]

ISSUE TWO: *Whether Appellant Aurelio Duarte together with his Wife and Children (Appellants Wynjean Duarte, Individually and as Next Friend to S.D., and Brandi Duarte), hold a Constitutionally Protected Liberty Interest in "Family Consortium" that is Infringed by Enforcement of Appellee City's Sex Offender Residency Restriction Ordinance, the Nature of Which Liberty*

[63] The West Lake Hills SORRO is available online at: http://z2codes.franklinlegal.net/franklin/Z2Browser2.html?showset=westlakehillsset (last visited 1/24/16).

[64] Although not dispositive either way, Plaintiff assumes Defendant would assign the task of administering such hearings to one of many city boards, made up of volunteer members from the community, that it has already formed to conduct hearings on an endless variety of municipal topics.

Interest Required the District Court to Apply the Analysis Established by Mathews v. Eldridge, When Determining Whether the Ordinance Violated their Federal Constitutional Right to Procedural Due Process?[65]

In Plaintiffs' original complaint, Plaintiff Aurelio Duarte, as well as the Duarte Family Plaintiffs (Wynjean Duarte, individually and as Next Friend to S.D., a Minor) and Aurelio's older daughter Brandi Duarte), asserted enforcement of Defendant's SORRO deprived them, and would continue to deprive them, of constitutionally protected "liberty interests" without procedural due process in violation of the Fourteenth Amendment to the United States Constitution. More specifically, the "Duarte Family Plaintiffs" allege they hold a fundamental right, *as well as* a constitutionally protected "liberty interest," to reside together as a family at a location of their choice that would otherwise be available to them but for Defendant's SORRO.[66]

For the purpose of further identifying the "liberty interests" they claim, the Duarte Family Plaintiffs directed both the Magistrate's and the District Court's attention to *Moore v. City of East Cleveland*, 431 U.S. 494

[65] CR IV, 1371-1378, *Pltfs. Objections to Mag.'s Report*, 4-11 (Dkt.#94), **Rec.Ex., 5**; CR IV, 1399-1400, *District Court Memo. Op.*, 16-17 (Dkt.#95), **Rec.Ex., 3**.
[66] CR I, 20-21, 22-23, and 23-24, *Plaintiff's Original Complaint*, 7-8, 9-10, 10-11 (Dkt.# 1), **Rec.Ex., 6**.

(1977).[67] In *Moore*, a majority of the Justices on the Supreme Court ruled that a person holds a constitutionally protected "private interest" under the Fourteenth Amendment that is infringed when a local government undertakes "to select categories of relatives who may live together and declare that others may not."[68]

As with Plaintiff Aurelio Duarte's individual claim, which asserted that he himself held a protected liberty interest to choose the location of his residence in areas prohibited by Defendant's SORRO, the District Court ruled that the Duarte Family Plaintiffs held neither a "fundamental right" nor a "liberty interest" to reside together as a family unit within areas prohibited by Defendant's SORRO.[69] On this point, as well as with regard to its broader conclusion that Defendant's SORRO did not violate the Duarte Family Plaintiffs' right to procedural due process more generally, the District Court erred for at least two reasons.

First, the District Court's conclusion that the Duarte Family Plaintiffs do not possess a protected "private interest" within the meaning of *Mathews v. Eldridge*, *supra*, carries forward and applies the same flawed reasoning

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[67] CR III, 1132-1134, *Pltfs. Resp. in Opp. to Def's Second MSJ* (Dkt.# 84); CR IV, 1374-1375, *Pltfs. Objections to Mag.'s Report*, 7-8 (Dkt.#94), **Rec.Ex., 5**.

[68] *Moore v. City of East Cleveland*, *supra*, 431 U.S. at 499 (plurality opinion); 431 U.S. at 520-521 (Stevens, J. concurring)(ruling that ordinance "cu[t] so deeply into a fundamental right normally associated with the ownership of residential property" that it "constitute[d] a taking of property without due process.").

[69] CR IV, 1398, 1399-1400, *District Court Memo. Op*., 15, 16-17 (Dkt.#95), **Rec.Ex., 3**.

which resulted in its error when considering Plaintiff Aurelio Duarte's individual procedural due process claim. In other words, when addressing whether the Duarte Family Plaintiffs possessed a protected liberty interest within the meaning of *Mathews v. Eldridge*, the District Court again failed to distinguish between what may be classified as a "fundamental" constitutional right under the Fourteenth Amendment, and what may be, under *Mathews v. Eldridge*, a "private interest" cognizable under the Fourteenth Amendment requiring procedural protection. In the interest of brevity the Duarte Family Plaintiffs would incorporate by reference Plaintiff Aurelio Duarte's argument on that error previously discussed herein.[70]

In addition to its failure to perceive that a "private" (but not necessarily "fundamental") interest may constitute a cognizable "liberty interest" within the meaning of *Mathews v. Eldridge*, *supra*, the District Court also ruled that its dismissal of the Duarte Family Plaintiffs' procedural due process claims was further supported by the Magistrate's finding (apparently in connection with the second *Mathews v. Eldridge* factor) that the Duarte Family Plaintiffs had "failed to identify what procedure was due, lacking, and/or inadequate."[71] Once again, the Magistrate's finding, and the

[70] See, this Brief, *supra*, at 14-18.
[71] CR IV, 1399, *District Court Memo. Op.*, 16 (Dkt.#95), **Rec.Ex., 3**, citing CR IV, 1358, *Magistrate's Report and Recommendation*, 39 (Dkt.# 91), **Rec.Ex., 4**.

District Court's adoption of the Magistrate's finding of this asserted fact, is in error.

In their original complaint, and in virtually every pleading they filed thereafter (including their response in opposition to Defendant's motion for summary judgment), the Duarte Family Plaintiffs emphatically and repeatedly complained that enforcement of Defendant's SORRO was procedurally unconstitutional by reason of its complete failure to provide them with a pre-deprivation opportunity to be heard on the issue of whether Plaintiff Aurelio Duarte currently poses (or has ever posed) any threat to anyone by reason of a lack of sexual control.[72] Invariably, Defendant's rejoinder to this repeated claim by the Duarte Family Plaintiffs included its own admission that enforcement of its SORRO did not include such an opportunity.[73]

Under the second *Mathews v. Eldridge* factor, it was only incumbent upon Plaintiffs to suggest, and for the District Court to consider, "the risk of

[72] CR I, 21, 22 and 24; *Pltfs.Original Complaint*, 8, 9, 11 (Dkt.#1), **Rec. Ex., 6** (complaining about "the lack of any policy or procedure adopted and implemented by the Defendant City of Lewisville, to determine, *prior to application or enforcement of its SORRO*, whether Plaintiff Aurelio Duarte has ever been a threat to society by reason of his lack of sexual control.")(italics in original); CR, III, 1139, *Pltfs. Resp, in Opp. to MSJ* (Dkt.# 84)("The Defendant does not dispute that application and enforcement of its SORRO generally does not require, and in the present case did not require, any pre-deprivation form of procedural due process to determine whether Plaintiff Aurelio Duarte currently (or has ever) posed a threat to anyone by reason of a lack of sexual control.").

[73] CR I, 57; *Def. City's MTD*, 20 (Dkt.# 6)("The ordinance does not require an individual showing of dangerousness."); CR IV, 564; *Def. City's Second MSJ* (Dkt.#70)(same).

an erroneous deprivation" of the "private interest" asserted, given "the procedures used," and "the probable value, if any, of additional or substitute procedural safeguards."[74] The Duarte Family Plaintiffs, notwithstanding the District Court's adoption of the Magistrate's finding, did not "fai[l] to identify what procedure was due, lacking, and/or inadequate."[75]

As with Plaintiff Aurelio Duarte's individual procedural due process claim, the Duarte Family Plaintiffs contend that the Court of Appeals must reverse the District Court's ruling which found they hold no constitutionally protected "private interest," and remand this case with directions that the District Court consider the two remaining factors pertinent to Plaintiff's procedural due process claims in accordance with *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). And again, the Duarte Family Plaintiffs do not view it appropriate, under these circumstances, for the Court of Appeals at this juncture to consider the remaining two *Mathews v. Eldridge* factors itself, and thereby resolve Plaintiff's procedural due process claims in the first instance. In the alternative, should the Court of Appeals deem it appropriate to consider the merits of the Duarte family Plaintiffs' procedural due process claims under the remaining two factors stated in *Mathews v. Eldridge*, they

[74] *Mathews v. Eldridge*, *supra*, 424 U.S. at 335.
[75] CR IV, 1399, *District Court Memo. Op*., 16 (Dkt.#95), **Rec.Ex., 3**, citing CR IV, 1357-1359, *Magistrate's Report and Recommendation*, 38-40 (Dkt.# 91), **Rec.Ex., 4**.

would incorporate by reference the argument previously submitted by Plaintiff Aurelio Duarte concerning those factors above.[76]

ISSUE THREE: *Whether the District Court Erred When Ruling Appellant Aurelio Duarte's Equal Protection Claim must Fail as a Matter of Law Because, under the Deferential Rational Basis Test Applicable this Claim, the Disparate Treatment Provided by Appellee City's Sex Offender Residency Restriction Ordinance, Between Persons under Community Supervision, and Appellant Aurelio Duarte (Who is Not under Community Supervision), "Rationally Advances" or is "Related to" a Legitimate Governmental Purpose*?[77]

Under its second ground for summary judgment Defendant City contended that Plaintiff Aurelio Duarte's equal protection claim must fail as a matter of law because, under the deferential rational basis applicable to that claim, its SORRO "rationally advances a legitimate governmental purpose."[78] The Defendant's argument, and the analyses upon which it is based, both of which were adopted by the District Court, is erroneous. Before proceeding to discuss the District Court's errors under this issue in

[76] See, this Brief, *supra*, at 24-28.
[77] CR IV, 1378-1381, *Pltfs. Objections to Mag.'s Report*, 11-14 (Dkt.#94), **Rec.Ex., 5**; CR IV, 1387-1392, *District Court Memo. Op.*, 4-9 (Dkt.#95), **Rec.Ex, 3**.
[78] CR II, 546, 557, 563, *Def. City's Second MSJ* (Dkt.#70).

greater detail, however, it is necessary for purposes of context to describe the nature of Plaintiff Aurelio Duarte's Equal Protection claim.

A) *Equal Protection Claim.*

Article 42.12, Section 13B of the Texas Code of Criminal Procedure provides in relevant part that:

> "(a) If a judge grants community supervision to a defendant described by Subsection (b) and the judge determines that a child as defined by Section 22.011(c), Penal Code, was the victim of the offense, the judge shall establish a child safety zone applicable to the defendant by requiring as a condition of community supervision that the defendant:
>
> (1) not:
>
> "(B) go in, on, or within 1,000 feet of a premises where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming pool, or video arcade facility."

Article 42.12, Section 13B further provides that:

> "(e) At any time after the imposition of a condition under Subsection (a)(1), *the defendant may request the court to modify the child safety zone applicable to the defendant because the zone as created by the court*:
>
> (1) interferes with the ability of the defendant to attend school or hold a job and consequently constitutes an undue hardship for the defendant; or
>
> (2) *is broader than is necessary to protect the public, given the nature and circumstances of the offense*. (italics added)

Further, as noted by the Magistrate,[79] Defendant's SORRO provides that it *does not apply* to restrict the location of a registered sex offender's residence if:

> "*The person was at the time of the violation [of the SORRO] subject to community services supervision* pursuant to Section 13B of Article 42.12 of the Texas Code of Criminal Procedure, as amended, *and the court reduced or waived the one thousand foot (1,000') restriction for a child free zone* under Section 13B(a)(1)(B) of Article 42.12 of the Texas Code of Criminal Procedure, as amended, as it applies to the person's residence."[80]

The foregoing provision of Defendant's SORRO places persons into two classes, both of which comprise persons who are required to register a Sex Offenders under Texas statutory law. One class ("Class 1") consists of offenders who, at the time of their residence, are under community supervision, but who have been (or may be) judicially relieved from compliance with the "child safety zone" otherwise required as a condition of supervision of community supervision under Article 42.12, Section 13B of the Texas Code of Criminal Procedure.[81] Article 42.12, Section 13B, as shown above, provides, *inter alia*, that persons on community supervision may apply to the State District Court monitoring their community

[79] CR IV, 1356, *Magistrate's Report and Recommendationt*, 37 (Dkt.#91), **Rec.Ex., 4**.
[80] CR II, 581-582, *Exhibit 1 Appended to Def. City's Second MSJ*, 4-5 (Dkt.#70-3), **Rec.Ex., 7**.
[81] *See*, CR II, 581-582, *Exhibit 1 Appended to Def. City's Second MSJ*, 4-5 (Dkt.#70-3), **Rec.Ex., 7**.

supervision and request that the statutory "child safety zone" imposed as a condition of community supervision be removed upon a showing that the condition "is broader than necessary to protect the public given the nature and circumstances of the offense."[82] When relief is granted on this ground by the State District Court monitoring a probationer's community supervision, registered sex offenders on community supervision *are not* subject to enforcement of the Defendant's SORRO, as provided by the literal terms of the Defendant's SORRO.[83]

In a second class ("Class 2"), which includes Plaintiff Aurelio Duarte, are offenders *who are not* currently subject to community supervision. These individuals, being required to register as sex offenders under State law (as are the offenders in Class 1), are required to comply with Defendant's SORRO or risk a fine not exceeding $500.00 per day for each violation.

Plaintiff Aurelio Duarte contends that imposition of the residency restriction on him, but not on the first class of offenders under Defendant's SORRO (i.e., offenders who are under community supervision and have been [or may be] judicially relieved from compliance with a "child safety zone"), deprives him of Equal Protection under Law. By Defendant's own admission, the residency restriction is not imposed as the result of, and does

[82] CR IV, 1391 n. 4, *District Court Memo. Op*., 8 n.4 (Dkt.#95), **Rec.Ex., 3**.
[83] CR II, 580, *Exhibit 1 Appended to Def. City's Second MSJ*, 3 (Dkt.#70-3), **Rec.Ex., 7**.

not attempt to be justified by, any greater threat to the community posed by Plaintiff Aurelio Duarte's class, and arising from a lack of sexual control. Indeed, and once again, the Defendant City has repeatedly argued that its SORRO makes no distinction between persons who may, and persons who assuredly do not, pose a threat to the community by reason of a lack of sexual control.[84] Rather, the "triggering event" which results in application and enforcement of the SORRO, for persons who are not on community supervision such as Plaintiff Aurelio Duarte, is a person's "inclusion on the Texas Sex Offender Registry."[85] In turn, the statutory requirement to register as a Sex Offender under Texas law is not imposed as the result of, and does not attempt to be justified by, any greater threat to the community arising from a lack of sexual control posed by Plaintiff Aurelio Duarte or his class.

B) ***District Court's Ruling on Equal Protection Claim.***

In three respects the District Court erred when ruling Plaintiff Aurelio Duarte's equal protection claim should be dismissed. First, the District Court applied an inappropriate level of deferential scrutiny to Defendant's SORRO

[84] CR I, 57; *Def. City's MTD*, 20 (Dkt.# 6)("The ordinance does not require an individual showing of dangerousness."); CR IV, 564; *Def. City's Second MSJ* (Dkt.#70)(same).
[85] CR II, 546, 564, *Def. City's Second MSJ* (Dkt.#70). Article 62.001(5) of the Texas Code of Criminal Procedure enumerates offenses for which conviction requires registration under Texas statutory law.

when considering Plaintiff equal protection claim.[86] Second, the District Court erred when ruling the disparate treatment Plaintiff has identified is irrelevant to disposition of his equal protection claim.[87] Third, the District Court erred when ruling Defendant's SORRO "does not create a distinction or classification between child sex offenders" who are on community supervision and those, like Plaintiff Aurelio Duarte, who are not.[88]

With regard to the first error of the District Court,[89] the Supreme Court has ruled that "strict scrutiny" should be applied to classifications involving race, alienage and national origin, because those factors…

> "…are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy — a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."[90]

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[86] CR IV, 1389 and n. 2, *District Court Memo. Op.*, 6 n.2 (Dkt.#95), **Rec.Ex., 3** ("[t]he 'test' advocated by A. Duarte is not the test described by the Supreme Court in *Cleburne [v. Cleburne Living Center, Inc*., 473 U.S. 432 (1985]").

[87] CR IV, 1389 n. 2, *District Court Memo. Op.*, 6 n. 2 (Dkt.#95), **Rec. Ex., 3** ("there is no need to identify a second characteristic that distinguishes A. Duarte in relation to other child sex offenders").

[88] CR IV, 1391, *District Court Memo. Op.*, 8 (Dkt.#95), **Rec.Ex., 3**.

[89] CR IV, 1389 and n. 2, *District Court Memo. Op.*, 6 n. 2 (Dkt.#95), **Rec. Ex., 3** ("[t]he 'test' advocated by A. Duarte is not the test described by the Supreme Court in *Cleburne [v. Cleburne Living Center, Inc*., 473 U.S. 432 (1985]").

[90] *Cleburne v. Cleburne Living Center, Inc*., 473 U.S. 432, 440 (1985).

Similar judicial oversight is due when state laws impinge on personal rights protected by the Constitution.[91] At the other end of the spectrum, the Supreme Court has stated that because the Equal Protection Clause generally allows wide latitude in the area of social and economic legislation, heightened scrutiny is inappropriate. With regard to classifications not subject to strict or intermediate scrutiny, the Supreme Court has held that:

> "[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement…the Equal Protection Clause requires only a rational means to serve a legitimate end."[92]

Plaintiff Aurelio Duarte contends that his Equal Protection claim (inequality between Classes 1 and 2) must be analyzed with "strict scrutiny," for the reason that Defendant's SORRO "impinge[s] on personal rights protected by the Constitution" (the right to "liberty");[93] for the reason that Defendant's SORRO is grounded on considerations that "reflect prejudice and antipathy — a view that those in the burdened class are not as worthy or deserving as others";[94] and for the reason that such discrimination "is unlikely to be soon rectified by legislative means."[95]

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[91] *Cleburne v. Cleburne Living Center, Inc*., *supra,* 473 U.S. at 440.
[92] *Cleburne v. Cleburne Living Center, Inc*., supra, 473 U.S. at 441.
[93] *Cleburne v. Cleburne Living Center, Inc*., *supra,* 473 U.S. at 440.
[94] Ibid.
[95] Ibid.

In the alternative, Plaintiff Aurelio Duarte contends that his Equal Protection claim (inequality between Classes 1 and 2) must be analyzed under the more deferential "rational basis" test. Under this more deferential test the Defendant must show that Plaintiff Aurelio Duarte's class (Class 2) has a "distinguishing characteristic," in relation to those exempted by the SORRO (Class 1), that is "relevant to interests the State has the authority to implement."[96] Furthermore, under this standard Defendant must demonstrate that the different and greater burden imposed on Plaintiff Aurelio Duarte (by enforcement of the SORRO), in relation to Class 1 members who are not so burdened, constitutes a "rational means to serve a legitimate end."[97] The Plaintiff respectfully submits that the District Court erred when it adopted a more deferential level of scrutiny that merely inquired whether Defendant's SORRO was "rationally related to a legitimate government purpose."[98]

The second error assigned by Plaintiff to the District Court's equal protection analysis is that the District Court erred when ruling the disparate treatment of Plaintiff is irrelevant to disposition of Plaintiff's equal protection claim. Specifically, Plaintiff refers to the District Court's ruling that "the individuals affected by the Ordinance have 'distinguishing

[96] *Cleburne v. Cleburne Living Center, Inc*., *supra,* 473 U.S. at 441.
[97] Ibid.
[98] CR IV, 1389-1390, *District Court Memo. Op*., 6-7 (Dkt.#95), **Rec.Ex., 3**.

characteristics' of being convicted child sex offenders, and there is no need to identify a second characteristic that distinguishes A. Duarte in relation to other child sex offenders."[99] By this means, the District Court effectively glossed over Plaintiff's claim, which is that the disparate treatment accorded to Plaintiff, in relation to registrants on community supervision, cannot be shown (even under the level of scrutiny employed by the District Court) to be "rationally related to a legitimate government purpose."[100]

After more than almost four (4) years of litigation, Defendant has not yet attempted, or even been required, to explain how the disparate treatment applied by Defendant's SORRO to Plaintiff, in contrast to registrants on community supervision, is "rationally related to a legitimate government purpose." And the District Court, apparently unable to comprehend such a "legitimate" purpose itself, has erroneously ruled that "there is no need to identify a second characteristic that distinguishes A. Duarte in relation to other child sex offenders."[101] With this ruling, the District Court has effectively excused Defendant from identifying or assigning any rationale whatsoever to that disparate treatment, about which Plaintiff has persistently

[99] CR IV, 1389 n. 2, *District Court Memo. Op.*, 6 n. 2 (Dkt.#95), **Rec. Ex., 3** ("there is no need to identify a second characteristic that distinguishes A. Duarte in relation to other child sex offenders").
[100] CR IV, 1389-1390, *District Court Memo. Op*., 6-7 (Dkt.#95), **Rec.Ex., 3**.
[101] CR IV, 1389 n. 2, *District Court Memo. Op.*, 6 n.2 (Dkt.#95), **Rec. Ex., 3** ("there is no need to identify a second characteristic that distinguishes A. Duarte in relation to other child sex offenders").

complained. Instead, the District Court, by this means, was enabled to adopt the Magistrate's conclusion concerning an issue unrelated to Plaintiff's actual equal protection claim. Thus, instead of addressing Plaintiff's equal protection claim, the District instead chose to answer its own question, to wit: whether "the Ordinance," generally, *as it applies to both registrants both on and off community supervision*, "rationally advances the government's interest in protecting children from risk of recidivism among child sex offenders."[102]

The third error assigned by Plaintiff to the District Court's equal protection analysis is that the District Court erred when ruling Defendant's SORRO "does not create a distinction or classification between child sex offenders" who are community supervision and other registrants, like Plaintiff Aurelio Duarte, who are not.[103] In this connection, the District Court's analysis of Plaintiff's equal protection claim is both factually mistaken, and incomprehensibly illogical.

The constitutional violation Plaintiff alleges involves the right to "equal protection under law," not a right to be free from "distinctions" or "classifications," rational or otherwise (although distinctions and classifications, if irrational, may lead to unconstitutional deprivation of the

[102] CR IV, 1390, *District Court Memo. Op.*, 7 (Dkt.#95), **Rec. Ex., 3**.
[103] CR IV, 1391, *District Court Memo. Op.*, 8 (Dkt.#95), **Rec. Ex., 3**.

constitutional right to "equal protection of law"). There can be no dispute, moreover, that under Defendant's SORRO the treatment and protection of law provided to registrants on community supervision differs from the treatment and protection of law provided to registrants who are not on community supervision, like Plaintiff Aurelio Duarte. As authorized by Defendant's SORRO and State law, registrants on community supervision are afforded an individualized assessment of recidivist risk, and may be exempted from compliance with the SORRO on that basis; registrants who are not on community supervision, like Plaintiff Aurelio Duarte, are not afforded an individualized determination of recidivist risk, and may not be exempted from compliance with the SORRO on that basis. This is a clear, undisputed fact; and the District Court's misunderstanding or unintentional obfuscation of this fact does not alter things.

Additionally, as stated, the District Court's single effort to justify the aforementioned disparate treatment, or to ostensibly provide a "rational basis" for it, is not only illogical but incomprehensibly so. When the District Court does eventually attempt, fleetingly, to identify the "rational basis" upon which the identified unequal treatment under law rests, it asserts the unequal treatment identified by Plaintiff is "rational" because a State District Court's statutory finding, that a "child safety zone" is "broader than

necessary to protect the public," *is "only one" way*, among other ways, whereby a registrant on community supervision may be exempted from compliance with Defendant's SORRO.[104] While the fact asserted by the District Court is inarguably true, one is left to wonder in what universe the existence of this fact provides any rational basis for the SORRO's unequal treatment between registrants on community supervision, and those like Plaintiff who are not.

C) *There is No Rational Basis.*

Insofar as the "advancement" or "rational relationship" to Defendant's governmental interest in protecting children, Defendant has failed to demonstrate that the unequal treatment authorized by its SORRO in any way advances or is related to that legitimate objective. As authorized by Defendant's SORRO, registrants on community supervision who are afforded an individualized assessment of recidivist risk under State law, may be exempted from compliance with the SORRO on that basis; registrants who are not on community supervision, like Plaintiff Aurelio Duarte, are not afforded an individualized determination of recidivist risk (under State law or otherwise), and may not be exempted from compliance with the SORRO on that basis. We know this intentional, disparate treatment *is not* predicated

[104] CR IV, 1391-1392, *District Court Memo. Op*., 8-9 (Dkt.#95), **Rec. Ex., 3**.

on any perceived or claimed distinction between the relative sexual threat posed by Plaintiff Aurelio Duarte, as compared to members of the first class exempted by the express terms of the SORRO (those on community supervision), because again, Defendant has repeatedly argued that application and enforcement of its SORRO makes no distinction between persons who may, and persons who assuredly do not, pose a threat to the community by reason of a lack of sexual control.[105] There simply is no conceivable, rational basis upon which to conclude that this disparity in treatment either "advances" or is "rationally related to" Defendant's asserted governmental interest in protecting children.

CONCLUSION

The District Court erred, when considering Plaintiff Aurelio Duarte's procedural due process claim, by ruling that he does not hold a "private interest" within the meaning of *Mathews v. Eldridge*, 424 U.S. 319 (1976), that is constitutionally protected under the Fourteenth Amendment. The District Court also erred, when considering the Duarte Family Plaintiffs' procedural due process claim, by ruling they do not hold a "private interest" within the meaning of *Mathews v. Eldridge*, 424 U.S. 319 (1976), that is constitutionally protected under the Fourteenth Amendment. Finally, the

[105] CR IV, 564; *Def. City's Second MSJ* (Dkt.#70)(enforcement of the SORRO does not depend on "an individual showing of dangerousness.").

District Court erred when failing to rule that Defendant's SORRO, by its irrationally disparate and unequal treatment of registered offenders, does not violate Plaintiff Aurelio Duarte's constitutional right to Equal Protection under the Fourteenth Amendment.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray the Judgment of the District Court in this case will REVERSED, and that this case will be remanded to the District Court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that two (2) true and correct paper copies of the foregoing brief, along with a computer-readable disk copy thereof, and a copy of Appellants' Record Excerpts along with a computer-readable disk copy thereof, have been served on the Appellee City of Lewisville by service on its attorney-in-charge, Wm. Andrew Messer, by U.S. mail, at his office

address, 6351 Preston Rd., Ste. 350, Frisco, Texas 75034, on this 26th day of January, 2016, in accordance with the Federal Rules of Appellate Procedure.

Additionally, undersigned counsel for Appellant certifies that on January 26, 2016, in accordance with Local Rule 31.1, the original and seven (7) paper copies of the foregoing brief; as well as four (4) paper copies of Appellants' Record Excerpts, were sent via U.S. mail to Mr. Lyle W. Cayce, Clerk, U.S. Court of Appeals for the Fifth Circuit, 600 S. Maestri Place, New Orleans, Louisiana 70130, in accordance with the Federal Rules of Appellate Procedure.

/s/ *Richard Gladden*

CERTIFICATE OF COMPLIANCE

This is to further certify that this brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B)(i) because it contains not more than 8,600 words, which is within the 14,000 word limitation imposed by Fed.R.App.P. 32(a)(7)(B)(i).

/s/*Richard Gladden*