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' REPLY BRIEF

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APPELLANTS' REPLY 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' Reply Brief on Appeal* and in this connection would respectfully show unto the Court as follows:

DISPUTED ISSUES OF FACT

For the most part Appellants (hereafter "Plaintiffs") do not disagree with the assertion of Appellee City of Lewisville (hereafter "Defendant") that the facts in the present case are "undisputed."[1] Indeed, the relevant facts identified by the Court of Appeals on the prior appeal of this case remain unaltered.[2] Certain alleged "facts" stated in Appellee's Brief on this appeal, however, are in error.

[1] *Appellee's Brief,* 5.
[2] *See, Duarte v. City of Lewisville*, 759 F.3d 514, 516 (5th Cir. 2014).

Contrary to Defendant's unsupported assertion, Plaintiffs did not "move to" the City of Lewisville *after* Plaintiff Aurelio Duarte discharged his sentence to confinement in the Institutional Division of the Texas Department of Corrections in 2010.[3] Rather, Plaintiffs alleged in their Original Complaint that they resided in the City of Lewisville prior to the revocation of Aurelio Duarte's community supervision in June of 2007;[4] and in the District Court, Plaintiffs submitted affidavits into the record establishing that they have, and did have prior to Plaintiff Aurelio Duarte's confinement in 2007, life-long, "deep roots" in the City of Lewisville.[5] The Magistrate itself found the "Parties seemingly agree Plaintiffs have deep roots in the City of Lewisville."[6]

Additionally, contrary to Defendant's unsupported assertion that Plaintiff Aurelio Duarte is "dangerous,"[7] Plaintiff is not "dangerous" and no arbiter of fact has ever made such a finding. In this connection, Defendant attempts to characterize Plaintiff Aurelio Duarte as "dangerous" is based

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[3] *Appellee's Brief*, 2.

[4] **ROA.17** (*Plaintiff's Original Complaint*)(Dkt.#1), **Record Excerpt 7, p. 4.** Hereinafter, citations to 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., 7**"). No hearings were conducted or recorded in the District Court so no reporter's record is included in the record on this appeal.

[5] **ROA.355** (Plaintiff Wynjean Duarte Affidavit)(Dkt.#39-1); **ROA.366-367** (Plaintiff Aurelio Duarte Affidavit)(Dkt.#39-3), **Rec.Ex., 9**.

[6] **ROA.1324**, *Magistrate's Report and Recommendation*, 5 (Dkt.#91); **Rec.Ex., 5, p. 5**.

[7] *Appellee's Brief*, 27 (asserting Plaintiff Aurelio Duarte is "dangerous" "according to the state's consistent finding").

solely upon the Magistrate's *sua sponte* interpretation of two *ex parte* administrative assessments by unknown Texas officials, one of which classified Plaintiff Aurelio Duarte as a "low risk" for recidivism, and a subsequent assessment which, without explanation, classified Plaintiff as a "moderate risk" of recidivism. In this regard, Plaintiffs do not dispute that, in accordance with Article 62.007 of the Texas Code of Criminal Procedure, an unknown committee of governmental actors initially (at some unknown point in time) classified Plaintiff Aurelio Duarte as a person who poses a "low risk" of harm to children. Nor do Plaintiffs dispute that this classification was elevated to "moderate," for unknown reasons, by the unknown governmental committee at some point thereafter, as the Magistrate has found.[8] The Plaintiffs would, however, again emphatically object to the Magistrate's *sua sponte* interpretation that these assessments validly either "indicate," or establish, that Plaintiff Aurelio Duarte poses now, or has ever posed, "a moderate danger to the community and may continue to engage in criminal sexual conduct."[9]

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[8] **ROA.1322** and **ROA.1357**, *Magistrate's Report and Recommendation,* 3, 38 (Dkt.#91); **Rec.Ex., 5**.

[9] This specific objection to the Magistrate's Report and Recommendation was included in Plaintiff's written objections (to the Magistrate's report) presented to the District Court. **ROA.1375-1377**; *Pltfs. Objections to Mag.'s Report,* 8-10 (Dkt.#94), **Rec.Ex., 6.**

REPLY TO ARGUMENTS OF APPELLEE

I. *The Plaintiffs Have Not "Abandoned" or "Waived" their Requests for Prospective Remedial Relief, and Attorney's Fees, Arising from their Claims Alleging the Violation of their Rights to Procedural Due Process and to Equal Protection.*

In their written objections to the Magistrate's Report and Recommendation, Plaintiffs informed the District Court that Plaintiff Aurelio Duarte, after the Magistrate's report and recommendation was rendered, had elected to abandon his claims resting on the Ex Post Facto Clause of Article I, Section 10 of the U.S. Constitution, and his claims resting on the Double Jeopardy Clause of the Fifth Amendment. In other words, Plaintiff Aurelio Duarte notified the District Court that he, individually, would confine his objections to that part of the Magistrate's report which denied his claims alleging deprivations of his constitutional rights to procedural Due Process and Equal Protection.[10]

In its first responsive issue on appeal, Defendant contends that *all Plaintiffs* on this appeal, due to the foregoing limitation of review expressed by Plaintiff Aurelio Duarte, have "abandoned" or "waived" their requests for remedial relief, including prospective equitable relief and attorney's fees (as

[10] **ROA.1370**, *Pltfs. Objections to Mag.'s Report*, 3 (Dkt.#94), **Rec.Ex, 6**

well as court costs, presumably), even should they prevail on one or more of the constitutional claims they have undeniably preserved for review on this appeal.[11] In this regard, Defendant also contends that *all Plaintiffs* on this appeal, due to the foregoing limitation of review expressed by Plaintiff Aurelio Duarte on this appeal, have "abandoned" or "waived" any future entitlement to remedial relief, including prospective equitable relief and attorney's fees (as well as court costs, presumably). In short, Defendant contends Plaintiffs' actions have caused such an "abandonment" and "waiver" by failing to include in their opening brief on this appeal argument asserting how they would be, as "prevailing parties," entitled to declaratory relief, injunction relief and attorney's fees, as well as by failing to include in their opening brief argument explaining how Title 42 U.S. C. Section 1983 provides a statutory vehicle to remedy the constitutional violations they continue to allege. The Defendant's contention on this point is frivolous; none of the decisional law cited by Defendant in support of this argument is remotely apposite;[12] and Defendant's contention on this point must be overruled.

[11] *Appellee's Brief*, 17.
[12] *Appellee's Brief*, 17, citing *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 960-61 (5th Cir. 2012); and *Sanders v. Unum Life Ins. Co. of America*, 553 F.3d 922, 926 (5th Cir. 2008).

II. *A "Private Interest," for Purposes of Procedural Due Process Analysis under Mathews v. Eldridge, Need Not Be Recognized as a "Fundamental Constitutional Right" under the Fourteenth Amendment.*

In *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005), the U.S. Supreme Court held that:

> "The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake. A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty.'"

As described by Plaintiffs in their opening brief,[13] the District Court below, relying on the three–Member plurality opinion in *Kerry v. Din*, --- U.S. ---, 135 S.Ct. 2128 (2015), ruled that Plaintiffs have not alleged a "private interest" cognizable as a "liberty interest" within the meaning of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), because they have failed to demonstrate that their 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

[13] *Appellants' Brief*, 16-17.

liberty, such that neither liberty or justice would exist" without its recognition.[14]

Although it is manifestly clear that the District Court erroneously overlooked the fact that the three–Member plurality opinion in *Kerry v. Din*, upon which it relied, does not constitute a controlling opinion of the Supreme Court; the Defendant, in its responsive brief, continues to knowingly quote that three–Member plurality opinion as if it were a controlling authority rendered by the Supreme Court.[15] Yet, as observed by the four-Member dissenting opinion in *Kerry v. Din*, 135 S.Ct. at 2142 (Breyer, J., joined by Ginsburg, Sotomayor and Kagan, JJ.), Supreme Court precedent rendered prior to the fractured decision in *Kerry v. Din* "make[s] clear that the Due Process Clause entitles" a person to procedural due process analysis under the Fourteenth Amendment as long as the person identifies "a liberty interest sufficiently important for procedural protection to flow 'implicit[ly]' from the design, object, and nature of the Due Process Clause." *Kerry v. Din*, 135 S.Ct. at 2142 (Breyer, J., joined by Ginsburg, Sotomayor and Kagan, JJ.), quoting *Wilkinson v. Austin*, *supra*, 545 U.S. at 221.

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[14]**ROA.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.).

[15] *Appellee's Brief*, 21.

While the Defendant, and the three–Member plurality opinion in *Kerry v. Din*, have attempted to distinguish several prior Supreme Court decisions that have found a variety of private interests "sufficiently important" to warrant procedural due process analysis;[16] it is (and remains) the "sufficiently important" standard, established by a majority of the Court in *Wilkinson v. Austin*, *supra,* 545 U.S. at 221, and not the "fundamental" and "deeply rooted" standard utilized in "substantive" due process analysis, as provided by *Washington v. Glucksburg*, 521 U.S. 702, 723-724 (1997), that applies to determine whether the "private interests" identified by Plaintiffs requires further procedural due process analysis under *Mathews v. Eldridge*, *supra*. It is for precisely this reason that the intermediate appellate and District Court authorities cited by Defendant, which have held the private interests identified by Plaintiffs are not a "fundamental" constitutional rights requisite for procedural due process analysis,[17] are likewise in error.

In the present case, the Court of Appeals must determine, under Issues One and Two of Plaintiffs' opening brief, whether the two separate (but related) private interests identified by Plaintiff Aurelio Duarte, and by

[16] *Appellee's Brief*, 21-23; *Kerry v. Din*, *supra,* 135 S.Ct. at 2137-2138 (three–Member plurality opinion).
[17] *Appellee's Brief*, 25-26 (citing persuasive authorities).

Plaintiff Aurelio Duarte together with his wife Plaintiff Wynjean Duarte, and their two daughters, respectively, constitute "liberty interest[s] sufficiently important for procedural protection to flow 'implicit[ly]' from the design, object, and nature of the Due Process Clause." *Kerry v. Din*, 135 S.Ct. at 2142 (Breyer, J., joined by Ginsburg, Sotomayor and Kagan, JJ.), quoting *Wilkinson v. Austin*, *supra*, 545 U.S. at 221. The relevant question is not whether or not those private interests would satisfy criteria to establish a "fundamental" constitutional right for "substantive" due process analysis under *Washington v. Glucksburg*, *supra*. The District Court erred when it ruled otherwise.

III. *The Disparate Treatment Provided under Defendant's SORRO, between Sex Offender Registrants who are and who are not under Judicial Community Supervision, Fails to Meet Even the "Rational Basis" Level of Scrutiny under the Equal Protection Clause.*

As previously explained in Plaintiffs' opening brief, under Defendant's sex offender residency restriction ordinance ("SORRO"), registrants on community supervision are afforded an individualized assessment of recidivist risk under State law, and may be judicially exempted from compliance with the SORRO, under the terms of

Defendant's SORRO, depending on the outcome of that judicial assessment. Conversely, 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 within Defendant's SORRO *is not* predicated 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.[18] For this reason, Defendant's assertion that the disparate treatment authorized by its SORRO is rationally related to its legitimate interest in protecting children from sexual abuse, at the hands of *all registrants*, regardless of whether they are on community supervision or not,[19] and regardless of whether they pose any threat to children by reason of a lack of sexual control, is without merit.

[18] **ROA.564**; *Def. City's Second MSJ* (Dkt.#70)(enforcement of the SORRO does not depend on "an individual showing of dangerousness.").
[19] Appellee's Brief, 44-45.

Plaintiff Aurelio Duarte adheres to his contention that the nature of the private interest he holds, which is deprived by the disparate treatment he has identified, requires that "strict scrutiny" be applied to determine whether Defendant's SORRO violates the Equal Protection Clause.[20] Without waiving that argument however, Plaintiff Aurelio Duarte in this reply brief would again assert that Defendant's SORRO must be invalidated under the Equal Protection Clause even under the more deferential "rational basis" test discussed in *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).[21]

In response to Plaintiff Aurelio Duarte's contention that there simply is no conceivable, rational basis upon which to conclude that the identified disparity in treatment either "advances" or is "rationally related to" Defendant's asserted governmental interest in protecting children; Defendant, for the first time on this appeal, has now asserted that its SORRO's disparate treatment between registrants is rationally related to its legitimate governmental interest in "defer[ing] to an existing court order" for the purpose of "avoid[ing] potentially conflicting orders."[22] That asserted basis for the identified disparate treatment, however, cannot serve as a

[20] See, *Appellants' Brief*, 39-40.
[21] *Appellants' Brief*, 41.
[22] *Appellee's Brief*, 36.

rational basis designed to serve any legitimate governmental interest. This is so for the simple reason that the interplay between Article 42.12, Section 13B of the Texas Code of Criminal Procedure ("Section 13B"), and Defendant's SORRO, *does not give rise to any* "conceivable" or "potential conflict" between a court order issued under Section 13B and the uniform enforcement of Defendant's SORRO (without the identified disparity in treatment the SORRO authorizes).

As shown by the text of Section 13B, which has been set out by Plaintiffs in their opening brief,[23] judicial relief when granted under Section 13B, after a registrant's individualized assessment of risk, may remove a general condition of community supervision that prohibits a registrant from "go[ing] in, on, or within 1,000 feet of a premises where children commonly gather." Such judicial relief does not "order" or compel anyone to do anything; and it neither removes, nor grants a registrant affirmative relief from, Defendant's independent residency restriction that prohibits a registrant 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."[24] In other words, the judicial relief authorized by Section 13B, when granted, does not authorize a registrant to

[23] *Appellants' Brief*, 35.
[24] **ROA.580**, *Exhibit 1 Appended to Def. City's Second MSJ*, 3 (Dkt.#70-3), **Rec.Ex., 8**.

"reside" within either "1,000 feet," or "1,500 feet," of any premises "where children commonly gather." Thus, judicial relief granted under Section 13B does not give rise to any "conceivable" or "potential conflict" with the uniform or "equal" enforcement of Defendant's SORRO (without the identified disparity in treatment the SORRO authorizes).

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, 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 20th day of April, 2016, in accordance with the Federal Rules of Appellate Procedure.

Additionally, undersigned counsel for Appellant certifies that in accordance with Local Rule 31.1, and upon the Clerk's acceptance and filing of this Reply Brief, the original and seven (7) paper copies of this Reply Brief will be 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 reply brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(A) because it contains not more than 2,480 words, which is within the 7,000 word limitation imposed by Fed.R.App.P. 32(a)(7)(B)(ii).

/s/*Richard Gladden*