Case No. 15-41456

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AURELIO DUARTE; WYNJEAN DUARTE;
S.D. A MINOR, BY AND THROUGH WYNJUEAN DUARTE,
ACTING AS HER NEXT FRIEND; 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

APPELLEE'S BRIEF

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CERTIFICATE OF INTERESTED PARTIES

Counsel for City of Lewisville, Texas, Appellee, certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in that the judges of this court may evaluate possible disqualification or recusal:

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STATEMENT REGARDING ORAL ARGUMENT

Appellee City of Lewisville, Texas respectfully requests oral argument because this case involves important constitutional issues of first impression in the Fifth Circuit. The district court properly dismissed appellants' claims in their entirety, as appellants claim a constitutional right to reside wherever they desire, unrestrained by the City of Lewisville's compelling governmental interest in protecting minor children in its communities. The City believes that oral argument will materially aid the Court in resolving this appeal.

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APPELLEE'S BRIEF

The City of Lewisville ("City" or "Lewisville") has, like many Texas municipalities, made a legislative determination that the children in its communities would be better protected by ensuring that convicted, registered child sex offenders do not reside within 1,500 feet of areas where children commonly gather. Appellant Aurelio Duarte ("A. Duarte") is such an offender and has claimed throughout this litigation that he has a constitutional right to reside wherever he desires, unimpeded by the City's laudable and commonsense goal of protecting its most vulnerable citizens, children, from harm.

In her report and recommendation below, the Magistrate Judge laid out in a thorough and clear manner why A. Duarte's claims—and the claims of his family—fail. The district court below correctly adopted the report and recommendation in its entirety and dismissed appellants' claims with prejudice. The City has been forced to defend its constitutional ordinance for over four years. In all that time, appellants have been entirely unable to identify the existence of any constitutional right that the City's ordinance violates. The City respectfully requests that this Court affirm the judgment of the district court, dismiss appellants' claims with prejudice, and allow the City to continue to protect children in Lewisville communities.

I.
STATEMENT OF THE ISSUES

1. Whether the judgment of the district court should be affirmed;
2. Whether appellants have abandoned their *ex post facto*, double jeopardy, injunctive relief, declaratory judgment, 42 U.S.C. § 1983, and attorneys' fees claims;
3. Whether the district court correctly dismissed Aurelio Duarte's due process claims;
4. Whether the district court correctly dismissed Wynjean Duarte's, Brandi Duarte's and Savana Duarte's due process claims; and
5. Whether the district court correctly dismissed Aurelio Duarte's equal protection claim.

II.
STATEMENT OF THE CASE

A. Nature of the Case

A. Duarte is a convicted, registered child sex offender. After his release from the Texas penitentiary, A. Duarte, wife Wynjean Duarte ("W. Duarte") and children Brandi Duarte ("B. Duarte") and Savana Duarte ("S. Duarte") moved to Lewisville. The City of Lewisville had enacted a child sex offender protective zone ordinance to prohibit child sex offenders from living within 1,500 feet from areas where children commonly gather. At all times material, the appellants have lived together as a family unit, and the City Ordinance does not address with whom a convicted child sex offender may live.

Appellant A. Duarte, his wife, and children filed suit against the City of Lewisville attacking the constitutionality of the Lewisville child predator protective zone ordinance, seeking damages, declaratory and injunctive relief for alleged civil rights violations under 42 U.S.C. § 1983 for claimed violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Double Jeopardy Clause of the Fifth Amendment, and the *Ex Post Facto* Clause of Article I, Section 10 to the United States Constitution. Appellants have abandoned their *ex post facto*, double jeopardy, injunctive relief, declaratory judgment, 42 U.S.C. § 1983, and attorneys' fees claims.

B. Course of Proceedings and Disposition in the Court Below

Appellants filed suit against the City of Lewisville on March 26, 2012. [ROA14-30]. The City filed a motion to dismiss pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. [ROA.38-63]. The Magistrate Judge in his report and recommendation of August 14, 2012, recommended dismissal of all claims based on standing [ROA.210-216], to which the appellants objected. [ROA.218-229]. On October 23, 2012, the district court issued an order sustaining in part appellants' objections to the Magistrate Judge's report and recommendation, wherein all appellants but A. Duarte were dismissed for lack of standing. [ROA.231-238].

After conducting discovery, the City filed its motion for summary judgment with supporting evidence on November 30, 2012, alleging in part that the remaining plaintiff A. Duarte lacked standing, and on May 22, 2013, the report of the Magistrate Judge was entered containing proposed findings of fact and a recommendation that the City's motion for summary judgment be granted. [ROA.442-452].

On June 4, 2013, A. Duarte objected to the Magistrate Judge's findings and recommendation. [ROA.453-467]. On July 2, 2013, the district court adopted the Magistrate Judge's findings and entered an order granting the City's motion for summary judgment. [ROA.475-479]. In accordance with the aforementioned orders, on July 3, 2013, the district court entered a final judgment in favor of the City and dismissing the appellants' claims with prejudice. [ROA.480]. Appellants filed a notice of appeal on July 24, 2013 [ROA.481-482], which resulted in the first appeal in this matter, Cause No. 13-40806 (the "first appeal"). This Court issued an opinion on July 22, 2014, reversing the judgment of the district court and remanding the case to the district court. *Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514 (5th Cir. 2014). The first appeal dealt only with standing of the appellants and not the merits of their claims.

Following remand, the City filed its motion for summary judgment on the merits of appellants' claims. [ROA.537-573]. The Magistrate Judge entered her

report and recommendation on August 21, 2015, in which she recommended that appellants' claims be dismissed in their entirety. [ROA.1320-1362]. Appellants filed written objections to the report and recommendation. [ROA.1368-1382]. On September 28, 2015, the district court adopted the report and recommendation of the Magistrate Judge in its entirety. [ROA.1384-1401]. Accordingly, the district court entered a take-nothing final judgment against the appellants. [ROA.1402]. Appellants filed a notice of appeal on October 26, 2015, initiating the instant appeal. [ROA.1403-1404].

C. Statement of Facts

The facts of this case are undisputed. Appellee City of Lewisville is a municipal corporation incorporated under the laws of the State of Texas, situated in Denton County, Texas, and is a home-rule municipality with the power of self-government as described in Section 51.072(a) of the Texas Local Government Code. [ROA.588]. The City of Lewisville's charter was enacted by election on January 29, 1963, pursuant to the Texas Constitution. [ROA.587-635].

After making a legislative determination that child predator offenders are a serious threat to public safety and that the recidivism rate for released sex offenders is alarmingly high (among other legislative findings), the City enacted the "Regulation of Child Predator Offender Residency" Ordinance Number 3522-01-

2008 (the "Ordinance") on or about January 28, 2008. [ROA.578-583]. The Ordinance states in pertinent part:

> **Sec. 2. Offenses.** It is unlawful for a person to establish a permanent or temporary residence within 1,500 feet of any premises where children commonly gather if the person is required to register on the Texas Department of Public Safety's Sex Offender Database (the 'Database') because of conviction(s) involving a minor.

[ROA.580].

The Ordinance defined "premises where children commonly gather" as "[i]nclud[ing] all improved and unimproved areas on the lots where a public park, public playground, private or public school, public or semi-public swimming pool, public or non-profit recreational facility, day care center or video arcade facility is located, as those terms are or may be defined in Section 481.134 of the Texas Health and Safety Code, as amended . . .." [ROA.580]. Violation of the Ordinance is a misdemeanor that is subject to a fine not to exceed $500 for every day of violation. [ROA.582]. The Ordinance provides six affirmative defenses to prosecution:

1. The person required to register on the Database established the permanent or temporary residence and has complied with all of the sex offender registration laws of the State of Texas, prior to the date of the adoption of this ordinance.

2. The person required to register on the Database was a minor when he or she committed the offense requiring such registration and was not convicted as an adult.

3. The person required to register on the Database is a minor.

4. The premises where children commonly gather, as specified herein, within 1,500 feet of the permanent or temporary residence of the person required to

register on the Database was opened after the person established the permanent or temporary residence and complied with all sex offender registration laws of the State of Texas.

5. The information on the Database is incorrect, and, if corrected, this article would not apply to the person who was erroneously listed on the Database.

6. The person was at the time of the violation 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.

[ROA.581-582].

Appellant A. Duarte is a convicted child sex offender registered with the Texas Department of Public Safety. [ROA.676-689]. He was indicted in July 2004 by a Dallas County Grand Jury for the third degree felony offense of Criminal Solicitation of a Minor, in violation of Texas Penal Code § 15.031, and was found guilty of the offense by a jury on May 19, 2006. [ROA.637, 639]. A. Duarte was sentenced to eight years confinement, which was reduced to community supervision for a term of ten years. [ROA.639-643].

On May 31, 2007, the State of Texas filed a motion to revoke A. Duarte's probation or proceed with an adjudication of guilt because he violated the conditions of his probation. [ROA.649-652]. His community supervision was revoked on June 5, 2007, by the 282nd District Court, and he was sentenced to a term of confinement of three years. [ROA.653-655].

As a result of this conviction, he is required to register as a "Sex Offender" with the Texas Department of Public Safety. [ROA.676-685, 759]. The Texas Department of Criminal Justice has developed risk levels for persons subject to sex offender registration. [ROA.759]. A. Duarte's risk level was initially rated as "low," but in March 4, 2009, his risk level was increased to "moderate," where it has remained, indicating he poses a moderate danger to the community and may continue to engage in criminal sexual conduct. [ROA.680-685]. From 2010 to 2013, A. Duarte was registered as a sex offender with Lewisville. [ROA.682-687]. He is now registered with Lake Dallas as a sex offender. [ROA.687]. He must annually register until 2020. [ROA.683].

At all relevant times, the Duartes—A. Duarte, W. Duarte, B. Duarte, and S. Duarte—have resided together as a family before A. Duarte's imprisonment and after his release. From approximately 2010 to 2013, the Duartes resided in the City at 324 E. Corporate Drive, Lewisville, Texas. [ROA.715, 684-685, 687-689]. Although the Lewisville residence is now inside a protected zone, at the time the Duartes lived there it was grandfathered under the Ordinance. [ROA.759]. Therefore, the Ordinance had no application to A. Duarte where he resided. [*Id.*]. On or about August 1, 2013, the appellants moved out of the City of Lewisville and to the City of Lake Dallas. [ROA.724]. The Duartes still reside in Lake Dallas. [*Id.*].

A. Duarte has been essentially unemployed since 2009, but as of May 2015, he works some odd jobs to make money. [ROA.697, 724]. W. Duarte works two jobs. [ROA.1062-1063]. They have no savings and only $200 in a bank account. [ROA.1068]. The appellants acknowledge that if they did not have the funds to purchase a house outside the protected zone or if a property owner refused to rent to a convicted felony sex offender, then that would not be caused by the Ordinance. [ROA.1065].

From approximately February 2010 until August 2011, W. Duarte communicated with City representative Leslie Peck, the sex offender registrar in the Criminal Investigation Section of the Lewisville Police Department, about residences in Lewisville. [ROA.729]. W. Duarte says that Ms. Peck's communication was responsive and helpful. [ROA.1058]. W. Duarte made approximately nine inquiries to determine if specific houses were in a protected area. [ROA.729]. In all, W. Duarte inquired about approximately thirteen residences. [*Id.*]. Several of the houses were not located in a protected zone. [*Id.*].

On April 23, 2010, the City communicated that 1019 Kingston was within a protected zone, but "if you go further down the street towards Kingston those are okay." [ROA.744]. On the same date, the City communicated that 1006 and 1201 Kingston and 915 Boxwood were within the protected zone, but "[s]ome of the houses in the 1400 and 1500 block of Kingston are okay." [ROA.744]. On May 12,

2010, the City communicated that 1102 Eastwood Dr. was not within a protected zone. [ROA.750]. The Duartes tried to buy the house, but it was sold before they were able to purchase it. [ROA.1057].

On August 31, 2011, W. Duarte inquired about 660 Pine St., and the City communicated that it was not within a protected zone. [ROA.734]. W. Duarte indicated that she and her husband intended to buy the house but someone purchased the house before they could do so. [ROA.1059]. W. Duarte's next communication was in January 2013. [ROA.733]. W. Duarte has not communicated with the City's sex offender registrar since March 2013. [ROA.729]. A. Duarte has never communicated with or inquired about a residential property with the City. [ROA.700, 702].

There are 495 residential properties outside the buffer zones that a registered child sex offender could legally reside within Lewisville. [ROA.756]. As of November 2012, 8 residential properties were for sale and 2 residential properties are for lease or rent. [ROA.757]. A. Duarte stated that "any home" would be a suitable place for A. Duarte and his family to reside. [ROA.708].

As of 2015, the following streets are available outside of the buffer zone Ordinance and within the City limits to registered convicted child sex offenders: 1300-1400 block of Wentworth Drive, 2000 block of Sunset Lane, 2000 block of Briarcliff Road, 1400 block of Diorio Drive, 900 block of Brose Drive, 1400 block

of Ross Drive, 1400 block of Stella Drive, 1400 block of Jewels Way, 1400 block of Bregenz Lane, 1000 block of Hillwood Drive, 1000 block of Brownwood Drive, 1000-1100 block of Westwood Drive, 1000-1100 block of Woodmere Drive, 1000-1100 block of Eastwood Drive, 1700 block of Cedar Keys Drive, 1600 block of Waterford Drive, 1600 block of Glenmore Drive, 1600 block of Shannon Drive, 1600-1800 block of Crosshaven Drive, 1600 block of Niagara Boulevard, 2000 block of Eagle Nest Place, 1400 block of Swallow Circle, 1400 block of Memory Court, 1600 block of Purgatory Pass, 2000 block of Aspen Place, 2000 block of Sierra Place, 1400 block of Swan Court, 2200 block of Mallard Court, 2200 block of Swallow Lane, 2200 block of Wren Lance, 2200 block of Campbellcroft Drive, 1300 block of Pinehurst Drive, 1300 block of Bogard Lane, 1400 block of Lakecrest Lane, 100 block of West Way, 600 block of Jones Street, 700 block of Runge Drive, 700 block of Blair Drive, 500-600 block of Northside Avenue, 500-600 block of Pine Street, 500-600 block of Ferguson Drive, 500 block of Beasley Drive, 100 block of Parkway Drive, 100 block of Simmons Avenue, 600 block of Greenland Road, 100 block of West College Street, 100 block of Stuart Street, 600 block of North Mill Street, 100 block of Martin Street, 900-1000 block of Lakeland Drive, 1600 block of Winterpark Lane, 1600 block of Sunswept Terrace, 2600 block of Annalea Cove, and 1300 block of Chaleur Bay. [ROA.757-758]. These streets represent a wide range of housing for all income levels. [ROA.758].

Between 2010 and April 2015, there were 92 housing units for sale and actually sold and 36 housing units for lease and actually leased outside the Ordinance buffer zones. [ROA.1038]. There were housing units available for sale and/or lease outside the Ordinance buffer zones in each year between 2010 and 2015. [*Id.*]. Housing units outside the buffer zones were available for sale and/or lease for time frames ranging from several weeks to ten months. [*Id.*]. Of the housing units outside the buffer zones for sale during the stated time frame, approximately 50% were available on the market for two months or longer. [*Id.*]. Of the housing units outside the buffer zones for lease during the relevant time frame, approximately 49% were available on the market for two weeks or longer. [*Id.*].

The Duartes all describe their family as very close. [ROA.724, 1074, 1082, 1091]. Their relationship has not been affected by this lawsuit or the Ordinance. [ROA.725, 1074, 1083, 1091]. S. Duarte testified that her relationship with A. Duarte was good and has always been good. [ROA.1091. B. Duarte also testified that she has a loving, normal relationship with her father, which has been the same throughout this lawsuit. [ROA.1083]. A. Duarte testified that he feels that he has a good relationship with both daughters and still loves them, cares for them, and gives them parental advice. [ROA.725].

IV.
SUMMARY OF THE ARGUMENT

"One of the most basic and important responsibilities of a municipal government is to protect the safety of its people." *Harris v. City of Philadelphia*, 47 F.3d 1342, 1358-59 (3d Cir. 1995) (Alito, J., concurring in part and dissenting in part). The City of Lewisville has, like many governments across the nation, taken steps to protect the most vulnerable members of its community by enacting a child sex offender residency ordinance to prevent convicted, registered child sex offenders like A. Duarte from residing within 1,500 feet of areas where children commonly gather. Although he has never been charged with violation of the Ordinance, A. Duarte and his family (of whom none are child sex offenders) have brought constitutional challenges to the City's Ordinance, including due process and equal protection challenges. Appellants have abandoned their *ex post facto*, double jeopardy, injunctive relief, declaratory judgment, 42 U.S.C. § 1983, and attorneys' fees claims. The district court correctly dismissed all of his claims in their entirety.

A. Duarte attempts to cast doubt on the district court's judgment regarding his due process claim because, he alleges, the court determined that he had no "fundamental right" and did not analyze whether he had a "private interest" in living wherever he desired. This Court should not be distracted by A. Duarte's linguistic shell game. The district court—with notable assistance and authority provided by the Magistrate Judge—correctly determined that A. Duarte has no constitutionally

protected liberty interest of *any* kind at stake in this case. A. Duarte has no constitutional right to reside wherever he desires. He cites no authority to the contrary, and this is a death knell to his due process claims.

A. Duarte's citation to the United States Supreme Court's decision in *Mathews v. Eldridge* as establishing the appropriate framework for the analysis of his due process claim is mistaken. As the district court correctly noted, *no* process is due—and thus no test must be applied—if the plaintiff fails to identify the existence of a constitutionally protected interest. This Court should affirm the judgment of the district court in dismissing A. Duarte's due process claim, as he has no constitutionally protected interest in this case.

The Duarte family—including A. Duarte, W. Duarte, B. Duarte, and S. Duarte—also assert a constitutionally protected liberty interest in "family consortium." But this due process claim fails for the same reason as A. Duarte's due process claim: there is no right—fundamental or otherwise—to live wherever one desires. Furthermore, the undisputed evidence offered by the family members themselves establishes that they are an extremely close family that has suffered no injury to their familial relationship and continues to work in and travel to Lewisville. The Duarte family has no due process claim, and the district court correctly dismissed the claims with prejudice.

A. Duarte's equal protection claim is also deficient. A. Duarte, as a registered, convicted child sex offender, is not a member of a protected class. Accordingly, the district court correctly analyzed his equal protection claim under rational basis review. The case authority is overwhelming that legislative bodies have a clear, compelling interest in protecting children from child sex offenders. Moreover, the Ordinance does not draw any distinction or classification between child sex offenders, and the district court properly discarded A. Duarte's claims to the contrary. This Court should affirm the judgment of the district court dismissing A. Duarte's equal protection claim.

V.
ARGUMENT

A. Standard of Review

The Court reviews the grant of a motion for summary judgment *de novo. Texas Med. Ass'n v. Aetna Life Ins. Co.*, 80 F.3d 153, 156 (5th Cir. 1996). Summary judgment is proper when the pleadings and evidence demonstrate that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Slaughter v. S. Talc Co.*, 949 F.2d 167, 170 (5th Cir. 1991). The moving party is not required to negate all elements of the non-moving party's claims; therefore, the motion should "be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c) is satisfied." *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871,

885 (1990) (citations omitted); *see also Boyd v. Georgia Pacific Corp.*, 278 F. App'x 355, 356 (5th Cir. 2008).

But plain error review applies where "a party did not object to a magistrate judge's findings of fact, conclusions of law, or recommendation to the district court" despite being "served with notice of the consequences of failing to object." *United States ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 205 n. 2 (5th Cir. 2013) (citing *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir.1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1)). "The plain error exception is designed to prevent a miscarriage of justice where the error is clear under current law." *Septimus v. Univ. of Hous.*, 399 F.3d 601, 607 (5th Cir.2005). To prevail under this standard, the appellant "must show (1) that an error occurred; (2) that the error was plain, which means clear or obvious; (3) the plain error must affect substantial rights; and (4) not correcting the error would seriously impact the fairness, integrity, or public reputation of judicial proceedings." *Id*. The plain error review standard applies when a party, as here, does not object to a magistrate judge's findings which are adopted by the district court. *See McBride v. Hilton*, 223 F. App'x 303, 304 (5th Cir. 2007) (affirming dismissal where appellant failed to object to conclusions of the Magistrate Judge and failed to show plain error in dismissal of 42 U.S.C. § 1983 claims).

B. Appellants have abandoned their *ex post facto*, double jeopardy, injunctive relief, declaratory judgment, 42 U.S.C. § 1983, and attorneys' fees claims

Nowhere in their initial brief do the Duartes brief or purport to appeal the district court's dismissal of their *ex post facto*, double jeopardy, injunctive relief, declaratory judgment, 42 U.S.C. § 1983, and attorneys' fees claims. The claims are not among the Duartes' statement of the issues. *See* Appellants' Brief, pp. 2-3. Appellants did not object to the Magistrate Judge's findings on these claims. [ROA.1368-1382]. In fact, the Duartes signaled their intent to abandon these claims in their objections to the report and recommendation of the Magistrate Judge, in which they limited their objections solely to the due process and equal protection claims and "abandon[ed] all other claims." [ROA.1370]. The district court noted that the Duartes had abandoned "all other claims" except due process and equal protection. [ROA.1386].

This Court has held that a party waives all issues not raised and argued in an initial brief. *See Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 960-61 (5th Cir. 2012) ("An appellant abandons all issues not raised and argued in its initial brief on appeal.") (quoting *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994)). Even mentioning a claim does not constitute a supported argument or adequate briefing. *Sanders v. Unum Life Ins. Co. of America*, 553 F.3d 922, 926 (5th Cir. 2008). By failing to address or brief their *ex post facto*, double jeopardy, injunctive relief,

declaratory judgment, 42 U.S.C. § 1983, and attorneys' fees claims, appellants have waived any appeal to the district court's dismissal of those claims with prejudice. The district court's order should be affirmed as to all claims, except due process and equal protection, on this basis alone.

C. The Duartes' due process claims were properly dismissed

The Due Process Clause of the Fourteenth Amendment guarantees that a state will not deprive a person of life, liberty or property[1] without some form of notice and opportunity to be heard. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). A. Duarte argues that he has a procedural due process right to "reside at the location of his choice." Appellants' Brief, p. 14. He claims that this is a "fundamental right." *Id.* at p. 16. He also claims that he has a "private interest" that constitutes a liberty interest for due process purposes. *Id.* at pp. 15-16. A. Duarte, along with W. Duarte, S. Duarte, and B. Duarte, also claim to have a due process liberty interest—and a fundamental right—to "reside together as a family at a location of their choice that would otherwise be available to them but for Defendant's SORRO." *Id.* at p. 29. The district court granted summary judgment on the Duartes' due process claims in their entirety. [ROA.1400]. That judgment should be affirmed because the Duartes

[1] A. Duarte does not argue that he has been deprived of a life or property interest. As the district court found "[t]here can be no legitimate argument (and none has been made) that A. Duarte has been deprived of a life or property interest as these rights are described both historically and in case law precedent." [ROA.1394]. A. Duarte solely claims to have a liberty interest in this case.

have not identified the existence of any liberty interest. The due process clause is simply not implicated by their allegations.

1. A. Duarte's procedural due process claim is meritless

The heart of A. Duarte's procedural due process argument is that the district court conflated its analysis of A. Duarte's "fundamental rights" with his "private interest" when determining whether he possessed a liberty interest entitling him to due process protection. *See* Appellants' Brief, p. 16. In essence, A. Duarte appears to argue that the district court improperly limited its analysis to whether A. Duarte had alleged the existence of a fundamental right that the Ordinance allegedly violated.[2] *See id.* Instead, A. Duarte contends that he has a "private interest" that is apparently lesser in importance than a fundamental right and that the district court should have acknowledged. *See id.* A. Duarte is mistaken.

[2] The City notes—as it did in the district court below—that A. Duarte's "procedural" due process claim sounds in terms of substantive due process. *See U.S. v. Dickson*, 403 F. App'x. 931, 931-32 (5th Cir. 2010) (federal pleadings are construed according to substance rather than form or label). The district court and Magistrate Judge took A. Duarte's pleading at face value, construing his claims under a procedural due process analysis. [ROA.1356]. Even if considered under substantive due process standards, A. Duarte's claim still fails. The Supreme Court has, in its entire history, recognized only a very limited number of substantive due process rights. *Glucksberg*, 521 U.S. at 720-21. The Supreme Court has counseled a reluctance to "expand the scope of substantive due process" because guideposts are "scarce and open-ended." *Miller*, 405 F.3d at 714; *Glucksberg*, 521 U.S. at 720. The courts have determined there is no fundamental right to live where one pleases. *Graham*, 2006 WL 2645130 at *7. Under either procedural or substantive due process, A. Duarte fails to identify the existence of a protected constitutional interest.

(a) A. Duarte has no liberty interest at stake

To bring a procedural due process claim under § 1983, a plaintiff must first identify a protected life, liberty, or property interest and then prove that governmental action resulted in a deprivation of that interest. *Baldwin v. Daniels*, 250 F.3d 943, 946 (5th Cir. 2001). Liberty interests protected by the Fourteenth Amendment "may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." *Jordan v. Fisher*, 813 F.3d 216, 222 (5th Cir. 2016) (quoting *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005)). A. Duarte claims that he has a liberty interest in "resid[ing] at the location of his choice, including but not limited to a location anywhere within the City of Lewisville, Texas." Appellees' Brief, p. 14. But as the district court noted, "[b]efore conferring constitutional status upon a previously unrecognized 'liberty,' for which A. Duarte has not asked, argued, and/or offered case law in support, the Supreme Court requires 'a careful description of the asserted fundamental liberty interest, as well as a demonstration that the interest is objectively, 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 if [it was] sacrificed.'" [ROA. 1396].

To begin, it is unclear what distinction A. Duarte would have this Court draw between a "private interest" and a "fundamental right." He cites no authority

explaining the distinction or how it would apply to his claims. A. Duarte appears to suggest that the Ordinance prohibits him from living wherever he desires within the City. It may be that the Ordinance prevents A. Duarte from residing wherever he desires, "but if that is the criterion for . . . substantive and procedural due process, we are in for quite a ride." *Kerry v. Din*, 135 S.Ct. 2128, 2138 (2015).

A. Duarte cites two inapposite cases—*Memphis Light, Gas & Water Div. v. Craft* and *Bell v. Burson*—in support of his notion that he has a protected "private interest." *Memphis Light* dealt with homeowners whose utility service was terminated for nonpayment of an apparently erroneous utility account. 436 U.S. 1, 4-6 (1978). The United States Supreme Court held that the termination of service was accomplished without procedural due process. *See id.* at 21. A. Duarte argues that the Supreme Court's identification of a property interest in that case—an interest he impliedly contends is lesser than the right to live wherever one chooses—means that the district court erred when it held that A. Duarte had no liberty interest at stake in this case. *See* Appellants' Brief, p. 18. He is wrong on several counts.

First, *Memphis Light* concerned an actual deprivation of a property interest, not a deprivation of an implied liberty interest (as in this case). More importantly, the Supreme Court did not create or even define the property interest at stake in *Memphis Light*; Tennessee state decisional law provided that utility service could not be disconnected without good cause. *Memphis Light*, 436 U.S. at 10-11. This

of course comports with the black letter law that the underlying substantive interest in a due process claim is created by "an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Federal constitutional law only determines whether that interest rises to the level of a "legitimate claim of entitlement." *Memphis Light*, 436 U.S. at 9. *Memphis Light* dealt with a property interest, and the interest in that case was uncontested. Thus, the Supreme Court was *not* engaged in a debate of whether "continuance of residential utility service by a government provider" was a "fundamental right" or a "private interest." *See* Appellants' Brief, p. 18. A. Duarte's citation to *Memphis Light* is thus inapposite.

A. Duarte's reliance on *Bell v. Burson* is likewise misplaced. *Bell* involved a Georgia state statute that mandated the suspension of an uninsured driver's license in the event of an automobile accident unless the driver posted security to cover the amount of damages claimed by aggrieved parties. 402 U.S. 535, 535-36 (1971). The statutory scheme made irrelevant any consideration of fault or innocence in the decision to suspend a license. *Id.* Bell was a clergyman whose ministry required him to travel by car. *Id.* at 537. The statute was applied to him when he was involved in an accident with a young girl, and his license was suspended. *Id.* Bell claimed that the suspension of his license without any due process violated his Fourteenth Amendment right. *Id.* The Supreme Court agreed, but far from determining whether Bell had alleged the existence of a "fundamental right" versus a "private interest,"

the Court simply held that the driver's license, once issued, was a property interest entitlement to Bell that the State could not deprive without due process. *See id.* at 539. *Bell* did not deal with the existence of a liberty interest.

In short, the cases cited by A. Duarte dealt with property interests, not implied liberty interests. As the district court noted, this distinction was recently clarified by the United States Supreme Court plurality in *Kerry v. Din*. In *Kerry*, a United States citizen sued when her husband, an Afghan citizen, was denied an immigrant visa by the United States. 135 S.Ct. at 2131. Din claimed a violation of her procedural due process rights when the United States deprived her of her supposed constitutional right "to live in the United States with her spouse." *Id.* As Justice Scalia observed, the denial of the visa did not deprive any traditionally understood interest in life, liberty, or property:

> Din, of course, could not conceivably claim that the denial of Berashk's visa application deprived her—or for that matter even Berashk—of life or property; and under the above described historical understanding, a claim that it deprived her of liberty is equally absurd. The Government has not "taken or imprisoned" Din, nor has it "confine[d]" her, either by "keeping [her] against h[er] will in a private house, putting h[er] in the stocks, arresting or forcibly detaining h[er] in the street." *Id.*, at 132. Indeed, not even Berashk has suffered a deprivation of liberty so understood.

Id. at 2133. Instead, Din's claim was analyzed under the "expand[ed] . . . meaning of 'liberty' under the Due Process Clause . . ." which includes "certain implied 'fundamental rights.'" *Id.* The relevant question when determining whether

such a fundamental right exists is whether its existence is supported by "this Nation's history and practice." *See Washington v. Glucksberg*, 521 U.S. 702, 723-24 (1997). For instance, the Supreme Court held in *Glucksberg* that longstanding national tradition of outlawing assisted suicide meant that there was no fundamental right to assisted suicide and thus that "right" was not entitled to due process protection. *Id.*

A. Duarte brazenly declares that "[n]o majority opinion of the United States Supreme Court has ever limited by definition the term 'private interest' within the meaning of *Mathews v. Eldridge* . . . to the contours of 'substantive' and 'fundamental' rights . . . ." Appellants' Brief, p. 18. To begin, *Eldridge* did not create or even purport to identify any new classes of due process liberty or property interests—indeed, the existence of a statutorily created property interest was uncontested in that case. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) ("The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions . . . that the interest of an individual in continued receipt of these benefits is a statutorily created 'property' interest protected by the Fifth Amendment."). A. Duarte's assertion that *Eldridge* altered the analysis of a constitutionally protected liberty or property interest is flatly incorrect.

There is no right—fundamental or otherwise—for A. Duarte to reside wherever he desires. Numerous courts have arrived at this conclusion, and A. Duarte

cites no relevant contrary authority.[3] Over thirty years ago, the Eighth Circuit said "we cannot agree that the right to choose one's place of residence is necessarily a fundamental right . . . [c]ases too numerous to mention have upheld restrictions on this interest" *Prostrollo v. Univ. of S.D.*, 507 F.2d 775, 781 (8th Cir. 1974), and there is no basis to conclude that the contention has gained hold in the intervening years. *Doe v. Miller*, 405 F.3d 700, 713-14 (8th Cir. 2005). The "courts have determined there is no fundamental right to live where one pleases." *Graham v. Henry*, 2006 WL 2645130, at *7 (N.D. Okla. 2006) (rejecting plaintiff's contention that there is a fundamental constitutional right to "reside in a certain place, i.e. with family members.").

In *People v. Leroy*, an Illinois appellate court determined that a probationer had no fundamental constitutional right to live with his mother when she lived within 500 feet of a restricted area. 828 N.E.2d 769, 776 (Ill. App. Ct.—2005). In *Formaro v. Polk County*, the Iowa Supreme Court determined that a registered sex offender

[3] A. Duarte relies on *Moore v. City of East Cleveland* for support for his putative liberty interest, but as the district court found, *Moore* is inapposite and "does not apply." [ROA.1398]. In *Moore*, the plaintiff homeowner was actually convicted under a statute that made it a crime for more than one family to live together in a dwelling when she lived with her son, grandson, and a grandson from another child. 431 U.S. 494, 497, 499 (1977). Because the statute regulated *with whom* a person offender may reside, it was found to be unconstitutional because it violated a liberty interest to live as a family unit under the Due Process clause. *Id.* at 501, 506. The Lewisville Ordinance is much different. It simply regulates *where* a convicted child sex offender may reside. It is not a direct regulation of the family, nor does it declare who may live with whom. Furthermore, *Moore* was analyzed under substantive due process, which A. Duarte has expressly disclaimed. In short, *Moore* does not apply.

did not have a first amendment right of association to live where he wanted, 773 N.W.2d 834, 842 (Iowa 2009), and in *State v. Steering*, the court noted that "although freedom of choice in residence is of keen interest to any individual, it is not a fundamental interest entitled to the highest constitutional protection. 701 N.W.2d 655, 664 (Ia. 2005). In *Spangler v. Collins*, a federal court in Ohio determined that a residency restriction of 1,000 feet did not implicate a fundamental right and therefore the statute was entitled to rational basis review. 2012 WL 1340366, *5 (S.D. Ohio 2012).

A. Duarte's alleged right to live where he desires is not a fundamental constitutionally protected right. Neither is it a "private interest" (to the extent there is any difference between those terms). The judgment of the district court should be affirmed.

(b) The *Mathews v. Eldridge* test is inapplicable and A. Duarte received all the process he was due

The district court correctly determined that the *Mathews* balancing test is not applicable to A. Duarte's claims because he has not alleged the existence of a protected liberty or property interest. [ROA.1394]. There is thus nothing for this Court to balance—A. Duarte has no due process right implicated. Nevertheless, A. Duarte received all the process he was due when he was convicted of his underlying child sex offense.

A. Duarte complains that the Ordinance provides no opportunity for him to show that he is not dangerous or whether he "poses (or has ever posed) any threat to anyone by reason of a lack of sexual control." *See* Appellants' Brief, p. 24. The Ordinance, however, does not require an individualized showing of dangerousness, and A. Duarte is not entitled to an individualized determination that he poses a threat to the safety of children prior to being subjected to the provisions of the Ordinance. *See Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7-8 (2003); *Doe v. Petro*, 2005 WL 1038846 at *2 (S.D. Ohio 2005). As the Supreme Court explained in *Smith v. Doe*, 538 U.S. 84, 92-33 (2003), and was reiterated by both the Eighth Circuit in *Miller*, 405 F. 3d at 719 and the Second Circuit in *Doe v. Cuomo*, 755 F.3d 105, 113 (2nd Cir. 2014), A. Duarte is not entitled to a due process hearing to establish a fact not relevant to the statutory scheme. *Conn. Dep't of Pub. Safety*, 538 U.S. at 4, 7-8. The Ordinance applies to any child sex offender required to register on the Texas Sex Offender Registry. A. Duarte's triggering event for the residency restriction was his child solicitation conviction and undisputed inclusion on the Texas Sex Offender Registry, not whether A. Duarte is dangerous (which he is, according to the state's consistent finding that he is a moderate risk to the community).

Moreover, the Ordinance is authorized to draw classifications between child sex offenders and other individuals, which the City Council as a legislative body is entitled to create. *Miller*, 405 F.3d at 709*; Petro*, 2005 WL 1038846 at * 2. Once a

legislative classification has been drawn, additional procedures are unnecessary because the statute does not provide an exemption from that legislative classification. *See Miller*, 405 F.3d at 709 (citing *Conn. Dep't of Pub. Safety*, 538 U.S. at 7-8). Procedural due process constraints do not apply to legislative and quasi-legislative decisions. *Martin v. Mem'l Hosp. at Gulfport*, 130 F.3d 1143, 1149 (5th Cir. 1997). Simply put, "[t]he procedural due process requirements of notice and a hearing are not applicable to a legislative body in the performance of its legislative functions." *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1074 (5th Cir. 1989). Further, convicted felons are properly subjected to many restrictions on their constitutional rights that would be objectionable if imposed on non-felons. *See, e.g., Jones v. Helms*, 452 U.S. 412, 420-22 (1981); *Petro*, 2005 WL 1038846, at *1.[4]

The district court correctly determined that even if A. Duarte's due process claim were analyzed under the *Mathews* test, it would still fail.[5] [ROA.1396]. A.

[4] The district court found that A. Duarte's assertion that he was entitled to the full scope of liberty enjoyed by others similarly situated was "not entirely accurate" for this reason. [ROA.1397].

[5] Under *Mathews*, the first factor requires the Court to ascertain the nature of the private interest that will be affected by the action, which as described *supra* and by the district court below, is nonexistent because A. Duarte has no liberty interest implicated by the Ordinance. *See Mathews*, 424 U.S. at 333-34. This factor is dispositive, ending any further analysis. If the Court should consider *Matthews* further, the second factor requires the Court to consider the risk of an erroneous deprivation of the interest through the procedures used. *Id.* The district court below correctly found that the risk is low, "considering that there is no liberty interest at stake" of which A. Duarte could be deprived. [ROA.1396]. The third factor requires the Court to look at the government's interest that additional safeguards or procedural requirements would entail. *See Mathews*, 424 U.S. at 333-34. A. Duarte provided no evidence and no argument in the district court regarding the additional procedures he would have the City undertake, and in any event, he has no liberty

Duarte is not entitled to any more process than he received. The judgment of the district court should be affirmed.

2. The Duarte family's claims were properly dismissed

Appellants' second issue relates to their assertion that they have a liberty interest in family consortium that the Ordinance allegedly violates. *See* Appellants' Brief, pp. 28-29. This is the Duarte family's due process claim. It is unclear (and was unclear in the district court below) how exactly this claim differs from A. Duarte's procedural due process claim, since both are premised on the assumption that A. Duarte has a right to live wherever he desires. The district court properly dismissed the due process claims of A. Duarte, W. Duarte, S. Duarte, and B. Duarte. [ROA.1399-1340].[6]

As noted, there is no right—fundamental or otherwise—to reside wherever one desires. *Prostrollo*, 507 F.2d at 781 ("We cannot agree that the right to choose one's place of residence is necessarily a fundamental right."); *Miller*, 405 F.3d at

interest sufficient to trigger constitutional procedural safeguards in the first place. Now, for the first time on appeal, A. Duarte posits that the City could "assign the task" of a pre-deprivation hearing of some kind "to one of many city boards, made up of volunteer members from the community," there is not a scintilla of evidence in the record establishing the feasibility or advisability of doing so, and the City submits that such a task could not be accomplished in the manner referenced by A. Duarte.

[6] Like A. Duarte's due process claim, this claim is listed by the Duartes as a procedural due process claim, although it seems to be in reality a substantive due process claim. *See Dickson,* 403 F. App'x. at 931-32. There are a very limited number of recognized substantive due process rights. *Glucksberg,* 521 U.S. at 720-21. Because the Duartes have not identified any fundamental right implicated or impacted by the City's Ordinance, their due process claims should be dismissed.

713-14; *Stone v. Pamoja House*, 111 F. App'x 624, 626 (2d Cir. 2004) (dismissing due process claim based on alleged "entitlement to reside in the shelter of [the plaintiff's] choice."). The "courts have determined there is no fundamental right to live where one pleases." *Graham*, 2006 WL 2645130 at *7 (rejecting plaintiff's contention that there is a fundamental constitutional right to "reside in a certain place, i.e. with family members."). This is the essence of the Duarte family's due process claims. They cite no law supporting this "fundamental right" or "liberty interest." The cases addressing this issue have held that there is no such fundamental right or liberty interest. *See, e.g., Manarite v. City of Springfield*, 957 F.2d 953, 960 (1st Cir. 1991) (holding that daughter of decedent had no liberty interest protected by due process clause to support a familial association claim). The Court should dismiss this issue on this basis, alone.

Moreover, the Ordinance does not in any way regulate the Duarte family's relationship with A. Duarte or whether they can reside with him. The Duartes mislead this Court when they state that 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 [the Ordinance]." Appellants' Brief, p. 30. The district court did no such thing. Instead, the district court first found that the Ordinance "does not implicate the private realm of family life or slice deeply into the family itself," and thus only incidentally affects the Duarte family.

[ROA.1398-1399]. Further, the court found that W. Duarte, B. Duarte, and S. Duarte have no more a constitutional right to live anywhere they desire than A. Duarte does. [*See* ROA.1399]. The district court never held that the Duarte family could not reside together as a family unit. The Ordinance does not affect the Duarte's family residential status.

The Ordinance exists for the protection of minor children within Lewisville. This provides not only a rational basis—all that is required for the Ordinance to survive the Duarte family's challenge—but indeed it is a compelling governmental interest. *See, e.g., Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 263 (2002) ("The Court has long recognized that the Government has a compelling interest in protecting our Nation's children . . . [t]his interest is promoted by efforts directed against sexual offenders . . . ."") (Thomas, J., concurring); *Paxson v. Chandler*, 531 F. App'x 475, 476 (5th Cir. 2013) ("[P]rotecting children from violent crimes and sexual exploitation is an obvious, legitimate government interest."). The district court below recognized the compelling nature of the City's interest. [ROA.1390].

Of course, no authority for the Duarte family's supposed liberty interest is provided, but factually, the Duartes' own testimony demonstrates that the Ordinance

has not interfered with their relationship with their father. S. Duarte testified about her relationship with her father:

> Q. What about your relationship with your mom?
> A. It's good.
> Q. And with your dad?
> A. It's good.
> Q. Okay. And has it always been a good relationship?
> A. Yeah.
> Q. So that's -- you've had a good family relationship for as long as you can remember, right?
> A. Yes.
> Q. So way before this lawsuit through today you would say you-all have a good family relationship, correct?
> A. Yes.
> Q. And asking specifically about your dad, you love your dad, correct?
> A. Yes.
> Q. And he loves you?
> A. Yes.
> Q. And has your dad always been able to give you parental advice if you need it?
> A. Yes.
> Q. If you have an issue with school you can always go to either one of your parents, correct?
> A. Yes.
> Q. And that happened before this lawsuit started and that is continuing today, right?
> A. Yes.

[ROA.1091]. Likewise, B. Duarte confirmed that the Ordinance has not affected her relationship with her father:

> Q. And so you agree with me. You said it was a fair statement to say that your relationship with your whole family has been a loving, normal relationship,

right?
A. Yes.
Q. And particularly with your dad, you're very close to him?
A. Yes.
Q. And it's been a very loving relationship you've had with him, correct?
A. Yes.
Q. Has that been the same since this lawsuit -- since before this lawsuit started through today, is that the same?
A. It hasn't changed my relationship with my dad.
Q. Has your relationship with any of your family changed from before the lawsuit started to today?
A. No.

[ROA.1083]. And A. Duarte confirmed his good relationship with both children:

Q. And you feel like you have a good relationship with both your daughters as well?
A. I do.
Q. And that hasn't changed through the lawsuit?
A. No.
Q. Still love them, care for them, give them parental advice, talk about boyfriends, go see movies, eat, those kind of things?
A. Those kind of things.

[ROA.725].

The undisputed evidence demonstrates that the Ordinance has done nothing to affect the Duarte children's relationship with their father or W. Duarte's relationship with her husband. Instead, the Ordinance merely regulates where A. Duarte himself can live. The Ordinance has no bearing on the familial relationship

between A. Duarte and his children or wife. The due process claims of A. Duarte, W. Duarte, S. Duarte, and B. Duarte were properly dismissed.[7]

The cases finding a due process violation for these kind of familial association claims require that the state action "be directly aimed at the parent-child relationship and permanently deprive the parent or child of family association." *See Missildine v. City of Montgomery*, 907 F. Supp. 1501, 1507 (M.D. Ala. 1995). The Ordinance is not aimed at husband-wife, parent-child relationships, or the Duarte family; instead, it only regulates where registered convicted child sex offenders may reside in the City of Lewisville. The judgment of the district court should be affirmed.

D. A. Duarte's Equal Protection claim was properly dismissed

A. Duarte contends that the Ordinance violates the Equal Protection Clause of the Fourteenth Amendment. *See* Appellants' Brief, p. 34. A. Duarte's argument is that the Ordinance places convicted, registered child sex offenders into two classes: one class of offenders under community supervision that have been judicially relieved of compliance with the one thousand foot restriction for a child free zone under the Texas Code of Criminal procedure, and a second class of offenders like A.

[7] Like A. Duarte, the due process claims by W. Duarte, B. Duarte, and S. Duarte also fail to identify what procedure was due, lacking, and/or inadequate. As the district court found, "[i]t is important to note that the Duarte Family members are not convicted child sex offenders, are not required to register on the Database, and are not prohibited from doing anything by the Ordinance." [ROA.1399]. The Duarte family's due process claims fail for this additional reason.

Duarte who are not on community supervision.[8] *See* Appellants' Brief, p. 36. It should be noted that although A. Duarte's equal protection argument spans twelve pages of his brief, that section contains precisely *one* case citation.

To establish an equal protection claim, A. Duarte must show that two or more classifications of similarly situated persons were treated differently. *Gallegos-Hernandez v. United States*, 688 F.3d 190, 195 (5th Cir. 2012). Only once that element is established does the Court determine the appropriate level of scrutiny. *Id.* Strict scrutiny "is appropriate only where a government classification implicates a suspect class or fundamental right." *Id.; see also Sonnier v. Quarterman*, 476 F.3d 349, 368 (5th Cir. 2007). "Otherwise, rational-basis review applies and [the] court need only determine whether the classification is rationally related to a legitimate government interest." *Gallegos-Hernandez*, 688 F.3d at 195. The actual reason for a state action is irrelevant for claims under rational basis scrutiny and will be upheld if any facts reasonably may be conceived to justify it. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). A. Duarte fails to show that there is any classification of two or more groups.

[8] A. Duarte's equal protection position has shifted throughout this litigation. In the district court, A. Duarte initially argued that the City's Ordinance created three classes, not two. [ROA.138]. The Magistrate Judge found that "A. Duarte's position appears to have changed . . . ." [ROA.1349]. A. Duarte did not object to this finding. [ROA.1368-1382]. The Court should reject A. Duarte's shifting and untenable position.

1. The Ordinance does not create multiple classes of child sex offenders

The district court was correct in its summation of A. Duarte's argument that the Ordinance creates multiple classifications of child sex offenders: it is "false." [ROA.1390]. The Ordinance applies to all registered, convicted child sex offenders equally. The "classification" of which A. Duarte complains is merely one of six available affirmative defenses under the Ordinance. The defense is little more than legislative deference to an existing court order and seeks to avoid potentially conflicting orders. Notably, the defense is only available when defendants have sought and obtained relief from the court in which the underlying child sex offense occurred, not the court enforcing the City's Ordinance. *See* TEX. CODE OF CRIM. PROC. Art. 42.12, Sec. 13B(e).

The defense in the Ordinance is equally available to anyone who meets its terms. This Court reviewed a similar claim in *Wood v. Quarterman*. In that case, a prisoner argued that the statutory definition of "duress"—an affirmative defense—violated his equal protection rights because it was only available to persons "of reasonable firmness," thereby discriminating against a separate class of "feeble minded" persons. 214 F. App'x 473, 474 (5th Cir. 2007). This Court held that the defense was available to anyone who met its terms and so denied the prisoner's certificate of appealability. *See id.* There is no evidence—and no citation to a single

authority by A. Duarte—that establishes that the Ordinance creates any classification among convicted, registered child sex offenders.

A. Duarte appears to contend that any difference between two people vis-à-vis a criminal statute or ordinance creates an equal protection claim. But that has never been the law. *See Williams v. Rhodes*, 393 U.S. 23, 30 (1968) ("[T]his Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups to be a violation of our Constitution."); *Baum v. Lunding*, 535 F.2d 1016, 1018-19 (7th Cir. 1976) ("Every minor difference in the application of laws to different groups is not a constitutional violation."); *Marcellus v. Virginia Bd. of Elections*, --F.Supp.3d--, 2016 WL 927187, at *8 (E.D. Va. March 4, 2016) ("However, the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution."). By A. Duarte's logic, all criminal statutes and ordinances would violate the Equal Protection Clause because they all create classifications among the "guilty" and the "not guilty." This absurd result should be avoided. The district court correctly dismissed A. Duarte's equal protection claim.

2. A. Duarte does not belong to a suspect or protected class and so rational basis review applies

The City's Ordinance does not even create classifications among similarly situated persons. Even if the Court proceeded to the next step of the equal protection analysis, however, A. Duarte's claim still fails. It is entrenched in federal

jurisprudence, and as this Court recently held, sex offenders and those included on the Texas sex offender registry—such as A. Duarte—are not a suspect class. *Stauffer v. Gearhart*, 741 F.3d 574, 587 (5th Cir. 2014); *see also Creel v. Scott*, 51 F.3d 1042, 1042 (5th Cir. 1995) ("Because sex offenders are not members of a suspect class, the state need demonstrate only that the restriction [] is reasonably related to the legitimate concerns of safety and security."); *Lustgarden v. Gunter*, 966 F.2d 552, 555 (10th Cir. 1992); *Riddle v. Mondragon*, 83 F.3d 1197, 1207 (10th Cir. 1996); *Cutshall v. Sundquist*, 193 F.3d 466, 482 (6th Cir. 1999); *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999) (citing *Artway v. Atty. Gen*., 81 F.3d 1235, 1267 (3d. Cir. 1996) for the proposition that "sex offenders are not a suspect class for purposes of Fourteenth Amendment analysis"); *Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005) (sex offenders are not a suspect class for purposes of equal protection analysis); *Cunningham v. Parkersburg Housing Authority*, 2007 WL 712392 at *6 (S.D.W.V. 2007) (citing *United States v. Lemay*, 260 F.3d 1018, 1030-31 (9th Cir. 2001)); *McGuire v. City of Montgomery*, 2013 WL 1336882 at *12 (M.D. Ala. 2013). Notably, A. Duarte does not cite any authority to the contrary.

Instead, A. Duarte claims that the lower court erred in using rational basis review.[9] Appellants' Brief, p. 39. This is so, he claims, because the Ordinance

[9] The district court below noted that "A. Duarte [did] not object to the Magistrate Judge's finding that the Ordinance should be analyzed using the 'more deferential' rational basis test." [ROA.1388]. A. Duarte is thus limited to plain error review of the unobjected-to factual findings

"impinges on personal rights protected by the Constitution . . . for the reason that [the Ordinance] 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." Appellants' Brief, p. 40. This argument is confusing, because A. Duarte suggests that the relevant classes for this Court to look at for equal protection purposes are (1) child sex offenders on community supervision who have been judicially relieved of residency restrictions under the Code of Criminal Procedure, and (2) child sex offenders like A. Duarte who are not on community supervision. Is it really A. Duarte's contention that the City enacted the Ordinance out of a specific "prejudice and antipathy" to persons not on community supervision? A. Duarte offers no insight or authority to answer this question.[10]

Indeed, there is not a single citation supporting A. Duarte's assertion that he is entitled to strict scrutiny review except his irrelevant quotes from *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). As the district court below noted, *Cleburne* does not support A. Duarte. [ROA.1389 ("As an initial matter, the 'test' advocated by A. Duarte is not the test described by the Supreme Court in

and legal conclusions. *See Hines v. Texas*, 76 F. App'x 564, 566 (5th Cir. 2003) (holding that plaintiff was limited to plain error review for unobjected-to conclusions of the Magistrate Judge and dismissing appeal).

[10] This Court dealt with a similar argument by a convicted sex offender who claimed that he was a member of an "unpopular group" and that Congress vindictively enacted the Sex Offender Registration and Notification Act ("SORNA") in violation of his equal protection rights. *United States v. Young*, 585 F.3d 199, 203 n. 18 (5th Cir. 2009). The Court noted that the "abortive" argument was "meritless." *Id.*

Cleburne."]. In that case, the Supreme Court held that a city's requirement of a special use permit for a facility to house the mentally handicapped was not rationally related to a legitimate governmental interest. *Id.* at 450. The case did not concern child sex offenders or residency restrictions. Further, the Court expressly rebuked the court of appeals below and held that the classification of mentally handicapped persons was not a suspect class for which strict scrutiny applied. *See id.* at 445-46.

Because the case law from numerous courts—and most relevantly this Court in *Stauffer* and *Creel*—has firmly established that sex offenders like A. Duarte are not members of a suspect or protected class, rational basis review applies to the City's Ordinance. The district court thus correctly used the rational basis review standard.

3. A. Duarte has no fundamental right to reside wherever he desires

A. Duarte alleges the Ordinance infringes upon his "fundamental right" to live where he wants, as supposedly guaranteed by the United States Constitution. *See* Appellants' Brief, p. 14. As explained *supra* Section V.C.1.A, A. Duarte has no fundamental right to live where he pleases because there is no such right.

Fundamental rights are those that are deeply rooted in this Nation's history and tradition and so implicit in the concept of ordered liberty that neither liberty nor justice would exist if they were sacrificed. *See Malagon de Fuentes v. Gonzales*, 462 F.3d 498, 505 (5th Cir. 2006); *Williams v. Attorney Gen. of Alabama*, 378 F.3d 1232,

1239 (11th Cir. 2004) (quoting *Glucksberg*, 521 U.S. at 720-21). The Supreme Court has expressed extreme reluctance to expand this concept, stating that it would do so only with the utmost care. *Glucksberg*, 521 U.S. at 720. Thus, for a right to be fundamental, it must be "deeply rooted in this Nation's history and tradition" and the asserted liberty carefully described. *Id.* at 720-21. In addition to the specific freedoms protected in the Bill of Rights, these special "liberty" interests include "the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Id.*at 720. None of those rights are implicated by A. Duarte's claims here.

The Eighth Circuit addressed the same argument made by A. Duarte in this case. It was not persuaded by the argument that the Constitution establishes a "fundamental right" to live where one wants, such that a strict scrutiny analysis should apply to a sexual residence statute. *Miller*, 405 F.3d at 714. The court found that the right to live where one wants would only be a violation if the residency statute was not rationally related to some legitimate governmental purpose. *Id.* A. Duarte's alleged right to live where he desires is not a fundamental constitutionally protected right for either his due process or equal protection claims.

4. The Ordinance is rationally related to a legitimate government purpose

Since A. Duarte does not belong to a suspect class and a fundamental right is not involved, rational basis review applies to this case. A. Duarte complains that

"[a]fter 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 [Ordinance] to Plaintiff, in contrast to registrants on community supervision, is rationally related to a legitimate government purpose." *See* Appellants' Brief, p. 42. But under the rational basis test, the City's Ordinance is "accorded a strong presumption of validity" and "must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis" for it. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993); *Cornerstone Christian Schools v. UIL*, 563 F.3d 127, 139 (5th Cir. 2009). Thus, the City does not bear the burden of demonstrating a rational basis for its enactment, application or enforcement of its Ordinance. Instead, A. Duarte bears the heavy burden of showing that there is no *conceivable* rational basis. *Bd. of Trs. Of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001); *Lindquist v. City of Pasadena*, 525 F.3d 383, 387 (5th Cir. 2008); s*ee State v. Seering*, 701 N.W.2d at 661(stating that the challenger must "refute every reasonable basis upon which the statute could be found to be constitutional).

The range of rational grounds is not restricted to those articulated at the time the government made its decision, but encompasses all conceivable bases, actual or hypothesized. *Reid v. Rolling Fork PUD,* 854 F.2d 751, 754 (5th Cir. 1988). "As long as there is *a* conceivable rational basis for the official action, it is immaterial that it was not *the* or *a* primary factor in reaching a decision or that it was not actually

relied upon by the decision makers or that some other nonsuspect irrational factors may have been considered." *Id.* (emphasis in original). Thus, even if the explanations given fail to pass rational basis scrutiny, there may be another reasonably imaginable rationale that would survive the test. It is A. Duarte's burden to show that there is none. *Newman Marchive Prsp v. Hightower*, 2009 WL 3403189, at *2 (5th Cir. 2009). A. Duarte has not met this heavy burden.[11]

A decision can be considered irrational only when the decision maker acts with no legitimate reason for its decision. *Harlen Associates v. Village of Mineola*, 273 F.3d 494, 500 (2nd Cir. 2001). "Decisions that are imprudent, ill-advised, or even incorrect may still be rational." *Lindquist*, 656 F.Supp.2d at 697. Rational basis review is "a paradigm of judicial restraint" and "[w]here there are 'plausible reasons' for [the government decision], '[the] inquiry is at an end.'" *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993).

The Ordinance here has the legitimate and compelling purpose of protecting children who are the City residents least able to protect themselves. The Ordinance itself includes findings that acknowledge that public safety and protection of the City's most vulnerable citizens, its children, are the primary goals of the child sex

[11] Indeed, the Magistrate Judge found that "[t]he Ordinance is reasonably related to the danger of recidivism posed by sex offenders," and that "[a] reasonable legislator could believe that the means employed by the Ordinance would help prevent future attacks by recidivist sex offenders." [ROA.1340, 1344]. A. Duarte did not object to these findings. [ROA.1368-1382]. This finding is therefore binding absent plain error, which appellants do not attempt to address in their brief. *See Hines v. Texas*, 76 F. App'x 564, 566.

offender residency restriction requirement. For instance, the Ordinance includes a finding that "[T]he City Council of Lewisville, Texas, finds, determines and declares that child predator offenders are a serious threat to public safety; and . . . the City Council determines that establishing regulations that restrict certain offenders from residing in areas that are at and near where there is a high concentration of children will provide better protection for children in the City . . . ." [ROA.579]. This is a legitimate governmental interest given the Supreme Court's explicit findings:

> Sex offenders are a serious threat in this Nation….'[t]he victims of sex assault are most often juveniles,' and 'when convicted sex offenders re-enter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault.' *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003).
>
> The risk of recidivism posed by sex offenders is 'frightening and high.' *Smith*, 548 U.S. at 103.
>
> When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault. *McKune*, 536 U.S. at 32 (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997)); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p.6 (1977).

In light of the significant risk found by the Supreme Court, the Ordinance rationally advances the government's interest in protecting children. This Court should join the myriad of other courts making this same finding. *See Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1015 (8th Cir. 2006) (finding Arkansas statute advances legitimate interest in protecting children from sex offenders); *Doe*, 405

F.3d at 714-15 (finding that the legislature had a legitimate interest in protecting children and that Iowa's statute rationally advanced this interest by prohibiting sex offenders from living within 2000 feet of a school or child care facility); *Graham*, 2006 WL 2645130 at *7 (finding Oklahoma statute rationally advances legitimate interest in protecting children from sex offenders); *Leroy*, 828 N.E.2d at 777 (finding that it is reasonable to believe that a law that prohibits child sex offenders from living within 500 feet of a school will reduce the amount of incidental contact they have with children and consequently the opportunity for the offenders to commit new sex offenses against those children will be reduced).

Because the Ordinance is rationally related to a legitimate government interest, the district court correctly dismissed A. Duarte's equal protection claim. This Court should affirm the district court's judgment.

PRAYER

WHEREFORE, appellee City of Lewisville prays that the judgment of the district court be affirmed, appellants' claims dismissed in their entirety, and for such other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 6, 2016, I electronically submitted Appellee's Brief with the Clerk of Court for the 5th Circuit Court of Appeals, using the electronic case filing system of the court. I hereby certify that I have served all counsel electronically or by another manner authorized by the Federal Rules of Appellate Procedure.

/s/ Wm. Andrew Messer
WM. ANDREW MESSER

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DATED: April 6, 2016