IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17-1449

MICHAEL BELEY AND DOUGLAS MONTGOMERY,
INDIVIDUALLY AND FOR A CLASS,

Plaintiffs-Appellants,

-vs-

CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
No. 12-cv-9714 — John Robert Blakey, District Judge.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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This case arises out of the City of Chicago's implementation of the Illinois Sex Offender Registration Act ("SORA"), 730 ILCS 150/1 *et seq.*[1] Defendant City of Chicago's brief - at length - seeks to argue a sex offender does not have a constitutionally protected interest to register as a sex offender pursuant to SORA. Defendant also argues that plaintiffs' Due Process Claim fails on the merits.

For the reasons stated in plaintiffs' opening brief, and articulated below, the Court should reverse the district judge's decision to dismiss this case at summary judgment and remand for further proceedings.

I. Registration With The City Of Chicago Implicates Constitutionally Protected Interest

This court, in *Schepers v. Indiana Department of Corrections*, 691 F.3d 909 (7th Cir. 2012), addressed an elemental issue – raised by the City here – relating to the contours of the Due Process Clause and state law governing the registration of sex offenders. The plaintiff and plaintiff class in *Schepers* challenged the Indiana Department of Corrections lack of process to challenge information published on a government administered website relating to a sex offender's status. The court held that being mislabeled by the government on a website as a sexually violent predator implicated a liberty interest protected by the Due Process Clause because it injured one's reputation by altering "one's legal status or rights." *Id.* at 914. And the Indiana Department of Corrections could be held liable for a Due Process Claim because it had day-to-day responsibility to administer the registry and "un-

[1] We cite defendant's response brief as "City Br. __," plaintiffs' opening brief as "Opening Br. __," and the record as "R.__."

der state law and in practice, the DOC has sufficient responsibility over the registry to be compelled to provide any additional process that may be required." *Id.* at 913-14.

Like the Indiana Department of Corrections in *Schepers*, 691 F.3d at 913, SORA delegates day-to-day operations of the registry to a handful of police officers assigned to the City's Criminal Registration Section (the "CRS"). Opening Br. 5-6; 730 ILCS 150/3(a). A failure to register a sex offender, as required by SORA, not only implicates the same liberty interest at issue in *Schepers* because a non-compliant sex offender is listed on the Illinois State Police website, 730 ILCS 152/115, but causes mandatory incarceration along with civil penalties. As explained in plaintiffs' opening brief, various district judges have held a sex offender's interest to register implicates an interest protected by the Due Process Clause. Opening Br. 19.

Without citing *Schepers*, the City argues the misapplication of SORA is not a cognizable Due Process Claim. City's Br. 12-16. This argument deserves little consideration.

As previously stated, this case arises out of the City's implementation of SORA. Plaintiffs contend the City, through the CRS, manipulated the registration requirements for sex offenders who lacked a residence at the time of registration by denying them an opportunity to comply with SORA. This is precisely the type of responsibility, as explained in *Schepers*, that may expose a government entity to liability under a Due Process Claim.

The City's reliance on *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988), and *Murphy v. Rychlowski*, 868 F.3d 561, 566 (7th Cir. 2017), are inapposite. City Br. 13-14. In *Archie*, this court addressed the constitutional question whether a local government had an obligation to provide "efficacious rescue services." 847 F.2d at 1213. In finding the Due Process Clause did not provide a citizen a protected interest in rescue services arising out of a fire department dispatcher's negligence, this court recognized the bedrock principal that "[w]hen the state puts a person in danger, the Due Process Clause requires the state to protect him to the extent of ameliorating the incremental risk" and that in *Archie*, the "state did not cause [the plaintiff's] diseases or otherwise propel her into danger." *Id.* at 1223. The holding is not applicable here because the CRS caused plaintiffs to violate SORA.

And for many of the same reasons, the City's reliance on *Murphy*, 868 F.3d at 566, for the bright line rule a registrant has no due process interest to challenge a government's refusal to register a sex offender, s*ee* City Br. 14, misreads the factual context of the court's holding and ignores *Schepers*. In *Murphy*, this court considered whether a sex offender with a mandatory lifetime registration in California, an issue not contested, who moved to Wisconsin had a due process interest to challenge continued registration under Wisconsin law. 868 F.3d at 566-67. This court declined to extend pre-registration process in that case and held that post-registration process satisfied the *Mathews v. Eldridge*, 424 U.S. 319 (1976), framework. *Id.* at 566-68. This case is easily distinguishable because plaintiffs

challenge the wholesale refusal by the City to register a category of sex offenders as required by SORA.

II. City's Policy Or Widespread Equivalent Practice Is Basis For Municipal Liability

The registration of a sex offender lacking a residence at the time of registration is prescribed by SORA:

> Any person who lacks a fixed residence must report weekly, in person, with the sheriff's office in the county in which he or she is located in an unincorporated area, or with the chief of police in the municipality in which he or she is located. The agency of jurisdiction will document each weekly registration to include all the locations where the person has stayed during the past 7 days.

730 ILCS 150/3.

The Illinois Appellate Court interpreted this provision in *People v. Wlecke*, 6 N.E.3d 745 (Ill. App. Ct. 2014), explaining the contours of registration for individuals who lack a residence at the time of registration:

> As already noted, the Act requires those offenders who lack a "fixed residence" to "report weekly, in person" to the appropriate law enforcement agency where the offender is located. 730 ILCS 150/6 (West 2010). A person required to register who lacks a "fixed residence" or "temporary domicile" must "notify, in person the agency of jurisdiction of his or her last known address." *Id.* "The agency of jurisdiction will document each weekly registration to include all the locations where the person has stayed during the past 7 days." 730 ILCS 150/3(a) (West 2010). The plain language of the Act therefore requires a person who lacks a "fixed residence," to "register" his address by simply reporting and *notifying* the agency of jurisdiction that he lacks a "fixed residence" and to report weekly thereafter.

Id. at 754 (emphasis in original).

The challenged policy or widespread equivalent practice here is the City's day-to-day gerrymandering of SORA's registration rules for those seeking to register as lacking a fixed address. Instead of following state law and registering such individuals for at least one week, plaintiffs presented sufficient evidence the City required each to identify an address and produce a government issued identification card reflecting the address. A direct consequence of this municipal policy or practice rendered plaintiffs exposed to arrest and incarceration along with various civil consequences because, as the district judge reasonably inferred, "homeless persons, almost by definition, will lack identification reflecting a current address because they have no address." Short Appendix 31.

Nothing in the statute provides for law enforcement to reject a sex offender's attempts to register weekly as a person lacking a fixed residence. As the Illinois Supreme Court has explained:

> By requiring sex offenders to register with local law enforcement agencies, the legislature sought to create an additional method of protection for children from the increasing incidence of sexual assault and sexual abuse. The Registration Act was designed to aid law enforcement agencies in allowing them to monitor the movements of the perpetrators by allowing ready access to crucial information.

People v. Cornelius, 821 N.E.2d 288, 298 (Ill. 2004) (internal citations and quotation omitted). Preventing offenders from registering due to the City's refusal to register a category of sex offenders is inconsistent with SORA's purposes in obtaining "crucial information" for the "protection [of] children from the increasing incidence of sexual assault and sexual abuse." *Id.*

Sergeant Phillip P. Jones, the commanding officer of the CRS during the majority of the class period, testified in a deposition that all sex offenders in Chicago must provide proof of an address:

> Q. Do all registrants who are sex offenders need a proof of the address?
>
> A. Every registrant needs proof of address. That is the threshold question, yes.

R. 166-3 at 67; Opening Br. 15-16. Sergeant Jones doubled down on this policy during a hearing before the Honorable John Z. Lee in *Johnson v. City of Chicago*, No. 12 C 8594:

> Q. Now, there is two things your office needs when they register a person. One is proof of their address which is an identification, correct?
>
> A. That's correct. The threshold question for every individual who registers, everyone registers, is they must have a government-issued ID in order to prove they reside in Chicago, because believe it or not, we have people who try to come and register in Chicago who don't really live in Chicago.

R. 166-2 at 46; Opening Br. 16. The City's brief does not address Sergeant Jones' testimony.

Most sex offenders lacking a fixed address at the time of registration were directed by the City to an emergency shelter at 200 S. Sacramento Boulevard. But this changed around September 2013 due to an expose on local television that identified a large number of sex offenders stayed in close proximity to a Safe Passage Route. R. 61 at 1-2; Dave Savini, *2 Investigators: Safe Passage Routes Lead Kids Past Sex Offender Shelters*, Sept. 10, 2013,

http://chicago.cbslocal.com/2013/09/10/2-investigators-safe-passage-routes-lead-kids-past-sex-offender-shelters/. At the same time, Detective Solomis Karadjias testified the number of sex offenders registered as lacking a fixed residence increased:

> Q. At any point in time, to your knowledge, did the number of people that were registered as lacking a fixed address increase?
>
> A. Yes.
>
> Q. When did that occur?
>
> A. I believe it was pretty level and then a shelter closed in September of 2013. The main - - I think the main shelter that our homeless people used shut down because - - or it didn't shut down, but it became a bad address because what happened was a charter school was built within 500 feet of it, and that it - - It made the shelter situated in a prohibited zone and, therefore, they could not register at that shelter any longer.
>
> Q. Was that an address on Sacramento that you're referring to?
>
> A. That's correct.
>
> Q. And prior to that time when the Franciscan Shelter became a prohibited zone, did the Registration Section refer people lacking a fixed address to go over and register with the Secretary of State as their address, 220 South - - 200 South Sacramento?
>
> A. I wouldn't say refer. What I would say is that if people - - people at some point would ask us do you know of a place that we could stay; we would say, well, you could try 200 South Sacramento. They take people in your position, and then it was up to them whether they wanted to stay there or not.

R. 166-2 at 116-17; Opening Br. 10.

The CRS Criminal Registration Logs (the "Logs") corroborate Detective Karadjias' testimony the number of sex offenders registered as lacking a fixed residence was level until September 2013. Ten months of Logs covering the class period from December 6, 2010 to October 21, 2013, document five sex offenders (James Manegold, Ginn Torres, Claude Canning, Paul Herbert, Vincent McArthur) registered weekly as lacking a residence at the time of registration. Opening Br. 11. The same Logs identify between 43 and 84 sex offenders were denied registration each month for failure to provide proof of address or lack of identification. *Id.*

The district judge wholesale dismissed this evidence noting "Plaintiffs' purported violations are interspersed with an equal number occasions where homeless offenders *were* registered without a fixed residence." Short Appendix 19. This was illogical in light of the evidence. Also, the district judge misread SORA by concluding a sex offender must provide proof of address along with inferring that a government issued identification was required by SORA to register. Short Appendix 23-23. The City essentially adopts the district judge's illogical review of the evidence. City Br. 20.

This analysis is irreconcilable with the additional evidence introduced by plaintiffs in support of the challenged policy or widespread equivalent practice. Take, for example, two registration attempts by plaintiff Michael Beley. Beley was released from the Taylorville Correctional Center on November 19, 2012 and spent the night "on the streets" of Chicago. Opening Br. 6. The following day, Be-

ley attempted to register. *Id.* Although Beley had release papers from the prison and a document titled "Illinois Sex Officer Registration Act Notification Form" identifying he did not have a "Resident Address," the City informed Beley that he would not be registered because he did not have an "ID with a fixed address" along with the $100 registration fee. *Id.* A record was made in the CRS Log that Beley was turned away because "PROOF OF ADD." *Id.*

Beley was again denied registration on November 23, 2012 despite his status as staying "in the streets." *Id.* It is undisputed that the CRS directed Beley to potential shelter options and made a record in the Log that he was not registered because "NO ID/ REF SHELT." *Id.*

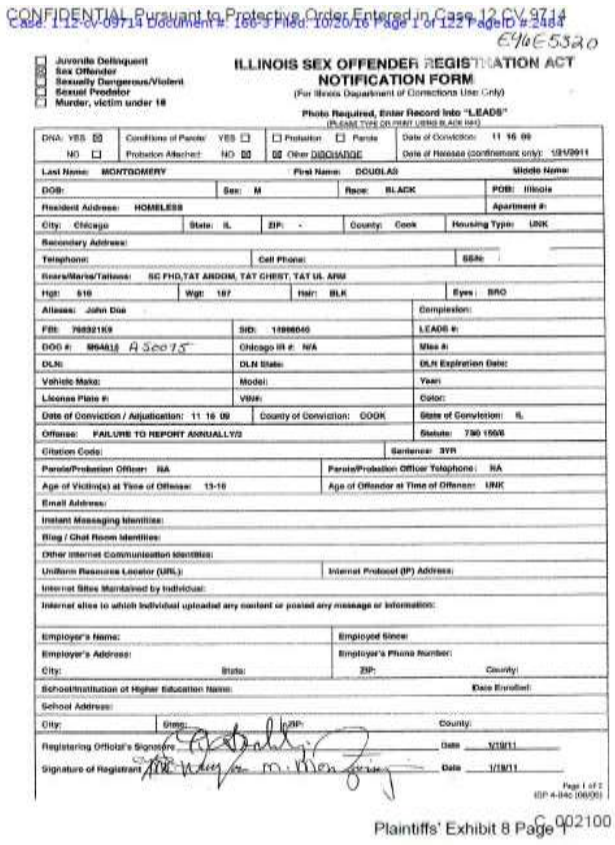
The City does not contest the facts surrounding Beley's registration attempts. City Br. fn. 2. By operation of law, Beley was in violation of SORA by November 23, 2012, because he was not registered within three days of release from the Taylorville Correctional Center. 730 ILCS 150/4. The district judge held Beley's November 20 and November 23, 2012 registration attempts were evidence of unconstitutional behavior. Short Appendix 18.

Consistent with the City's then existing policy or practice, Beley located an address, the 200 S. Sacramento Boulevard emergency overnight shelter, and obtained a state identification card reflecting this address. The City then registered Beley on December 11, 2012. City Br. 5.

The City does not contest the same sequence of events occurred to Albert Bingham, Johnathan Collantes, Timothy Downs, Eric Flowers, Kieth Frierson,

Jemiah Gholson, Sean Messer, and Eric Williams. City Br. 20; Opening Br. 12-14. The CRS Logs reflect each was denied registration for the dubious reason of lacking identification or an address and subsequently registered after acquiring an Illinois identification card listing the shelter address at 200 S. Sacramento Boulevard. Opening Br. 12-14.

The district judge also considered plaintiff Douglas Montgomery's registration experience on January 27, 2011, and held it was evidence a reasonable jury could deduce unconstitutional behavior. Short Appendix 18. During that registration attempt, Montgomery presented an "Illinois Sex Officer Registration Act Notification Form" to the City identifying he was "HOMELESS." Opening Br. 8. The first page of this document is reproduced below:



CONFIDENTIAL Pursuant to Protective Order Entered in Case 12 CV 9714
Case: 1:12-cv-09714 Document #: 166-3 Filed: 10/26/16 Page 1 of 122 PageID #:2484

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ILLINOIS SEX OFFENDER REGISTRATION ACT
NOTIFICATION FORM
(For Illinois Department of Corrections Use Only)

Juvenile Delinquent
Sex Offender
Sexually Dangerous/Violent
Sexual Predator
Murder, victim under 18

Photo Required, Enter Record Into "LEADS"
(PLEASE TYPE OR PRINT USING BLACK INK)

DNA: YES ☒ NO ☐ | Conditions of Parole: YES ☐ Probation Attached: NO ☒ | ☐ Probation ☐ Parole ☒ Other DISCHARGE | Date of Conviction: 11 16 09 | Date of Release (confinement only): 1/31/2011

Last Name: MONTGOMERY | First Name: DOUGLAS | Middle Name:
DOB: | Sex: M | Race: BLACK | POB: Illinois
Resident Address: HOMELESS | Apartment #:
City: Chicago | State: IL | ZIP: - | County: Cook | Housing Type: UNK
Secondary Address:
Telephone: | Cell Phone: | SSN:
Scars/Marks/Tattoos: SC FHD,TAT ARDOM, TAT CHRST, TAT UL ARM
Hgt: 510 | Wgt: 187 | Hair: BLK | Eyes: BRO
Aliases: John Doe | Complexion:
FBI: 768321K9 | SID: 13998045 | LEADS #:
DOC #: B04618 A 50075 | Chicago IR #: N/A | Misc #:
DLN: | DLN State: | DLN Expiration Date:
Vehicle Make: | Model: | Year:
License Plate #: | VIN#: | Color:
Date of Conviction / Adjudication: 11 16 09 | County of Conviction: COOK | State of Conviction: IL
Offense: FAILURE TO REPORT ANNUALLY/2 | Statute: 730 150/6
Citation Code: | Sentence: 3YR
Parole/Probation Officer: NA | Parole/Probation Officer Telephone: NA
Age of Victim(s) at Time of Offense: 13-16 | Age of Offender at Time of Offense: UNK
Email Address:
Instant Messaging Identities:
Blog / Chat Room Identities:
Other Internet Communication Identities:
Uniform Resource Locator (URL): | Internet Protocol (IP) Address:
Internet Sites Maintained by Individual:
Internet sites to which individual uploaded any content or posted any message or information:
Employer's Name: | Employed Since:
Employer's Address: | Employer's Phone Number:
City: | State: | ZIP: | County:
School/Institution of Higher Education Name: | Date Enrolled:
School Address:
City: | State: | ZIP: | County:
Registering Official's Signature: | Date 1/19/11
Signature of Registrant: | Date 1/19/11

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R.166-3 at 1. Despite presenting this document, Montgomery was informed by a CRS police officer that the City was "not registering homeless people right now" and to register he must identify a "fixed address" and produce an identification card. Opening Br. 8-9. The Log shows a person named "Douglas McArthur" was turned away from the registration office that day because he "NEEDS ADDRESS."[2] Opening Br. 9.

In addition to Beley, Montgomery, Bingham, Collantes, Downs, Flowers, Frierson, Gholson, Messer, and Williams, the City agrees plaintiffs presented additional evidence in support of this policy or widespread equivalent practice:

- Four declarants, Henry Hartage, Adarryll Kelly, James McDonald, and Charles Mowder, informed that registration as a person lacking a residence at the time of registration not permitted and instructed that an address was necessary to register. City Br. 20; Opening Br. 9-10, 23.

- Dwight Barkley, John Trotter, Arthur Jones, and Davin Tangrio were each denied registration for being homeless. City Br. 20; Opening Br. 12, 24.

The City argues, however, that this evidence "must be viewed against the thousands of other registrations CPD performed during the relevant time frame" and does not create an inference of a policy or widespread practice. City Br. 20.

[2] The City suggests that it is undisputed that Montgomery attempted to register using an alias on January 27, 2011. City Br. 5-6. The cited record by the City, R. 163 at 6, does not support this contention. Moreover, it makes little sense why Montgomery would attempt to register using an alias, particularly where he presented the City with an "Illinois Sex Offender Registration Act Notification Form" identifying his legal name and that he was "HOMELESS." Opening Br. 8-9. On appeal, the facts must be viewed in the light most favorably to plaintiffs. *Burton v. Downey*, 805 F.3d 776, 783 (7th Cir. 2015).

This position is irreconcilable with the testimony of Sergeant Jones, Detective Karadjias, and the above identified evidence.

In an effort to diminish the significance of the Logs, the City suggests the "isolated examples of denials of registration must be viewed against the thousands of other registrations." City Br. 20. This argument is a nonstarter because the district judge, after conducting a "rigorous analysis" at the class certification stage, *Blow v. Bijora*, 855 F.3d 793, 806 (7th Cir. 2017), held that "it is reasonable for this Court to infer that there is a potential pool of plaintiffs in the hundreds, if not more." Short Appendix 23. As it turned out, the Logs tracked the district judge's common sense inference that the pool of potential plaintiffs is in the hundreds.[3]

[3] The City makes a terse argument in an attempt to undermine the district judge's findings at class certification by suggesting "it is well settled that certification of a claim says nothing about its ultimate merits, which are 'generally irrelevant to . . . class certification.'" City Br. 21, citing *Messner v. Northshore University HealthSystem*, 669 F.3d 802, 823 (7th Cir. 2012). But this position is irreconcilable in this case because discovery was closed when the City responded to plaintiffs' class certification motion and essentially the same evidence was reviewed by the district judge at summary judgment. For example, the district judge reviewed the following facts at class certification: (1) the testimony of Beley and Montgomery, (2) declarations from Adarryll Kelly, Charles Mowder, James McDonald, Kenneth Williams, and Henry Hartage, (3) CRS Logs for several weeks showing sex offenders were turned away for "NEED ID," "NEED UPDATED ID," "PROOF OF ADD," (4) *People v. Wlecke*, 6 N.E3d 745 n. 2 (Ill. App. Ct. 2014) finding the City enforced a "common practice . . . to turn away sex offenders attempting to register for lack of proof of address," and (5) testimony by Sergeant Jones that every sex offender "needs proof of address." Short Appendix 27-36. This evidence led the district judge to conclude that plaintiffs' "claims are based on the same course of conduct that affected all members of the proposed class: the Chicago Police Department's purported policy of refusing to register homeless sex offenders." Short Appendix 36. At summary judgment, the district judge reviewed essentially the same evidence to arrive at an opposite conclusion; that "the evidence does not present a triable issue of fact regarding whether there was a policy or widespread practice of denying SORA registration to sex offenders who lacked a fixed residence at the time of registration" and "[a]t most, Plaintiffs have shown 'occasional lapses' or 'individual misconduct by police officers,' not 'systemic problems' or 'institutional behavior.'" Short Appendix 24. The district judge's rulings are irreconcilable, particularly because the evidence must be viewed most favorable to plaintiffs at summary judgment.

The Logs show the City routinely, as a matter of course, did not register sex offenders weekly as lacking a residence at the time of registration. Opening Br. 10-12. More than a year and a half after this case was filed, the City altered the policy and procedure to register sex offenders lacking an address at the time of registration to conform with SORA. Three separate weeks after the class closed, the Logs show at least one hundred sex offenders registered weekly as lacking a residence:

- 124 sex offenders from December 8, to December 12, 2014;
- 126 sex offenders from January 12, to January 16, 2015; and
- 243 sex offenders from February 1, to February 5, 2016.

Opening Br. 17. During the same period, no sex offender was denied registration for lack of identification and under ten were turned away for failure to provide proof of address. *Id.*

In a final attempt to undermine the Logs, the City argues they "say nothing about whether the individuals at issue were improperly denied registration." City Br. 20. This argument is internally inconsistent because the City concedes, solely based on Log entries, that Dwight Barkley, John Trotter, Arthur Jones, and Davin Tangrio, were denied registration for being homeless. *Id.* Furthermore, all registration activity, including the universe of sex offenders registered weekly as lacking a residence at the time of registration, is documented in these Logs by a handful of police officers assigned to CRS. Opening Br. 5-6, 10.

Any contention that the enforcement of state law is not a basis for municipal liability, *see* City Br. 16-23, misconstrues plaintiffs' theory of the case. *Surplus Store & Exchange, Inc. v. City of Delphi*, 928 F.2d 788 (7th Cir. 1991), does not advance the City's position. In that case, the plaintiff attempted to establish municipal liability for deprivation of property because of a "'policy' of allowing or instructing its police officers to enforce the challenged state statute." *Id.* at 791. The court noted several flaws in the plaintiff's legal position including: (1) the failure to allege a policy, ordinance, regulation, or decision officially adopted by the municipality that was itself unconstitutional; (2) the failure to argue the constitutional violation was caused by an entrenched practice with the effective force of a formal policy that the municipality allowed to develop, which practice or custom was itself unconstitutional; or (3) that the municipality enforces the law in a manner or method that caused the constitutional violation. *Id.*

This case is distinguishable from *Surplus Store* because plaintiffs challenge the City's manipulation of SORA to cause them to be unable to comply with state law and thus subject to strict liability civil and criminal penalties. The City's brief concedes plaintiffs "have consistently described their claim this way." City Br. 14-15.

And the City's statutory argument that plaintiffs and the plaintiff class must present "positive identification" by way of a state identification card, City Br. 4-8, 18-19, is inconsistent with the plain language of SORA, the interpretation of SORA by state courts, and the City's administration of SORA following the issu-

ance of the June 2014 Memorandum. Opening Br. 16-17. In addition, the Illinois Appellate Court dismissed this contention by construing the "plain language of the Act therefore requires a person who lacks a 'fixed residence,' to 'register' his address by simply reporting and *notifying* the agency of jurisdiction that he lacks a 'fixed residence' and report weekly thereafter." *Wlecke*, 6 N.E.3d at 754.

III. Plaintiffs' Due Process Claim Does Not Fail On The Merits

The City contends plaintiffs' Due Process Claim fails on the merits. City Br. 23. Specifically, the City argues plaintiffs cannot show a protected interest in question or that procedures attending that deprivation were inadequate. *Id.* Plaintiffs respond to each contention below.

A. Not Necessary For Beley And Other Class Members To Be Arrested To Be Deprived Of Liberty

The City asserts that a sex offender must be arrested for a failure to register charge to implicate a liberty interest. City Br. 24-25. This position, for the reasons above stated, is inconsistent with *Schepers* and simply ignores the compelling interest for a registered sex offender to remain free in society.

In addition, this analysis does not apply to plaintiff Montgomery and similarly situated registrants who were arrested for violating SORA.

B. Sufficient Evidence The City's Registration Procedures Were Unconstitutional

The evidence presented does not demonstrate, as a matter of law, the adequacy of the remedy to protect plaintiffs' asserted liberty interest. Where a plain-

tiff alleges that a deprivation of a protected due process interest is pursuant to an established procedure rather than a random, unauthorized action, a pre-deprivation remedy is required. *Schepers*, 691 F.3d at 916; *Leavell v. Illinois Dept. of Natural Resources*, 600 F.3d 798, 804-05 (7th Cir. 2010). A satisfactory due process remedy cannot be meaningless or non-existent. *Belcher v. Norton*, 497 F.3d 742, 751-52 (7th Cir. 2007).

As an initial matter, the City is wrong the plaintiffs challenge the "City's legal interpretation of SORA's requirements" rather than "factual questions arising during registration." City Br. 26. Indeed, the gravamen of the complaint is that plaintiffs and the plaintiff class attempted to register as lacking a residence, but were denied, despite SORA permitting such registration, because the City refused to comply with state law.

As for the first *Mathews* factor, the private interest at stake, the City takes the position that because "multiple avenues for judicial review are available for individuals denied registration under SORA" any additional procedural safeguard weighs against plaintiffs. City Br. 28. This position is illogical for the reasons advanced in plaintiffs' opening brief. "A homeless sex offender has a significant interest in registering." *Saiger v. City of Chicago*, 37 F.Supp.3d 979, 983 (N.D.Ill. 2014).

The City defends the existing procedures to challenge a sex offender's denial of registration and contends the second *Mathews* factor also weights against plaintiffs. Specifically, the City suggests "there is no reason to believe the City's

current procedures are likely to result in erroneous resolutions of those disputes, nor that additional procedures would meaningfully prevent future erroneous factual determinations or better ensure the fundamental fairness of registration decisions." City Br. 29. The City advances this argument despite evidence of internal uncertainty about the registration requirements for a sex offender lacking a residence at the time of registration. Opening Br. 15-16. In addition, "[n]either SORA nor the City offers any sort of opportunity, administrative or otherwise, to challenge a refusal to register a sex offender." *Saiger*, 37 Supp.3d at 983. This is problematic because "a fair opportunity for rebuttal" is "among the most important procedural mechanisms for purposes of avoiding erroneous deprivations." *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005).

The City also argues, as a matter of law, any additional procedure for a sex offender to challenge the denial of registration "would impose substantial costs," City Br. 29, and therefore the third *Mathews* factor also weighs against plaintiffs. This position is absurd. SORA requires the City to register a person who provides notice that he or she lacks a fixed residence at the time of registration and to report each week thereafter identifying all overnight locations the previous seven days. 730 ILCS 150/3; *Wlecke*, 6 N.E.3d at 754. Some formal or informal process could be fashioned at Chicago Police Department Headquarters, the registration location for all sex offenders, to challenge a denial of registration.

Finally, the City suggests that any additional procedures would frustrate SORA because "[a]n offender challenging a denial of registration would necessari-

ly remain unregistered during the entire process." City Br. 30. This argument is illogical because plaintiffs seek compliance with SORA. And for the reasons above stated, there is no logical explanation to challenge the proposition that some pre-deprivation process could be conducted at Police Department Headquarters expeditiously so registration is not disrupted.

C. Inadequate Post-Deprivation Remedies

Finally, the City argues post-deprivation process in the form of a writ of mandamus, a request for declaratory judgment, or an action for temporary injunctive relief, provides constitutionally adequate process. City Br. 32-37.

The district judge carefully reviewed many of the City's arguments in ruling on a Rule 12(b)(6) motion and held:

> There is significant doubt that such a post-deprivation remedy would be adequate in the present case, where Plaintiffs allege that Defendant had a policy to deny homeless sex offenders the opportunity to register. *See Saiger*, 2014 WL 1612691, *4. The Constitution "usually" requires a hearing before the government deprived a person of liberty. *Zinermon v. Burch*, 494 U.S. 113, 127-28 (1990); *Schepers*, 691 F.3d at 916. Based upon the record, this case does not warrant an exception to the "usual" rule.
>
> An instructive case on both the pre-deprivation and post-deprivation arguments raised by Defendant is *Schepers*. The Seventh Circuit there rejected similar arguments in the context of correcting errors to Indiana's sex offender registry. 691 F.3d at 916. Some offenders were mistakenly classified in the registry, subjecting them to additional requirements and prohibitions. *Id.* at 911. In addressing what process was due, the Seventh Circuit noted that some registrants "can, and have, challenged registry errors in the course of criminal prosecutions for failure to comply with registration requirements." *Id.* at 916. The Court concluded, however, that "due process does not require a person to risk additional criminal conviction as the price of correcting an erroneous listing, especially where a simple procedure

> fix is available much earlier." *Id.* at 916. It further concluded that pursuing a state writ was disfavored and that the Department of Corrections had given no example of a registrant using a writ to challenge a registrant listing. *Id.* The same is true here.

Beley v. City of Chicago, 2015 WL 684519, at *3-4.

Here, the City does little to satisfy the significant doubt about the adequacy of post-deprivation process for a sex offender denied registration. A mandamus "is an extraordinary remedy" in Illinois, *People ex rel. Alvarez v. Howard*, 72 N.E.3d 346, 350 (Ill. 2016), and not a meaningful form of post-deprivation process. And the City's reliance on *People ex rel. Birkett v. Konetski*, 909 N.E.2d 783, 792 (Ill. 2009), is inapposite because it related to a narrow legal question concerning the application of SORA to a juvenile offender.

For many of the same reasons, the City cannot argue now that a declaratory judgment or "temporary injunctive relief to protect against arrest or other penalty during the pendency of that litigation" satisfies the Due Process Clause. City Br. 34-35.

IV. Conclusion

For these reasons, the order dismissing this case should be reversed. The case should be remanded to the district court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, attorney for plaintiffs-appellants, certifies that the foregoing brief complies with the type-volume limitations of Rule 32(a) of the Federal Rules of Appellate Procedure. The brief contains 5,029 words, as counted by the word-counting application of Microsoft Word 2010.

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☑

CERTIFICATE OF SERVICE

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on November 13, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Patrick W. Morrissey

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Certificate of Service When Not All Case Participants Are CM/ECF Participants

I hereby certify that on _____, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

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I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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