No. 18-386

In the Supreme Court of the United States

JOSHUA VASQUEZ, ET AL.,
Petitioners,

v.

KIMBERLY FOXX, STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF EIGHTEEN SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are eighteen scholars across six disciplines whose work includes the leading empirical studies of persons convicted of sexual offenses and the laws applied to them. The Appendix identifies them and describes their work.

Amici believe it critical that judicial decisions affecting constitutional rights be grounded on an accurate understanding of empirical realities. At the very least, they should not propagate misunderstandings. Unfortunately, such misunderstandings are commonplace and often traceable to language in early opinions of this Court. The Seventh Circuit opinion in this case is an example. It relies on mistaken assumptions about both the re-offense risks posed by those to whom the laws apply, and the impact of residential exclusions on the likelihood of their re-offending. *Amici* wish to provide the Court with accurate descriptions of the scientific studies addressing these subjects. We urge the Court to grant Petitioners' request—not only to correctly settle the law, but also to ensure that consequential but mistaken factual assumptions do not continue to infect it.

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money intended to fund preparing or submitting the brief; and no person—other than *Amici* and their counsel—contributed money intended to fund preparing or submitting the brief. The parties received timely notice and consent to the filing of this brief.

SUMMARY OF ARGUMENT

The Illinois law upheld below[2] impermissibly burdens constitutionally protected interests in liberty and property by imposing a residency ban that forces individuals on a statutory blacklist to move from their homes, with or without their families, no matter how long they have lived there or how often they have been ordered to move in the past, on the basis of flawed factual assumptions about those individuals, which they are given no opportunity to contest. Moreover, the law burdens such interests irrationally, because the ban is incapable of advancing its valid purpose no matter to whom it is applied.

Illinois applies this residency ban to every person ever convicted—no matter how long ago—of a "sex offense" included on a broad statutory list.[3] Affected individuals[4] must move whenever a neighbor opens a "day care home" within 500 feet of their home.[5] Simply remaining in one's home is then a felony. It should go without saying that this law imposes extraordinary burdens on constitutionally protected interests in

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[2] 720 ILCS 5/11-9.3 (b-10).

[3] *Id.* at (d).

[4] We refer to those on the statutory list as "affected individuals." We avoid the statutory label, "child sex offenders," because it communicates the mistaken premise that those so classified all share serious character defects making them a high re-offense risk. In fact, they share only this legal disability, not a psychological diagnosis.

[5] A daycare home is a family home in which the residents care for at least 3 (but not more than 12) children, including their own. 225 ILCS 10/2.18.

liberty and property by denying affected individuals the right to establish and remain in a home—a right all others enjoy as a matter of course. It imposes these burdens without allowing those affected any process by which to seek removal from the blacklist, as the imposition is not based on any factual findings, but rather on two flawed assumptions: (1) that residency bans reduce the risk to children posed by "sex offenders," and (2) that the affected individuals share inherent and immutable characteristics that necessarily make them all a high risk to re-offend for the rest of their lives. Because neither assumption is true, neither provides justification for the law.

The law's avowed purpose is of course laudatory: protecting children from harm. But compelling scientific studies have consistently found that such residency bans do not advance that goal. The underlying reality is that crimes against children are facilitated by social proximity, not geographical proximity. Tragically, residency bans can actually *increase* re-offense risk by preventing the affected individuals from finding stable housing for their families, thus frustrating their reintegration into the community. Multiple state law enforcement agencies have accordingly concluded that residency bans degrade public safety and should not be adopted. Courts striking down residency bans have reached the same conclusions.

In light of the facts, even a residency ban limited to higher risk individuals could not be justified. But the Illinois law's failure to consider an individual's actual re-offense risk ensures it is not so limited. Instead, the law relies on a single conviction to effectively establish

an irrebuttable presumption, ending only at death, that a person threatens harm. This presumption renders irrelevant subsequent decades of responsible law-abiding behavior which, overwhelming scientific evidence shows, can establish that an individual poses no meaningful risk of future offenses. The law therefore arbitrarily burdens the liberty and property interests of many individuals who present no special risk to children or anyone else.

Rules regulating anyone convicted of a sexual offense — "registrants"[6] — are typically grounded on an assumption that they *all* suffer from immutable character defects and psychiatric compulsions that compel them to re-offend at "frightening and high" rates. *Smith v. Doe*, 538 U.S. 84, 103 (2003). That assumption was central to the Seventh's Circuit's holding here ("a conviction for a sex offense provides evidence of substantial risk of recidivism," *Vasquez v. Foxx*, 895 F.3d 515, 525 (7th Cir. 2018) (quoting *Smith*)) and is the justification for denying petitioners any opportunity for an individualized determination of their re-offense risk. But this assumption—though widely repeated—is fundamentally flawed.

Indeed, *Smith*'s dramatic characterization of the re-offense risk posed by registrants — "frightening and high" — has been repeated by over one hundred courts.[7] Yet the re-offense figure it relied upon came

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[6] We use the term "registrant" because the main attribute these individuals share is the obligation to register in sex-offender registries.

[7] A 2015 count found the phrase "frightening and high" in 91 judicial opinions, and briefs in 101 cases. Ira Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial*

from casual opinion, not data, and has since been disavowed by the very sources the Court relied upon in making it.[8] Peer-reviewed studies published since *Smith* have demonstrated its error. *See Does #1–5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016) ("The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that '[t]he risk of recidivism posed by sex offenders is 'frightening and high.'"), *cert. denied,* 138 S. Ct. 55 (2017). The widespread impact of this mistaken understanding requires this Court to correct it.

Petitioners Vasquez (Compl. ¶ 28) and Cardona (*id.* ¶ 41) were both threatened in 2016 with felony prosecutions for remaining in their homes after daycares were licensed nearby. Mr. Vasquez, convicted seventeen years ago of possessing explicit pictures of minors, *id.* ¶ 22, has never been charged with another offense. Now married, he lives with his wife and their nine-year old daughter. *Id.* ¶¶ 24-25. The family had been required to move before, in 2013, when a neighbor acquired a daycare license. *Id.* ¶ 32. Mr. Cardona, convicted fourteen years ago for "indecent solicitation

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Mistake About Sex Crime Statistics, 30 CONST. COMMENT. 495, 497 (2015). A Lexis search for cases with the phrase yielded 119 hits on October 4, 2018.

[8] The Court's statement cites a Justice Department manual, but the manual itself cited only an article in a mass-market magazine that neither contained nor referenced any data, *id.* at 497-98. The article's author has since disavowed the 80% figure cited in the manual. Jacob Sullum, *'I'm Appalled,' Says Source of Phony Number Used to Justify Harsh Sex Offender Laws*, REASON (Sep. 14, 2017), http://reason.com/blog/2017/09/14/im-appalled-says-source-of-pseudo-statis.

of a child," has never re-offended. *Id.* ¶¶ 35-36. When ordered to move, he had lived in his single-family home for more than twenty-five years and had owned it for six years. *Id.* ¶ 38. He shared the home with his mother, who had fatal lung cancer and depended on him for care. *Id.* ¶¶ 42-43.

Illinois could use simple and scientifically validated risk assessment instruments as part of an inexpensive hearing system to identify the many individuals who, like Mr. Vasquez and Mr. Cardona, pose no meaningful danger to children. By denying any opportunity for such individualized risk assessment, Illinois instead needlessly deprives petitioners and many others of constitutionally protected interests in liberty and property without due process.

Section I below describes the research showing that residency bans do not reduce re-offense risk and likely degrade public safety. Section II briefly explains how older judicial opinions commonly misread re-offense data because of their mistaken assumption that all registrants share the same re-offense risk. Section III describes the compelling data establishing how a released offender's re-offense risk declines over time at liberty without committing a new offense, and how that rate of decline varies with a registrant's initial risk level, which can be measured by simple actuarial tests commonly used by other jurisdictions.

ARGUMENT

I. Residency Bans Do Not Reduce Sexual Re-Offending, and Probably Make Re-Offending More Likely. They Therefore Provide No Benefits to Weigh Against the Burdens They Impose.

The residency ban targets many people who pose no threat to children, as Sections II and III below explain. But some individuals do re-offend. The question is whether a law forcing them to leave their home whenever a daycare is licensed in their neighborhood makes their re-offending less likely. The Seventh Circuit thought that it obviously does. In upholding the law, the court pronounced it "self-evident that creating a buffer between a child day-care home and the home of a child sex offender may protect at least some children from harm." *Vasquez*, 895 F.3d at 525. But the proposition that anyone would lease or buy a home near a daycare to prey on preschool-aged children, who typically travel there and back with their parents, is hardly self-evident. It is in fact demonstrably wrong, as good data on the question would have shown, had petitioners been allowed to present it.

The most compelling study was conducted by the Minnesota Department of Corrections,[9] when Minnesota was contemplating residency restrictions for registrants. To determine whether such restrictions would protect children, the Department identified

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[9] MINN. DEP'T OF CORR., RESIDENTIAL PROXIMITY & SEX OFFENSE RECIDIVISM IN MINNESOTA (April 2007), http://www.csom.org/pubs/mn%20residence%20restrictions_04-07sexoffenderreport-proximity%20mn.pdf [hereinafter MINNESOTA REPORT].

every person convicted of a sex offense who was both released from a Minnesota prison between 1990 and 2002 and incarcerated again for a new sex offense by 2006.[10] It then determined whether a residency ban would have prevented these re-offenses.

Between 1990 and 2002, 3,166 persons with sex offense convictions were released from Minnesota prisons.[11] By 2006, 224 of them had returned to prison for a new sex offense.[12] Another 80 had been convicted of a new sex offense but did not return to prison.[13] Together, these 304 repeat offenders accounted for approximately 3% of the 10,600 sexual offense convictions in Minnesota during the study period.[14] In other words, 97% of those convicted of a sexual offense in Minnesota during this time were first-time offenders who could not be subject to any residency rule. This fact alone tells us that conviction-triggered residency bans cannot have an important impact on the overall incidence of sexual offending.[15]

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[10] *Id.* at 8.

[11] *Id.* at 7.

[12] *Id.*

[13] *Id.* at 24.

[14] *See id.*

[15] Other studies agree that about 95% of persons arrested for a sex offense are first-time offenders. *E.g.*, Jeffrey C. Sandler et al., *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*. 14 PSYCHOL., PUB. POL'Y & L. 284 (2008) (In N.Y., 95% of sex-offense arrestees between 1986 and 2006 were first-time sex offenders.).

But would such a rule have mattered in the 3% of cases in which it could have applied? To answer that question, the study examined the facts of each of the 224 repeat-offense cases in which the offender returned to prison.[16] It assumed a hypothetical rule prohibiting anyone ever convicted of a sex offense from living too close to a school, park, playground, daycare center, or "other location where children are known to congregate."[17] The study tested three possibilities for the minimum required distance: 1,000 feet, 2,500 feet, and 1 mile.[18] Obviously, a 500-foot rule like Illinois' could not prevent an offense if a rule prohibiting residence within a mile could not.

The Department first determined that no proximity ban could have mattered in 145 of the 224 cases, because in each of these either the victim and perpetrator were biologically related, or the perpetrator made contact with the victim through another adult, such as a girlfriend, wife, co-worker, or friend.[19] (Often, offender and victim shared a residence.)

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[16] The study focused on the 224 reincarcerated persons due to the greater availability of data on individuals returned to custody. MINNESOTA REPORT, *supra* note 9, at 8. There is no reason to assume the results would have been different if the study included the 80 who were not reincarcerated. Their new offenses were probably regarded as less serious than those committed by offenders returned to prison.

[17] *Id*. at 10.

[18] *Id.*

[19] *Id.* at 17. Throughout the report, results are usually given as percentages; we have here converted them into actual counts.

In the remaining 79 cases, the perpetrator made contact with an unrelated victim directly, not through an intermediary.[20] In 42 of these 79, the victim was an adult.[21] That left 37 cases of direct contact with underage victims (22 of whom were adolescents unlikely to be in a daycare).[22] In 21 of these 37 cases, the offender first contacted the victim more than a mile from his residence, too far for any residency ban to matter.[23]

That left 16 cases in which the first contact between an offender and an underage victim occurred within a mile of the offender's residence.[24] But *none* of these cases involved contact made at a school, park, daycare, or other place where children "congregated."[25] In eight of them, the victim was a neighbor, and in the remaining eight, contact was made at a restaurant, store, or the home of an acquaintance.[26] Indeed, there were only two cases among the entire 224 in which initial contact with a juvenile victim was made at a listed location, but neither was a daycare and both were more than ten miles from the offender's residence.[27]

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[20] *Id.*

[21] *Id.* at 18 tbl.7, 19.

[22] *Id.*

[23] *Id.* at 21.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 23.

In short, the study found *no* cases in which a residency ban would have prevented contact with a juvenile victim.[28] The study's conclusion that residency bans do not affect re-offense rates is thus not based on any complicated statistical analysis, but on "the inexorable zero." *Johnson v. Transportation Agency*, 480 U.S. 616, 657 (1987) (O'Connor, J., concurring). The Department concluded "the types of offenses such a law are [sic] designed to prevent[were,] in the case of Minnesota, virtually non-existent over the last sixteen years."[29] When young children are in danger, the source isn't likely a stranger who lives near their daycare center, but an uncle who lives across town—or the caretaker herself.

The Minnesota study is compelling, but its conclusions are not unique. Colorado's Sex Offender Management Board similarly found "no research indicating that residence restrictions are correlated with reduced recidivism or increased community safety," and concluded that "limiting where a sex offender sleeps at night . . . seems ineffective."[30]

Both studies also noted that residency restrictions can be counterproductive because the barriers they create to stable housing undermine efforts to reintegrate offenders into the community, and may

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[28] *Id.* at 23-24.

[29] *Id.* at 25.

[30] COLO. SEX OFFENDER MGMT. BD., WHITE PAPER ON THE USE OF RESIDENCE RESTRICTIONS AS A SEX OFFENDER MANAGEMENT STRATEGY 4-5 (2009), http://www.csom.org/pubs/CO%20Residence%20Restrictions%202.pdf.

thereby make re-offending more likely.[31] Indeed, Colorado's Board recommended that the legislature consider *prohibiting* local jurisdictions from adopting such laws.[32] The California Sex Offender Management Board came to similar conclusions when it examined residency restrictions that California then imposed on registrants on parole:

> [T]here is no evidence that residence restrictions are related to preventing or deterring sex crimes against children. To the contrary, the evidence strongly suggests that residence restrictions are likely to have the unintended effect of increasing the likelihood of sexual re-offense.[33]

California's restrictions were later struck down by a unanimous court as an unconstitutional denial of due process. *In re Taylor*, 343 P.3d 867 (Cal. 2015). The ruling was based on findings from an eight-day evidentiary hearing that led the court to conclude the restrictions had caused many registrants "to become homeless," and thereby "denied them reasonable access to medical and psychological treatment resources, drug and alcohol dependency services, job counseling, and

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[31] *Id.* at 3-4; MINNESOTA REPORT, *supra* note 9, at 25-26.

[32] COLO. SEX OFFENDER MGMT. BD., ANNUAL LEGISLATIVE REPORT 26 (Jan. 2014).

[33] CAL. SEX OFFENDER MGMT. BD., HOMELESSNESS AMONG CALIFORNIA'S SEX OFFENDERS: AN UPDATE 1 (Sept. 2011), http://www.casomb.org/docs/Residence_Paper_Final.pdf.

other social services." *Id.* at 877. The court concluded that the law

> imposed harsh and severe restrictions and disabilities on the affected parolees' liberty and privacy rights, however limited, while producing conditions that hamper, rather than foster, efforts to monitor, supervise, and rehabilitate these persons. Accordingly, it bears no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators. . . .

Id. at 879.

The conclusions from Minnesota, Colorado, and California are echoed in scholarly studies published in peer-reviewed journals.[34] They reflect a widespread consensus recently accepted in a report published by the U.S. Justice Department agency responsible for implementing the Federal Adam Walsh Child Protection and Safety Act of 2006:[35]

> [T]here is no empirical support for the effectiveness of residence restrictions. In fact, a

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[34] *See, e.g.*, Kelly M. Socia, *The Efficacy of County-Level Sex Offender Residence Restrictions in New York,* 58 CRIME & DELINQ. 612 (2012) (comparing NY counties with and without residency restrictions); Paul A. Zandbergen, Jill S. Levenson & Timothy S. Hart, *Residential Proximity to Schools and Daycares: An Empirical Analysis of Sex Offense Recidivism*, 37 CRIM. JUST. & BEHAV. 482 (2010) (Florida registrants who lived closer to schools or daycares no more likely to re-offend sexually than those who did not).

[35] Department of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking ("SMART Office").

> number of negative unintended consequences have been empirically identified, including loss of housing, loss of support systems and financial hardship that may aggravate rather than mitigate offender risk.[36]

II. Contrary to the Seventh Circuit's Assertion, a Single Conviction for a Sex Offense Is Not Good Evidence of a Substantial Risk of Recidivism.

The Seventh Circuit's rejection of Petitioners' Due Process claims relied on this Court's statement in *Smith* that "a conviction for a sex offense provides evidence of substantial risk of recidivism." 538 U.S. at 103 (quoted in *Vasquez*, 895 F.3d at 524). As explained above, *Smith*'s mistaken understanding of re-offense risk was based on a casual statement, published in a popular magazine and since recanted by its author.[37] The actual data tell a very different story, but unfortunately, *Smith* has facilitated judicial confusion, even when courts reference reputable sources. That confusion arises from a common but erroneous assumption: that all who commit a crime labeled "sex offense" share a similar propensity to re-offend. But the Illinois law at issue here, and sexual offense registry laws generally, apply to a behaviorally and psychologically diverse range of individuals who would not be expected to have, and in fact do not have, similar

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[36] Chris Lobanov-Rostovsky, *Sex Offender Management Strategies*, *in* NAT'L CRIM. JUST. ASS'N, SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE 181, 205 (SMART Office, 2017), https://ojp.gov/smart/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf.

[37] *See supra* note 8 and accompanying text.

re-offense risks. While that point is usually clear in the research literature, it is often missed in popular sources and by courts and lawyers. The result is the mistaken assumption that a study of the re-offense rate of one subgroup of sexual offenders applies equally to other subgroups, or to sexual offenders in general.

The Court's opinion in *United States v. Kebodeaux* provides an example. After acknowledging that some studies find registrants have low recidivism rates, the opinion adds:

> There is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals. See Dept. of Justice, Bureau of Justice Statistics, P. Langan, E. Schmitt, & M. Durose, Recidivism of Sex Offenders Released in 1994, p. 1 (Nov. 2003) (reporting that compared to non-sex offenders, released sex offenders were four times more likely to be rearrested for a sex crime, and that within the first three years following release 5.3% of released sex offenders were rearrested for a sex crime).

570 U.S. 387, 395-96 (2013).

The 5.3% re-offense figure taken from the Langan et al. study is obviously much lower than the "frightening and high" 80% rate erroneously relied on in *Smith*. But it still overstates the three-year rate re-arrest rate averaged across all registrants for the simple reason that the study did not consider all registrants, but only *adult, male, violent offenders*

released from state prisons.[38] This group has a higher re-offense risk than do registrants generally. One reason is that those sent to state prisons (as opposed to those sent to jails or put on probation) are disproportionately repeat offenders,[39] which inflates their average re-offense rate. First-time offenders—like Mr. Vasquez and Mr. Cardona—are considerably less likely to re-offend after release than are those who have already re-offended. That is true even among the limited sample of adult, violent, male offenders in the Langan et al. study: the re-offense rate of first-time offenders among them was about half that of those with a prior conviction, and considerably less than half that of those with at least six prior arrests, who constituted 28% of the entire prisoner group.[40]

One cannot apply re-offense data from one registrant subgroup to other subgroups, or to registrants more generally.[41] Even an average re-

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[38] DEPT. OF JUST., BUREAU OF JUST. STAT., PATRICK A. LANGAN ET AL., RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 1, 3, 7 (NOV. 2003) (noting that everyone in the study population was male, all the men in the study were violent sex offenders, and only a "few" were under eighteen).

[39] First-offenders are about 95% of those arrested for sex crimes, *see supra* note 15, but only 71.5% of those in this sample, LANGAN ET AL., *supra* note 38, at 26 tbl.27, 28 tbl.31 (showing that 78.5% in the study had been arrested for a prior crime and 29% for a prior sex crime).

[40] The re-offense rate of first-time offenders in the study was 3.3%. LANGAN ET AL., *supra* note 38, at 26 tbl.27. The average three-year re-offense rate among the 28% with at least six prior arrests (not necessarily for a sex crime) was about 7.25%. *See id.* at 27 tbl.29.

[41] This point also explains why *Smith*'s reliance on a 1997 study for the proposition that registrant re-offending may first occur many

offense risk properly computed across all registrants is no more likely to fit any one of them than would a pair of pants of their average waist and length. When a group is defined by a legal criterion that bears little relationship to re-offense risk, there is no reason to expect the group's average risk to provide much information about the risk of particular individuals within it.

The statement quoted from *Kebodeaux,* that released sex offenders are four times more likely than other released felons to be arrested for a sex crime, is thus misleading. Most important, this generalization is incorrect with respect to many individuals in the group, including those like Petitioners who have been at liberty for years without re-offending. But the comparison is also unhelpful because it has no context. If male ex-felons in their twenties were three times more likely than those in their sixties to re-offend, that fact alone would hardly justify forcing them all from their homes.[42]

A rational approach to risk must attend to how it is measured, and how to set a benchmark for when it is

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years later is mistaken. 538 U.S. at 104. The opinion references only a summary of the study, but the full report explained that the study population consisted of persons released from a residential treatment facility for high-risk offenders, and that, as a result, the study's findings could not be extrapolated to others. Robert A. Prentky et al., *Recidivism Rates among Child Molesters and Rapists: A Methodological Analysis*, 21 L. & HUM. BEHAV. 635, 637-38 (1997).

[42] These points are equally applicable to the references in *Smith* to the earlier Justice Department studies. 538 U.S. at 103.

high enough to justify burdening constitutionally protected interests. Section III addresses these points.

III. Re-Offense Risk Declines over Time for All Risk Groups, and Simple Risk Evaluations Tools Can Be Used to Determine Whether Residency Bans Should Be Imposed on an Individual Basis

Reasonably accurate ways to estimate an individual's re-offense risk are available and in wide use. The best example is the Static-99R, a 10-item actuarial scale that assesses the sexual re-offense risk of adult males.[43] A non-proprietary tool developed by Canadian government researchers, it is the most widely used sex-offense risk assessment instrument in the world.[44] Studies commissioned by the State of California have validated its predictive accuracy for adult males on the California registry.[45]

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[43] The ten items cover demographics and sexual and general criminal history (e.g., prior sexual offenses and non-sexual violence). *See, e.g.*, Leslie Helmus, David Thornton, R. Karl Hanson & Kelly M. Babchishin, *Improving the Predictive Accuracy of Static-99 and Static-2002 with Older Sex Offenders: Revised Age Weights*, 24 SEXUAL ABUSE: J. RES. & TREATMENT 64, 67 (2012). Such "structured" risk assessment tools are more accurate than clinical assessments. *See id.* at 65; R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCHOL. ASSESSMENT 1, 6-8 (2009).

[44] *See* Static-99 Clearinghouse, Static-99/Static-99R, http://www.static99.org/ (last visited Oct. 15, 2018).

[45] *E.g.,* R. Karl Hanson et al., *The Field Validity of Static-99 / R Sex Offender Risk Assessment Tool in California,* 1 J. THREAT ASSESSMENT & MGMT. 102 (2014).

The Static-99R measures re-offense risk at the time of release from custody, but once the registrant has been at liberty for a few years, an accurate measure must also consider his post-release conduct. The single most well-established finding in criminology is that the likelihood a felon will re-offend declines with each year after release that he remains offense-free.[46] Two widely cited studies, described below, show that this finding also applies to those convicted of sex offenses. Because this risk reduction follows predictable trajectories that vary with the registrant's initial risk level, individual risk assessments are easily adjusted to take account of legally compliant behavior after release. Even those assessed as high-risk at the time of their release become low-risk after enough years at liberty without re-offending.

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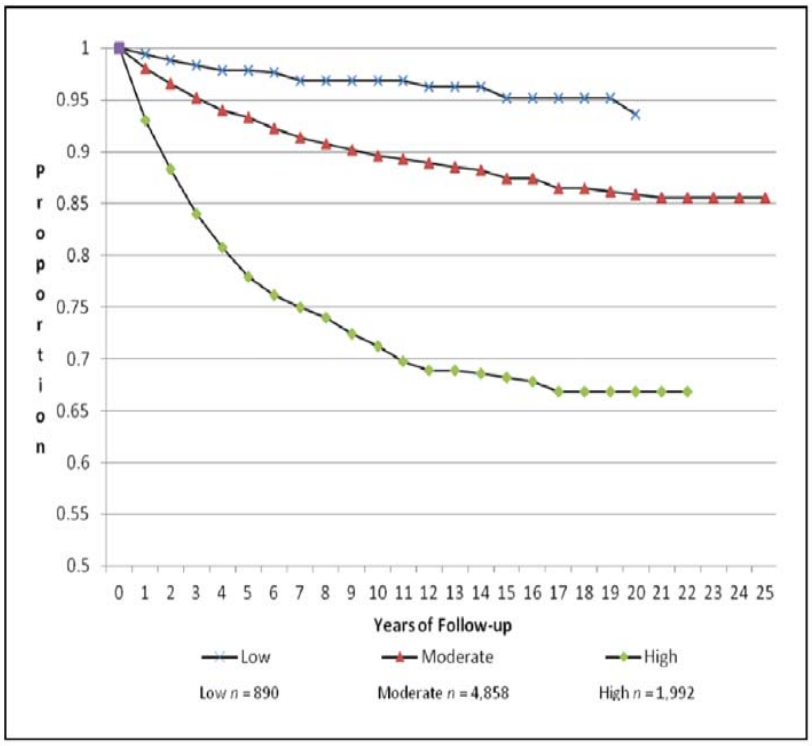
[46] Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009); Megan C. Kurlychek et al., *Long-Term Crime Desistance and Recidivism Patterns–Evidence from the Essex County Convicted Felon Study*, 50 CRIMINOLOGY 71, 75 (2012).

FIGURE ONE



The first study combined data from twenty-one prior studies that, in total, followed 7,740 adult male sex offenders released from custody.[47] The follow-up periods were 8.2 years on average, but as long as 31

[47] R. Karl Hanson et al., *High Risk Sex Offenders May Not Be High Risk Forever*, 29 J. INTERPERSONAL VIOLENCE 2792, 2794-95 (2014). This study examined re-offending by adult men only, because the Static-99R has not been validated for women, juveniles, or some non-contact offenders.

years.[48] The Static-99R was used to classify offenders as High, Moderate, or Low-risk for sexual re-offending at the time of release. Figure One, reprinted from this study, shows the proportion of individuals in each of these three risk groups who committed no new sex offense at years 1 to 21 after release.[49] The Static-99R's predictive power is shown by the separation of the three lines in the years after release. After twenty years, 95% of the low-risk group had not re-offended, compared to 85% of the moderate-risk group and 67% of the high-risk group. But the key finding is that the proportion of individuals who remain offense-free stabilizes over time. Even the line for the high-risk group is quite flat after the twelfth year and doesn't change at all after the seventeenth. That means that very few who did not re-offend by the twelfth year re-offended later, and virtually none re-offend for the first time after seventeen offense-free years.

The second study, published in 2018, asked when after release a legally compliant offender's risk level becomes low enough that special measures cannot be justified.[50] The standard cannot be zero risk because no group is *zero* risk for sex offenses, and control measures obviously cannot be applied to everyone. (Every widening of the net means fewer resources to apply to each person within it, or to other programs that reduce

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[48] In ten of the twenty-one studies, re-offense was defined as a new conviction for a sex offense; in eleven, re-offense was defined as the filing of new sex-offense charges. *Id.* at 2797-98.

[49] *Id.*

[50] R. Karl Hanson et al., *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 PSYCHOL. PUB. POL'Y & L. 48, 50 (2018).

risk.) The researchers looked to common legislative practice to settle on a non-zero risk level to serve as the benchmark for "desistance" from sexual offending. They focused on nonsexual offenders, whom states do not put on sex offender registries, nor burden with residency bans. They found data on the rate of post-release sexual offending among those with a criminal conviction but no convictions for a sexual offense.[51] Based on that data, they chose a sexual re-offense rate of 2% as the desistance benchmark for sexual offenders.

This study used the Static-99R to classify registrants in one of five risk levels as of the time of their release, from "Very Low" through "Well Above Average."[52] Risk levels for all five groups were then recalculated at six-month intervals in the years following release, to take account of any absence of sexual re-offending up to that point. These continually updated "hazard rates" show the risk that a released registrant who has remained offense-free until that time will re-offend in the future. The hazard rates for each of the five risk categories are shown in Figure Two, reproduced from the 2018 study, for each of the 24 years following release.[53] The horizontal black line shows the 2% "desistance" rate against which each group's hazard rate for any given year can be compared.

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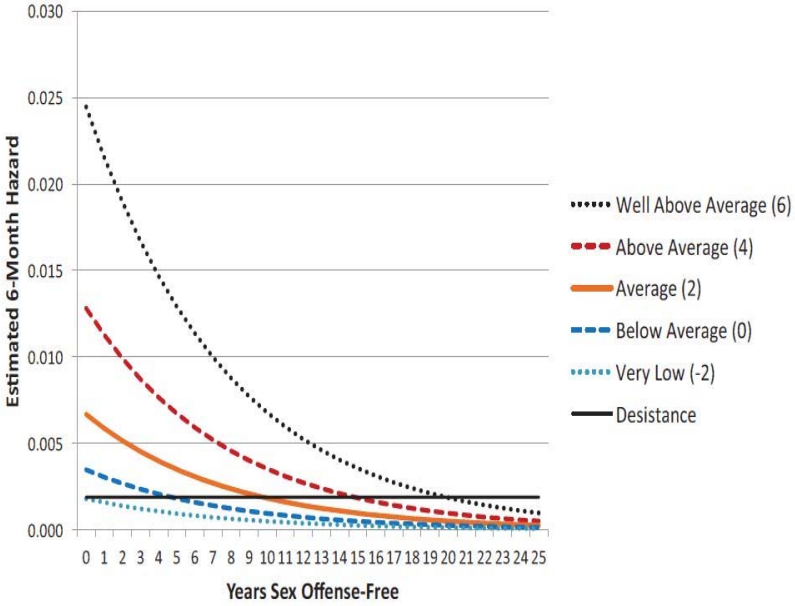
[51] *Id.* at 49 (citing Rachel E. Kahn, Gina Ambroziak, R. Karl Hanson & David Thornton, *Release from the Sex Offender Label*, 46 ARCHIVES SEXUAL BEHAV. 861, 862 (2017)).

[52] *Id.* at 51, 54-56.

[53] *Id.* at 55 fig.2.

FIGURE TWO



The highest risk group ("Well Above Average") remains above the 2% desistance level for a long time—about twenty-one years. But that is a very small group. A recent California study found that only thirty-three of a random sample of 371 adult registrants (8.8%) were in this risk category.[54] Another seventy-four (20%) were "above average" in risk.[55] More than 70% of registrants were in the three lower risk categories. The two lowest risk groups reach desistance

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[54] Seung C. Lee, R. Karl Hanson, Nyssa Fullmer, Janet Neeley & Kerry Ramos, *The Predictive Validity of Static-99R Over 10 Years for Sexual Offenders in California: 2018 Update*, SARATSO 19, http://saratso.org/pdf/Lee_Hanson_Fullmer_Neeley_Ramos_2018_The_Predictive_Validity_of_S_.pdf.

[55] *Id.*

by the fifth year after release, while the "Average" risk group does so by the tenth year (if they have not re-offended). In short, by the tenth year after their release, more than two-thirds of all adult male registrants present a lower risk of sexual re-offending than do those released after having committed only nonsexual offenses—a group no one proposes subjecting to residency bans.[56]

One cannot reduce the rate of sexual offending by imposing restrictions on individuals unlikely to sexually offend in the first place. But that is just what the Illinois law at issue here does when it imposes lifetime residency bans on everyone who has ever committed a listed offense. A net cast so wide ensnares individuals who have become low-risk since their release, even if they were not at the time of release (although many were).

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[56] When arrests for sexual offenses are discussed, the observation is usually made that a significant proportion of sex offenses are not reported. While surely true, that observation has little bearing on this analysis. There is no reason to think police are less likely to know about offenses committed by affected individuals than those committed by individuals without a sex-offense record. Indeed, if anything, the contrary seems more likely, assuming investigations start by examining individuals with records. If unreported offenses were taken in account, therefore, the relative rate of re-offense by affected individuals—their real rate as compared to the real rate of others—would likely be lower, because offenses committed by affected individuals are less likely to go undetected than offenses committed by individuals with no prior sex-offense convictions. Notably, increased public attention to the problem of sex offenses seems to have reduced the proportion that go unreported, at least for child victims. David Finkelhor et al., *School, Police, and Medical Authority Involvement with Children Who Have Experienced Victimization*, 165 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 9 (2011).

Petitioners' convictions are fourteen and seventeen years in the past. Neither has been convicted of any other offense. If permitted to present evidence, they could demonstrate they are among the large share of affected individuals who present a very low risk—indeed, a risk that is indistinguishable from that presented by other very low-risk groups that no one proposes subjecting to a residency ban. Petitioners are entitled to that hearing. Subjecting them and their families to repeated forced relocations on the unexamined and unchallengeable assumption they are dangerous works a deprivation of liberty and property without due process.

CONCLUSION

Humans are poor at perceiving where danger really lurks.[57] Dramatic events stick in the mind and distort our perception of risk. People believe accidents cause as many deaths as disease, when disease causes fifteen times as many deaths as do accidents. They think more people die from homicides than from diabetes or stomach cancer, when the opposite is true.[58] Writing about common misperceptions of the risks associated with inoculations, Eula Biss observed:

> Risk perception may not be about quantifiable risk so much as it is about immeasurable fear. Our fears are informed by history and economics, by social power and stigma, by myth and nightmares. And as with other strongly held

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[57] There is a large body of experimental literature on this topic. *See, e.g.*, PAUL SLOVIC, THE PERCEPTION OF RISK (2000); PAUL SLOVIC, THE FEELING OF RISK (2010).

[58] *See* SLOVIC (2000), *supra* note 57, at 106-07.

> beliefs, our fears are dear to us. When we encounter information that contradicts our beliefs, we tend to doubt the information, not ourselves.[59]

These words help explain why we have residency bans like those at issue in this case. Such bans are born of unreasoned fear of, and anger at, anyone who has committed a "sex offense." But most of those individuals targeted by these laws, like Petitioners, pose no danger. The grave and highly unusual deprivations of liberty and property imposed on them and their families need be based on facts, not on fear, nor on a desire to extract retribution from those who have already been punished for their crimes.

The importance of the state's interest in the safety of children is beyond doubt. But that interest cannot justify imposing burdens that do not advance their safety on law-abiding people who do not threaten it. Petitioners wish only to continue to live in their long-established family homes. The Court should review and reverse the decision of the Seventh Circuit.

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[59] EULA BISS, ON IMMUNITY: AN INOCULATION 37 (2014).

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APPENDIX

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APPENDIX

DESCRIPTION OF *AMICI CURIAE*

Amanda Agan is Assistant Professor of Economics and an Affiliated Professor in the Program in Criminal Justice at Rutgers University. She received her Ph.D. in Economics from the University of Chicago. Her research focuses on the economics of crime, and her studies spotlight the unintended consequences of policies such as sex offender registration and ban-the-box laws. Her studies on the consequences of sex offender registration include papers in the *Journal of Law and Economics* and the *Journal of Empirical Legal Studies*.

Catherine L. Carpenter is The Honorable Arleigh M. Woods and William T. Woods Professor of Law, Southwestern Law School. She teaches and writes in the area of criminal law. Her primary scholarly focus is about the injustice and unconstitutionality of sex offender registration laws. Her work has been cited by courts, including the Maryland Court of Appeals in *Doe v. Department of Public Safety and Correctional Services*, 62 A.3d 123 (Md. 2013), which overturned Maryland's sex offender registration laws on *ex post facto* grounds.

Ira Ellman is Distinguished Affiliated Scholar, Center for the Study of Law and Society, University of California, Berkeley, and Affiliated Faculty of the Berkeley Center for Child and Youth Policy. He was Chief Reporter for the American Law Institute's major project, *Principles of the Law of Family Dissolution*.

His empirical studies with social psychologists have focused on family policy. His 2015 article, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, has been widely discussed in both legal publications and in key national media.

R. Karl Hanson, Ph.D., C.Psych., is one of the leading researchers in the field of risk assessment and treatment for individuals with a history of sexual offending. He has published more than 175 articles, including several highly influential reviews, and has contributed to the development of the most widely used risk assessment tools for individuals with a history of sexual offending (Static-99R; Static-2002R; STABLE-2007). Based in Ottawa, Canada, he worked for Public Safety Canada between 1991 and 2017, a federal department, and retired as Manager of Corrections Research. He is now adjunct faculty in the psychology departments of Carleton University (Ottawa) and Ryerson University (Toronto).

Eric Janus is a professor of law at Mitchell Hamline School of Law, former President and Dean of William Mitchell College of Law, a scholar and expert in sex offender civil commitment laws, author of *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State*, and director of the Sex Offense Litigation and Policy Resource Center, established in 2017.

Richard A. Leo, Ph.D., J.D., is the Hamill Family Chair Professor of Law and Psychology and Dean's Circle Scholar at the University of San Francisco School of Law. He is an expert on police interrogation practices, the impact of *Miranda*, psychological coercion, false confessions, and the wrongful conviction

of the innocent. Dr. Leo has won numerous individual and career achievement awards for research excellence and distinction, and in 2016, the *Wall Street Journal* named him as one of the twenty-five law professors most cited by appellate courts in the United States.

Chrysanthi Leon, J.D., Ph.D., is Associate Professor of Sociology and Criminal Justice at the University of Delaware. She received her J.D. and Ph.D. from the University of California, Berkeley. She is the author of *Sex Fiends, Perverts, and Pedophiles: Understanding Sex Crime Policy in America*, and co-editor of *Challenging Perspectives on Street-Based Sex Work*.

Jill S. Levenson, Ph.D., is a Professor of Social Work at Barry University in Miami Shores, Florida. She studies the impact and effectiveness of social policies and therapeutic interventions designed to reduce sexual violence. She has published over 100 articles about sex offender management policies and clinical interventions, including projects funded by the National Institutes of Justice and the National Sexual Violence Resource Center.

Wayne A. Logan is Gary & Sallyn Pajcic Professor, Florida State University College of Law. Professor Logan is the author of *Knowledge as Power: Criminal Registration and Community Notification Laws in America* (Stanford University Press, 2009), cited by the U.S. Supreme Court in *United States v. Kebodeaux*, 570 U.S. 387 (2013), and co-editor (with J.J. Prescott) of *Sex Offender Registration and Community Notification Laws: An Empirical Evaluation* (Cambridge Univ. Press, under contract).

Robert D. Lytle is an Assistant Professor in the Department of Criminal Justice at the University of Arkansas at Little Rock. He has published research on public opinion, desistance patterns, and policy relating to sex offending, including a dissertation and several papers on sex offender registration and notification laws. His current work is focusing on policy implementation and effectiveness for criminal justice policy, including sex offense laws generally and sex offender registration and notification specifically.

Michael H. Miner, Ph.D., L.P., is Professor of Family Medicine and Community Health and Research Director for the Program in Human Sexuality at the University of Minnesota Medical School. He is Coordinator of Psychological and Forensic Assessment for the Program in Human Sexuality. His research focuses on sex offender treatment, sexual abuse perpetration by adolescent males, risk assessment, and psychological and cognitive mechanisms underlying hypersexuality and sexual risk behavior. He is the immediate Past President of the Association for the Treatment of Sexual Abusers and Past Vice President of the International Association for the Treatment of Sexual Offenders.

J.J. Prescott, Ph.D., J.D., is an economist and Professor of Law at the University of Michigan where he is co-director of the Empirical Legal Studies Center and the Program in Law and Economics. His recent research includes examination of the ramifications of post-release sex offender laws and the socio-economic consequences of criminal record expungement. The Sixth Circuit Court of Appeals relied upon his work in *Does #1–5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *cert.*

denied, 138 S. Ct. 55 (2017) in holding that portions of Michigan's sex offender registration law violated the *Ex Post Facto* clause.

Lisa L. Sample is the Reynolds Professor of Public Affairs and Community Service in the School of Criminology and Criminal Justice at the University of Nebraska Omaha. She has been publishing research on public opinion, reoffending, and sex offender laws since 2001. Her current research focus is the longitudinal effects of sex offender laws on registrants, their partners/spouses, and their children, which is the subject of her forthcoming co-authored book, *Living Under Sex Offense Laws: Consequences for Offenders and their Families*.

Jonathan Simon, J.D., Ph.D., is the Adrian Kragen Professor of Law and Director of the Center for the Study of Law and Society at the University of California, Berkeley. His work focuses on the political dimensions of criminal law and crime policies.

Christopher Slobogin, J.D., LL.M., occupies the Milton R. Underwood Chair at Vanderbilt University School of Law. He is the Director of the Criminal Justice Program and Affiliate Professor of Psychiatry. He is co-author of the leading casebook on mental health law and the best-selling treatise on the same subject. He has written several articles about preventive detention of sex offenders and also addresses the topic in his Harvard University Press book, *Minding Justice: Laws that Deprive People with Mental Disability of Life and Liberty*.

Kelly Socia, Ph.D., is an Associate Professor in the School of Criminology and Justice Studies at the

University of Massachusetts Lowell. His research has focused on individuals listed on sex offense registries, residency restrictions, re-entry and recidivism, among other topics. In a recent Florida case he provided expert testimony and geomapping that resulted in a ruling against *ex post facto* application of local residency restrictions.

Richard Wollert, Ph.D., is a member of the Mental Health, Law, and Policy Institute at Simon Fraser University. An expert witness in many cases involving sexually violent predators, his publications critique sex offender recidivism risk assessments, DSM paraphilia diagnoses, and federal sentencing guidelines for child pornography. Dr. Wollert and his associates have treated over 5,000 sex offenders at his Oregon and Canadian clinics.

Franklin Zimring is the William G. Simon Professor of Law and Faculty Director, Criminal Justice Studies, at the University of California, Berkeley. He is known worldwide for his empirical work on criminal justice policy. Among his many books are *Criminal Law and the Regulation of Vice* and *An American Travesty: Legal Responses to Adolescent Sexual Offending*.