IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PAUL MURPHY, et al.,	)	
	)	
Plaintiffs,	)	No. 16 CV 11471
	)	
v.	)	Judge Virginia M. Kendall
	)	
LISA MADIGAN, Attorney General of Illinois, and JOHN BALDWIN, Director of the Illinois Department of Corrections	)	
	)	
Defendants.	)	

DEFENDANTS' COMBINED MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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The defendants, Lisa Madigan, Attorney General of Illinois and John Baldwin, Director of the Illinois Department of Corrections, by their attorney, the Illinois Attorney General, submit the following combined memorandum of law in support of their motion for summary judgment and in opposition to Plaintiffs' motion for summary judgment.

INTRODUCTION

Plaintiffs are prisoners currently incarcerated in the Illinois Department of Corrections ("IDOC"). Because they were convicted of certain serious sex offenses, they are also sentenced to an indefinite term of Mandatory Supervised Release (MSR) of three years to life. Plaintiffs have served their initial prison sentences, but they must submit an acceptable host site (residence) before they can be released on MSR. An acceptable host site is one that complies with all statutory restrictions on where sex offenders may live, all parole conditions, and IDOC policies. IDOC will not release a sex offender to live in a homeless shelter or to homelessness. IDOC enforces these conditions to ensure public safety, especially the protection of children, and to support the supervision of and rehabilitation of the offender.

In this case, Plaintiffs challenge both the statutory restrictions and IDOC policies regarding where they may live. However, Plaintiffs' substantive claims (substantive due process, equal protection, and Eighth Amendment) may not be brought in a Section 1983 action. Because they challenge a parole condition (*i.e.*, the requirement that they live at an IDOC-approved host site), they may only bring these claims in a habeas corpus proceeding. Moreover, each of these claims also fail on the merits. And while the Plaintiffs' procedural due process claim may be brought in a Section 1983 claim, that claim also fails as a matter of law. Accordingly, the Court should grant summary judgment in favor of the Defendants and deny Plaintiffs' motion.

BACKGROUND

The Statutory Scheme

Plaintiffs are prisoners convicted of sex-related offenses and are serving time in the Illinois Department of Corrections ("IDOC"). Complaint (Dkt. 1) ¶¶ 12-18. Plaintiffs allege they are part of a group of 4,000 offenders in the same category. *Id.* ¶ 121. Plaintiffs allege a variety of claims in connection with Illinois laws setting terms of Mandatory Supervised Release (MSR) for sex offenders. Because MSR involves release from incarceration while still remaining under supervision by the Illinois Prisoner Review Board ("PRB"), it is the "rough equivalent" to parole. *Sims v. Walker,* No. 10 C 5266, 2011 WL 2923859 at *1 (N.D. Ill. July 12, 2011).

Illinois law provides that when a person is sentenced to a period of incarceration "the parole or mandatory supervised release term shall be written as part of the sentencing order." 730 ILCS 5/5-8-1(d). For persons committing certain kinds of felony sex offenses,[1] "the term of mandatory supervised release shall range from a minimum of 3 years to a maximum of the natural life of the defendant." 730 ILCS 5/5-8-1(d)(4). The MSR period is an indeterminate sentence. *People v. Rinehart,* 2012 IL 111719 at ¶¶ 29-30.

A person released on MSR must comply with a list of conditions imposed by the Prisoner Review Board: "The conditions of parole, aftercare release, or mandatory supervised release shall be such as the Prisoner Review Board deems necessary to assist the subject in leading a law-abiding life." 730 ILCS 5/3-3-7(a). Besides the standard mandatory conditions, such as not possessing a firearm and consenting to visits by a parole agent, *see id.*, sex offenders may be subject to additional restrictions. 730 ILCS 5/3-3-7(b-1). Some of these conditions may depend on additional approvals by the Department of Corrections. A sex offender may be required to

[1] These offenses include criminal sexual assault, aggravated criminal sexual assault, predatory criminal sexual assault of a child, aggravated child pornography manufacture of child pornography, or dissemination of child pornography. 730 ILCS 5/5-8-1(d)(4).

reside only at a location approved by the Department of Corrections, *id.* at (b-1)(1), comply with all requirements of the Sex Offender Registration Act. *Id.* at (b-1)(2), and comply with all Illinois laws regarding where sex offenders may live. For example, Illinois law prohibits child sex offenders from living within 500 feet of day care centers, schools, and playgrounds. *See* 720 ILCS 5/11-9.3(b-5) and 9.3(b-10).

In effect then, the sex offender's release on MSR is subject to the dual oversight of the Prisoner Review Board and Department of Corrections. The PRB may approve the release for a certain date, but the release is effected only with the Department's approval as to living conditions, and other possible conditions.

IDOC's Process for Investigating and Approving Host Sites

No more than six months before release, a sex offender may propose a host site by giving an address to the Field Services Representative at the sex offender's facility, who enters the information in the IDOC database. Defendants' Statement of Facts ("DSOF") ¶ 1. The proposed host site is then routed to the appropriate district. The parole commander for that district verifies that the host site has been routed to the correct district and that the MSR release date is no more than six months away. He then assigns the host site to a parole agent. *Id*. ¶ 2.

The IDOC parole agent assigned to investigate the host site begins the investigation of the host site by checking the Department's mapping software for day care centers and schools within 500 feet of the address. If there are none, the agent then uses Google Earth to check for playgrounds, parks, schools, or other facilities providing programs exclusively for minors. If there are any such facilities within 500 feet, then the agent will generally deny the host site. *Id*. ¶ 3. Next, the parole agent calls the local registering agency (usually the local police department) to verify that the agency will register a sex offender at the address given. *Id*. ¶ 4.

Next, the parole agent visits the proposed host site. During this visit, he will look for problems (such as day care centers or playgrounds) that may have been missed on the map. *Id.* ¶ 5. He will meet with the host to ensure that he or she is willing to host the offender and understands the rules. The agent will also find out who the other residents of the house are, and will make sure that any co-owners or co-leaseholders are also willing to have the offender live in the home. *Id.* ¶ 6. The parole agent attempts to verify that the home will be a good environment for the offender, supportive both financially and emotionally, physically safe, and structurally sound, with working utilities, etc., and not in violation of any supervision rules. *Id.* ¶ 7.

If the parole agent denies a host site at any point in this process, then the parole commander reviews that denial to make sure that the denial is reasonable and meritorious. *Id.* ¶ 8. The parole commander may either sustain or reverse the agent's decision to deny a host site. *Id.*

Transferring to Another State

In addition to paroling to a location in Illinois, a sex offender may also serve their MSR term while residing out of state pursuant to the Interstate Compact for Adult Offender Supervision. *Id.* ¶ 9. The conditions required for a transfer are established by the Interstate Commission for Adult Offender Supervision. *Id.* ¶ 10. In brief, the individual must have a valid basis for transfer to the receiving state under ICAOS Rules 3.101, 3.101-1, and 3.101.2. If the offender is seeking transfer based on having a relative in the receiving state, the offender is not actually required to reside in the same home as the relative. Rather, the relative must have "indicated a willingness and ability to assist" the offender. *Id.* ¶ 11.

The IDOC will not generally approve an out-of-state transfer if children or any of the offender's previous victims (not just victims of sex crimes, but also victims of theft, domestic

abuse, or other crimes) reside at the proposed host site. In addition, the receiving state's authorities must review the proposed residence and agree that it complies with all local and state laws and policies regarding residences of sex offenders before issuing reporting instructions. *See* Rule 3.101-3.

There are four named plaintiffs in this case:

- Paul F. Murphy: Convicted in 2011 of aggravated child pornography. Approved for release on March 14, 2014, by the PRB but is still incarcerated. Plaintiffs' Statement of Facts ("PSOF") ¶¶ 39, 42-43.
- Stanley Meyer: Convicted in 2008 of criminal sexual assault. Approved for release on May 12, 2011, by the PRB but is still incarcerated. *Id*. ¶¶ 72, -73.
- J.D. Lindenmeier: Convicted in 2007 of predatory criminal sexual assault of a child. *Id*. ¶ 63. Approved for release on July 18, 2011, by the PRB but is still incarcerated. *Id*.
- Jasen Gustafson: Convicted in 2013 of aggravated child pornography. *Id*. ¶ 51. Approved for release on October 19, 2014, by the PRB but is still incarcerated. *Id*. ¶ 52.

Plaintiffs have submitted declarations of nine additional offenders who are members of the class in this case. However, there are significant inaccuracies in some of these statements. For example, Cinszeo Doss declares that he was given only 30 days to find new housing once his current residence was no longer in compliance with the terms of his MSR. PSOF ¶ 86. However, IDOC records show that Doss was initially given notice that his residence was not compliant with the terms of his MSR on October 13, 2015. Doss was given multiple extensions of time to find another compliant host site, and on April 27, 2016, he was given one final extension, until May 5, 2016, to move to a compliant host site. Defendants' Response to Plaintiffs' Statement of Material Facts ("Def. Resp. to PSOF") ¶ 86. During this 5½ month period, Doss's parole agent approved five different host sites as acceptable residences. However, he did not move, and on May 5, 2016, a warrant was issued to take Doss back into custody. *Id*. For a fuller discussion

regarding Doss and Plaintiffs' other declarants, please see Defendants' Response to Plaintiffs' Statement of Material Facts ¶¶ 84-133.

ARGUMENT

Summary judgment should be granted when, viewing all the facts in the light most favorable to the non-moving party, there is no genuine dispute regarding any material fact. "Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute." *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 978 (7th Cir. 1996). If there are no genuine issues of material fact when evaluated under the substantive law, and that substantive law dictates a result favoring movant, then the motion should be granted. "Only factual disputes that could affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *McGinn v. Burlington Northern R.R. Co.*, 102 F.3d 295, 298 (7th Cir. 1996). That standard is met in this case. Controlling precedent demonstrates that Defendants are entitled to judgment as a matter of law and Plaintiffs' motion for summary judgment should be denied.

I. PLAINTIFFS CHALLENGE THE FACT AND DURATION OF THEIR CONFINEMENT, RELIEF BARRED IN A SECTION 1983 ACTION.

In our motion to dismiss, Defendants argued that the relief sought by Plaintiffs was, in substance, a request for release from incarceration. The theories Plaintiffs pursued, and the allegations they made, all point to this form of relief. Challenges to the conditions of confinement can be brought in a Section 1983 case. Challenges to the procedures used to determine release can also be brought in a Section 1983 case. *Wilkinson v. Dotson*, 544 U.S. 74 (2005). But a prisoner must use a habeas corpus action to challenge the prisoner's conviction itself; or the duration of his sentence; or the nature of the sentence if the relief sought is to be removed from a harsher setting (confinement in prison) to a less harsh setting (parole or

mandatory supervised release). *Heck v. Humphrey*, 512 U.S. 477 (1994); *Burd v. Sessler*, 702 F.3d 429, 432 (7th Cir. 2012) (habeas corpus is the exclusive remedy to the fact or duration of one's confinement). Because parole conditions also relate to the prisoner's freedom, challenges to such conditions must be brought in a habeas proceeding.

This Court denied our motion to dismiss on this point. Dkt. 31 at 10-13. The Court concluded that Plaintiffs' request for relief was purely procedural, rather than seeking discharge from incarceration. We respectfully ask the Court to take another look at this issue. Plaintiffs, we believe, are directly asking for a release from incarceration, and this form of relief cannot be obtained in a Section 1983 case.

Plaintiffs' complaint and legal theories demonstrate that the claim is not primarily about fair procedures to determine if someone should be granted Mandatory Supervised Release. Rather, the "bottom line" is that Plaintiffs want to be released from incarceration. That is certainly the only fair way to read Count I, alleging a violation of substantive due process; Count II, an equal protection count alleging discriminatory treatment on the basis of indigence (that offenders without private resources cannot meet the conditions of release); and Count IV, an Eighth Amendment claim alleging the sentences for sex offenses are disproportionate. The first Count III, alleging vagueness, was dismissed. The second Count III is the only one remaining titled as explicitly referring to procedural due process, and the only one arguably not subject to the *Heck* bar. Other than that procedural due process claim, Plaintiffs are not alleging that fair procedures would give prisoners a fighting chance to gain release, but that the whole statutory system is stacked against them. They allege that the "overlapping statutory and regulatory schemes . . . make it nearly impossible for them to satisfy the conditions required for release from prison on MSR." Dkt. 1 ¶ 19. Prisoners unable to meet the conditions for release are

serving "what amounts to a life sentence." *Id.* ¶ 32. The statutory and regulatory schemes "make it impossible for an indigent person sentenced to a 'three to life' term of MSR to be released from prison." *Id.* ¶ 137. "The punishment shocks the conscience because it is far out of proportion to the offense." *Id.* ¶ 134. Other than the second Count III, the complaint is not about more process; it is about more freedom, and that puts it squarely in the realm of habeas corpus.

If the claim fundamentally relates to alleged disproportionate sentencing, then it should be brought under the Eighth Amendment, not substantive due process. The more specific constitutional provision should control over the more generalized claim of substantive due process. *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997); *McCullah v. Gadert,* 344 F.3d 655, 658 (7th Cir. 2003); *Vera-Natal v. Hulick,* No. 05 C 1500, 2005 WL 3005613 at *9 (N.D. Ill. 2005); *United States v. Strong,* 40 F. App'x 214, 218 (7th Cir. 2002) (when claim relates to criminal punishment, claim should be brought under Eighth Amendment, not substantive due process). Claims of a too-long sentence brought under the Eighth Amendment, and its functional equivalent under substantive due process, are clearly within the realm of habeas. *Sims,* 2011 WL 2923859 at *4 (wrongful incarceration claim under Eighth Amendment barred by *Heck*); *Mauro v. Freeland,* 735 F.Supp.2d 607, 622 n.50 (S.D. Tex. 2009) (Eighth Amendment claim of disproportionate punishment barred by *Heck*).

Similarly, the equal protection claim of Count II is also barred by *Heck.* This claim alleges a discriminatory system that results in a "severe and permanent deprivation of liberty." Dkt. 1 ¶ 142. *See Conkleton v. Raemisch,* 603 Fed. Appx. 713, 716 (10th Cir. 2015) (barring equal protection challenge which would necessarily imply the invalidity of the duration of plaintiff's confinement).

The statutes challenged all relate to sentencing, and the Department's authority to approve host sites originate from those sentencing statutes. 730 ILCS 5/3-3-7. Again, this is a strong indication that the challenges raised here relate directly to the duration of the sentence. The Prisoner Review Board approves an offender for Mandatory Supervised Release, but subject to special conditions for sex offenders. 730 ILCS 5/3-3-7 (b-1). Oversight of the conditions—such as finding a suitable host site ("residing at a Department approved location")—is delegated to the Department of Corrections. *See id.* at (b-1)(1). The statutory release conditions for sex offenders also state the offender must "comply with other special conditions that the Department may impose that restrict the person from high-risk situations and limit access to potential victims." *Id.* at (b-1)(15).

Any sort of claim seeking a "quantum change" in the prisoner's status—such as going from prison confinement to MSR, *i.e.*, seeking release from prison—must be brought in a habeas proceeding. *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991). Specifically, the Seventh Circuit has held that challenges to parole conditions also must be brought in a habeas proceeding, because a parole condition is also a restriction on freedom, albeit as the Court of Appeals has put it, a more "metaphysical" restraint. *Williams v. Wisconsin*, 336 F.3d 576, 579-80 (7th Cir. 2003); *Drollinger v. Milligan*, 552 F.2d 1220, 1224-25 (7th Cir. 1977). *See also Bleeke v. Server*, No. 1:09-cv-228, 2010 WL 299148, at *4 (N.D. Ind. Jan. 19, 2010) (parolee challenging parole condition preventing him from contacting his children could not bring substantive due process claim under Section 1983); *Yoder v. Wisconsin Dept. of Corrections*, No. 03-C-193-C, 2004 WL 602647 at *6-7 (W.D. Wis. March 11, 2004) (plaintiff could not challenge parole conditions in Section 1983 case); *Kitterman v. Norton*, No. 18-cv-190, 2018 WL 1240487 at *3 (S. D. Ill. March 9, 2018) (plaintiff could not challenge MSR conditions in Section 1983 case). Release on

MSR is the functional equivalent of parole, and "[f]ew things implicate the validity of continued confinement more directly than the allegedly improper denial of parole." *Butterfield v. Bail*, 120 F.3d 1023, 1024 (9th Cir. 1997). And if a prisoner seeks to live near a park or school or forest preserve, or be released from prison into homelessness, that expansion of freedom in the form of a lifting of a parole condition also falls within habeas. *Heck*, *Drollinger*, and *Williams* would bar a Section 1983 claim seeking to prohibit the imposition of those parole (MSR) conditions or a revocation of parole based on violating such a condition.[2]

II. PLAINTIFFS' CLAIMS ALSO FAIL ON THE MERITS.

While plaintiffs' claims cannot be brought under Section 1983, their claims also fail on the merits and should be dismissed for this reason as well.

A. Plaintiffs' Substantive Due Process Claim Fails.

1. Plaintiffs' Substantive Due Process Claim Is Duplicative of Their Eighth Amendment Claim.

In Count I, captioned "Substantive Due Process," plaintiffs allege that the MSR system results in an effective life sentence, and that this punishment "shocks the conscience because it is far out of proportion to the offense." Dkt. 1 ¶¶ 131-34. However, as discussed above, Plaintiffs' substantive due process claim is duplicative of their Eighth Amendment claim, which also alleges a disproportionate punishment (Dkt. 1 ¶ 158-59), and should be dismissed for this reason. As the Supreme Court held in *Albright v. Oliver*, 510 U.S. 266, 273 (1994), "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive

[2] In a divided decision, with five judges voting to rehear the case *en banc*, the Ninth Circuit has taken a different view, permitting parole conditions to be challenged under Section 1983. *Thornton v. Brown*, 757 F.3d 834 (9th Cir. 2013).

due process,' must be the guide for analyzing these claims." Thus, courts have dismissed substantive due process claims like Plaintiffs' that are based on the constitutionality of criminal punishments, holding that these claims are properly analyzed under the Eighth Amendment. *See, e.g.*, *Lanier*, 520 U.S. at 272 n.7 ("[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."); *Strong*, 40 F. App'x at 218 ("The Eighth Amendment addresses the constitutionality of criminal punishments, however, and where a specific constitutional amendment provides an explicit textual source of protection against a particular government action, that Amendment, not the more generalized notion of substantive due process, is the guide for analyzing the claim."); *Vera-Natal*, 2005 WL 3005613, at *9; *Marsh v. Gilmore*, 52 F. Supp. 2d 925, 928 (C.D. Ill. 1999); *United States ex rel. Smith v. Nelson*, No. 96 C 5589, 1997 WL 441309, at *5-6 (N.D. Ill. July 28, 1997). Plaintiffs' substantive due process claim should likewise be dismissed as duplicative of their Eighth Amendment claim.

2. Plaintiffs' Substantive Due Process Claim Fails Because the IDOC's Restrictions are Reasonably Related to Legitimate Penological Interests.

Moreover, even if Plaintiffs' substantive due process claim is not duplicative, it nevertheless fails. Plaintiffs argue that the IDOC has violated their fundamental right to freedom from bodily restraint. Dkt. 75 at 28. But this is not a case where the traditional understanding of the primacy of a "fundamental" constitutional right is at play. In most cases, infringements of fundamental rights can be justified only by a compelling state interest and only if achieved in the least restrictive way possible. But this is a case involving MSR (akin to parole). Supervision for convicted sex offenders is a form of custody, albeit a less restrictive form of custody than incarceration. Individual constitutional rights, while not entirely absent, are not at full strength

for parolees. *Morrissey v. Brewer,* 408 U.S. 471, 482 (1972) (parolees are subject to "restrictions not applicable to other citizens").

The Court should apply the test announced in *Turner v. Safley,* 482 U.S. 78 (1987), which set forth the level of scrutiny to be used in evaluating prison regulations that impacted inmates' constitutional rights. As the Seventh Circuit has held, the *Turner* test applies to parole conditions as well as prison regulations. *Felce v. Fiedler,* 974 F.2d 1484, 1494 (7th Cir. 1992). In *Turner*, the prison regulations restricted inmates' right to correspond and the right to marry. Under conditions not involving persons in custody, of course, infringements on such communicative and associational rights would impose on the state a heavy burden of justification. For those in custody, however, the state restriction must meet a reasonableness standard: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. This test is far more deferential to correctional officials than strict scrutiny. The Supreme Court identified four considerations lower courts should use in applying the test: whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; whether there remain alternative means open to the prisoner to exercise the right; the impact accommodation of the right will have on have staff, other inmates, and the allocation of correctional resources generally; and finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation. *Id.* at 90-91. The court emphasized this is not a "least restrictive alternative" test. Prison officials do not have to "set up and shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.* at 91.

Parolees (persons on MSR) remain in a form of custody under the supervision of the Department of Corrections. One recent case this court might find informative in applying the *Turner* standard is *Muhammad v. Evans,* No. 11 CV 2113, 2014 WL 4232496 (S.D.N.Y. 2014), a case challenging the parole conditions imposed by the State of New York. Though not a sex offender case, the supervisory conditions imposed impacted the parolee's associational and privacy rights, making it similar to our case. The offender was deemed at risk of committing domestic violence, and the parole conditions required him to stay away from the woman who had orders of protection against him; to participate in domestic violence counseling; to notify his parole officer of any intimate relationships; and to require prior written permission of his parole officer before residing with any intimate partner. The court upheld the conditions under the *Turner* criteria. *Id.* at *9-10.

In contradistinction to Plaintiffs' arguments in support of their summary judgment motion, applying the *Turner* test yields results more balanced and accommodating to the State's compelling interests in the supervision of convicted sex offenders and the protection of children and the public generally.

a. It is Reasonable for the IDOC Not to Release Convicted Sex Offenders into Homelessness.

Plaintiffs argue that the IDOC may release convicted sex offenders into homelessness if the offender is unable to find an approved host site. But it is reasonable for the IDOC to conclude that releasing thousands of convicted sex offenders onto the street would not promote public safety and the protection of children. Homeless shelters have a transient population of men, women, and children living in close quarters; even men's shelters might house children. DSOF ¶ 13. For this reason, as a landlord, the homeless shelter is required to give notice to the other residents that a sex offender is living at the shelter. *Id.* And the personal safety of the

offender is a consideration: the sex offender may be at risk of assault from other residents of the shelter. *Id.* ¶ 14.

Finally, there are practical, logistical reasons why a homeless shelter is not an appropriate host site for a sex offender on MSR. First, a sex offender is not guaranteed space at the shelter long-term; he is uncertain of having a bed at the shelter each day. *Id.* ¶ 15. Second, homeless shelters might not have the landlines needed for electronic monitoring and generally do not allow electronic monitoring (or GPS monitoring) at their facilities. *Id.* ¶ 16. And third, if another sex offender enters the homeless shelter, the sex offender on MSR would have to leave the shelter to avoid violating 730 ILCS 5/3-3-7(a)(7.6), which prohibits a sex offender on MSR from living at the same address as another sex offender. *Id.* ¶ 17. Nor would releasing a sex offender into homelessness promote the rehabilitation of the offender. *Id.* ¶ 18.

Plaintiffs argue that the use of GPS monitoring is a sufficient alternative to having an approved host site, but the evidence does not support this claim. First, under the current system, GPS monitoring is typically only used as a supplement to electronic monitoring when an offender leaves his home to go to an approved location—*e.g.*, to a job or an appointment. *Id.* ¶ 19. Electronic monitoring, which is required by statute, requires a landline telephone and a stable power source—neither of which are available to offenders in a homeless shelter, and certainly not available on the street. *Id.* ¶ 20. If the IDOC had to rely on GPS monitoring 24/7, then the inclusion zones would need to be more tightly circumscribed and exclusion zones would need to be more carefully described. Then, as a practical matter, parole agents would need to be assigned to monitor the whereabouts of each homeless sex offender. *Id.* ¶ 21. The effort required to adequately supervise thousands of homeless sex offenders would be staggering, and the cost of failure is heartbreaking. It is important to remember that the class at issue in this case have

been sentenced to indefinite MSRs because the legislature believed that these sex offenders are the most dangerous and most subject to recidivism. These individuals have all been convicted of either criminal sexual assault (or worse) or child pornography. Applying the *Turner* standard, it is reasonable for the IDOC to conclude that they cannot adequately supervise such offenders out on the street.

b. It is Reasonable for the IDOC to Enforce Restrictions on Where Sex Offenders May Live.

Plaintiffs argue that IDOC places unduly burdensome restrictions on where sex offenders may live. But the vast majority of rejected host sites are rejected based on statutory restrictions on where child sex offenders may live, not on IDOC rules. Illinois law prohibits child sex offenders from living within 500 feet of day care centers, schools, and playgrounds. *See* 720 ILCS 5/11-9.3(b-5) and 9.3(b-10). These residency restrictions have been repeatedly upheld by the courts, including the Seventh Circuit. The Seventh Circuit recently upheld the restriction on residing within 500 feet of day care centers, finding that strict scrutiny was not required and holding that the provision easily satisfied rational basis review. As the court stated, it is "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 v. Foxx*, 895 F.3d 515, 525 (2018). The *Vasquez* court's rationale applies equally well to residency restrictions on schools and playgrounds. *See also People v. Avila-Briones*, 49 N.E.3d 428, 436, 448-51 (Ill. Ct. App. 2016) ("[B]y keeping sex offenders who have committed offenses against children away from areas where children are present (*e.g.*, school property and parks) . . . , the legislature could have rationally sought to avoid giving certain offenders the opportunity to reoffend."); *People v. Pollard*, 2016 IL App (5th) 130514, ¶¶ 34-36, 38-44 (holding that 720 ILCS 5/11–9.3 and 720 ILCS 5/11–9.4–1 did not violate offenders fundamental rights and finding that there is "a direct

relationship between the residency, employment, and presence restrictions of sex offenders and the protection of children"). There is no basis for the Court to find that these statutes are unconstitutional.

Similarly, the IDOC's restrictions on living with minors[3] and the statutory restrictions on living near playgrounds, parks, schools, day care centers, swimming pools, beaches, theaters, or "any other places where minor children congregate" without the prior approval of the IDOC (730 ILCS 5/3-3-7(b-1)(12)) are reasonable methods for keeping sex offenders from living with children or in areas where large numbers of children regularly gather. *Cf. Vasquez*, 895 F.3d at 525. All of these restrictions are rationally related to the State's legitimate interest in protecting children from abuse and aiding the offender's rehabilitation by keeping him separated from children.

Plaintiffs assert that the IDOC improperly restricts all sex offenders from living in any home with internet access, computers, or smart phones. Dkt. 75 at 37-38. But the documents that Plaintiffs refer to in support of this claim are out-of-date. As discussed in Deputy Chief Dixon's deposition in December 2017, whether a sex offender is allowed to live in a home with internet access is determined on a case-by-case basis. DSOF ¶ 22. The guidelines for determining whether a sex offender may live in a home with internet access are roughly similar to the new guidelines regarding whether a sex offender may use the Internet. *Id.* ¶ 23. In brief, sex offenders with Internet-related sex offenses (such as possession of child pornography or luring a child on the Internet) are not allowed to live in a home with Internet access. However, sex offenders

[3] Plaintiffs assert that the IDOC's restriction on living with minors violates the rights of sex offenders to live with and parent their own minor children. Dkt. 75 at 39-40. However, none of the named Plaintiffs in this case are parents, so they lack standing to raise this issue. Moreover, counsel for Plaintiffs has filed a separate class action lawsuit, currently pending before Judge Feinerman, which addresses this issue. *See Frazier v. Baldwin*, No. 18-cv-1991 (N.D. Ill. June 13, 2018.

whose offenses were not related to the Internet and who do not have a history of misusing computers or the Internet generally may be allowed to parole to a home with Internet access. *Id.* ¶ 24. It is reasonable for the IDOC to prohibit individuals convicted of Internet-related crimes from living in a home with internet access, so as to remove the temptation to misuse the Internet again.

Finally, Plaintiffs challenge 730 ILCS 5/3-3-7(a)(7.6), which makes it illegal for anyone on MSR for a sex offense to live in the same "condominium complex or apartment complex" as another sex offender. Dkt. 75 at 42-43. But it was rational for the legislature to conclude that a sex offender on MSR living too closely to other sex offenders might be negatively affected by this proximity, including being tempted into recidivism.

Plaintiffs further argue that the IDOC's interpretation of this statute as prohibiting more than one sex offender from living in the same trailer park (unless each trailer is on a separately owned parcel of land) is "not mandated by Illinois law." *Id.* But IDOC's judgment that a trailer park owned by a single entity is equivalent to an apartment complex is a reasonable one. More importantly, this is the interpretation of the statute that has been adopted by the ISP (the agency responsible for maintaining the sex offender registry) and numerous local police departments, including the Chicago Police Department. PSOF at ¶ 12. It is important that the IDOC's interpretation of this statute is consistent with the interpretation adopted by local police departments because sex offenders on MSR (like all other sex offenders) must register with their local police department, and the police department has the authority to arrest (and send back to IDOC custody) a sex offender who is violating any of the statutes regarding where they may reside. DSOF ¶ 4. It would not be helpful to a sex offender if the IDOC were to permit him to live in a trailer park with another sex offender if the local police department will not allow the

offender on MSR to register at that address. This would result in a more prolonged, and expensive, version of turnaround at the gate: The IDOC would approve the offender's release, the offender or his family would pay for a lease on a trailer, and the offender would leave prison. But within a few days, the local police department would arrest the offender and send him back to IDOC custody, but having forfeited the money paid for the lease.

B. Plaintiffs' Equal Protection Claim Fails Because the Challenged Statutes and Regulations Are Reasonably Related to Legitimate Penological Interests.

Plaintiffs also argue that Defendants have violated their equal protection rights because Defendants have denied Plaintiffs the fundamental right to be free from confinement based solely on their indigence. Dkt. 75 at 45-49. Plaintiffs once again argue that the challenged restrictions are "subject to strict scrutiny and can only survive if they are 'suitably tailored to serve a compelling state interest.'" *Id*. at 46. But as discussed above, the proper standard for evaluating a parole condition, such as the condition that the offender live at an approved host site, is the *Turner v. Safley* test: that the condition is reasonably related to a legitimate penological interest. And as discussed above in detail, the challenged restrictions easily meet this standard.

Plaintiffs note that the problem that indigent offenders face is aggravated because there are no halfway houses or transitional housing facilities in Illinois that will accept someone who has been convicted of a sex offense. Dkt. 75 at 47. While this is true, it is not due to any fault of the IDOC. DSOF ¶ 25. The IDOC licensed Another Chance Ministry in East St. Louis, but it closed in 2015. *Id*. ¶ 26. St. Leonard's House stopped offering housing to sex offenders in 2009 after a sex offender housed at St. Leonard's was charged with raping two women at knifepoint and assaulting a third woman. *Id*. ¶ 27. In addition, the IDOC licensed G&G Associates/New Hope in Chicago Heights in 2007, but this facility was not able to house any sex offenders

because the municipality passed a restrictive ordinance after IDOC issued its transitional housing license. *Id.* ¶ 28. Moreover, although Plaintiffs are correct that the IDOC is not currently able to provide financial assistance to offenders who cannot afford housing, the case law is clear that the Department is not required to provide such funding. *See Lucas v. Dep't of Corr.*, 2012 IL App (4th) 110004, ¶ 15, 967 N.E.2d 832, 835 ("DOC had no statutory or regulatory duty to obtain a residential placement for plaintiff that would enable him to comply with the electronic monitoring that was a condition of his MSR (although DOC had statutory authority to try to do so—and did try to do so"); *Murdock v. Walker*, No. 08-C-1142, 2014 WL 916992, at *14 (N.D. Ill. March 10, 2014).

Finally, Plaintiffs rely on *State v. Adams*, 91 So.3d 724 (Ala. Crim. App. 2010), a case from the Alabama Court of Criminal Appeals. As Plaintiffs rightly note, this case is not binding authority on this court. Moreover, there is an important difference between *Adams* and this case. In *Adams*, the requirement that the offender provide his address to authorities was not a parole condition, but rather was part of Alabama's sex offender registration law. Thus, a violation of this statute resulted in a new felony conviction for the offender, and the statute was therefore properly evaluated under strict scrutiny. Here, however, as discussed above, parole conditions are properly evaluated under *Turner v. Safley* test. Accordingly, the *Adams* case has little persuasive value here.

C. Plaintiffs' Procedural Due Process Claim Fails.

Plaintiffs allege that the IDOC misuses its discretion when it denies host site placements. "The basic requirements of due process are notice and an opportunity to be heard." *Crayton v. Duncan*, No. 15-CV-399, 2015 WL 2207191, at *6 (S.D. Ill. May 8, 2015). With regard to notice, each of the Plaintiffs received notice of the reasons that various host sites were denied. PSOF ¶¶ 53-54, 64-65. Plaintiffs also had an opportunity to be heard regarding the application of

this policy to their cases, in that they were able to file grievances within the prison system. DSOF ¶ 26. As the *Murdock* court held, if offenders "disagree with IDOC's host site determination, they can challenge the determination or file a grievance, which may lead to a new investigation of the parolee's release plan." *Murdock*, 2014 WL 916992, at *11; *see also* DSOF ¶¶ 29-30. "[T]he fact that this procedure has not had a favorable outcome does not mean that [plaintiffs were] denied due process." *Crayton*, 2015 WL 2207191, at *6.

Plaintiffs argue that the grievance process is "entirely inadequate to address unreasonable denials of approval for proposed host sites because the Department of Corrections does not see rejection of host sites as a grievable issue." Dkt. 75 at 63 n.26. But Plaintiffs' sole support for this allegation is a single grievance filed by J.D. Lindenmeier that was rejected as "outside the scope" of the grievance process. *Id*. But Lindenmeier did not grieve the allegedly unreasonable denial of a particular host site; rather, he sought to be released on work release, have a sex offender evaluation completed, to be sent to a halfway house, and to have electronic monitoring. Pl. Ex. 21. Unlike what Lindenmeier sought to grieve, the grievance process is an appropriate and effective means of seeking review of a parole agent's decision regarding a host site. *Murdock*, 2014 WL 916992, at *11; DSOF ¶¶ 29-30.

Thus, the existing process sufficiently protects the Plaintiffs' procedural due process rights. However, Defendants are willing to consider ways to improve this process.

D. Plaintiffs' Eighth Amendment Claim Should Be Dismissed as a Matter of Law.

Plaintiffs assert Eighth Amendment claims in three different aspects. First, because the parole authorities will not release an offender into homelessness, Plaintiffs allege that MSR conditions requiring a valid host site in the form of a permanent address criminalize the status of being homeless. Second, Plaintiffs allege that IDOC has acted with deliberate indifference in the exercise of discretion it has to approve or deny housing placements. Third, Plaintiffs allege that the parole conditions impose grossly disproportionate punishment.

For the reasons that follow, these claims should be rejected as a matter of law.

1. The parole conditions do not criminalize the status of homelessness.

The Eighth Amendment prohibits criminalizing a "status" or "propensity" such as being an alcoholic. *Robinson v. California*, 370 U.S. 660 (1962). Plaintiffs allege this legal principle acts as a restraint on the State to prevent releasing an offender into the "status" of homelessness. This is an incorrect interpretation of what MSR is, and a misreading of the Eighth Amendment prohibition.

Plaintiffs are convicted sex offenders who have been sentenced for their past crimes. The Mandatory Supervised Release conditions they are subject to, which often hinge on a measure of discretion to be exercised by parole authorities, are part of that sentence and relate back to those criminal convictions. Thus, a parole or MSR condition that requires that the offender "reside only at a Department approved location," 730 ILCS 5/3-3-7(b-1)(1), is not *criminalizing* homelessness, any more than reasonably restricting the offender's contact with his own children is *criminalizing* the offender's status as a parent. In *Diaz v. Lampela*, 601 Fed. Appx. 670 (10th Cir. 2015), the plaintiff's claim against the parole board was that the board's refusal to release him amounted to punishment because of his "mere status as a pedophile with a propensity to

commit future sex offenses." *Id.* at 675. The Court rejected the claim: "But we are not addressing a sentence imposed on such grounds; Mr. Diaz's indeterminate sentence was imposed for a commission of a criminal offense. We are addressing the discretionary denial of parole, which merely continues punishment already imposed for the underlying offense and does not itself implicate the Eighth Amendment." *Id.* at 676. That is exactly the situation we have here.

Plaintiffs are overreading the case on which they principally rely, *State v. Adams,* 91 So.3d 724 (Ala. Court of Crim. Appeals 2010). In that case the statute in question made it a new and separate criminal offense for a sex offender not to report his actual address where he would be living after release within 45 days prior to his release from custody. On his release date, not having complied, the offender was re-arrested and indicted on the new offense. The court held that the charge of failing to provide an address when he did not have one to report was, in effect, punishment of his status as a homeless person, and was not voluntary, criminally-culpable conduct.

In our case, the situation is governed by the logic of the Tenth Circuit in *Diaz*—there is no criminal charge here based on the offender's mere status as homeless. A parole condition is part and parcel of the criminal sentence imposed for the underlying criminal conduct. As such, this interpretive branch of the Eighth Amendment prohibiting crimes based on one's mere status is simply inapplicable.

2. No "deliberate indifference" has been shown.

Plaintiffs' second approach under the Eighth Amendment is to allege, as they state it in their brief in the argument heading, "The IDOC's Misuse of Its Discretion with Regard to Approving Parolees' Housing amounts to Deliberate Indifference." Dkt. 75 at 52. The first paragraph of this section of their brief focuses on *Monell* liability and *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989), which discusses a city's liability for failure to train police officers

on how to humanely handle persons in their custody with severe mental illness, and when such a failure to train can evidence "deliberate indifference" by the local municipal body. As applied to a state agency like the Department of Corrections, this argument seriously misses the mark.

First, the Eleventh Amendment bars suits against the State and its agencies or departments, so there can be no liability against the IDOC for deliberate indifference or anything else in a Section 1983 case. *Pennhurst v. Halderman*, 465 U.S. 89, 100 (1984) (in the absence of consent a suit against a State or its agencies or departments is barred, regardless of the relief sought); *Alabama v. Pugh*, 438 U.S. 781 (1978). *Monell* liability applies to local units of government where the Eleventh Amendment does not apply, so the citation to *City of Canton* is in error. A city can be sued on a deliberate indifference theory if its policymakers act with deliberate indifference, but the IDOC cannot.

The only defendants in the case are the Attorney General and the Director of the Department of Corrections, not the Department of Corrections itself. The Attorney General has no direct supervisory authority over how parole agents apply the statue or exercise discretion, and there is no claim that she does. Similarly, there is no claim the Director of the IDOC has directed that field agents engage in systemically bad-faith conduct intentionally or knowingly designed to injure offenders, such that it amounts to deliberate indifference. Conduct at such a level would be required to establish a deliberate indifference claim under the Eighth Amendment.

Such claims by convicted sex offenders regarding parole conditions have been attempted, without success. To establish an Eighth Amendment claim, a plaintiff must establish two things. First, he must show a subjective element, *i.e.*, a state of mind requirement that the defendant's actions were wanton "in light of the particular circumstances surrounding the challenged

conduct." *Singleton v. Doe*, 210 F. Supp. 2d 359, 365 n.9 (E. D. N.Y. 2016) (rejecting parolee's Eighth Amendment claim). The offender must allege that the defendant acted with a "subjectively culpable state of mind." *Id.* Second, the objective component asks whether the punishment was sufficiently harmful to establish a violation "in light of contemporary standards of decency." *Id.* That is a high standard to meet, because prison conditions that are merely harsh or unpleasant would not be actionable. *Id.* Only deprivations that deny "the minimal civilized measure of life's necessities" are sufficiently grave to establish an Eighth Amendment violation. *Id.* In rejecting another claim on parole conditions, the court noted: "The Eighth Amendment is only concerned with 'deprivations of essential food, medical care, or sanitation" or "other conditions intolerable for prison confinement." *Dayson v. Rondeau,* No. 1:12-cv-1310, 2013 WL 1818628 at *4 (W.D. Mich. 2013), *quoting Rhodes v. Chapman*, 452 U.S. 337, 348 (1981). *See also Robinson v. New York*, 2010 WL 11507493 at *5 (N.D.N.Y. 2010) (rejecting Eighth Amendment claim on parole conditions, on both the subjective and objective elements; "there is nothing in the complaint to suggest that the imposition of prerelease and special conditions by defendants…may have been wanton, malicious, or in bad faith.")

In *Armato v. Grounds,* 766 F.3d 713 (7th Cir. 2013), the plaintiff, a convicted sex offender, alleged that defendants deliberately kept him incarcerated beyond the terms of his sentence. Defendants, however, believed in good faith he could not be released under Illinois law without an MSR term, and sought legal advice from the Attorney General's Office when they determined the apparent mistake in the sentencing papers. The Court found this not to be a matter of deliberate indifference, and that "prison officials are entitled to rely on a reasonable interpretation of a state statute, even if they are ultimately mistaken." *Id.* at 721 (internal quotation marks omitted).

In this case, Plaintiffs challenge the Illinois statutes relating to sex offenders and the statutory conditions governing their release on MSR. They also challenge the scope of discretion afforded parole agents under Illinois law and how they may exercise it. But there are no facts in the record suggesting the sort of subjective malice, bad faith, and knowing disregard of an offender's liberty interests (to the extent he has any in this context). Parole agents have to be concerned with public safety, protection of minors, and that Illinois law be followed regarding the supervision of this population. Deputy Chief Dixon testified at length about how housing sites are screened, using maps and GPS to determine footage from schools, parks, and day care centers. DSOF ¶ 3. He testified that IDOC parole agents have to work in conjunction with the local police and what they will accept—there is no sense approving a host site if the local police disagree. *Id*. ¶ 4. In short, on the subjective level, no deliberate indifference or bad faith has been shown. On the objective side, there is also a failure of proof, because there has been no showing that any offender, even if he remains unable to meet the conditions of MSR, has been denied the "minimal civilized measure of life's necessities"—their incarceration does not involve inadequate food, medical care, sanitation, etc. That is the standard plaintiffs have to meet, and as matter of law they have failed to meet it.

3. Plaintiffs' disproportionate sentencing claim should be dismissed.

In their third Eighth Amendment challenge (all of which challenge differing aspects of the duration of their sentence—and thus, as noted earlier barred by *Heck*), plaintiffs allege that their sentences, with the MSR conditions attached, are disproportionate. Murphy received 36 months for possession of child pornography; Gustafson received 4 years for one count of child pornography; Lindenmeier received six years for one count of predatory criminal assault of a child; and Meyer received 48 months for criminal sexual assault. All inmates are eligible for good time reductions, so that they can be eligible for release upon completion of 85% of their

sentence, or, under prior Illinois law, 50% of their sentence. Their MSR terms were three years to life, and they allege the lack of approval of a host site leaves them incarcerated and unable to be released. Meyer is the named plaintiff in this situation with the most additional time; he has served more than seven years beyond the completion of his sentence. PSOF ¶ 80.

To put this in perspective, compare Eighth Amendment challenges made to sentences under the federal Sentencing Guidelines. In *United States v. Niggemann,* 881 F.3d 976 (7th Cir. 2018), the defendant was convicted of receipt and possession of child pornography. He had a prior conviction for sexual abuse of a minor. He faced a mandatory minimum of 15 years, and the Sentencing Guidelines recommended a much longer term of 235 to 293 months (17-24 years). He received a sentence of 182 months (15 years, 2 months). In *United States v. Rodriguez,* 725 Fed. Appx. 411 (7th Cir. 2018), the defendant was convicted of one count of production of child pornography. He received a sentence of 210 months (17 years, 6 months). The Court noted that "the Supreme Court had rejected challenges to much longer sentences for lesser crimes," *id.* at 412, and that "the [Supreme] Court once upheld a sentence of 25 years to life imprisonment for the theft of three golf clubs," citing *Ewing v. California,* 538 U.S. 11, 28-31 (2003). *Id.* "Against this background, anyone challenging a sentence on Eighth Amendment grounds faces a steep uphill climb." *Id.*

To determine whether a sentence is disproportionate under *Solem v. Helm,* 463 U.S. 277, 292 (1983), three factors are considered: (a) the gravity of the offense and the harshness of the penalty; (b) the sentences imposed on other criminals in the same jurisdiction; and (c) the sentences imposed for commission of the same crime in other jurisdictions. *See Niggemann,* 881 F.3d at 981. "Unless the defendant establishes an inference of gross disproportionality between

the offense and the penalty, the analysis does not move on to consider sentences imposed on other criminals or in other jurisdictions." *Id.*

The offenses committed by plaintiffs here are manifestly serious. The terms of incarceration are not in any way excessively long when compared to the case law precedent and the federal Sentencing Guidelines for possession or distribution of child pornography, to take just those examples. Under *Solem*, there is no need to go beyond the first part of the test.

Lifelong MSR terms, given the fact that pedophiles will tend to recidivate, are not unreasonable to protect public safety, especially minors. Plaintiffs' argument is tantamount to saying that they have a constitutional right to be released into homelessness, rather than the Illinois legislature's more cautious formulation that an offender reside at a IDOC approved location—a stable dwelling with a landline so the individual can be monitored, in a location not too close to schools, parks, and other locations where children gather. The Plaintiffs' Eighth Amendment claim of disproportionate sentencing should be rejected. Much longer sentences would be constitutional under the governing Eighth Amendment standard.

CONCLUSION

Wherefore, Defendants Lisa Madigan and John Baldwin respectfully request that this Court grant their summary judgment motion, deny Plaintiffs' summary judgment motion, and order any further just and proper relief.

Respectfully submitted,

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