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

PAUL MURPHY, et al.,	)	
	)	No. 16 C 11471
Plaintiffs,	)	
	)	
v.	)	Judge Kendall
	)	Magistrate Judge Schenkier
LISA MADIGAN, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case challenges the constitutionality of a statutory and regulatory framework that results in the indefinite detention of people who have been convicted of sex offenses who have a mandatory supervised release sentence of three years to life. The Plaintiffs and the members of the class have completed their prison sentences but cannot find or afford housing that complies with the Illinois laws and Illinois Department of Corrections regulations that restrict where they are allowed to live. The evidentiary record shows that these individuals have no realistic hope of ever getting out of prison. These indefinite detentions are primarily the result of two policies and practices: (1) a statutory requirement that sex offenders on mandatory supervised release be placed in residences compliant with all statutory and regulatory residency restrictions; and (2) the Illinois Department of Corrections' persistent misuse of its discretion to deny approval of available housing.

As a result of these policies and practices, it is literally impossible for an indigent sex offender who lacks outside financial assistance to ever get out of prison; and even individuals who can afford housing remain incarcerated for years while seeking to find compliant housing and waiting to have it approved or denied by the Department. The situation these individuals face is further aggravated by a statutory condition that states that sex offenders who have an indeterminate mandatory supervised release sentence receive no credit for mandatory supervised release time they serve while incarcerated. Thus, they can can never max out their

mandatory supervised release time in prison—a condition widely known as "dead time."

There is something seriously wrong with the existing law. Simply put, the current system does live up to American standards or fundamental principles of the Constitution. It is a basic principle of law that all people are to be free from unreasonable restraints on their physical liberty. It is fundamental to our notions of a free society that we do not imprison citizens because we fear that they might commit a crime in the future. At its core, the challenged framework suggests a regime of preventive detention, which is anathema to notions of due process. Sex offenders may indeed be subject to society's opprobrium, but that does not insulate the criminal and civil justice systems from a fair and probing constitutional inquiry. All citizens should be afforded the protections provided by the Constitution, including groups perceived as potentially dangerous to the public—the mentally ill, people with alien status, or those previously convicted of criminal behavior. It is the politically powerless, despised, and vulnerable among us who need constitutional protections the most.

The statutory scheme here is constitutionally infirm and morally questionable, but it is also unnecessary—unnecessary because the indefinite and possibly life-long detentions at issue here are not necessary to protect public safety. Plaintiffs are not advocating for anything radical. The Illinois Department of Corrections already supervises hundreds of homeless parolees. People who have been adjudge to pose a serious threat to public safety due to a mental disorder and lack of sexual control

should not be released from confinement, and a well-established statutory procedure for civil commitment exists to insure that such individuals are subject to civil confinement. Moreover, individuals on supervised release should be subject to the full array of restrictions appropriate to supervised release, including GPS monitoring, reporting requirements, daily curfews, sex offender treatment, no-contact restrictions, and any other reasonable restrictions. Authorities have the power under existing law to impose generic and individually tailored release conditions on individuals on mandatory supervised release. Revocation is always available for a parolee who does not comply with the terms of his parole. Society fears recidivism by convicted sex offenders, but the risk of recidivism cannot excuse excessive, indefinite detention imposed without due process. The interest in preventing recidivism may be vindicated "by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct." *Foucha v. Louisiana,* 504 U.S. 71, 82 (1992).

Individuals subject to indefinite detentions should be released into homelessness while serving out their terms of mandatory supervised release. This is not because homelessness is a perfect solution. It is, however, the necessary consequence of the given conditions—*e.g.*, scarcity of housing, indigency, and constitutional constraints. Moreover, for someone who is indigent and without outside financial assistance, a release into homelessness is the only hope; otherwise, they will rot in prison. As one indigent inmate explained, "I believe my only hope is

to be released into homelessness, find a job, save money, and then rent a place to live. That is my only chance to go on with my life." See Plaintiffs' L.R. 56.1 Statement of Facts ("SOF") at ¶101.

The motives behind the imposition of these indefinite detentions is no mystery. Sex offenders are a despised and feared population. Political sensitivities pose an enormous barrier to bringing about either legislative or executive reform in this matter. There is no upside for legislators who stand up for the constitutional rights of sex offenders in the face of public sentiment. Given this, it is up to the courts to protect this subclass of people. It is, of course, appropriate for the court to do so. The courts' role is to protect constitutional rights of all people, including despised minorities. But, in addition, as a neutral arbiter, the court will shelter legislators and the IDOC itself from the public wrath of making unpopular decisions.

FACTUAL BACKGROUND

I. Indeterminate Mandatory Supervised Release

Any person sentenced to serve a period of incarceration in the Illinois Department of Corrections ("the Department" or "IDOC"), other than a natural life sentence, is also sentenced to a period of community supervision called mandatory supervised release ("MSR").[1] 730 ILCS 5/5-4.5-15(c). For most offenses, Illinois law

[1] Although MSR serves the same purposes as traditional parole (*i.e.*, facilitating supervised reintegration into society for a former prisoner), MSR differs from traditional parole in one key respect. MSR is a period of community supervision that only begins after the completion of a prison sentence.730 ILCS 5/5-4.5-15(c). Traditional parole gave some prisoners an opportunity to serve a portion of their sentences outside of prison at the discretion of the PRB. Illinois stopped using traditional parole in 1978. *Id.*

sets a precise term of MSR (*i.e.*, a fixed number of years). Individuals convicted of certain sex offenses, however, receive an indeterminate term of MSR "rang[ing] from a minimum of 3 years to a maximum of natural life." 730 ILCS 5/5-8-1(4)(d).[2] The Illinois Supreme Court has interpreted this statute to require sentencing judges to impose an indeterminate term of MSR (rather than a finite term of three years or more). *People v. Reinhart*, 2012 IL 111719 (2012). The named Plaintiffs and all members of the class have been sentenced to indeterminate MSR.[3]

II. Entities Responsible for Determining Eligibility for Release

Illinois law vests responsibility for setting the conditions of MSR and determining eligibility for release on MSR with the Prisoner Review Board ("PRB"), an entity distinct from the Department of Corrections. 730 ILCS 5/3-3-7(a). All of the Plaintiffs and class members have completed their prison sentences and have been found eligible for release on MSR by the PRB. See §VIII below.

The fact that the PRB has determined that someone is eligible for release on MSR does not necessarily mean that the IDOC will release the person from prison. Rather, any prisoner approved for release on MSR must meet certain conditions

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[2] In particular, an MSR term of three years to life applies to people convicted of predatory criminal sexual assault of a child, aggravated criminal sexual assault, or criminal sexual assault, on or after July 1, 2005, and to those convicted of child pornography offenses after January 1, 2009.

[3] Prior to the Illinois Supreme Court's decision in *Reinhardt*, there was confusion concerning the precise meaning of the statute, and many people who pled guilty to or were convicted of offenses enumerated in 730 ILCS 5/5-8-1(4)(d) received determinate terms of MSR from their sentencing courts that were later amended to three to life. See, *e.g.*, SOF at ¶¶41, 91, 84, 120 (discussing class members who originally received determinate terms of MSR that have been amended to three to life).

before being released. In particular, any prisoner required to register as a sex offender must have an approved "host site" at which to reside while on MSR. SOF at ¶2.[4] The IDOC, through its parole division, has the sole authority to approve or deny prisoners' proposed host sites. SOF at ¶3. The IDOC will not release prisoners who are required to register as sex offenders into the community on MSR unless and until they obtain a "host site" that complies with the statutes and IDOC regulations restricting where people classified as sex offenders are allowed to live and meets the approval of an agent of the IDOC's parole department. SOF at ¶4.

III. Conditions for Termination of MSR

Some Illinois prisoners have the option of "maxing out" their MSR time if they are unable to identify an approved host site by staying in prison until their MSR term runs out. Prisoners who are eligible for statutory day-for-day credit while imprisoned continue to receive credit during any period of incarceration while on MSR. 730 ILCS 5/3-6-3(a)(2.1). Thus, for example, someone who has a two-year sentence of MSR can "max out" his MSR time (*i.e.*, complete his MSR sentence in prison and be released to the community without any supervision) by serving an additional year in an IDOC facility.

People sentenced to an indeterminate term of MSR are, however, treated differently. Such prisoners cannot "max out" their MSR time if they cannot identify

[4] Dion Dixon is the Deputy Chief of the Parole Division of the Illinois Department of Corrections. The IDOC produced him to testify as its 30(b)(6) witness concerning the IDOC's policies and procedures for investigating, approving, and denying proposed host sites for sex offenders; the training parole officers receive concerning investigation and approval of host sites; how the IDOC monitors individuals serving MSR; and the IDOC's use of GPS monitoring and electronic home detention. Plaintiffs' L.R. 56.1 Statement at ¶1.

an approved host site. This is because, pursuant to 730 ILCS 5/3-14-2.5(e), "the term of extended mandatory supervised release ... shall toll during any period of incarceration" for people sentenced to indeterminate MSR under 730 ILCS 5/5-8-1(4)(d). Because of this tolling provision, the period of MSR never starts to run for people with indeterminate MSR until they obtain an approved host site. Thus, someone who has served his or her entire prison sentence and been approved for release by the PRB will remain in prison indefinitely if he is unable to identify a host site. SOF at ¶4.[5]

IV. Statutory Housing Restrictions

Illinois law imposes several layers of restrictions that limit where people sentenced to indeterminate MSR can live. First, Illinois law requires that all persons with indeterminate MSR "shall be placed in an electronic home detention program for at least the first 2 years" of their MSR. 730 ILCS 5/5-8A-3(g). Functionally, this requirement makes it illegal for someone with indeterminate MSR to be homeless while on MSR because the electronic home detention technology requires a landline telephone. SOF at ¶6. The Department's Sex Offender Supervision Unit Protocols instruct that "all Parole Agents will notify the host that a landline phone must be maintained at the host-site (for the purposes of electronic monitoring/GPS)." *Id.*

[5] Moreover, a person with an indeterminate MSR sentence of "three years to life" can only apply for termination of his MSR after successfully completing three years of MSR outside of prison. 730 ILCS 5/3-14-2.5(d); SOF at ¶5. As a result, prisoners with indeterminate MSR receive no credit for MSR time they serve while incarcerated even if they eventually find a host site and obtain their release.

Several other Illinois laws restrict where people who are classified as "child sex offenders" may reside. Illinois law prohibits people classified as child sex offenders from "knowingly resid[ing] within 500 feet of a school building or the real property comprising any school that persons under the age of 18 attend." 720 ILCS 5/11-9.3 (b-5). Another section of the same statute makes it unlawful for a child sex offender "to knowingly reside within 500 feet of a playground, child care institution, day care center, part day child care facility, day care home, group day care home, or a facility providing programs or services exclusively directed toward persons under 18 years of age." 720 ILCS 5/11-9.3 (b-10). Pursuant to 720 ILCS 5/11-9.3(e), the 500-foot distance is measured from the outer property line of the prohibited location to the outer property line of the potential residence. The named Plaintiffs and class members are all subject to these restrictions.

These housing restrictions alone have the effect of putting large swaths of Illinois off limits to people classified as child sex offenders. There are 4,248 public primary and high schools in Illinois. SOF at ¶7. There are 7,920 licensed daycare providers in Illinois. SOF at ¶8. In the City of Chicago alone, there are 332 Chicago Park District owned playgrounds. SOF at ¶9.

In addition to the restrictions imposed by statute on all individuals classified as child sex offenders, Illinois law also imposes another layer of restrictions on all people on MSR for sex offenses. In particular, Illinois law makes it unlawful for any individual convicted of a sex offense to reside while on MSR "at the same address or in the same condominium unit or apartment unit or in the same condominium

complex or apartment complex with another person he or she knows or reasonably should know is a convicted sex offender or has been placed on supervision for a sex offense." 730 ILCS 5/3-3-7(a)(7.6).

Illinois law also prohibits anyone on MSR for a sex offense from "resid[ing] near ... parks, schools, day care centers, swimming pools, beaches, theaters, or any other places where minor children congregate" without prior approval of the Illinois Department of Corrections. 730 ILCS 5/3-3-7(b-1)(12). The statute does not define what is meant by "near" and leaves the decision about whether a proposed host site is too "near" to a prohibited location to the discretion of the IDOC. SOF at ¶10.[6]

V. Housing Restrictions Imposed By IDOC Policy

In addition to the statutory restrictions, the IDOC is authorized to impose additional restraints on housing that can keep people in prison even if they locate a host site that complies with Illinois law. See 730 ILCS 5/3-3-7(a)(15) and (b-1)(15). Illinois law requires all people on MSR for sex offenses to "reside only at a department-approved location." 730 ILCS 5/3-3-7 (b-1)(1). Whether a host site is approved is left to the sole discretion of the parole department. The IDOC exercises the discretion it has been given under Illinois law to further restrict the available housing in which people can reside while on MSR for a sex offense.

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[6] People on MSR for sex offenses are also subject to myriad other restrictions on their lives pursuant to Illinois law. Among other restrictions, they must register their names, addresses, and other identifying information with the state; obtain the approval of an agent of the Department of Corrections prior to accepting employment or pursuing a schooling; refrain from entering any geographic areas identified by their parole agents; refrain from contact with minors; provide a written daily log of activities if directed by an agent of the Department of Corrections; and obtain prior approval of a parole officer before driving alone in a motor vehicle. 730 ILCS 5/3-3-7 (b-1).

First, by statute, the 500-foot residency restrictions apply only to sex offenders whose victims were minors. However, IDOC gives its parole agents authority to apply these conditions to any and all sex offenders under their supervision, regardless of the age of the victim. SOF at ¶11.

Second, the IDOC interprets the statutory restriction on residing in the same "condominium complex or apartment complex" as another sex offender as prohibiting more than one person who is classified as a sex offender from living in the same trailer park (unless each trailer is on a separately-owned parcel of land). SOF at ¶¶12, 13.[7] This interpretation is not mandated by any statute.

As a matter of policy, the IDOC also prohibits anyone on MSR for a sex offense from living in a host site where there are computers, routers, wi-fi access or other Internet-related devices. SOF at ¶13. This means that a person classified as a sex offender cannot reside at the home of a family member or friend unless the host is willing to get rid of all computers, smart TVs, and other Internet-accessible devices in the home.[8]

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[7] Meanwhile, there is no legal restriction on two people classified as sex offenders living next door to one another in separate single-family homes or adjacent apartment buildings that are not on the same parcel of property.

[8] The IDOC's policy concerning Internet access for people on parole for sex offenses was recently amended to allow parole agents to consider requests for Internet access on a case-by-case basis under limited circumstances. SOF at ¶15. This policy does not actually go into effect until August 10, 2018. *Id.* However, this new policy made no changes to the restrictions on residing in a location with Internet access. The IDOC's Sex Offender Supervision Unit Protocols state that "computers, routers, internet related devices [are] prohibited in the prospective host site" (SOF at ¶¶14, 16); and the "Parole School Handout" distributed to every sex offender who is preparing for release on MSR states that people on parole for sex offenses are "prohibited from having internet access of any type." (SOF at ¶16). According to Deputy Chief Dixon, a parole agent may on a case-by-case basis decide to allow offenders to reside in a location that has a computer or other Internet-accessible

IDOC prohibits all people convicted of sex offenses (whether against an adult or minor victim) from residing at any address where children reside or visit. SOF at ¶18. This restriction applies even if the parolee is related to the child (or is the parent of the child) and has never been accused of inappropriate or harmful conduct towards the child. SOF at ¶¶18, 19. This means that a married parent of a minor child cannot parole to his or her own home with his spouse and child and can only get out of prison if he is able to secure a separate residence apart from his or her family. *Id*. The IDOC also prohibits any person classified as a sex offender from living at a host site visited by minors even if the minor visits only "one time" and even if the offender has never committed an offense against a child. SOF at ¶20. None of these restrictions are mandated by any Illinois law. Rather, Illinois law vests the IDOC with discretion to make decisions about what contact people on parole for sex offenses may have with children. 730 ILCS 5/3-3-7 (b-1)(9) (people on MSR for sex offenses must "refrain from all contact …with minor children without prior identification and approval of an agent of the Department of Corrections.")

The IDOC also vests its parole agents with discretion to deny approval of host sites for a wide variety of other reasons, including the presence of the following:

- A dog or other pets;
- Alcohol;
- Children's toys or clothes;
- E-readers such as an iPad, Nook, or Kindle;

devices. SOF at ¶17. But there is no evidence that this discretion has ever been exercised to allow a person on parole for a sex offense to live at a host site where there are computers or Internet access. The Plaintiffs (and dozens, if not hundreds, of class members) have all been told they may not reside at an address with computers or Internet access and have had host sites rejected because there are computers present. See, SOF at ¶¶16, 65, 98, 122.

- Pictures of children (even if photos of relatives of the parolee or the host or the parolee's own child);
- Cameras, binoculars, telescopes, video equipment;
- Gaming systems; and
- Safes.

SOF at ¶21.

There is no formal process for a parolee to contest the decision of a parole agent to deny approval of a specific host site. SOF at ¶22. Deputy Chief Dixon testified that a person is allowed to contact the parole agent's supervisor to request review of the agent's decisions, but parolees are not advised of this right or given any information about how they can contest a parole agent's decision. SOF at ¶23.

VI. The Lack of Housing Options for Indigent Sex Offenders

It is impossible for someone with indeterminate MSR who cannot identify and pay for a host site to ever get out of prison. SOF at ¶27 ("Q. Can a person with a [MSR] term of three years to life get out of prison if they are unable to identify a host site? A. No.") This restriction has a devastating impact on indigent and homeless parolees because the state provides no free or low-cost resources for them to obtain housing.

There are no halfway houses or transitional housing facilities in the state of Illinois that will accept someone who has been convicted of a sex offense. SOF at ¶28. The IDOC will not allow anyone who has been convicted of a sex offense to use a homeless shelter as a host site. SOF at ¶29. People who have been convicted of sex offenses are ineligible for work release programs provided through the IDOC. SOF at ¶30.

Illinois law does not require the Department of Corrections to assist prisoners with obtaining housing. The Code provides that, "[t]o assist parolees or releasees, the Department shall provide employment counseling and job placement services, and *may* in addition to other services provide the following: (1) assistance in residential placement." (emphasis added) 730 ILCS 5/3-14-3(1) (West 2012)). As a matter of practice, the Department does not provide parolees such assistance.

VII. Out-of-State Placement Pursuant to the Interstate Compact Does Not Present a Meaningful Alternative

To be eligible to serve MSR at a host site outside of Illinois, a prisoner must meet the criteria for transfer pursuant to the Interstate Compact for Adult Supervision. There are two primary requirements for any interstate transfer: (1) obtaining housing that complies with the restrictions imposed by Illinois and the receiving state and (2) proof of income or financial support in the receiving state. SOF at ¶31.[9] Proof of financial support can be proof that the parolee has a job, a letter from a family member or friend agreeing to provide financial support until the parolee finds work, or proof of adequate government benefits. SOF at ¶32.

Any out-of-state housing site must meet all of the restrictions and conditions imposed by Illinois (both the statutory restrictions and those imposed by IDOC as a matter of policy) and all of the restrictions imposed on sex offender housing by the receiving state. SOF at ¶33. Even if a parolee has proof of financial support and is able to find and pay for an out-of-state host site that complies with all of the

[9] Dara Matson, the IDOC's Interstate Compact Administrator, testified on behalf of the Department concerning interstate transfer requests and policies.

applicable restrictions, the receiving state has the discretion to reject the transfer request if the parolee seeks transfer to a state where he or she does not have a "qualifying family member" (a parent, spouse, adult child, adult sibling, grandparent or aunt or uncle). SOF at ¶34.

The IDOC produced in discovery all transfer requests under the Interstate Compact from Illinois offenders convicted of sex offenses. SOF at ¶35. These documents show that the transfer process is, for all practical purposes, only available to offenders with a strong system of familial and financial support. Forty-three people with indeterminate MSR have received approval for interstate transfer requests and are currently serving MSR outside of Illinois. SOF at ¶36. Many of them had to submit multiple requests for transfer before receiving approval, with some submitting the forms as many as four times before their transfer was granted. Forty-two of the 43 people with indeterminate terms of MSR who were approved for transfer had the documented financial and housing support of one or more members of their family in the receiving state. SOF at ¶36.

In light of the foregoing, the Interstate Compact process offers little recourse for parolees who cannot find a home with a member of their family. Only 1 of the 43 parolees with indeterminate MSR was approved to transfer to a transitional housing facility, and he was only able to do so thanks to substantial financial support from his family. SOF at ¶¶36, 37. In particular, the records reflect that Douglas Pettit was able to transfer to "New Name Ministries" in Fort Worth, Texas, a privately run facility that requires the payment of an initial $750 fee and another

$550 per month, fees which Mr. Pettit's siblings assumed responsibility for in order to secure his transfer. SOF at ¶37. In short, the Interstate Compact does not offer relief for offenders without this support, and hence does not represent a meaningful alternative for indigent offenders who cannot afford housing in Illinois.

VIII. The Challenged Restrictions Lead to Indefinite Detention of Hundreds of People Who Cannot Identify Compliant Host Sites

Without personal financial resources to pay for housing or the support of a family member or friend willing to take them in whose home complies with the sundry conditions imposed by law and IDOC policy, a person with an indefinite term of MSR will be imprisoned indefinitely. The IDOC's 30(b)(6) witness Dion Dixon testified to this fact:

> Q: Is it possible for a sex offender with an indeterminate MSR term who, A, does not have money to pay for his own housing, and, B, does not have family or friends on the outside who can pay for his housing to ever get out of the Illinois Department of Corrections?
>
> A: Never say never, but, … using those criteria, no.

SOF at ¶38.

Because Illinois law and IDOC policy make it nearly impossible for many people who have been sentenced to indeterminate terms of MSR to meet the conditions for release into the community, hundreds of people remain in prison beyond the completion of their prison sentences with no prospect for getting out.

Each of the named Plaintiffs has completed his term of incarceration and has been deemed eligible for release on MSR by the PRB. SOF at ¶¶42, 52, 63, 73. All of the named Plaintiffs remain imprisoned and face a realistic threat of lifetime

incarceration because they are not able to find compliant host sites and their MSR time will never start to run until they can secure compliant housing.

A. Paul Murphy

Paul Murphy was sentenced in 2012 to 36 months of probation on a charge of possession of child pornography. SOF at ¶39. Murphy's probation was revoked after 18 months because he was homeless and was sleeping in a doorstep within 500 feet of a park. SOF at ¶40. Murphy completed his term of incarceration and was approved for release on MSR on March 3, 2014. SOF at ¶42. Murphy remains imprisoned to date—more than four years beyond his approval for release on MSR—because he has an indeterminate term of MSR and cannot find a compliant host site. SOF at ¶43.

Due to his financial situation, Murphy cannot afford to purchase or lease any property of his own. He has no checking or saving accounts, and his income for the past five years combined is around $3,000. SOF at ¶48. Murphy does not have a spouse or any family who can help him find and/or pay for housing. SOF at ¶48. Murphy has no family or friends who could take him in to live with them. *Id*. He has been divorced since 1998, and estranged from his two daughters for the past 10 years and does not know their whereabouts. *Id*. He has no other family. *Id*.

Murphy has made numerous attempts to secure a compliant host site by writing letters to organizations that assist formerly incarcerated people with securing housing. SOF at ¶44. Murphy also applied to live in a halfway house in East St. Louis. SOF at ¶45. These attempts have all been unsuccessful because Murphy is

prohibited from living in any sort of transitional housing. SOF at ¶46. Murphy also applied for placement at a work release facility in Peoria. SOF at ¶47. He was turned down due to having been convicted of a sex offense. *Id*. He also applied to a "Technology Boot Camp" program in Chicago, but has not heard back. *Id*.

B. Jasen Gustafson

Jasen Gustafson was sentenced in 2013 to four years in the IDOC at 50 percent on one count of possession of child pornography. SOF at ¶51. This sentence was accompanied by a MSR term of three years to life. The PRB approved Gustafson for release on MSR on October 19, 2014. SOF at ¶52. To date, the IDOC has not released Gustafson from prison because he cannot find an approved "host site" at which to serve his MSR. SOF at ¶52–62.

Gustafson has made numerous attempts to find a host site compliant with the terms of his MSR. In 2014, before the date of his MSR release, he met with the Parole Review Board to understand the conditions of his release. SOF at ¶52. As soon as he was eligible, Gustafson began submitting host sites for approval, starting with his mother's residence. SOF at ¶53. That address was denied due to its proximity to a day care. *Id*. His second attempt at a host site, his aunt's home, was denied on the grounds that his aunt occasionally had her grandchildren visit. SOF at ¶54. Gustafson has also tried to secure housing at a halfway house in Colorado through the Interstate Compact, but his request was denied due to a lack of a support system for him in Colorado. SOF at ¶55.

Outside of his mother and aunt, whose addresses were rejected as host sites, Gustafson has no family or friends who are willing and able to help him find housing. SOF at ¶56. Gustafson has not had contact with his father in several years. SOF at ¶57. His father is also on parole and cannot provide any support to Gustafson. *Id.* Gustafson has spoken with his grandmother in Tennessee, but she is unable to host him due to her poor health. SOF at ¶58. Gustafson's brother cannot offer him support as he lives with his mother, whose home was already rejected as a host site. SOF at ¶59.

Gustafson has no money of his own to pay for housing. He has neither a checking or saving bank account and has had no income in the last five years apart from the IDOC state pay. SOF at ¶60. Gustafson has not attempted to secure his release through a work release program because it is his understanding that his current status (as a sex offender) disqualifies him from the program. SOF at ¶61.

C. J.D. Lindenmeier

J.D. Lindenmeier was convicted in 2006 of one count of Predatory Criminal Assault of a Child and sentenced to six years in the IDOC at 85 percent. This sentence was accompanied by an MSR term of three years to life. SOF at ¶63. The PRB approved Lindenmeier for release on MSR on July 18, 2011. SOF at ¶63. He remains imprisoned to date — more than seven years beyond the completion of his prison sentence — because he cannot find a host site.

With the help of his family and friends, Lindenmeier has made a concerted effort to find a host site. He has submitted addresses from everyone in his circle of

family and friends, all of which have been denied. SOF at ¶64. His father's home was denied as a host site because it was within 500 feet of a park. SOF at ¶65. His mother's home was rejected solely for the presence of computers and smartphones. *Id.* A family residence of Lindenmeier's girlfriend was denied because it was within 500 feet of a daycare. *Id.* His sister's home was rejected because she has two children living with her. *Id.* His father's girlfriend's home was denied because it was too close to a park. *Id.* His mother's boyfriend's home was also denied, although Lindenmeier is unsure of the reason for the denial. *Id.* Lastly, the home of a close friend, Ashley Snowber, was denied because it was within 500 feet of an unspecified "restricted area." *Id.* At each of these seven rejected addresses, Lindenmeier has a system of support ready to help him reintegrate into society. SOF at ¶66. His parents, long-time friend Ms. Snowber, and even the partners of his parents have all committed to him they are willing to do whatever they can to ensure Lindenmeier would be able to reliably support himself. *Id.*

Lindenmeier also has written letters to numerous halfway houses, including the Salvation Army, Carpenter's Place in Rockford, and Wayside Cross Ministries in Aurora. He was rejected from all of them. SOF at ¶67. Lindenmeier looked into the possibility of work release, but has not applied to any of the IDOC's work release programs because an IDOC counselor advised him that submitting an application would be futile due to his status as a sex offender. SOF at ¶68.

Lindenmeier has no financial resources of his own to find or pay for housing SOF at ¶69. Lindenmeier does not have a bank account and has received no income

in the past five years except for the IDOC pay he receives for his work in prison. Lindenmeier currently earns $14.40 a month for his work as a clerk. *Id.*

Outside of the family and friends whose addresses he has already submitted, Lindenmeier has no one else who could help him find housing. He has never been married and has no children. SOF at ¶70. Lindenmeier's family is financially incapable of paying for him to live in a home by himself, and their financial situation does not allow them to move to a new location that could qualify as an acceptable host site. *Id.*

D. Stanley Meyer

Stanley Meyer was convicted in 2008 of one count of Criminal Sexual Assault and sentenced to 48 months at 85 percent, with a MSR term of three years to life. SOF at ¶72. The victim of Meyer's offense was an adult. *Id.* The PRB approved Meyer for release on MSR on July 15, 2011. SOF at ¶73. Meyer remains imprisoned more than seven years beyond the completion of his sentence because he cannot secure a host site. SOF at ¶80.

Meyer has no financial resources, nor does he have a bank account of any kind. He owns no assets outside of his possessions at Taylorville. SOF at ¶74. His sole income comes from his work as a porter at Taylorville, for which the state pays him $14.40 per month. *Id.*

Meyer has very limited contact with his family. He never knew his father, and his mother is now deceased. SOF at ¶75. The last contact Meyer had with his family was in 2009 when his sister informed him of their mother's passing and that the

rest of his family had moved to Texas. *Id*. At the time of this most recent contact, Meyer's family indicated they were unwilling or unable to help him. *Id*.

In 2011, as his projected release date approached, Meyer made numerous attempts to find housing with a halfway house. SOF at ¶76. None of these efforts were successful and he was informed that his conviction prevented him from going to any halfway house. *Id*. Meyer also wrote letters to family and friends looking for help with a host site, but received no responses from anyone he contacted. SOF at ¶77.

E. Non-Party Witnesses

The named Plaintiffs are not alone. In discovery, the IDOC admitted that it is currently imprisoning 241 people with indeterminate MSR terms who have been approved for release on MSR. SOF at ¶81. The Department further acknowledged that "many," if not all of these people, are "likely being held because of a failure to identify an acceptable host site." *Id*.[10] This figure is certainly growing. Indeterminate MSR sentences are of relatively recent vintage. The law imposing mandatory indeterminate MSR sentences went into effect on July 1, 2005 for individuals convicted of "predatory criminal sexual assault of a child, aggravated criminal sexual assault, or criminal sexual assault" and on January 1, 2009 for

[10] Only about 25 percent of people classified as sex offenders who are eligible for release on MSR are actually able to find housing and get out of prison. According to the recent findings of the Illinois Sex Offenses & Sex Offender Registration Task Force, on which a representative of the IDOC served, there are currently 1,200 to 1,400 sex offender parolees imprisoned in IDOC who "may not be released from custody because they are unable to secure permanent, stable housing meeting Illinois statute requirements or agency policy." SOF at ¶82. Meanwhile, only about "350 to 450" sex offender parolees are actually serving MSR in the community. SOF at ¶83.

individuals convicted of child pornography offenses. 730 ILCS 5/5-8-1(4)(d). As more people who have been convicted of these offenses finish their prison sentences and seek host sites at which to serve their MSR, the population of people who cannot find a place to live and thus face indefinite detention will surely increase.

Plaintiffs have attached to this motion the declarations of nine other class members who are in IDOC long beyond the completion of their sentences due to their inability to find compliant housing.[11] For example, Cinszeo Doss was released on MSR in 2012, and lived with his mother in Chicago. SOF at ¶85. In April 2016, four years after his release, Doss' MSR was revoked for not having a compliant host site because another sex offender, one no longer on parole, had moved in nearby. SOF at ¶86. Doss, through no fault of his own, had to move in order to comply with his parole officers' instruction that he could not live near another sex offender. Doss submitted numerous other addresses, but he could not secure another compliant host site within the 30 days he was given to do so. *Id*. He remains imprisoned to date. Doss has made numerous efforts to find compliant housing since his reincarceration. SOF at ¶87. These attempts have all been unsuccessful. His proposed host sites have been denied for a variety of reasons, including the presence of a defunct, non-operational day care within 500 feet of the host site; the presence of a school more than 500 feet from a proposed host site; and the presence of an unused park in the vicinity of the host site. SOF at ¶¶87–90.

[11] For purposes of brevity, Plaintiffs have not included all of the details of these individuals' stories in this brief. Their accounts are set forth in full in Plaintiffs' L.R. 56.1 statement of material facts and the supporting declarations. SOF at ¶¶84–133.

Likewise, Alfred Aukema is currently incarcerated at Taylorville Correctional Center. SOF at ¶96. He has been eligible for release on MSR since September 7, 2017. Aukema has no spouse and no financial resources. SOF at ¶97. Aukema has made three attempts to secure a compliant host site, each of them unsuccessful. SOF at ¶98. The first address he tried was fully compliant with the various restrictions that accompany the MSR sentence, but it was denied by the parole department because the owner is currently incarcerated at Taylorville. *Id*. A second address, at a trailer park in Cahokia, Illinois, was rejected due to the presence of another sex offender in a different trailer on the other side of the park. *Id*. Finally, Aukema's aunt's home in California was denied due to visits by her grandchildren and the presence of dogs, firearms, Internet-connected devices, and pictures of children on the property. *Id*. Aukema's aunt offered to construct a separate structure for him on the property, which is spacious enough to accommodate another home, but this proposal was denied because the parole agent insisted such an action would only be permissible if she had her property re-zoned into two separate parcels, which she cannot afford to do. *Id*. Aukema has been unsuccessful in his search for a halfway house, religious organization, or other third-party support system that could help him. SOF at ¶99. If the IDOC will not approve any of his proposed host sites, Aukema would like to be released into homelessness, so he can obtain employment while living at a shelter and save up money to pay for his own housing, but the IDOC will not allow this. SOF at ¶¶100, 101. With no financial resources, and with all of the help his family can provide exhausted,

Aukema is out of options and trapped in the IDOC indefinitely. Aukema fears that the only way he will ever get out of the IDOC "is if I die." SOF at ¶102.

IX. The Costs of Incarceration vs. Community Supervision

Beyond the human cost of these policies, the monetary price tag of keeping MSR eligible offenders incarcerated indefinitely to the taxpaying public is significant. Courts have recognized that the cost of supervising a person in the community is much lower than the cost of keeping someone incarcerated. See, *Felce v. Fielder*, 974 F.2d. 1484, 1500 (7th Cir. 1992) ("Mandatory release parole also saves the state money and alleviates prison overcrowding."); *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) (a key component of parole is "to alleviate the costs to society of keeping an individual in prison.")

The real-world numbers in Illinois clearly reflect this. For example, in 2017, the average annual cost of keeping a person incarcerated in an IDOC facility was $26,365. SOF at ¶134.[12] In contrast, according to IDOC spokesperson Tom Shaer, the average cost to the State of supervising a parolee on release in the community is approximately $2,000 per year. SOF at ¶135. Thus, the State pays over twelve times more each year to imprison individuals who are entitled to be released.

[12] The Court can take judicial notice of the IDOC's annual report from which this figure was taken. The Seventh Circuit has held that it is appropriate for the Court to take judicial notice of documents and records retained on government websites where the accuracy of the information "is not subject to reasonable dispute." *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (taking judicial notice of documents maintained on the website of the National Personnel Records Center); *Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F.3d 600, 607 (7th Cir.2002) (taking judicial notice of information from website of the FDIC).

X. Illinois Law Allows the State to Civilly Commit Sex Offenders Who Are Likely to Commit Additional Offenses If Released

Illinois law provides a mechanism for the IDOC to retain custody of any person who is deemed too great a risk of re-offense to be released into the community on MSR after the completion of his sentence. In particular, the Sexually Dangerous Persons Act, 725 ILCS 205 allows for the involuntary commitment of certain convicted sex offenders, "who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children." 725 ILCS 205/1.01.

The Sexually Violent Persons Commitment Act, 725 ILCS 207/1 et. seq., vests the DOC with the responsibility to determine whether anyone who has been convicted of a "sexually violent offense" should be subject to civil commitment.[13] *Id*. The Department is required "not later than 6 months prior to the anticipated ... entry into mandatory supervised release" of any person who has been convicted of a sex offense to "send written notice to the State's Attorney in the county in which the person was convicted" of the person's "anticipated release date and that the person will be considered for commitment." 725 ILCS 207/9. No later than three months prior to a sex offender's anticipated release, the Department must make a recommendation concerning whether the offender should be referred for civil commitment based on "a comprehensive evaluation of the person's mental condition." 725 ILCS 207/10.

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[13] The Act defines "sexually violent offense" to include convictions for criminal sexual assault, aggravated criminal sexual assault, criminal sexual assault of a child, criminal sexual abuse, indecent solicitation of a child, and possession of child pornography. 725 ILCS 207/5 (e).

Illinois' civil commitment scheme contains procedural protections for the person being considered for involuntary commitment, including the right to a trial; the requirement that the state "prove by clear and convincing evidence" that the person is "substantially probable to engage in acts of sexual violence" if released; and automatic periodic review of the person's continued confinement. 725 ILCS 207/40.

XI. Other States' Approaches to Supervising Homeless Registrants

Illinois is, of course, not the only state that has prisoners who are required to register as sex offenders who cannot afford to pay for housing while on parole or community supervision. Unlike Illinois, other states have made special provisions for the supervision of homeless registrants that balance the government's interest in the safety of the community with the parolee's right to release from custody. For example, the Wisconsin Department of Corrections has a policy titled "Homeless Sex Offenders" that provides parole agents directions about how to supervise and manage those parolees who cannot find suitable housing. SOF at ¶136.[14] This policy provides that homeless parolees are subject to special restrictions, including placement on GPS monitoring; a requirement that they "remain in the county of supervision, unless an exception is granted for employment, offense related programming, or other pre-approved activities"; and a requirement that they "must call and speak with the [parole] agent at least once every seven days, on a weekday, to report … the location(s) in the city where he/she has been frequenting and sleeping for the past seven days and plans to frequent/or sleep for the next seven

[14] The court should take judicial notice of this Policy pursuant to *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) and Federal Rule of Evidence 201.

days." SOF at ¶137; see also *Werner v. Wall*, 836 F.3d 751 (7th Cir. 2016) (discussing constitutionality of Wisconsin's policy of incarcerating homeless sex offenders which has since been discontinued).

Florida similarly requires homeless sex offender parolees to "report in person at the sheriff's office within 48 hours of being released from the Florida Department of Corrections and within 48 hours of establishing or vacating a permanent, temporary, or transient residence," which the statute defines as "a place where the person sleeps or seeks shelter and a location that has no specific street address." Fla. Stat. §943.0435.[15]

ARGUMENT

I. The Challenged Scheme Violates Substantive Due Process

For a government policy that infringes on "fundamental rights and liberties" to survive scrutiny under the substantive due process clause, the government must show that the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("the Fourteenth Amendment 'forbids the government to infringe . . . fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'") (quoting *Reno v. Flores*, 507 U. S. 292, 302 (1993)).

[15] California too releases people on parole for sex offenses into homelessness. See, *In re Taylor*, 343 P. 3d 867 (Cal. 2015) (finding unconstitutional residency restrictions that applied to people on parole for sex offenses in San Diego county).

Plaintiffs are entitled to judgment on their substantive due process claim because, as set forth below, the challenged scheme interferes with the fundamental liberty interest in freedom from bodily restraint and is not narrowly tailored to serve state interests in public safety or rehabilitation.[16]

A. There is a Fundamental Right to Freedom from Bodily Restraint

The Supreme Court has repeatedly recognized that "freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the due process clause] protects." *Zadvydas v. Davis,* 533 U.S. 678, 690 (2001); *Foucha*, 504 U.S. at 80 ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action… We have always been careful not to minimize the importance and fundamental nature of the individual's right to liberty."); *Demore v. Kim*, 538 U.S. 510 (2003) (the constitution "permits detention only where 'heightened, substantive due process scrutiny' finds a 'sufficiently compelling' governmental need.") (quoting *United States v. Salerno*, 481 U.S. 739, 748 (1987)); *Reno*, 507 U.S. at 316 (O'Connor, J., concurring) ("The

[16] When evaluating the constitutionality of the regulatory and statutory scheme challenged here, the Court has to view the scheme as a whole and in context by examining the cumulative effect of the statutory restrictions along with how the IDOC implements the statutes and the way the IDOC uses the broad discretion it is given under the law. The inquiry should be whether this *scheme as a whole* is narrowly tailored to serve a compelling government interest; not whether any one provision viewed in isolation is constitutionally permissible. See, *e.g.*, *Nat. Fedn. of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2652 (2012) (warning against evaluating the constitutionality of a particular section of a broader legislative scheme without taking into account the broader context of the law).

institutionalization of an adult by the government triggers heightened, substantive due process scrutiny.")

The fact that Plaintiffs have been convicted of sex offenses does not change the fact that they retain a fundamental liberty interest in release from prison once they have served the term of confinement to which they were sentenced. The Supreme Court has consistently held that "criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others." *Jackson v. Indiana*, 406 U.S. 715, 724 (1972); *Foucha*, 504 U.S. at 79 (1992) ("a convicted criminal who allegedly was mentally ill was entitled to release at the end of his term unless the State committed him in a civil proceeding. There is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments."); *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment.")[17]

[17] The fact that Plaintiffs have a term of MSR after their sentence of imprisonment does not negate their liberty interest in release into the community. While courts have noted that prisoners do not have a fundamental liberty interest in being granted early release from an incomplete prison sentence on parole (see, *e.g.*, *Kendrick v. Hamblin,* 606 F. App'x 835, 837 (7th Cir. 2015)), Plaintiffs and the members of the class have already discharged their prison sentences and been granted MSR. MSR is not early release on an unexpired prison sentence, but is a separate sentence of community supervision. This court has recognized that a Plaintiff has a liberty interest in being released from confinement in prison once they are approved for release on MSR by the PRB. *Murdock v. Walker,* No. 08 C 1142, 2014 WL 916992, at *6 (N.D. Ill. Mar. 10, 2014) (After the PRB approved prisoners for release "that approval [becomes] a form of statutory liberty...")

The principle that all persons have a fundamental right to liberty that cannot be limited unless the restriction is narrowly tailored to serve a compelling government interest underpins decades of Supreme Court jurisprudence. As shown below, the challenged scheme fails scrutiny under the due process clause because it severely interferes with Plaintiffs' fundamental right to be free from indefinite incarceration pursuant to a scheme that is not narrowly tailored to serve a compelling interest.

B. The Challenged Scheme Is Not Narrowly Tailored to Meet a Compelling Government Interest

Narrow tailoring requires the government entity that seeks to restrict a person's liberty to make a showing that its justification for the detention is compelling and that the government interest served by the detention cannot be met without detention. *Demore v. Kim*, 538 U.S. 510, 557 (2003) (Kennedy, J., concurring) ("In sum, due process requires a special justification for physical detention that outweighs the individual's constitutionally protected interest in avoiding physical restraint as well as adequate procedural protections. There must be a sufficiently compelling governmental interest to justify such an action, usually a punitive interest in imprisoning the convicted criminal or a regulatory interest in forestalling danger to the community.") (citing *Zadvydas*, 533 U.S. at 690–691; *Flores*, 507 U.S. at 316 (O'Connor, J., concurring); *Salerno*, 481 U.S. at 748) (internal quotation marks omitted). Accordingly, the Supreme Court has required that the "class of persons subject to confinement must be commensurately narrow and the duration of confinement limited accordingly." *Id*., (citing *Zadvydas*, at 691.)

Here, the government interests that are supposed to be served by the detention of Plaintiffs are public safety and offender rehabilitation. Plaintiffs acknowledge that such interests are important. However, the Defendants' chosen means of advancing these interests cannot be said to be narrowly tailored.

1. Indefinite Imprisonment of Homeless Sex Offenders Is Not a Narrowly Tailored Means of Advancing a Compelling Government Interest

The requirement that everyone convicted of a sex offense must find compliant housing before being released from IDOC custody inevitably prolongs detention for the poor, and thus imposes a substantial infringement of the fundamental right to freedom from bodily restraint. On the record before this court, the Defendants cannot meet their burden to show that indefinite imprisonment is the least restrictive means of advancing public safety and offender rehabilitation. See, *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) (requiring government to make a showing that a regulation that burdens a "fundamental right" is the "the least restrictive means of protecting the State's objectives").

a. GPS Monitoring Is a Less Restrictive Means of Advancing the State's Interests

There is a readily available alternative to indefinite imprisonment of those who cannot obtain a compliant host site that would permit the IDOC to adequately supervise offenders: GPS monitoring. Illinois law already requires that people convicted of certain sex offenses be subject to GPS monitoring for the duration of their MSR. 730 ILCS 5/3-3-7 (a)(7.7). The IDOC's 30(b)(6) witness, Dion Dixon,

testified that the IDOC has been using GPS to monitor people on MSR for more than ten years. SOF at ¶138.

The GPS system employed by the Department of Corrections provides extensive real-time data to parole agents. It tracks offenders' whereabouts, their movement, how long they remain in any location, and the precise time of their movement. SOF at ¶139. The IDOC's GPS system also sends parole agents an immediate alert when an offender enters an "exclusion zone" (*i.e.*, somewhere the parole agent has defined as a place where the offender is not permitted to be) or an "inclusion zone" (*i.e.*, a place that the parole agent has specified that the offender should be at a particular time, such as a job or an appointment). *Id*. The parole agent also has the option to log into a computer terminal to see where the offender is at any given time and to review the stored data about where the offender has been. *Id*.

The Defendants have rejected out of hand the idea of using the state's existing GPS system to track sex offenders who are unable to afford compliant housing, insisting that it's "not a good fit" for purposes of offender supervision and protection of public safety. SOF at ¶140. This conclusion is not supported by any evidence in the record.

Contrary to the Defendants' conclusion that GPS monitoring of homeless parolees would compromise public safety, the Seventh Circuit has noted that GPS monitoring of people who have been convicted of sex offenses has been an extremely effective tool in reducing re-offense rates. *Belleau v. Wall*, 811 F. 3d 929, 936 (7th Cir. 2016) ("A study of similar GPS monitoring of parolees in California found that

they were half as likely as traditional parolees to be arrested for or convicted of a new sex offense. There is no reason to think that GPS monitoring of convicted child molesters in Wisconsin is any less efficacious.") (internal citation omitted). Moreover, the IDOC's conclusion that GPS monitoring of homeless sex offenders would compromise public safety is belied by evidence that other states successfully monitor homeless sex offenders using GPS. See, *e.g.*, SOF at ¶137 (Wisconsin's policy of monitoring homeless sex offenders with GPS while on parole).

Even if the DOC is not satisfied that GPS monitoring alone would be an adequate tool to supervise homeless sex offenders, that does not mean that indefinite imprisonment of such people is justified. If further security measures are necessary, the Department could (as Wisconsin does) impose additional restrictions on homeless sex offenders on supervised release, including requiring the offender to have more frequent in-person visits with the parole agent and requiring the parolee to remain in the county in which they are released. The Department could also, through use of the GPS system's exclusion zones, more strictly circumscribe the places the offender is allowed to be. Indeed, Illinois law already imposes intensified sex offender registration requirements on any person required to register as a sex offender who does not have a permanent residence. See, 730 ILCS 150/3 (requiring sex offenders without a fixed residence to report weekly, in person, to the local law-enforcement agency in the area in which he or she is located and to provide information about all the locations where he has stayed in the previous seven days.)

b. The Evidence Establishes that Plaintiffs and the Members of the Class Do Not Present a Danger that Justifies Continued Detention

There is an additional reason that the Defendants cannot meet their burden to show that indefinite imprisonment of sex offenders who cannot find a host site is a narrowly tailored response to public safety or rehabilitation concerns. The evidence in the record shows that the Department of Corrections has already concluded that the Plaintiffs can safely be released into the community on MSR.

Under the Sexually Violent Persons Commitment Act, 725 ILCS 207/40, the State may civilly commit any offender shown to be "a sexually violent person," judged by, among other things, their likelihood to reoffend. See *In re Detention of Walker*, 314 Ill. App. 3d 282 (4th Dist. 2000). Pursuant to this statute, the IDOC is required to conduct an evaluation of all people convicted of sex offenses in advance of their MSR dates. All of the Plaintiffs and class members have been evaluated and none has been referred for civil commitment proceedings. Instead, they have all been approved for release by the PRB. Thus, the people affected by the challenged policies are those whom the State has not sought to commit and about whom a determination has been made that they do not represent a threat to public safety if released.

c. The Disparate Treatment of Similar Offenders Shows that Indefinite Incarceration Is Not a Narrowly Tailored Response to Public Safety and Rehabilitation Concerns

Finally, Defendants cannot show that indefinite detention of Plaintiffs and the members of the class who cannot find housing is narrowly tailored to serve a

compelling interest because IDOC regularly releases people who have been convicted of offenses identical to Plaintiffs' offenses, as well as people convicted of even more serious offenses.

The statute that created indeterminate MSR (*i.e.*, 730 ILCS 5/5-8-1(4)(d)) only applies to people who committed their crimes after the effective date of the statute (July 1, 2005 for those convicted of predatory criminal sexual assault of a child, aggravated criminal sexual assault, or criminal sexual assault; and January 1, 2009 for those convicted of child pornography offenses). Thus, anyone convicted of one of the offenses enumerated in 730 ILCS 5/5-8-1(4)(d) before the effective date of that statute has a fixed term of MSR, which means that upon "maxing out" his MSR term in prison he will get out of IDOC without any supervision. Upon release, such individuals are allowed to be homeless or live in housing that would not meet IDOC approval. Meanwhile, Plaintiffs and class members who have been convicted of identical offenses remain imprisoned indefinitely with no chance to get out unless they can obtain an approved host site. This disparate treatment undercuts any claim that it is necessary to indefinitely imprison homeless offenders convicted of the offenses enumerated in 730 ILCS 5/5-8-1 after the statute's effective date.

In addition, the IDOC cannot show it is necessary to indefinitely imprison the members of the class because it routinely releases into the community homeless people who have been convicted of other (oftentimes more serious) sex offenses for which the law does not require an indeterminate period of MSR. For example,

people convicted of the following offenses, all of which involve sexual conduct with a minor victim, do not receive indefinite MSR terms:

- Sexual exploitation of a child (720 ILCS 5/11-9.1);
- Custodial sexual misconduct (720 ILCS 5/11-9.2);
- Indecent solicitation of a child (720 ILCS 5/11.6);
- Patronizing a juvenile prostitute (720 ILCS 5/11-18.1);
- Criminal sexual abuse of a minor (720 ILCS 5/11-1.50(b) or (c)); and
- Aggravated criminal sexual abuse of a minor (720 ILCS 5/11-1.60 (b), (c) and (d)).

People convicted of these offenses receive determinate terms of MSR and can "max out" their time and be released without supervision (regardless of whether they have a place to live). Meanwhile, people like Plaintiffs Paul Murphy and Jasen Gustafson, who have been convicted of possessing child pornography (a non-contact offense), face potential life imprisonment due to their inability to find compliant housing. The IDOC cannot show that it is necessary for public safety reasons to imprison a person who has been convicted of possessing child pornography for the rest of his or her life while it is acceptable to release a person who has been convicted of aggravated criminal sexual abuse of a minor into homelessness with no supervision after he maxes out his MSR term.

Finally, the IDOC cannot show that indefinite imprisonment of the Plaintiffs and class members who cannot identify host sites is necessary to advance public safety because it routinely releases parolees who have been convicted of violent felonies, including first degree murder (720 ILCS 5/9-1); aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1)); and aggravated battery of a child (720 ILCS 5/12-

4.3(a)) on MSR even if they cannot afford a host site and need to stay at a homeless shelter. SOF at ¶141.

2. The Burdensome Housing Restrictions Are Not Narrowly Tailored to Serve a Compelling Government Interest

Separate from the statutory requirement that Plaintiffs and the members of the class must obtain housing before their release, the challenged scheme fails strict scrutiny under the due process clause in an additional way. The burdensome restrictions limiting where people on MSR for sex offenses can live (imposed both by Illinois statute and as a matter of IDOC policy) pose a serious infringement of fundamental liberty interests by making it impossible for many parolees to obtain a compliant host site, thus forcing them to stay in prison beyond the completion of their sentences. As shown below, the IDOC cannot meet its burden to show these restrictions are narrowly tailored to serve a compelling government interest.

a. The Restriction on Residing at a Location with Computers or other Internet-Accessible Devices

Illinois law gives the Department discretion to decide whether individuals on MSR who are required to register as sex offenders can access the Internet. 730 ILCS 5/3-3-7 (b)(7.6)(i). As a matter of policy, the IDOC prohibits anyone on MSR for a sex offense from living in a host site where there are computers or devices that can access the Internet. The IDOC's instruction manual for parole agents states that "computers, routers, internet related devices [are] prohibited in the prospective host site." SOF at ¶14. Given the ubiquity of computers and smart phones and their centrality to almost every aspect of life (communication, paying bills, reading the

news), prohibiting parolees from living with any friend of family member who cannot give up their Internet access obviously puts many potential host sites off limits.

The IDOC's prohibition on living in a host site that has computers or internet access cannot be seen as narrowly tailored to promote safety or rehabilitation. It is a blanket policy applied to everyone who has been convicted of a sex offense. SOF at ¶14. The Department does not take into account whether the offense had anything to do with the Internet or whether a restriction on Internet access will help the parolee reintegrate into society and lead a law-abiding life.[18] For example, J.D. Lindenmeier has been prohibited from residing at his mother's home solely because there are computers and Internet access on the premises. SOF at ¶65. Lindenmeier's criminal case had nothing to do with the Internet. SOF at ¶63.

b. The Restriction on Living at a Place Where Minors Live or Visit

Illinois law also vests the IDOC with discretion to decide whether people on parole for sex offenses may have contact with children. 730 ILCS 5/3-3-7 (b-1)(9) (people on MSR for sex offenses must "refrain from all contact …with minor children without prior identification and approval of an agent of the Department of Corrections.") The IDOC does not decide on an individual basis whether a parolee

[18] The IDOC's new Internet policy (Ex. 19), which goes into effect on August 10, 2018, allows parole agents discretion to allow some people on parole for sex offenses (not those deemed to be "Internet related sex offenses") to have access to the Internet. SOF at ¶ 15. This new policy does not change the restrictions on living at an address with Internet access. *Id*. The Department's Sex Offender Supervision Unit Protocols still provides that "computers, routers, internet related devices [are] prohibited in the prospective host site." SOF at ¶16.

should be allowed to live with a child or reside at a location where children visit. Rather, the Department broadly prohibits all people convicted of sex offenses from residing at any address where children live or visit. The restriction is absolute—Deputy Chief Dixon testified that IDOC will reject approval of a host site if a minor visits the residence even "one time." SOF at ¶20. The IDOC applies these restrictions to all sex offender parolees, including those such as Plaintiff Stanley Meyer who have never been convicted of an offense against a minor. SOF at ¶18. The IDOC also applies these restrictions to parolees who are parents or grandparents of minor children. SOF at ¶19. In applying these restrictions, the IDOC does not undertake any individualized assessment of whether a particular parolee poses a danger to his or her own child. None of these restrictions are mandated by any Illinois law.

These restrictions have the effect of cutting off parolees from many potential host sites and thereby increase the likelihood that parolees with indeterminate MSR will have to remain in prison. For example, a married parent cannot parole to his or her own home with his spouse and minor child(ren). SOF at ¶19. Such a person can only get out of prison if he or she is able to secure a separate residence apart from his or her family. *Id*. Likewise, a parolee cannot live at a host site with a family member or friend if children even visit on sporadic or rare occasions. SOF at ¶20.

The IDOC's broad policy of applying these restrictions without undertaking any individualized assessment of the parolee's characteristics and circumstances is not

narrowly tailored. Not all people who have been convicted of sex offenses pose a danger to their own children. In cases where the parolee does not pose a danger to children, the restrictions do nothing to advance public safety. In many cases, they undermine rehabilitation by denying parolees the opportunity to be responsible parents and to live with their supportive families—activities that would foster their success on MSR. See Urban Institute, From Prison to Home: The Dimensions and Consequences of Prisoner Reentry, (2001) ("[S]trong family involvement or support was an important indicator of successful reintegration across the board."); Vera Institute of Justice, The Front Line: Building Programs that Recognize Families' Role in Reentry, 1 (Sept. 2004) ("family support can help make or break a successful transition from prison to community").

c. The Restriction on Living 'Near' Various Locations

The restrictions prohibiting people from residing "near" locations including playgrounds, parks, schools, day care centers, swimming pools, beaches, theaters, or any other places where minor children congregate are likewise not narrowly tailored to advance compelling interests.

As with the restrictions on residing with children, the IDOC applies the housing restrictions broadly to all people who have been convicted of sex offenses without regard to the individual characteristics of the parolee, his or her background, or the nature of the offense. SOF at ¶11. Although these restrictions are ostensibly aimed at keeping people who may pose a danger to children away from places where

children may be present, the IDOC applies these restrictions with equal force to people who have been convicted of sex offenses against adult victims. *Id*.

Illinois law does not mandate the IDOC's sweeping interpretation of the statutory restrictions. 730 ILCS 5/3-3-7(b-1)(12), which restricts people on MSR for sex offenses from "resid[ing] near ... parks, schools, day care centers, swimming pools, beaches, theaters, or any other places where minor children congregate … without prior approval of the Illinois Department of Corrections," gives the IDOC discretion to permit parolees to live near the enumerated locations. The IDOC does not use this discretion to make a case-by-case evaluation of host sites, but simply applies an across-the-board rule. Likewise, 720 ILCS 5/11-9.3, which restricts people classified as child sex offenders from living within 500 feet of schools, playgrounds and daycares, only applies to people who have committed offenses against children; but the IDOC applies it across the board to all people required to register as sex offenders. SOF at ¶11.

As explained above, these sweeping restrictions put large swaths of the state off limits to parolees—particularly in urban areas—by prohibiting them from looking for potential host sites within 500 feet of thousands of schools, parks, playgrounds, theaters, and other places where children may congregate. By giving the statutory restrictions such a broad effect, the IDOC further exacerbates the likelihood that parolees with indeterminate MSR will remain imprisoned indefinitely. The IDOC's broad interpretation of the state's statutory restrictions and its broad exercise of its

discretion to limit available housing also shows the lack of narrow tailoring in the IDOC's policies.

d. The Restriction on Living In the Same Apartment Complex as Another Person Convicted of a Sex Offense

Illinois law 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. The IDOC applies this restriction to prohibit more than one sex offender from living in the same trailer park (unless each trailer is on a separately owned parcel of land), although this interpretation is not mandated by Illinois law. SOF at ¶12. Neither this statute nor the IDOC's interpretation of it are narrowly tailored to serve a compelling interest. The Defendants have not come forth with any persuasive safety or rehabilitative justifications for these restrictions.[19] There is no logical reason to believe that there is a compelling public safety need to prohibit people on MSR for sex offenses from living in separate units in the same apartment building; separate buildings in the same apartment complex; or separate trailers in the same trailer park when it is completely permissible under Illinois law for two people on MSR for sex offenses to live next door to one another (whether in apartment buildings, houses, or trailers) so long as their homes are on separate plots of land.[20]

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[19] In his deposition, when Deputy Chief Dixon was asked what the reason was for prohibiting more than one sex offender from living in a trailer park, he did not reference any safety or rehabilitative purpose. Rather, he simply stated that the state police and Chicago police had interpreted the prohibition on more than one offender living in an "apartment complex" to also apply to trailer parks. SOF at ¶12. When asked why it was interpreted that way he said, "I don't know." SOF at ¶13.

[20] There is also no reason to conclude that people who have been convicted of sex offenses' living near one another contributes to criminality. At least one analysis found that it has

The IDOC's decision to restrict more than one person classified as a sex offender from living in any trailer park further exacerbates the difficulties that parolees have in finding compliant housing in two ways: (1) it puts off limits an affordable housing option for parolees who may not have substantial financial resources; (2) it slashes the number of potential host sites that comply with all of the restrictions on living within 500 feet of various locations such as schools, parks and playgrounds (because even if an entire trailer park complies with all of the proximity restrictions, only one person classified as a sex offender is allowed to live there).

In sum, the broad statutory and policy restrictions imposed on sex offenders' potential host sites are not narrowly tailored to promote public safety or offender rehabilitation. Oftentimes, the restrictions bear no relation to the individual's offense or their particular needs while on parole. When the consequence of restricting housing is indefinite imprisonment, the government simply cannot paint with such a broad brush.

In its detention cases, the Supreme Court has looked askance at restrictions that draw broad categorizations, stressing the importance of confining restrictions

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the opposite effect: it reduces the incidence of re-offense and improves supervision. Minnesota Dept. of Corrections officials noted that there was not "a negative effect related to a level three offender living with another sex offender. In fact, supervision agents …have noted benefits from having more than one … offender living in one location. Closer supervision is possible because travel time between offenders is reduced. Also, … offenders who live with other offenders experience more visits from a supervising agent because agents for both offenders visit the same property. Finally, offenders tend to inform on each other when supervision restrictions are violated or crimes are committed." See, Mn. Dept of Corrections Level Three Sex Offender Residential Placement Report (available at: http://www.csom.org/pubs/MN%20Residence%20Restrictions_Lvl%203%20SEX%20OFFENDERS%20report%202003%20(revised%202-04).pdf) (last visited August 9, 2018).

on liberty to "a sphere of real need," and has required the Government to prove "by clear and convincing evidence" that a detention is justified based on "an identified and articulable threat to an individual or the community." *Demore*, 538 U.S. at 550 (quoting *Salerno*, 481 U.S., at 748). The Defendants cannot show that broad, categorical restrictions on parolees' housing are narrowly tailored to serve a compelling interest. Accordingly, these restrictions do not survive strict scrutiny.

3. Indefinite Detention Is Not Narrowly Tailored

Finally, it must be noted that there is nothing "narrow" about indefinite (potentially lifelong) detention based solely on a prisoner's inability to obtain housing that complies with the restrictions imposed by Illinois law and IDOC policy. In *Zadvydas v. Davis*, 533 U.S. at 690-91, the Supreme Court specifically warned against "[t]he serious constitutional problem arising out of a statute that … permits an indefinite, perhaps permanent, deprivation of human liberty." See also *Jackson v. Indiana*, 406 U. S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed").

The Supreme Court explained in *Zadvydas* that "preventative detention" based on someone's alleged "dangerousness" has only been upheld when "limited to specially dangerous individuals and subject to strong procedural protections." (citing *Kansas v. Hendricks,* 521 U.S. at 368 (upholding scheme that imposes detention upon "a small segment of particularly dangerous individuals" because it provided "strict procedural safeguards"); *Salerno*, 481 U.S. at 747, 750-752

(upholding pretrial detention, stressing "stringent time limitations," the fact that detention is reserved for the "most serious of crimes," the requirement of proof of dangerousness by clear and convincing evidence, and the presence of judicial safeguards); *Foucha*, 504 U.S. at 81-83 (striking down insanity-related detention system that placed burden on detainee to prove his non-dangerousness). In cases in which "preventive detention is of potentially indefinite duration," the Supreme Court has also "demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger." *Id*. (citing *Hendricks*, supra, at 358, 368).

None of these circumstances are present here. On this record the Defendants cannot meet their burden to establish that the challenged scheme of indefinitely imprisoning all class members who cannot identify a compliant host site satisfies strict scrutiny. Accordingly, Plaintiffs are entitled to judgment in their favor on their substantive due process claim.

II. The Challenged Scheme Violates Equal Protection

The statutory scheme here also violates Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). There are two primary ways an equal protection violation occurs. One is when the disparate treatment among similarly situated groups results in the denial of a fundamental right. The other is when disparate treatment among similarly situated groups is

based on a person's membership in a "suspect" class.[21] *Srail v. Village of Lisle, Ill.*, 588 F.3d 940, 943 (7th Cir. 2009). Plaintiffs' equal protection claim rests on the first theory, namely, that Defendants have denied Plaintiffs the fundamental right to be free from confinement based solely on their indigence.

Plaintiffs have already shown in the preceding section that a fundamental right is at stake here, namely, the right to be free from unreasonable confinement. As this court recognized in denying the Defendants' motion to dismiss, "turning a four-year sentence into an indefinite one when there has been no further criminal conduct is an obvious offense to Meyer's fundamental right to freedom from bodily restraint." ECF No. 31 at 19.

Where, as here, a challenged restriction impinges on a fundamental right, it is subject to strict scrutiny and can only survive if it is "suitably tailored to serve a compelling state interest." *Cleburne* at 440; see also *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1000 (7th Cir. 2006) ("Government action [that] interferes with a person's fundamental rights" is subject to strict scrutiny.)

Here, as explained, one of the principle requirements imposed on sex offenders by state statute is that they have to obtain approved housing before being released from prison onto MSR. The factual record shows that this statutory requirement severely discriminates against the poor by denying release for those who cannot pay

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[21] There is a third, albeit less common, way to establish an equal protection violation, which is to show that the disparate treatment among groups has no rational basis. See *Plyler v. Doe*, 457 U.S. 202, 228-230 (1982) (concluding that excluding undocumented children from schools violated equal protection because the State's justifications for the law were "wholly insubstantial in light of the costs," even while recognizing that education is not a fundamental right and that undocumented aliens are not a suspect class).

for approved housing. The law's discriminatory effect is confirmed by the situations of the individual indigent Plaintiffs themselves who, due to their inability to afford housing, continue to be incarcerated long after they have finished their full prison sentences. See, SOF at ¶¶42, 80 (Paul Murphy remains imprisoned more than four years beyond his approval for release on MSR because he cannot afford housing; Stanley Meyer remains imprisoned more than seven years beyond the completion of his sentence because he cannot afford housing.) The discriminatory effect of this law against poor parolees was also confirmed by officials of the IDOC. In particular, Deputy Chief Dixon testified that it is, practically speaking, impossible for an indigent person who cannot rely on the financial assistance of others to ever get out of prison:

> Q: Is it possible for a sex offender with an indeterminate MSR term who, A, does not have money to pay for his own housing, and, B, does not have family or friends on the outside who can pay for his housing to ever get out of the Illinois Department of Corrections?
>
> A: Never say never, but, … using those criteria, no.

SOF at ¶38. The problem for indigent offenders is further aggravated because, as the factual records shows, there is a dearth of other housing available. See, SOF ¶¶ 28–30 (there are no halfway houses or transitional housing facilities in Illinois that will accept someone who has been convicted of a sex offense; IDOC will not allow anyone who has been convicted of a sex offense to use a homeless shelter as a host site; people who have been convicted of sex offenses are ineligible for work release programs provided through the IDOC; and the IDOC does not assist prisoners with obtaining housing).

The Supreme Court has repeatedly struck down practices that deprive a person of liberty because of indigency. In *Griffin v. Illinois*, 351 U.S. 12 (1956), the Court found that an Illinois rule permitting a criminal appeal only if a defendant could pay for a trial transcript violated due process and equal protection. Likewise, in *Williams v. Illinois*, 399 U.S. 235 (1970), the Court overturned an Illinois law that permitted extended prison sentences, beyond the statutory maximum, for those prisoners who could not pay a fine. The Court wrote as follows:

> Once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.

Id. The statutory scheme at issue here produces the same type of discrimination condemned by the Supreme Court in *Griffin* and its progeny—discrimination resulting in a deprivation of a fundamental right that is the result of a person's indigency.

In *State v. Adams*, 91 So.3d 724 (Ala. Crim. App., 2010), a case from the Alabama Court of Criminal Appeals, the court found a state statute requiring sex offenders to provide the Alabama Department of Corrections prior to release from custody the actual home address at which he or she will reside upon release from prison to violate the Equal Protection Clause. *Id*. at 754. The case provides an excellent parallel to the issues addressed here. The *Adams* court found that the effect of the Alabama law was to impose indefinite incarceration on those who could not afford housing, "resulting in a deprivation of a fundamental right that is based, in actuality, on poverty." *Id*. at 71. The court explained that "the opportunity for an

indigent homeless sex offender to secure release from confinement following completion of his sentence is virtually nil." *Id*. at 741. Relying on Supreme court precedent, the court found that the Alabama law violated equal protection because "the statutory scheme create[d] a classification based on wealth, depriving a certain class of citizens indefinitely of their liberty as a result of their inability to pay." *Id*. at 742. Though not binding on this court, the case is squarely on point and offers a thorough and, Plaintiffs believe, persuasive analysis of the legal issues at play here.[22]

III. The Challenged Scheme Violates the Eighth Amendment

The Eighth Amendment circumscribes the criminal process in three ways: "[f]irst, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667-668 (1977) (internal citations omitted). The evidence establishes Plaintiffs' entitlement to judgment on their Eighth Amendment claim in three ways. First, the challenged statutory and regulatory schemes criminalize the status of being homeless. Second, the IDOC has acted with deliberate indifference in its exercise of the discretion it has to deny

[22] The fact that the housing restrictions themselves apply to all inmates is of no consequence. A law that is "nondiscriminatory on its face may be grossly discriminatory in its operation." *Griffin v. Illinois*, 351 U.S. 12, 17, n. 11 (1956). Since only indigents will be detained beyond their parole release dates, Illinois has made release "contingent upon one's ability to pay... ." *Williams*, 399 U.S. at 242. In that respect, Defendants' policy violates the Equal Protection Clause by denying release to indigents.

approval of housing. And third, the challenged scheme imposes grossly disproportionate punishment.

A. The Challenged Scheme Criminalizes the Status of Homelessness In Violation of the Eight Amendment

The Supreme Court has noted a distinction "between applying criminal laws to punish conduct, which is constitutionally permissible, and applying them to punish status, which is not." *Joel v. City of Orlando*, 232 F.3d 1353, 1361 (11th Cir. 2000) (citing *Robinson v. California*, 370 U.S. 660 (1962)). The Supreme Court has twice addressed whether criminal laws impermissibly criminalized status rather than conduct. First, in *Robinson*, the Court struck down a California statute making it illegal to "be addicted to the use of narcotics," *Robinson*, 370 U.S. at 660, as constituting cruel and unusual punishment because the statute punished the defendant solely for the status of being an addict and not for any particular conduct. In *Powell v. Texas*, 392 U.S. 514 (1968), a plurality of the Court upheld a Texas statute making it illegal to "be in a state of intoxication in any public place," *Powell*, 392 U.S. at 516, despite evidence indicating that the defendant was a chronic alcoholic, on the ground that the statute punished the defendant's conduct of being intoxicated in public and not his status as an alcoholic.

In *State v. Adams,* the Alabama Court of Criminal Appeals persuasively applied these precedents to a situation strikingly similar to the predicament faced by the Plaintiffs here. As described above, the defendant in *Adams* challenged the constitutionality of a state statute that required people convicted of sex offenses to provide the Alabama Department of Corrections "the actual address at which he or

she will reside or live upon release" at least 45 days prior to his release from custody and provided that "[a]ny adult criminal sex offender in violation of this section who is to be released due to the expiration of his or her sentence shall be charged with violating this section and, upon release, shall immediately be remanded to the custody of the sheriff of the county in which the violation occurred." *Adams,* 91 So.3d at 734. The defendant was indigent and homeless and, as a result, was unable to comply with the statute, leading to his continued incarceration after the completion of his prison sentence for committing a rape. The court determined that the statute violated the Eighth Amendment prohibition against cruel and unusual punishment because it "punishes the defendant solely for his status of being homeless." *Id*. at 739.

Relying on the Ninth Circuit's analysis in *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006) (finding a municipal ordinance criminalizing "sitting, lying, or sleeping on public streets and sidewalks" violated the Eighth Amendment as applied to six homeless individuals who had sought injunctive relief barring enforcement of the ordinance against them."), the *Adams* court found that "[r]ead together, [*Powell* and *Robinson*] stand for the proposition that the Cruel and Unusual Punishments Clause of the Eighth Amendment forbids punishing criminally not only a person's pure status, but also a person's involuntary conduct that is inseparable from that person's status." *Id*. at 754. The court concluded that the law could not be applied to an indigent person consistent with the Eighth Amendment. The court wrote as follows:

> The undisputed evidence … established that Adams was indigent, that he had no family or friends with whom he could live, and that, despite his efforts, he had not been accepted to any homeless shelter or halfway house ... The undisputed evidence further established that there are only four shelters and/or halfway houses in the entire state of Alabama that accept sex offenders and that those shelters/halfway houses are virtually always full to capacity. For Adams, then, the failure to provide an 'actual address at which [he would] reside or live' … was not voluntary conduct merely related to, or derivative from, the status of homelessness, but was entirely involuntary conduct that was inseparable from his status of homelessness.

Id.

The same is true here. For indigent offenders such as Plaintiffs Paul Murphy and Stanley Meyer, their failure to find compliant housing is not a voluntary act but involuntary conduct inseparable from their status as being homeless. The state cannot, consistent with the Eighth Amendment, punish them with incarceration for life because of their homelessness.

B. The IDOC's Misuse of Its Discretion with Regard to Approving Parolees' Housing Amounts to Deliberate Indifference

The Supreme Court has explained that a §1983 Plaintiff can establish *Monell* liability by showing that a government entity had knowledge of conditions that were likely to result in constitutional violations and failed to act to prevent violations from occurring. *Canton v. Harris*, 489 U.S. 378, 396 (1989) (O'Connor, J., concurring in part) ("Where a 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied.")

As this Court noted in its decision on the Defendants' motion to dismiss (ECF No. 31 at 15-16), the Seventh Circuit has recognized deliberate indifference claims in the Eighth Amendment context where, as here, "[a] plaintiff … is detained in jail for longer than he should have been due to the deliberate indifference of corrections officials." *Id.* (quoting *Childress v. Walker*, 787 F.3d 433, 439 (7th Cir. 2015)).

The undisputed evidence establishes that the Illinois Department of Corrections acted with deliberate indifference to the violations of class members' constitutional right to be released from prison once they have completed their sentences in continuing its policies severely restricting the available housing for people convicted of sex offenses.

1. The IDOC Is On Notice That Its Policies Result in Indefinite Detention

There can be no serious doubt that the IDOC is on notice that its policies concerning housing for people convicted of sex offenses are leading to constitutional violations. First, over the past ten years, numerous lawsuits, including this one filed in 2016, have challenged the imprisonment of sex offenders who cannot find housing that satisfies DOC rules. See, *e.g.*, *Murdock v. Walker*, No. 08 CV 1142, 2010 WL 3168341 (N.D. Ill. Aug. 6, 2010); *Amato v. Grounds*, 944 F. Supp. 2d 627, 631 (C.D. Ill. 2013); *Cordrey v. Prisoner Review Bd.*, 21 N.E. 3d 423 (Ill. 2014).

Second, the IDOC has acknowledged that unless people convicted of sex offenses find compliant housing, they can "[n]ever get out of the Illinois Department of Corrections." SOF at ¶27. Third, notice can be inferred from the fact that the IDOC has admitted that it currently imprisons 241 people with indeterminate MSR who

cannot identify compliant housing. SOF at ¶81. Moreover, it has been well documented that more than 1,200 people who have been approved for release on MSR for sex offenses are imprisoned beyond their MSR dates due to the housing restrictions. SOF at ¶82, Illinois Sex Offenses & Sex Offender Registration Task Force Final Report, December 2017, at 22 ("On average, the Illinois Department of Corrections houses 1,200 to 1,400 offenders who may not be released from custody because they are unable to secure permanent, stable housing meeting Illinois statute requirements or agency policy.") Meanwhile Deputy Chief Dixon testified that there are only about "350 to 450" sex offender parolees who have actually found housing that allows them to serve their MSR in the community. SOF at ¶83.

2. The IDOC Has Failed to Act in Response to Being on Notice of Ongoing Constitutional Violations

Despite having ample notice that its policies are leading to violations of fundamental constitutional rights, the IDOC has failed to act by amending the policies and practices that severely restrict housing and thereby keep hundreds of people in prison indefinitely beyond the completion of their sentences. For example, the IDOC continues to prohibit more than one person classified as a sex offender from living in the same trailer park as another person classified as a sex offender; the IDOC continues to prohibit people from living at any host site that has Internet access; and the IDOC continues to apply the restriction on living with 500-feet of locations where children congregate to people who have never committed an offense against a child despite the lack of any statutory obligation to impose these restrictions. See, *e.g.* SOF at ¶¶ 65, 94, 98.

3. The IDOC's Deliberate Indifference Is the Moving Cause Behind the Violations of Plaintiffs' and Class Members' Constitutional Rights

Where, as here, a government's action or failure to act is the "moving force" behind a constitutional violation, Courts have held the government entity liable pursuant to *Monell*. *Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 306 (7th Cir. 2010). The evidence clearly establishes that the challenged IDOC policies are the moving cause behind the violations of Plaintiffs' and class members' rights. For example, J.D. Lindenmeier has been in prison for more than seven years beyond his release date because he cannot find a place to live that the IDOC will approve. SOF at ¶¶63, 64. But for the restriction on living in a home that has Internet-capable devices, Lindenmeier would be out of prison. The sole reason the IDOC gave for rejecting Lindenmeier's mother's home as a host site was the presence of computers and smart phones on the premises. SOF at ¶65. The IDOC has imposed this restriction on Lindenmeier despite knowing that it will lead to his continued detention beyond his release date.

As this Court already recognized in rejecting Defendants' motion to dismiss Plaintiffs' Eighth Amendment claim, the fact that Defendants have unreasonably "rejected proposed host sites leading to indefinite incarceration" constitutes deliberate indifference. ECF No. 31 at 16 (citing *Childress v. Walker*, 787 F.3d 433, 439 (7th Cir. 2015)).

C. The Indeterminate Prison Sentences Imposed Here Are Grossly Disproportionate to the Crimes Committed in Violation of the Eighth Amendment

The statutory scheme here makes it impossible for sex offenders who cannot find or afford approved housing to get out of prison. The real-world effect of the scheme is to impose a life sentence of incarceration on individuals entitled to release on MSR who cannot afford or find approved housing. The human costs of the scheme are devastating. Individuals subject to it are thrown into despair and hopelessness. As one incarcerated inmate explained, "I'm afraid that the only way I will ever get out of here is if I die." SOF at ¶102.

The imposition of an indeterminate and potentially lifetime sentence is the result of a somewhat Kafkaesque interaction of three separate statutes, the upshot of which is that individuals with MSR terms of three to life receive no credit for MSR time they serve while incarcerated and thus can never max out their MSR sentence—a condition widely known as "dead time". The three interacting statutes are as follows:

(1) 730 ILCS 5/3-14-2 authorizes the IDOC retains custody of all prisoners approved for release on MSR by the PRB and is charged with assuring that prisoners are in compliance with the conditions set by the PRB before they are released from an IDOC facility on MSR;

(2) 730 ILCS 5/5-8A-3(g) requires individuals convicted of crimes requiring the imposition of a "three to life" MSR term to be placed in an electronic home detention program for at least the first 2 years" of their MSR. The electronic home detention technology requires a fixed homesite with a landline phone; and

(3) 730 ILCS 5/3-14-2.5(e) states that the term of extended mandatory supervised release for sex offenders "shall toll during any period of incarceration."

It should be noted that the situation for Plaintiffs (*i.e.*, those who have indeterminate MSR terms of three to life) is markedly different from individuals who receive determinate MSR sentences. This is so because by statute individuals who have determinate MSR sentences receive MSR credit for the time they serve in prison. 730 ILCS 5/3-6-3(a)(2.1). Accordingly, if, for example, an individual with a determinate three-year MSR sentence is unable to find compliant housing and thus cannot be released from prison onto MSR, the individual will "max out" of his MSR term after serving 1.5 years and then be released from prison without any additional supervision. But, pursuant to 730 ILCS 5/3-3-7(a)(7.7), three-to-lifers get no MSR credit for the time served in prison and thus "maxing out" is not an option.[23]

Supreme Court precedent supports the notion that a proportionality principle is implicit in the Eighth Amendment's prohibition on cruel and unusual punishments. In *Graham v. Florida*, 560 U.S. 48 (2010), the Court wrote, "The concept of proportionality is central to the Eighth Amendment," adding "Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Id*. at 59 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).[24] The Court has

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[23] There is a fourth statutory provision which aggravates the situation further for three-to-lifers: Under 730 ILCS 5/3-14-2.5(d), a person with an MSR sentence of "three years to life" can only apply for termination of his MSR after successfully completing three years of MSR *outside* of prison.

[24] Admittedly, the Supreme Court has not always spoken consistently on this matter. See *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) (The Court recognizes that it has not established

ruled that sentences that violate this provision are those that are "grossly disproportionate" to the crime committed.[25]

In *Solem v. Helm*, 463 U.S. 277, 290-91 (1983), the Court set forth a three-factor inquiry to determine if a penalty was "grossly disproportionate." The three factors are as follows: (1) whether the gravity of the offense comports with the harshness of the penalty; (2) whether "more serious crimes are subject to the same penalty, or to less serious penalties" as an indication that the punishment is excessive; and (3) comparing other jurisdictions' punishments for the same crime. Under this three-factor test, the indeterminate prison sentences imposed here are grossly disproportionate.

First, in consideration as to whether indeterminate (and potentially life-long) sentences comport with the gravity of the offenses, the answer is emphatically "no." Prison sentences for life are appropriate in certain situations, but such sentences are properly reserved for "the worst of the worst." The statutory scheme here subjects non-violent offenders who had received modest prison sentences—even, in Plaintiff Murphy's case, a sentence of probation—to indeterminate and potentially life-long prison sentences.

Second, in consideration of whether "more serious crimes are subject to the

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"a clear or consistent path for courts to follow.") For a scholarly discussion of the Supreme Court precedent on the matter, see Sarah Maureen Reed, 80 N.D. L. Rev. 497, "Sentencing And Punishment—Cruel And Unusual Punishment: The United States Supreme Court Upholds California's Three Strikes Law."

[25] *Weems v. United States*, 217 U.S. 349, 372-73 (1910) (holding a prisoner's punishment improper because it was not proportionate to his offense; therefore, the prisoner's sentence violated the constitutional prohibition on cruel and unusual punishment).

same penalty, or to less serious penalties" as an indication that the punishment here is excessive, the answer is that the penalty imposed here is uniquely harsh. Its disproportionate nature is revealed by the fact that it does not apply to those who have committed much more serious and heinous offenses, including first-degree murder. SOF at ¶141. Individuals convicted of murder do not receive a three-to-life MSR sentence and do not have to obtain housing that complies with all of these restrictions in order to be released on MSR.

Another uniquely harsh aspect of the statutory scheme imposed on Plaintiffs here is that, but for those prisoners subjected to indeterminate MSR, any time spent on MSR while in prison counts in their favor. The effect is that, if a person with three to life serves two years of MSR time in prison and then finds housing and gets out, he is not able to apply for release from MSR for three more years, because the two years he did in prison count for nothing. This is not the case for those who have determinate sentences.

Third, in consideration of punishments that other jurisdictions impose for similar offenses, Plaintiffs are not aware of, and Defendants have not identified, any other jurisdiction that imposes the same scheme of indefinite detention on sex offenders. Wisconsin abandoned such a scheme several years ago. Wisconsin had a practice of detaining in county jails sex offenders who had completed their prison sentences but who could not find compliant housing, but in the face of litigation Wisconsin altered their practice. See *Werner v. Wall*, 836 F.3d 751 (7th Cir. 2016) (considering a §1983 challenge to policy under which Wisconsin Department of

Corrections held paroled sex offenders in county jails until they could find housing and finding that the officials were entitled to qualified immunity.)

Finally, the scheme at issue is particularly cruel and unfair because it imposes unprecedented and potentially life-long punishment on people based on conditions beyond their control. No one questions that parolees can and should be revoked when they affirmatively violate the conditions of their parole, but the current statutory scheme severely punishes individuals for their failure to obtain housing through no fault of their own. See *Morrissey*, 408 U.S. at 481-84 (society has a vested interest in maintaining parole supervision and in continuing release on parole, absent a compelling reason to revoke parole). Indigency, however, is not a threat to public safety. See *Bearden v. Georgia*, 461 U.S. 660, 669, n. 9 (1983) ("the condition at issue here—indigency—is itself no threat to the safety or welfare of society.") Here, the State is unfairly and unreasonable equating affirmative, anti-social acts of parole violations (which, admittedly, call for parole revocation) with an unpreventable condition of poverty (which does not).

IV. The IDOC's Policies Violate Procedural Due Process

As explained above, the challenged scheme inevitably prolongs detention in prison for people who cannot find housing that the IDOC will approve. People subjected to extended detention because their proposed host sites have been rejected have no recourse. The IDOC does not have any formal process by which a parolee can appeal the decision of a parole agent to deny approval of a proposed host site. Parole agents' decisions about housing are essentially unreviewable.

Where, as here, a person's freedom is at stake, a long line of Supreme Court case law has emphasized the necessity of thorough procedural protections, including the right to an adversarial hearing and a high burden of proof being placed on the government proponent of the detention (*i.e.*, "clear and convincing evidence"). See, *e.g.*, *Hendricks*, 521 U.S. at 357 (holding that civil commitment is permitted only where "the confinement takes place pursuant to proper procedures and evidentiary standards."); *Foucha*, 504 U.S. at 81-82 (invalidating a statute under which "the state need prove nothing to justify continued detention"); *Salerno*, 481 U.S. at 751 ("[T]he procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination"); *Addington v. Texas*, 441 U.S. 418, 427 (1979) (requiring a heightened burden of proof "to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered"). The Department's current process falls far short of the dictates of procedural due process.

A. Under the Three-Part test of *Matthews v. Eldridge*, Plaintiffs Are Entitled to a Procedural Protections Before Being Deprived of a Fundamental Right

As the Supreme Court has long instructed, "[t]he essence of due process is the requirement that a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976) (citation omitted). Under the *Mathews* test, "identification of the specific dictates of due process generally requires consideration of three factors: First, the

private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id*. at 335 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970)). An analysis of these factors demonstrates that the Department's current policy, which vests parole agents with almost limitless discretion to reject host sites, is fundamentally inadequate where a person's freedom is at stake.

1. A Fundamental Right to Liberty is at Stake

As emphasized throughout this brief, there is no liberty interest more fundamental or basic than the right to freedom from bodily restraint without proper procedural protections. See *Demore*, 538 U.S. at 557 ("due process requires a special justification for physical detention that outweighs the individual's constitutionally protected interest in avoiding physical restraint as well as adequate procedural protections.") It is abundantly clear that the parole department's denial of approval for proposed host sites leads to the potentially indefinite detention of Plaintiffs and members of the class, and thus proper procedural protections are necessary.

2. The Current Process Presents a Serious Risk of Erroneous Deprivations of Plaintiffs' Liberty

As to the second *Mathews* factor, the risk of an erroneous deprivation under the IDOC's current policy is great. The IDOC gives parolees no recourse to challenge arbitrary or irrational decisions of the parole department with regard to their

proposed host sites. Deputy Chief Dixon admitted that there is no "formal process" for a parolee to challenge a parole agent's decision to reject a host site. SOF at ¶22. The only opportunity to contest a decision is to "raise objection with the – with the field service rep or the – their counselor" who will then "usually … send an email … to the parole commander, asking them to take a look at this." SOF at ¶24.[26]

This review process, if you can even call it that, is inadequate for numerous reasons, including the following:

- parolees' are given no notice that they can contest a parole agent's decision or instructions about to whom they can address any objections;
- counselors and field services representatives are under no obligation to communicate a parolee's objections to the parole commander and the parole commander is under no obligation to actually undertake a review of an agent's decision;
- there are no criteria constraining the commander's review of the parole agent's decision;
- there is no requirement that the commander provide the parolee a written explanation of why a parole agent's decision is being upheld;
- the parolee is afforded no opportunity to present evidence or explain why a proposed host site should not have been rejected.

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[26] The PRB's Parole Revocation process is inadequate to satisfy the dictates of procedural due process with regard to rejection of host sites. A PRB hearing focuses solely on whether the parolee has "violated" a condition of his parole by not having an approved host site—not whether the parole agent's rejection of proposed host sites was appropriate. The parolee has no opportunity to contest the parole agent's decision(s) to reject proposed housing that led to the "violation" at a PRB hearing. SOF at ¶25.

Likewise, the inmate grievance process has also shown to be 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. SOF at ¶26 (J.D. Lindenmeier's grievance about his continued detention because of lack of a host site was denied because "IDOC does not set sex offender laws." Review of this decision was denied by the Administrative Review Board because the "Issues are outside the scope of the ARB.")

By placing essentially unreviewable discretion in the hands of parole agents, the IDOC's policy creates a substantial risk that parolees will be deprived of their liberty for arbitrary reasons that do not meaningfully advance public safety or rehabilitative goals.

On the other hand, basic procedural protections, including the opportunity to seek review of a parole agent's decision from a neutral decisionmaker, would be of great value to parolees. The Seventh Circuit has advised that, in the context of parole decisions that impact important liberty interests, the dictates of due process require, at a minimum, the opportunity to present one's case to "a neutral decisionmaker." *Felce*, 974 F.2d. at 1499 (finding that a condition requiring the parolee to take antipsychotic drugs could not be imposed unless the decision was reviewed by "independent decisionmakers" who were "not directly involved in [the parolee's] supervision and treatment").

Here, proper procedural protections are particularly essential to protect against the overreaching of IDOC officials with regard to people classified as sex offenders, a population that is often feared, vilified and disdained.[27] Leaving decisions that affect this population's most basic liberty interests in the hands of the people

[27] Indeed, the IDOC's own training materials characterize all people who have been convicted of sex offenses as inherently dangerous and in need of extremely tight control. SOF at ¶142, "Effective Community Management of Sex Offenders" PowerPoint Training Presentation, at 274 (the presentation begins with a cartoon depicting a paroled sex offender as a large tiger menacing a small child). Likewise, these materials emphasize that parole agents should prioritize maintenance of tight control over the parolee above all else. *Id*. at 292 ("Even 'minor' rules violations may warrant revocation."); *Id*. at 289 ("Don't become complacent with your supervision strategies and your interactions with the offender.")

responsible for supervising them invites excessive regulation that does not properly take into account the need to respect the parolees' constitutional rights.

3. The IDOC's Interests Would Not Be Compromised By Proving a Process for Review of Parole Agents' Decisions

Turning to the final *Mathews* factor, there is no reason to believe that the IDOC's interests in community safety, supervision of offenders, and rehabilitation would be compromised by proving a mechanism for parolees to contest parole officers' decisions to reject proposed host sites. If there is truly a reason that the site is not suitable for the parolee, the decision can be upheld. At a minimum, a parolee should be afforded an opportunity to plead his case to a higher authority when the consequences of denial can be so dire for individuals with indeterminate terms of MSR. As for the administrative cost and burden of substitute procedures, Plaintiffs do not demand an elaborate judicial process, but rather a simple opportunity for neutral review of the parole agent's decisions.

Based on the record before the Court, the current policy cannot stand and Plaintiffs are entitled to judgment on their claim that the challenged policies violated procedural due process.

V. Relief Sought

Plaintiffs contend that the whole MSR scheme here is unconstitutionally infirm. This motion seeks, first, a finding from this court on liability. The next step is for all the necessary stakeholders to get together to figure out the proper solutions to the unconstitutional scheme, which may include a change of laws and/or a modification of the IDOC's interpretation of them, as well as changes of the IDOC's uses and

misuses of its discretion to deny approval of housing to Plaintiffs and the class. The Supreme Court has indicated that it is proper for federal courts to invite state input in developing appropriate relief in institutional reform cases. See *Lewis v. Casey*, 518 U.S. 343, 362 (1996) (identifying the "proper procedure" for federal courts to follow in imposing institutional reform remedies in the prison context). Particularly, federal courts should "charge[] the [state agency] with the task of devising a Constitutionally sound program." *Id.* (internal citation omitted)." Plaintiffs welcome the opportunity to work with the state and the court in shaping the proper remedy for eliminating the constitutional violations at issue in this case.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Honorable Court grant them judgment as a matter of law on their claims that the challenged statutory and regulatory scheme violations their constitutional rights.

Respectfully submitted,

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