IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-02178-RBJ

STEPHEN BRETT RYALS,

Plaintiff,

v.

CITY OF ENGLEWOOD,

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Steven Brett Ryals, through undersigned counsel, submits this response to Defendant City of Englewood's ("the City") Motion for Summary Judgment, Dkt. No. 34, filed on April 26, 2013 ("the Motion").

I. INTRODUCTION

Mr. Ryals seeks to enjoin the City from prosecuting him for the crime of living in the Englewood home he purchased for himself and his wife in the summer of 2012. Through its Sex Offender Residency Restriction, Municipal Ordinance 34 ("Ord. 34"), the City criminalized Mr. Ryals' simple act of dwelling in his own home on the basis of his decade-old felony sex offense, effectively banning him from living in the City.

That is irrational and punitive. The City's Motion for Summary Judgment contends that Mr. Ryals poses a public safety risk, but the facts show just the opposite. Mr. Ryals served out his sentence, participated in State-mandated treatment and rehabilitation, and was supervised by

the State for years until he was deemed safe. He has since secured a stable job, entered into a common law marriage with a woman he has known since high school, and bought a house in a stable community for them to live together. All of these facts make him an exceedingly low risk for re-offense.[1]

The most straightforward basis for this Court to grant relief to Mr. Ryals is that Ord. 34 is preempted by State law. Colorado has an exemplary, comprehensive system of sex offender management and treatment that reduces sexual offense recidivism rates far below the national average. The Colorado General Assembly considered and specifically rejected implementing blanket residency restrictions like the City's in 2006, and instead has adopted a system based on individualized assessments by skilled interdisciplinary teams of State officials who regulate sex offender housing decisions, as well as most other aspects of their lives. In short, the State's election *not* to adopt a statewide policy of residency restrictions is itself a policy, and a successful one. The State occupies the field in this area, preempting Ord. 34.

Even if this were a mixed area for State and municipal regulation, Ord. 34 still would be preempted because the evidence shows it actually frustrates the State's sex offender management system, making Coloradans less safe. It does so in two ways. First, blanket residency restrictions like the City's cause offenders to go "underground" and drop out of the statewide registration system. Second, they prevent offenders from successfully reintegrating into society.

[1] The City concedes it makes no individualized assessment about an offender's risk when determining whether to ban the person from the City. Rule 30(b)(6) Dep. of Detective Janellee Ball ("Ball 30(b)(6) Dep.") 45:23-46:13, att'd as **Exhibit 1**. It looks instead only to whether the prior sex offense was a felony or a second misdemeanor, or involved multiple victims, and whether the offender must register with the State. This strict liability scheme renders irrelevant the City's recitation of facts in its Motion – much of which is disputed by Mr. Ryals – about the actual offense Mr. Ryals committed years ago and what has happened since.

As we explain below, in addition to being preempted, Ord. 34 violates both the federal and state constitutional guarantees of substantive due process and against *ex post facto* laws.

At this stage of the proceedings, the question for the Court is whether there are material facts in dispute that preclude entry of summary judgment for the City. The Motion barely acknowledges this standard, except for reciting it once and labeling a laundry-list of allegations – material and immaterial – "undisputed." In fact, most of those allegations are disputed. Summary judgment should be denied because these disputed facts create triable issues as to all of Mr. Ryals' theories of relief.

II. STATEMENT OF MATERIAL DISPUTED FACTS

A. Colorado's Comprehensive Scheme for the Monitoring and Treatment of Convicted Sex Offenders Is Undermined by Ordinance 34.

1. The State of Colorado Has a Comprehensive Statewide Scheme for the Monitoring and Treatment of Convicted Sex Offenders.

The City makes much of the fact that other states have enacted statewide residency restrictions. Colorado has chosen a different path. In 2006, Colorado's legislature "specifically considered enacting a residency restriction," and "decided against" doing so.[2] Instead, the Legislature chose to implement a comprehensive system of individualized, evidence-based evaluation, monitoring, and treatment plans tailored based on the facts and circumstances of each individual offender and his/her community.[3]

[2] Dep. of Sex Offender Management Board Adult Standards Coordinator and Community Notification Coordinator Cathy Rodriguez ("Rodriguez Dep.") 90:17-25, att'd as **Exhibit 2**.

[3] Ex. 2, Rodriguez Dep. 90:17-25 (Legislature considered and then declined to adopt statewide residency restrictions); C.R.S. §§ 16-22-101–115 (Colorado Sex Offender Registration Act); C.R.S. § 16-11.7-103 (establishing state Sex Offender Management Board and outlining its duties).

To great success, Colorado's approach has made this State much safer than others, with recidivism rates between two and twelve times lower than the national average. While recidivism rates from 5 to 30% are common in other parts of the United States, the latest study on the efficacy of Colorado's system of evidence-based, individualized monitoring and treatment shows that Colorado has a "very low" sexual crime recidivism rate of only 2.6% for three-year post-criminal justice supervision.[4]

By statute, Colorado's legislature delegated to the State's Sex Offender Management Board ("SOMB") responsibility for developing an evidence-based best-practices system of sex offender management and treatment. *See* C.R.S. § 16-11.7-103. One of the State's "guiding principles" for its system is community safety.[5] It is "a basic philosophy and a premise by which [the SOMB does] everything," and is a "paramount goal of the SOMB."[6] The Legislature has explained the purpose of Colorado's comprehensive scheme as follows:

> The general assembly finds that, to protect the public and to work toward the elimination of sexual offenses, it is necessary to comprehensively evaluate, identify, treat, manage, and monitor adult sex offenders … [through the creation of] a program that establishes evidence-based standards for the evaluation, identification, treatment, management, and monitoring of adult sex offenders and juveniles who have committed sexual offenses at each stage of the criminal or juvenile justice system to prevent offenders from reoffending and enhance the protection of victims and potential victims.

C.R.S. § 16-11.7-101.

Consistent with that purpose, Colorado state law contains a comprehensive and complex network of statutes and regulations that provides an all-encompassing and potentially life-long

[4] *See* Outcome Eval. of the CO SOMB STANDARDS AND GUIDELINES (Dep. Ex. 53) 20, 24, att'd as **Exhibit 3**; Dep. of Director of Sexual Litigation for the Colorado Office of the State Public Defender Laurie Kepros ("Kepros Dep.") at 70:6-24, att'd as **Exhibit 4**; Ex. 2 Rodriguez Dep. 78:22-79:11.
[5] Ex. 2, Rodriguez Dep. 72:15-73:6.
[6] *Id.*

continuum of supervision and management. This includes: (a) registration and monitoring as required by the Colorado Sex Offender Registration Act, C.R.S. §§ 16-22-101−115, and the Lifetime Supervision Act, C.R.S. §§ 18-1.3-1001−1012; and (b) evaluation, treatment, and management as mandated by the SOMB, C.R.S. §§ 16-11.7-101−109, and Standards promulgated by the SOMB and by the State's Probation and Department of Corrections Adult Parole units, C.R.S. §§ 18-1.3-901−916, C.R.S. § 17-22.5-403.

a. *Registration and monitoring.*

Keeping track of where former sex offenders reside is one of the key components of Colorado's sex offender management scheme. It does so "to be able to track offenders who have been convicted," and "to provide that information to community members."[7]

b. *Evaluation, treatment and management.*

By statute, former sex offenders in Colorado are subjected to an "offense-specific" evaluation.[8] The State has determined that the best way to evaluate and treat sex offenders is through a comprehensive cross-disciplinary team of state personnel, relying on these individual evaluations.[9] An individualized plan targeted to each former offender's risk is the key to the success of Colorado's statewide scheme.[10] Critically for this case, Colorado's statutory and regulatory scheme "do[es] not include public officials from local government" on those teams.[11]

The Legislature has assigned to the State responsibility to "provide parole supervision and assistance in securing … housing … as may effect the successful reintegration of such

[7] Ex. 2, Rodriguez Dep. 54:5-20.
[8] Ex. 2, Rodriguez Dep. 23:5-16.
[9] Ex. 2, Rodriguez Dep. 73:16-74:10.
[10] Ex. 4, Kepros Dep. 41:24-42:11.
[11] Ex. 2, Rodriguez Dep. 75:1-5.

offender into the community while recognizing the need for public safety." C.R.S. § 17-22.5-403(6) & (8). Thus, sex offender management at the state level includes "coordinat[ing] with [the offender's] probation or parole officer about the location of the residence," and requiring that the offender secure "prior approval" for the residence.[12]

Finding housing for registered sex offenders is a difficult task. The State has determined that, even in Colorado, where there are no statewide residency restrictions, lack of housing remains "nearly an epidemic issue for sex offenders."[13] This leads to state probation and parole officers using "discretion . . . on a case-by-case basis" regarding placement of sex offenders in light of the "limited housing options" in the state for them.[14]

The State's rule regarding registered sex offenders is that after an offender has "completed his supervision, [he] can live anywhere in the state that he wants."[15] This component of the statewide scheme is a necessary carrot to induce registered sex offenders to actively participate in their treatment programs and comply with supervision requirements – their success is rewarded with the freedom to live where they want upon release from state supervision.

2. Ordinance 34 Undermines the Statewide Scheme.

Ord. 34 has greatly frustrated enforcement of the State's registration system for monitoring offenders. In one instance, the Englewood Police Department determined that citing an offender named Mr. Green under Ord. 34 caused Mr. Green to go underground – because of the City's enforcement of its residency restriction, Mr. Green was not registered anywhere for a

[12] Ex. 4, Kepros Dep. 28:12-20.
[13] Ex. 2, Rodriguez Dep. 16:25-17:8.
[14] Ex. 2, Rodriguez Dep. 79:23-82:23.
[15] Ex. 2, Rodriguez Dep. 96:7-12.

period in late 2011 and early 2012.[16] In another instance, an Englewood Police Officer determined that citing an offender named Ms. Peters would likely cause the offender to be homeless, but the officer cited Ms. Peters nevertheless.[17] After citing a Mr. Vigil under the municipal law, Mr. Vigil failed to register and was then charged with violating the state registration statute.[18] The same thing happened after a Mr. Wetteland was cited under Ord. 34, and the Police Department subsequently discovered that, not only was he unregistered, but he had lied to the Englewood Police Department about having moved.[19]

The State's SOMB has examined the effects of municipal residence restrictions on the ability of the state to keep track of sex offenders. It has determined:

> locally, the result has been offenders going underground. What that means is stop registering and going to unknown locations. It's also found that the offenders have increased giving false addresses, false locations . . . [and] absconding from supervision.[20]

This "frustrates[s] or make[s] it more difficult for the state to achieve its goals for the management of sex offenders" in Colorado.[21]

The effect on the State's system for treatment and management of offenders is similar. The state has determined that municipal "residence restrictions" as well as other factors "have made it monumentally difficult for offenders to obtain housing."[22] The residency restrictions, in

[16] Ex. 1, Ball 30(b)(6) Dep. 64:31-68:17.
[17] Ex. 1, Ball Rule 30(b)(6) Dep. 60-16:61:7.
[18] Dep. of Detective Janellee Ball ("Ball Dep.") at 13:15-16:1, att'd as **Exhibit 5**.
[19] Ex. 5, Ball Dep. 16:5-17:18, 22:11-27:8.
[20] Ex. 2, Rodriguez Dep. 99:12-100:9.
[21] Ex. 2, Rodriguez Dep. 100:10-17.
[22] Ex. 2, Rodriguez Dep. 82:24-83:22.

particular, are a "substantial barrier" to parole and probation officers successfully placing sex offender parolees.[23]

Likewise, the State has determined that the housing instability caused by municipal residency restrictions "actually impacts recidivism" by making it "more likely" that a former offender will commit another sex crime in the future.[24] The SOMB has summed up the State's policy position:

> Community safety is paramount and should be the common goal when considering any policy or law regarding sex offenders. Residence restrictions and zoning laws as a whole are clearly counterproductive to this goal.[25]

In other words, the State's SOMB's "position with respect to … blanket local residency restrictions is that they make communities less safe, not more safe."[26]

B. Ordinance 34 Was Improvidently Adopted, Is Arbitrarily Enforced, and Effectively Bans Convicted Sex Offenders from Living in the City.

1. Codification

Ord. 34 was first contemplated in or around May 2006, when the State notified the City that its probation department planned to place a Sexually Violent Predator ("SVP") in the City.[27] The City was informed that the SVP could not be placed in neighboring Greenwood Village because of Greenwood Village's residency restriction.[28] In response, City Council decided during its study session on August 14, 2006, to enact a residency restriction governing most sex

[23] Ex. 2, Rodriguez Dep. 103:14-104:2.
[24] Ex. 2, Rodriguez Dep. 84:15-85:9.
[25] *See* SOMB White Paper on Residence Restrictions (Dep. Ex. 54) 5, att'd as **Exhibit 6**.
[26] Ex. 2, Rodriguez Dep. 97:18-98:6.
[27] *See* Dep. of Thomas Vandermee ("Vandermee Dep.") 18:17-19:8, 27:1-8, att'd as **Exhibit 7**; Dep. of Laurett Barrentine ("Barrentine Dep.") 82:14-83:1, att'd as **Exhibit 8**.
[28] Dep. of Daniel Brotzman ("Brotzman Dep.") 11:11-19, 12:10-18, att'd as **Exhibit 9**.

offenders.[29] City Attorney Daniel Brotzman provided City Council a packet of materials,[30] but these materials did not contain any studies, data, or other evidence that might show passage of a residency restriction would do anything to increase the protection of children. City Council's packet included only (1) the Greenwood Village residency restriction, and an article about its adoption; (2) the Eighth Circuit opinion in *Weems v. Little Rock* upholding Arkansas' statewide individualized-risk-based residency restriction, and a copy of the Arkansas restriction; (3) an Indiana residency restriction, along with minutes from the meeting where it was adopted, where the only non-counsel member attendees to speak on the proposed law spoke against it; (4) a newspaper article criticizing residency restriction; and (5) excerpts from Colorado statutes governing SVPs.[31] The City did not consult any representative of the State Parole Board, SOMB, the District Attorney for the 18th Judicial District, or any state official, before drafting or enacting Ord. 34.[32] City Council did not conduct any of its own research regarding recidivism rates of sex offenders.[33] Nor did it solicit input to aid its deliberations from anyone except the City Attorney.[34] Instead, the City based its "finding" that "recidivism rates for released sexual predators and the specified sex offenders is high, especially for those who commit their crimes against children" not on evidence, but on ordinances from other jurisdictions, mimicking Greenwood Village's "finding" almost verbatim.[35] In so doing, City Council failed to provide

[29] Ex. 8, Barrentine Dep. 78:4-6, 177:3-15.
[30] Ex. 9, Brotzman Dep. at 24:13-25:3.
[31] *See* City Council Packet, Ex. S to Def.'s Mot.; Rule 30(b)(6) Dep. of Deputy City Manager Michael Flaherty ("Flaherty Dep.") 61:24-62:8, att'd as **Exhibit 10**.
[32] Ex. 9, Brotzman Dep. 61:16-62:9; Ex. 10, Flaherty Dep. 8:14-19.
[33] Ex. 9, Brotzman Dep. 47:21-48:19.
[34] Ex. 10, Flaherty Dep. 25:24-26:3.
[35] Ex. 9, Brotzman Dep. 27:17-24, 61:4-7; Ex. 8, Barrentine Dep. 231:7-232:8; Ex. 10, Flaherty Dep. 35:22-36:8, 51:4-53:22 (if Greenwood Village's finding is incorrect, so is the City's).

any meaningful targeting of the categories of persons subject to Ord. 34 that might link the law to its stated purpose.[36]

2. Enforcement

The City enforces Ord. 34 in a manner that does not actually prevent sex offenders from living near places where children congregate.[37] As a matter of policy, the City has allowed several sex offenders to live within the restricted area because they established residency prior to 2006 – even though they were later convicted of a felony sex offense requiring registration.[38] Likewise, Ord. 34 does not prevent sex offenders from entering the City or spending time there – it prohibits only where they may live. Thus, Ord. 34, as implemented, does not restrict sex offenders' proximity to the places where children congregate during the day; it only affects where they may sleep at night.[39]

3. Reach

Ord. 34 applies to all sex offenders identified in Section 7-3-3(A), including offenders whose victims were not children.[40] For example, the law applies to an adult employee of a correctional institution who had consensual sex with an adult inmate, an adult psychotherapist who had consensual sex with an adult client, an adult who committed public indecency within the meaning of 16-22-109(z) (with multiple convictions or multiple onlookers), and an adult convicted of indecent exposure (with multiple convictions or multiple onlookers).[41] The City

[36] Ex. 9, Brotzman Dep. 30:4-14, 58:12-59:8; Ex. 1, Ball 30(b)(6) Dep. 29:13-30:20; Ex. 10, Flaherty Dep. 21:6-22:2 (the City only expanded categories beyond SVP because other cities did).
[37] Ex. 5, Ball Dep. 34:23-38:25.
[38] Ex. 1, Ball 30(b)(6) Dep. 43:18-44:20.
[39] Ex. 10, Flaherty Dep. 66:1-68:4; Ex. 9, Brotzman Dep. 26:7-27:3, 30:23-31:21.
[40] Ex. B. to Def.'s Mot.
[41] C.R.S. §§ 16-22-103(2), 16-22-102(9)(f),(m),(u), & (z).

does not conduct an individualized risk assessment of sex offenders who seek to reside in the City,[42] and the fact that an offender has been rehabilitated is in no way significant to the City in enforcing Ord. 34.[43] In enacting the legislation, despite being directly asked, the City did not consider how Ord. 34 would affect homebuyers such as Mr. Ryals.[44] In fact, according to Detective Janelle Ball, Mr. Ryals is the first sex offender since the law's enactment to purchase a home in the City.[45]

Over ninety-nine percent of the City is off-limits to sex offenders subject to Ord. 34.[46] It was "by design" that the City effectively banned sex offenders from the City.[47] Indeed, John Voboril, who created the Official Sex Offender Residency Ban Map (the "City's Map") in 2006, stated that the City "pretty much banned most of the city."[48] At least one City Council member believed that Ord. 34 banned all sex offenders from the City.[49] The detectives who enforced Ord. 34 repeatedly told sex offenders they would have to find housing outside the City.[50]

The City contends that there are 126 residential addresses where sex offenders subject to Ord. 34 may reside, and that within the areas Mr. Ryals searched, there are 42 unrestricted residences. This is disputed. The City's Map contains errors that significantly reduce the number of permissible residences under Ord. 34.[51] The Map also does not distinguish between industrial

[42] Ex. 1, Ball 30(b)(6) Dep. 20:10-21:8, 29:13-30:20, 34:16-22; Ex. 9, Brotzman Dep. 30:4-14.
[43] Ex. 5, Ball Dep. 17:25-18:20.
[44] Ex. E to Def.'s Mot.; Ex. 8, Barrentine Dep. 178:16-22, Ex. 10, Flaherty Dep. 36:15-22.
[45] Dep. of Plaintiff Stephen Brett Ryals ("Ryals Dep.") 58:23-59:7, att'd as **Exhibit 11**.
[46] Expert Report of Peter Wagner ("Wagner Report") 6, att'd as **Exhibit 12**.
[47] Ex. E to Def.'s Mot.; Ex. 9, Brotzman Dep. 48:20-49:8, Ex. 8, Barrentine Dep. 409:14-21.
[48] Email thread May 2008 (Dep. Ex. 13), att'd as **Exhibit 13**.
[49] Ex. 8, Barrentine Dep. 127:19-128:3, 234:12-22.
[50] Dep. of Detective Ed Disner ("Disner Dep.") at 34:8-35:14, 43:4-10, 44:7-12, att'd as **Exhibit 14**; Ex. 5, Ball Dep. 13:5-25; Ex. 1, Ball 30(b)(6) Dep., 70:4-72:14.
[51] Affidavit of Peter Wagner ("Wagner Aff.") ¶¶ 4-7, att'd as **Exhibit 15**.

areas and residential areas that are suitable for housing.[52] Mr. Ryals' mapping expert, Peter Wagner, states that there are in fact no more than 60 unrestricted residences in the City, and this number could be even smaller.[53] Wagner also notes there are no more than 18 unrestricted residences in Mr. Ryals' search area.[54] And of course, the City fails to denote the availability of the allegedly permissible residences for rent or purchase.[55]

The City's list of allegedly allowable addresses appended as Exhibit I to its Motion was not created until 2008, is not regularly maintained,[56] and has not been updated.[57] It is unclear whether the errors present in the City's 2006 Map were corrected at the time the list of addresses was created.[58] Further, the list is purposefully kept from sex offenders,[59] and they must identify, select, and bring *individual addresses* to the Englewood Police Department to confirm whether an address is, indeed, unrestricted.[60] In fact, the City warned offenders subject to Ord. 34 – falsely – that they could face criminal liability for trespassing should they take affirmative steps to locate a residence within the unrestricted areas of the City.[61] Upon learning about Ord. 34's breadth, most individuals subject to it choose to leave the City.[62]

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[52] Ex. 12, Wagner Report 5; Ex. 14, Disner Dep. 16:11-23.
[53] Ex. 15, Wagner Aff. ¶¶ 4-5.
[54] Ex. 15, Wagner Aff. ¶¶ 6-7.
[55] Dep. of Sergeant Kelly Martin ("Martin Dep.") 40:14-17, att'd as **Exhibit 16**.
[56] Ex. 14, Disner Dep. 9:17-20, 10:20-11:7; Ex. 16, Martin Dep. 42:2-45:9.
[57] Ex. 16, Martin Dep. at 42:16-44:23.
[58] Ex. 16, Martin Dep. 34:20-25.
[59] Ex. I to Def.'s Mot.; Ex. 14, Disner Dep. 28:7-12, 33:2-20; Ex. 1, Ball 30(b)(6) Dep. 76:21-78:6, 77:23-78:21.
[60] Ex. 14, Martin Dep. 40:14- 41:18.
[61] Sex Offender Res. Info. Sheet (Dep. Ex. 14), att'd as **Exhibit 17**; Ex. 14, Disner Dep. 30:10-25.
[62] Ex. 5, Ball Dep. 14:14-18.

The City has never updated its Map since enactment of Ord. 34,[63] the Englewood Police Department itself did not create the 2008 list of unrestricted properties,[64] and the Englewood Police Department does not have the mapping capabilities to recreate the 1000/2000 feet buffers upon demand or need.[65] In fact, the Englewood Police Department conceded that for the twenty months following Ord. 34's enactment when no list existed, detectives would not have been able to conclusively advise a sex offender whether an address on the border of one of the visual buffers was indeed restricted.[66] Therefore, contrary to Detective Ball's sworn statement that she and Detective Ed Disner "maintain a list of addresses within the City where sex offenders covered by Ordinance 34 may reside[,]" no maintenance, either by the City or the Englewood Police Department actually occurs.[67]

The City has achieved its legislative goal: currently, there are no sex offenders subject to Ord. 34 living in the sliver of Englewood not subject to the ban.[68]

C. <u>Residency Restrictions Actually Defeat the Goals They Are Said to Serve</u>.

If the City had conducted its own research prior to enactment of Ord. 34, rather than relying on unverified "findings" in Greenwood Village's ordinance, it would not have found support for the law. There is no established empirical link between sex offender residency restrictions and reduced sexual recidivism.[69] Likewise, there is no evidence that such restrictions

[63] Ex. 16, Martin Dep. 42:16-44:23.
[64] Ex. 16, Martin Dep. 33:1-25.
[65] Ex. 16, Martin Dep. 39:18-22.
[66] Ex. 16, Martin Dep. 38:20-39:3.
[67] *See* Ex. F to Def.'s Mot. ¶ 7.
[68] Ex. 1, Ball 30(b)(6) Dep. 41:15-25; Ex. F. to Def.'s Mot., Ball Aff. ¶ 13. The City admits the only individuals subject to Ord. 34 currently residing in the City were grandfathered in and live at restricted addresses. Def.'s Mot. 5.
[69] Expert Report of Dr. Jill Levenson ("Levenson Report") 1-4, att'd as **<u>Exhibit 18</u>**.

protect children against sexual abuse.[70] Nor is there an established correlation between proximity to schools or child care facilities and sex offense recidivism.[71] And of course, a residency restriction that regulates only where a sex offender sleeps at night, such as Ord. 34, does nothing to prevent offenders from targeting children in places where they congregate during the day.[72]

Ord. 34, like the ordinances it is copied from, repeats the popular "finding" that "the recidivism rate for released sexual predators and the specified sex offenders is high, especially for those who commit crimes against children."[73] This is untrue.[74] Moreover, residence laws like Ord. 34 imply that children are at risk from lurking predators, when in fact most sexual offenders are well-known to their victims.[75] Ord. 34 does nothing to address the most common form of child abuse, molestation by family members or close acquaintances.[76] While there is no empirical evidence to support the efficacy of residency restrictions like Ord. 34, there is data that demonstrates their harm. As is the case in Englewood, residency restrictions can drastically reduce housing availability for individuals subject to them, especially affordable housing.[77] They also reduce employment opportunities and force offenders out of family homes, isolating them and depriving them of their community, all obstacles to successful reintegration.[78] As noted above, housing instability is strongly correlated with increase criminal recidivism.[79] Thus, by

[70] Ex. 18, Levenson Report 1; Expert Report of Laurie Kepros, ("Kepros Report") 17, att'd as **Exhibit 19**.
[71] Ex. 18, Levenson Report 2; Ex. 19, Kepros Report 17 (citing Minnesota study that found that only a small fraction of total offenders surveyed perpetrated their crime within one mile of their residence).
[72] Ex. 18, Levenson Report 7.
[73] Ex. B to Def.'s Mot.
[74] Ex. 18, Levenson Report 8.
[75] Ex. 18, Levenson Report 8.
[76] Ex. 14, Disner Dep. 59:1-9; Ex. 18, Levenson Report 8.
[77] Ex. 18, Levenson Report 4-5.
[78] Ex. 18, Levenson Report 6-7.
[79] Ex. 18, Levenson Report 7.

increasing the number of homeless or transient sex offenders, residency restrictions like Ord. 34 make communities less safe.[80]

D. Ordinance 34 Makes It a Crime for Mr. Ryals to Live With His Wife in Their Home.

It is undisputed that Mr. Ryals served out his sentence for a crime he committed over ten years ago, complied with all the terms of his parole, continues to comply with all State registration requirements under CSORA, and has not reoffended.[81] He has secured a stable job and entered into a common law marriage with a woman he had known since high school, and bought a house in a good community for them to live together.[82] He has no subsequent criminal history since his treatment and release from prison.

Mr. Ryals and Ms. Schoepke began looking for a house in early 2012.[83] A realtor helped them locate a home that fit their criteria: a good neighborhood, enough space for Ms. Schoepke's art studio, affordable, and proximate to their work.[84] During the process of purchasing their Englewood home, they were provided information concerning their new home's zoning and other characteristics, but nothing in the purchase process alerted them to the prohibition imposed on their home by Ord. 34.[85] In fact, Ord. 34 contains no notice provisions, and the City does not include information about Ord.34 in places where a prospective resident might find it, such as zoning records,[86] or the "New Resident Checklist" on the City's website.[87]

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[80] Ex. 18, Levenson Report 5-7.
[81] Ex. 11, Ryals Dep. 12:14-17, 30:15-31:10, 32:8-11.
[82] Ex. 11, Ryals Dep. 17:1-11; Dep. of Erin Schoepke ("Schoepke Dep.") 17:10-13, att'd as **Exhibit 20**.
[83] Ex. 20, Schoepke Dep. 31:18-21.
[84] Ex. 11, Ryals Dep. 45:22-46:1.
[85] Ex. 11, Ryals Dep. 59:13-18.
[86] The City admits it would be possible to reference the restricted areas on its zoning map. Ex. 10, Flaherty Dep. 44:5-8.

Mr. Ryals followed the appropriate State-mandated process for registering his new address within five days after changing residences.[88] When he called the City's police department, Detective Ball told him that because he had a felony sex offense he was not allowed to live in the City.[89] Having been unaware of rules restricting where sex offenders may live at the time he pled guilty to his offense, this was the first Mr. Ryals heard of Ord. 34.[90]

III. STANDARD OF REVIEW

Summary judgment eliminates a plaintiff's chance to offer evidence at trial in support of his claims, and is appropriate only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1050 (10th Cir. 2008) (quoting Fed. R. Civ. P. 56(c)). When making such a determination, the Court examines "the factual record, together with all reasonable inferences derived therefrom, in the light most favorable to the nonmoving party…." *Id*. The City, as the moving party, bears the burden of showing that there is an absence of evidence to support Mr. Ryals' claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (emphasis added). Genuine disputes of material fact preclude summary judgment here.

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[87] Ex. 9, Brotzman Dep. 67:5-14; "New Resident Checklist" at http://www.englewoodgov.org/our-community/new-resident-checklist, attached as **Exhibit 21**.
[88] Ex. 11, Ryals Dep. 64:18-65:3.
[89] Ex. 11, Ryals Dep. 57:10-18, 58:14-19.
[90] Ex. 11, Ryals Dep. 59:13-18, 80:4-8, 56:10-15, 57:10-18.

IV. ARGUMENT

A. Mr. Ryals' Claims Present Both As-Applied and Facial Challenges to Ordinance 34.

The City's legal argument begins with an almost casual reference to what it claims is Mr. Ryals' as-applied challenge to Ord. 34. Mr. Ryals has never characterized his claims as either a facial or an as-applied challenge, and the City, other than identifying that a difference exists, has failed to demonstrate what the implication for summary judgment, would be from such a difference. "A facial challenge tests a law's application to all conceivable parties, while an as-applied challenge tests the application in regard to only the specific facts of a plaintiff's case." *Olson v. City of Golden*, 814 F. Supp. 2d 1123, 1123 n.1 (D. Colo. 2011). Mr. Ryals' claims present both facial and as-applied challenges.[91] Indeed, the Court, when considering a claim explicitly characterized as an as-applied challenge, is "free to hold that the statute is unconstitutional on its face." *Jacobs v. The Florida Bar*, 50 F.3d 901, 906 n.19 (11th Cir. 1995) (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 795-96).

Facial and as-applied challenges may be brought in tandem. *See, e.g., Olson*, 814 F. Supp. 2d at 1123. And the federal doctrine of constitutional avoidance of some facial challenges is not implicated here because unlike most facial challenges, Ord. 34 is not being challenged before enactment. *Compare Arizona v. United States*, 132 S.Ct. 2492, 2510 (2012) (declining to resolve a facial challenge to a provision of Arizona's immigration reform that had not yet gone into effect because "[t]here is a basic uncertainty about what the law means and how it will be

[91] In Mr. Ryals' prayer for relief, he specifically asks for a declaration that Ord. 34 is preempted by the Colorado Constitution, that Ord. 34 constitutes new, after-the-fact punishment in violation of the *Ex Post Facto* Clauses of both the Colorado and the federal constitutions; and asks for a permanent injunction barring the City from enforcing Ord. 34 in general, and specifically against him. Compl., Dkt. 2, at 12.

enforced.") In contrast, there is solid data and evidence over a span of nearly seven years that establish the contours of Ord. 34.

Finally, the distinction between an as-applied and facial challenge is a federal constitutional issue that has no application with respect to Plaintiff's preemption claim. When faced with preemption challenges, Colorado courts make no such distinction. *See, e.g., City of Northglenn v. Ibarra*, 62 P.3d 151, 153 (Colo. 2003) (ruling on a preemption claim before considering an as-applied due process challenge); *JAM Restaurant v. City of Longmont*, 140 P.3d 192, 194 (Colo. App. 2006) (identifying no substantive distinction for the evaluation of plaintiff's as-applied and facial challenges to a municipal zoning ordinance).[92]

B. Ordinance 34 is Preempted Under the Colorado Constitution.

There are numerous genuine issues of material fact surrounding Mr. Ryals' first claim for relief, that Ord. 34 is preempted by the Colorado Constitution and state law. Disputes include the contours of the comprehensive statewide scheme regarding regulation of sex offenders, how the State's efforts to register, monitor, and rehabilitate sex offenders are frustrated by Ord. 34, rendering Colorado less safe, the nature and effect of Ord. 34 on surrounding communities, and other disputes described *infra*.

Colorado law governing preemption is as follows. There are "three categories of regulatory matters: (1) matters of local concern; (2) matters of statewide concern; and (3) matters of mixed state and local concern." *City of Commerce City v. State*, 40 P.3d 1273, 1279 (Colo. 2002) (internal citations omitted). The City does not argue that sex offender regulation is

[92] The City, after mentioning that it may be important whether Mr. Ryals' claims are facial challenges instead of as-applied, attempted to reserve its rights to brief at a later time the facial challenge issue. Mr. Ryals objects to such a reservation because it would constitute a new argument in favor of summary judgment after the time for doing so has passed.

a matter of local concern to the exclusion of any state regulation. Regarding matters of state concern, the State has supreme authority and home rule municipalities have no power to act unless authorized by the constitution or by state statute. *City & Cnty. of Denver v. Qwest Corp.*, 18 P.3d 748, 754 (Colo. 2001). In matters of mixed state and local concern, both home rule municipalities and the State may adopt legislation but in the event of a conflict, the State's statutory or regulatory scheme supersedes a conflicting provision of the home rule ordinance. *Commerce City*, 40 P.3d at 1279 (internal citations omitted).

There is no specific test that resolves whether a particular matter is exclusively within the State's domain, the municipality's purview, or is of mixed concern. *City & Cnty. of Denver v. Colorado*, 788 P.2d 764, 767 (Colo. 1990). These determinations are made "on an ad hoc basis, taking into consideration the facts of each case." *Id*. at 767-68 (citing *Nat'l Adver. Co. v. Dep't of Highways*, 751 P.2d 632, 635 (Colo. 1988)) (emphasis added). "Because the categories do not reflect factually perfect descriptions of the relevant interests of the state and local governments, categorizing a particular matter constitutes a legal conclusion involving considerations of both fact and policy." *Webb v. City of Black Hawk*, 295 P.3d 480, 486 (Colo. 2013) (internal citations omitted). Here, the parties dispute facts relevant to the legal conclusion of whether this is a matter exclusively of state concern, rendering summary judgment inappropriate.

Courts consider the following factors when determining which prong of preemption analysis applies: (1) the necessity for statewide uniformity, (2) whether the municipal legislation has an extraterritorial impact; (3) whether the subject matter is traditionally one that the state or local government handles; and (4) whether the Colorado Constitution specifically identifies that state or local legislation should regulate the issue. *Town of Telluride v. Lot Thirty-Four Venture,*

LLC, 3 P.3d 30, 37 (Colo. 2000). Other factors considered can include: (5) whether there is a legislative declaration or intent that the matter is of statewide concern; and (6) the need for cooperation between state and local government in order to effectuate the local government scheme. *Commerce City*, 40 P.3d at 1280-81.

1. The Regulation of Sex Offenders is a Matter of Exclusive Statewide Concern.

In matters of exclusive statewide concern, the State "may adopt legislation and home-rule municipalities are without power to act unless authorized by the constitution or by state statute." *Ibarra*, 62 P.3d at 155. The City points to no evidence showing that the State, through its Constitution or statutes, explicitly authorized municipalities to enact residency restrictions – because there is none. Thus, if the Court agrees that residency restrictions on sex offenders are a matter of statewide concern, the inquiry is over and Ord. 34 is preempted. *See id.* at 156 (Colo. 2003) (internal citations omitted).

a. Colorado's comprehensive scheme of sex offender regulation demonstrates that the State has acted upon the need for statewide uniformity in this area.

Colorado has enacted a complex, comprehensive, and detailed statewide scheme of interrelated statutes and regulations designed to manage sex offenders.[93] In describing the role of the SOMB, Plaintiff's expert witness Laurie Kepros, Director of Sexual Litigation for the Colorado Office of the State Public Defender, states, "[s]tate law requires that all [registered sex offenders] be evaluated and treated only as provided for in state standards and by evaluators and treatment providers approved by the SOMB."[94]

[93] *See* discussion *supra* Section II(A)(1).
[94] Ex. 19, Kepros Report 5-6 (emphasis added).

Rather than relegate management of sex offenders to municipalities, the State created a single body – the SOMB – to manage and advise on issues regarding sex offender treatment and management. Uniformity of sex offender treatment and management is critical to achieve the State's objectives in punishing sex offenders as well as taking steps, based on individualized analysis, to reduce the risk of re-offense. *See, e.g.*, *Town of Telluride*, 3 P.3d at 38 (Colo. 2000) (finding preemption of a local ordinance and holding that "[u]niformity in landlord-tenant relations fosters informed and realistic expectations by the parties to a lease, which in turn increases the quality and reliability of rental housing, promotes fair treatment of tenants, and could reduce litigation"); *Century Elec. Serv. & Repair, Inc. v. Stone*, 193 Colo. 181, 184 (1977) (holding that a state statute superseded a home rule ordinance regarding the licensing of electricians because "[t]he state has a clear concern in ensuring that Colorado electricians have free access to markets throughout the state.").

The City concedes that the Colorado Sex Offender Registration Act ("CSORA"), C.R.S. §§ 16-22-101−115, is part of the statewide effort to regulate sex offenders, but claims that "the state does not have any regulation restricting where sex offenders may reside." Def.'s Mot. 44-45. That is wrong. Sex offenders on probation or parole must receive housing approval from their supervising officer.[95] Uniformity is needed to allow probation and parole officers to place sex offenders in the community successfully. This is precisely why uniformity in sex offender regulation must exist at the state level.[96] *See, e.g.*, *Ibarra*, 62 P.3d at 161 (holding that a local

[95] *See* SOMB STANDARDS & GUIDELINES FOR THE ASSESSMENT, EVALUATION, TREATMENT AND BEHAVIORAL MONITORING OF ADULT SEX OFFENDERS ("SOMB Standards and Guidelines") § 5.620(K) (rev. Nov. 2011), *available at* http://dcj.state.co.us/odvsom/sex_offender/SO_Pdfs/2012%20ADULT%20STANDARDS %20FINAL%20C.pdf (last accessed May 27, 2013).

ordinance regulating the number of unrelated sex offenders in one residence was preempted in part because it undercut uniformity by "den[ying] [] access to a setting that is state-created to reduce the rate of recidivism and to assist them in becoming productive members of society.") (internal citations omitted).

b. Ord. 34 has extraterritorial impacts on Colorado residents outside of the City.

"An extraterritorial impact is one involving state residents outside the municipality." *Town of Telluride*, 3 P.3d at 38. This impact has been described as a "ripple effect" on other communities and persons. *Id.* at 38 (internal citations omitted). Contrary to the City's contention, the impact to other communities need not be fully actualized now to justify preemption. In *Denver & Rio Grande W. R.R. Co. v. City & Cnty. of Denver*, 673 P.2d 354, 361 (Colo. 1983), the Supreme Court of Colorado found that "[b]ecause of the potential impact beyond the municipality's borders," a local ordinance was preempted. (emphasis added). *Town of Telluride*, 3 P.3d at 38; *see also Webb*, 295 P.3d at 491 ("Black Hawk's ordinance may lead to other municipal bicycle bans by local communities . . . ." (emphasis added)).

Other courts as well have noted this phenomenon in other states when municipalities enact residency restrictions. *See People v. Oberlander*, No. 02-354, 2009 N.Y. Misc. LEXIS 325, at *2 (N.Y. Sup. Ct. Jan. 22, 2009) ("Sex offender residency restrictions are multiplying throughout New York State, as local legislatures scramble to outmaneuver each other with highly restrictive ordinances designed to banish registered offenders from their communities.")

Mr. Ryals has strong evidence of both actual and potential extraterritorial impact.[97] In fact, the SOMB itself has noted that "when one local jurisdiction decides to enact a restriction, surrounding jurisdictions often want to jump on board. That's what happened with Evans when Greeley enacted theirs."[98] Indeed, the City's own impetus for enacting its restriction was the fact Greenwood Village already had such an ordinance, and as a result the SVP who was to be placed in Greenwood Village was instead to be placed in Englewood.[99] *See Ibarra*, 62 P.3d at 161-62 ("Th[e] ripple effect is compounded by the fact that other municipalities in Colorado have similar ordinances . . . ." (internal citations omitted)).

c. Sex offenders have historically and traditionally been regulated by the State.

In an attempt to demonstrate that sex offender regulation is not a state matter under this factor, the City points out that the SOMB was created in 1992. Def.'s Mot. 47 (citing C.R.S. § 16-11.7-101−109). This argument against the State's historical and traditional province over placement of sex offenders fails to cite any authority for what the City perceives to be the minimum amount of time an issue must be within the control of the State to be considered "traditional." Significantly, for as long as sex offenders have been regulated as a class in Colorado – over thirty years now – those regulations have emanated from the State, not local municipalities.

The City again points to no facts − disputed or undisputed − in support of its position that sex offender regulation is not traditionally managed by the State. Colorado's legislative declaration when creating the SOMB, included in the Statement of Material Disputed Facts,

[97] *See* discussion *supra* Section II(B)(1) & (3).
[98] Ex. 2, Rodriguez Dep. 105:4-18.
[99] *See* discussion *supra* Section II(B)(1).

above, shows just the opposite. *Nat'l Adver. Co.*, 751 P.2d at 635 (legislative declaration afforded "great weight" in the analysis of whether a matter is of statewide concern).

d. The State has not created any role for municipalities to enact their own restrictions.

Rather than point to any affirmative grant of authority from the State, the City repeatedly emphasizes that the General Assembly, in 2006, considered a statewide residency restriction. *See*, *e.g.*, Def.'s Mot. 45. What the City fails to note is that, after detailed and careful consideration and debate, the State rejected such a scheme.[100] As the roll call vote began on a proposed statewide residency restriction, the three votes that were cast were all "nays" before a motion to postpone indefinitely – i.e., kill – the bill was proposed, seconded, and passed. *Id*. at 59-63. Thus, the fact that the bill was proposed, and rejected, is further evidence of the State's decision not to employ residency restrictions in its uniform, comprehensive statewide scheme for the regulation of sex offenders.

The City argues that the State's coordination of registration-related items with local law enforcement demonstrates that municipalities have an interest in the residency of sex offenders. Def.'s Mot 45. But the fact that registration laws, as part of the comprehensive state sex offender regulation scheme, require local law enforcement assistance in providing places for offenders to register is a fact that militates in favor of the residency of sex offenders being considered a matter of statewide concern. *Ibarra*, 62 P.3d at 163 (holding that counties and private agencies that administer state functions are merely subordinate designees of the State and must carry out

[100] *See* Ex. CC to Def.'s Mot. *See also* True and Accurate Transcript of Testimony Provided on February 2, 2006 Regarding House Bill 1089 (2006) before the House Judiciary Committee, att'd as **Exhibit 22** and Affidavits of Cynthia Dinkins and Peggy Heilman, att'd as **Exhibit 23** and **Exhibit 24**, respectively.

the mandates of the State); *City & Cnty. of Denver*, 788 P.2d at 768 (required cooperation from local government means "the matter will in all likelihood be considered a state concern").

The 2012 amendments to CSORA do not change the analysis. To combat problems with registration of transient sex offenders at risk of "going underground," the General Assembly amended CSORA to state, "A local law enforcement agency shall accept the registration of a person who lacks a fixed residence; except that the law enforcement agency is not required to accept the person's registration if it includes a residence or location that would violate state law or local ordinance." C.R.S. § 16-22-108(1)(a)(I) (emphasis added). This amendment was the result of transient sex offenders, or offenders "who lack[ed] a fixed residence," attempting to register addresses in local city parks, which as a matter of ordinary course are not zoned as residential addresses.[101] Nothing about this amendment suggests an intent by the State to abandon the uniform system of laws and regulations in favor of a patchwork of inconsistent regulations on where sex offenders who are allowed to live once the State has approved the same. At most, the impact of this amendment is both material and disputed between the parties, and is yet another reason that summary judgment on Mr. Ryals' preemption claim is inappropriate.

Finally, the fact that the City possesses police powers to regulate land use, an area often regulated by local government, does not mean that those police powers are as broad and expansive as the City contends. In fact, such a position has been rejected by the Supreme Court of Colorado when it held that although municipalities may legislate around permissible uses of real property (i.e., commercial, residential, etc.), that power does not mean the municipality can

[101] *See* Affidavit of L. Kepros, att'd as **Exhibit 25**, ¶¶ 6-8.

dictate the rate or price at which the property may be used. *See also Town of Telluride*, 3 P.3d at 39 n.9. Here, while the City may govern what use a parcel of land may be put toward (i.e., residential versus industrial), it does not have the unchecked right to govern who may live at that parcel of land. *See id.*; *see also Webb*, 295 P.3d 480 (holding that a home rule municipality's power to regulate bicyclists using the municipality's streets was not sufficiently broad to survive a preemption claim). In sum, the factual record here shows that sex offenders have historically been regulated by the State, not municipalities.[102]

* * *

For all of the foregoing reasons, this Court should conclude that regulation of sex offenders is an area of statewide concern. Because the State has not expressly delegated to municipalities the ability to regulate in this area, municipal regulations such as Ord. 34 are preempted. *See Ibarra*, 62 P.3d at 156.

2. Even if Ordinance 34 Implicated an Area of Mixed State and Local Control, It Is Preempted.

Even if this Court concludes that regulation of sex offenders is a mixed issue, as the City argues, the Court still should find that questions of fact preclude summary judgment.

a. Ordinance 34 impermissibly conflicts with the statewide scheme for sex offenders because it prohibits what the State allows.

[102] *See* Ex. 10, Flaherty Dep. 85:10-85:12 (stating that the City has no ordinances beyond Ord. 34 that pertain to sex offenders); 30(b)(6) Dep. of Sergeant Kelly Martin 15:8-12, att'd as **Exhibit 26** (same); 30(b)(6) Dep. of John Collins 11:1-11:14, att'd as **Exhibit 27**, (prior to enactment of Ord. 34, the City had only one detective tasked to work on sex offender issues (related in large part to the state requirement of registration and notification and no other funding was allocated to sex offender management by the City)); Ex. 19, Kepros Report 2-3 (listing seven state statutes related to sex offenders) and 11 (Mr. Ryals' status as a sex offender is a direct function of Colorado law and his plea was accepted by a state court).

For a mixed matter, the conflict between a state statutory scheme and a local ordinance need not be direct or express for the local ordinance to be preempted. *Ibarra*, 62 P.3d at 159-60 (internal citations omitted). A conflict between a state and local rule exists if the local ordinance "forbids what the state legislation authorizes." *Commerce City*, 40 P.3d at 1284 (citing *Denver & Rio Grande W. R.R. Co.*, 673 P. 2d at 361 n.11) (emphasis added). Here, a sex offender like Mr. Ryals who has completed the individualized treatment protocol required by the State continues to be restricted by having to register every time he moves. The State permits Mr. Ryals to live in the City or any other municipality in Colorado, while the City bans him from doing so.[103] Ord. 34 therefore directly conflicts with what the State allows, and is preempted.

b. Ordinance 34 materially impedes the State's ability to register, treat, monitor, and rehabilitate sex offenders.

Operational conflict between the statewide scheme and a local ordinance also provides grounds to find it preempted. This arises when a local interest is implemented in a way that materially impedes a state interest. When this occurs, "local regulations may be partially or totally preempted to the extent that they conflict with the achievement of the state interest." *DOT v. City of Idaho Springs*, 192 P.3d 490, 496 (Colo. App. 2008) (citing *Bd. of County Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1059 (Colo. 1992)).

Here, material facts demonstrate an operational conflict between the State's purposes in sex offender regulation and Ord. 34. The State has an interest in pursuing an individualized treatment plan with sex offenders. That goal is frustrated by Ord. 34, which stops the State from placing sex offenders in what the State concludes is the best, most stable environment for the

[103] *See* Ex. 1, Ball 30(b)(6) Dep. 30:25-31:20 (stating that the reach of Ord. 34 is unaffected by whether a state probation officer wants an offender to live in the City (to be close to a support system, for example) and the City does not and did not consult with parole or probation officers in enacting Ord. 34)).

particular offender.[104] The State has determined that municipal residency restrictions frustrate its individual assessment-based system for sex offender treatment and management, and increases rates of recidivism, making the state less safe.[105] This is directly contrary to state policy.

Likewise, Mr. Ryals has material evidence to show that Ord. 34 impedes the efficacy of the State's registration system. To promote public safety, the State requires accurate and timely registration of sex offenders. This system is hindered by residency restrictions, which cause offenders to "go underground" in an effort to shield their real residence.[106]

The evidence shows further that the clear impetus of Ord. 34 was to flout future State actions to place SVPs in the City.[107] It is inconceivable how a local ordinance enacted to thwart state action could be consistent with state law.

In summary, even if regulation of sex offenders was a mixed matter of state and local concern, Ord. 34 should still be preempted. This is because the ordinance cannot be reconciled with the State's detailed, individualized system of regulation of sex offenders that promotes public safety through offender-specific assessment, placement in the most supportive living situation possible, and monitoring through the statewide sex offender registry.[108]

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[104] *See* discussion *supra* Section II(A)(2).
[105] *See* discussion *supra* Section II(C).
[106] *See* discussion *supra* Section II(A)(2) & II(C).
[107] *See* discussion *supra* Section II(B)(1).
[108] The City cites *City & County of Denver v. Qwest Corp*. for the proposition that the State has not indicated a pervading interest in the statewide uniform regulation of sex offenders. *Qwest* actually holds the opposite and stands for the proposition that a local municipality's rational basis in legislating to protect the health, safety, or welfare of the citizens of a municipality is insufficient to overcome the State's interest in a matter of even mixed state and local concern. 18 P.3d 748, 755. *See also Nat'l Adver. Co.*, 751 P.2d at 636-37 (uniform regulation of highway advertising signs, even in the face of safety concerns cited by the local municipality, was held to be necessary); *Bennion v. City & Cnty. of Denver*, 504 P.2d 350, 351-52 (Colo. 1972) (invalidating a local ordinance that prohibited resistance to unlawful arrest in conflict with state statute because the matter was not exclusively of local control and state residents have an expectation of uniformity in state criminal codes).

3. Courts Around the Country Find Local Ordinances Like Englewood's Preempted.

Courts in other jurisdictions have concluded that municipal residency restrictions on sex offenders are preempted by state law. The most detailed case concerns Allegheny County, Pennsylvania's residency restriction. In *Fross v. County of Allegheny*, 612 F. Supp. 2d 651 (W.D. Pa. 2009), after weighing the County's home rule powers with statewide laws regulating sex offenders in Pennsylvania, both through its sex offender registration law and its probation and parole laws, the federal district court "conclude[d] that Allegheny County's sex offender residency restriction ordinance is preempted by state law." *Id.* at 658. Colorado's system, as described above, is very similar to Pennsylvania's.

The County appealed to the Third Circuit, which in turn certified to the Pennsylvania Supreme Court the question "whether Pennsylvania law preempts the ordinance." *See Fross v. County of Allegheny*, 438 Fed. Appx. 99 (3d Cir. 2011). As requested, the Pennsylvania Supreme Court issued a detailed opinion answering that question. It concluded, on a factual record identical in all material respects to the record here, that the Allegheny County ordinance was indeed preempted by state law. *See Fross v. Cnty. of Allegheny*, 20 A.3d 1193 (Pa. 2011). The City attempts to distinguish *Fross*, but fails to address the facts that led to the Pennsylvania Supreme Court's decision. The City claims the local *Fross* ordinance prohibited residency that was allowed by the state, and notes as well that the parole board in Pennsylvania faced considerable difficulty finding compliant housing for sex offenders post-enactment of Ord. 34. But as explained in the Statement of Material Disputed Facts, above, both of those facts are

present here as well.[109] Not only are the City's distinctions of *Fross* unavailing, but they further highlight the similarities of the Pennsylvania scheme to Colorado's.

Other courts have reached the same conclusion. In *Terrance v. City of Geneva,* 799 F. Supp. 2d 250, 252 (W.D.N.Y 2011), a federal court in New York held that the local residency restriction at issue "is preempted by New York State's comprehensive, detailed, and thorough scheme for regulating sex offenders." *See also People v. Blair*, 23 Misc. 3d 902 (Albany City Ct. 2009) (specifically rejecting the argument that the local residency restriction was not preempted as to unsupervised sex offenders because of the breadth of the statewide scheme and following at least five other New York decisions also finding preemption); *G.H. v. Galloway*, 951 A.2d 221, 230 (N.J. Super. Ct. App. Div. 2008), *aff'd by G.H. v. Galloway*, 971 A.2d 401 (N.J. 2009) (expressly rejecting the idea that the residency restriction was saved from preemption because it only restricted where registered sex offenders lived, instead of worked or recreated).

The City relies on two cases concerning sex offender residency restrictions in Florida and Iowa to argue that Ord. 34 is not preempted. As an initial matter, some municipalities in Florida have had their restrictions stricken under a preemption analysis.[110] *See, e.g.*, *Florida v. Schmidt*, No. 16-2006-MO-010568, at 38-41 (Duval County Ct., Div. H, October 11, 2007).[111] And the Iowa statewide restriction is meaningfully different from Ord. 34.[112] Most notably however, both

[109] *See* discussion *supra* Section II(A)(1)(b).

[110] Florida's aggressive, and ineffective, residency restrictions have created concentrated communities of sex offenders, a fact that indisputably frustrates efforts to prevent re-offense. *See* Lisa F. Jackson & David Feige, "*Sex Offender Village*, N.Y. TIMES (May 21, 2013), *available at* http://www.nytimes.com/2013/05/22/opinion/sex-offender-village.html?_r=0).

[111] For convenience, a copy of the *Schmidt* opinion is att'd as **Exhibit 28**.

[112] For example, the Iowa residency restriction is limited to those sex offenders who have committed offenses against children, establishes a fixed date on which the day cares, schools, parks, etc. that triggered restriction buffers were set (unlike Ord. 34, which is a moving target), and is a statewide, not local scheme.

Florida and Iowa have statewide sex offender residency restrictions, a scheme expressly considered and rejected in Colorado. The fact that Colorado's comprehensive approach to sex offender management does not include a statewide residency restriction demonstrates that this state does not believe residency restrictions are an effective component to its otherwise successful method of individualized treatment, analysis, and monitoring. Thus, ordinances that may be permissible under other states' statutory schemes are preempted under Colorado law.

C. Ordinance 34 Increases the Punishment for Mr. Ryals' Crime, Rendering It an Unconstitutional *Ex Post Facto* Law.

The *Ex Post Facto* Clause prohibits any law that "'inflicts a greater punishment[ ] than the law annexed to the crime' at the time of its commission or criminalizes any act 'done before the passing of the law.'" *United States v. Lawrance*, 548 F.3d 1329, 1332 (10th Cir. 2008) (citing *Calder v. Bull*, 3 U.S. 386, 390 (1798)). Thus, to be an illegal *ex post facto* law, the law must be both retrospective, that is, "it must apply to events occurring before its enactment," and it must be punitive, i.e., "it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

At the time he committed his offense, Mr. Ryals could have made his home anywhere within the City. Following his conviction, however, the City imposed a new affirmative disability on Mr. Ryals: he is now prohibited from living almost anywhere within the City, solely as a consequence of his sex offense. Exacerbating the new limitation, the City enacted no notice provisions that might alert a convicted sex offender to the law, and affirmatively concealed from such individuals the list of legal residences.[113] Accordingly, under Ord. 34, Mr. Ryals has been prosecuted for the crime of living in his home, strictly as a consequence of his prior sex offense.

[113] *See* discussion *supra* Section II(D).

Because Ord. 34 imposes a new disability on Mr. Ryals exclusively as a function of his sex offense conviction, his second and third claims challenge the validity of Ord. 34 under the *Ex Post Facto* clauses of the United States Constitution and the Colorado Constitution. U.S. CONST. art. I, § 9; COLO. CONST. art. II, § 11.

Ord. 34 illustrates precisely the purpose of the constitutional ban on *ex post facto* laws, which "is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver*, 450 U.S. at 30. Whether Ord. 34 is retrospective and punitive turns on several disputed material facts, a number of which are cited below, demonstrating the impropriety of summary judgment on Mr. Ryals' *ex post facto* claims.

1. Ordinance 34 Is Retrospective Because It Changes the Legal Consequences of Mr. Ryals' Crime.

To be retrospective, a law "must apply to events occurring before its enactment." *People v. DeWitt*, 275 P.3d 728, 731 (Colo. App. 2011); *see also F.R. v. St. Charles County Sheriff's Dep't*, 301 S.W.3d 56, 61 (Mo. 2010) (holding that sex offender residency restriction imposed a "new obligation, duty or disability" and thus was improper retroactive law). While a law is not deemed retrospective merely because it operates on a preexisting status, a law is retrospective "if it changes the legal consequences of acts completed before its effective date." *DeWitt*, 275 P.3d at 731.

Ord. 34 changes the legal consequences of Mr. Ryals' sex offense. Mr. Ryals pled guilty to his offense in 2001.[114] At that time, sex offender residency restrictions like Ord. 34 were not in

[114] *See* discussion *supra* Section II(D).

effect in Colorado.[115] Thus, at the time he entered his plea, Mr. Ryals could not have contemplated that his guilty plea would result in greater punishment (removal from his home) than the punishment then indexed to his crime. It is this lack of a fair warning of the full legal consequences of his crime that raises the red flag of retrospectivity. *See Weaver*, 450 U.S. at 28-29 ("[t]hrough [the *ex post facto*] prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed"); *see also Smith v. Doe*, 538 U.S. 84, 108 (2003) (Souter, J., concurring) (noting the significance of the portion of Alaska's sex offender registration statute which made written notification of the requirements of the registration statute "a necessary condition of any guilty plea").

The City attempts to overcome Ord. 34's inherent retrospective nature by reframing Mr. Ryals' crime. The conduct that Ord. 34 prohibits, they argue, is not Mr. Ryals' sex offense, but rather his "act" of living in his home in the City. Def.'s Mot. 22-25. With this argument, the City seeks to analogize Ord. 34 to the Colorado statute upheld in *DeWitt*, the Possession of a Weapon by a Previous Offender ("POWPO") statute, which a division of the Colorado Court of Appeals found did not violate Colorado's *Ex Post Facto* Clause because it prohibited the act of possessing a firearm, not the predicate felonies. 275 P.3d at 732. The analogy does not fit: while a convicted felon may live without a firearm, a convicted sex offender cannot live without a residence. But aside from the obvious discrepancy in the severity of the statutory restraint, the Colorado Court of Appeals' analysis of this question of federal Constitutional law is not binding or persuasive.

[115] Ex. S to Def's Mot. 2.

The Tenth Circuit Court of Appeals has had no trouble finding a restriction of a registered sex offender retrospective when the sex offense predates the enactment of the restriction. In *United States v. Hinckley*, 550 F.3d 926 (10th Cir. 2008), *abrogated on other grounds by Reynolds v. United States*, 132 S.Ct. 975 (2012), the Tenth Circuit found a sex offender registration and notification law to be a "retroactive registration scheme." *Id.* at 938. It was not barred by the *Ex Post Facto* Clause only because the court determined it was a "civil" retrospective scheme, and not punitive. *Id.* The U.S. Supreme Court reached the same conclusion when considering Alaska's sex offender registration law. *Smith*, 538 U.S. at 96. For purposes of the *Ex Post Facto* analysis, it found that both the registration requirement and the notification system in Alaska's statute "are retroactive," and found the statute constitutional only after determining that it was not enacted with punitive intent or effect. *Id.* at 90. Just as a registration system for sex offenders is retrospective when it applies to sex offenses committed before its enactment, a residency restriction likewise is retrospective when applied to sex offenses committed before the restriction's enactment. The only question remaining is whether Ord. 34 is punitive, either in intent or effect. *See Lawrance*, 548 F.3d at 1333.

2. Ordinance 34 is Punitive.

When determining whether a law is punitive for *ex post facto* purposes, courts apply the so-called '*Kennedy-Ward*' test,[116] which requires the court to first "ascertain whether the legislature meant the statute to establish 'civil' proceedings . . . ." *Smith*, 538 U.S. at 92 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). Second, even if the legislature had a good faith intention to enact a civil, nonpunitive scheme, the court "must further examine whether the

[116] Derived from *United States v. Ward*, 448 U.S. 242, 248-49 (1980) and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *See Smith*, 538 U.S. at 107 (Souter, J., concurring).

statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *Id.* (internal quotation marks omitted).

This inquiry is so facially fact-bound that summary judgment is easily overcome. Taking to heart this Court's order of May 7, 2013, instructing counsel to focus on the governing standard, Mr. Ryals will provide the Court just a few examples of facts sufficient to demonstrate genuine disputes surrounding his *ex post facto* claims, rather than presenting every fact and argument that he might present at trial.

a. The City intended Ordinance 34 to be a criminal law.

To determine whether the legislature intended a law to be civil or criminal, the Court first considers statutory construction. *Smith*, 538 U.S at 92. Ord. 34 is not expressly designated as "civil." The City contends that because Ord. 34 states that it is "promulgated for the health, safety, and welfare of the public," the City Council intended it to be a civil law. In the same way that the label of a statutory provision cannot by itself transform a civil remedy into a criminal one, a stated purpose cannot on its own express the true intent of the legislature. As acknowledged by Justice Souter in his *Smith* concurrence, a stated goal of ensuring public safety must be analyzed within the context of the enactment. *Id.* 108-09 (Souter, J., concurring) ("[I]t would be naïve to look no further, given pervasive attitudes toward sex offenders") (internal citations omitted).

Here, there are a number of examples that illustrate the City Council's intent to enact a criminal scheme. The fact that Ord. 34 is enforced by the Englewood Police Department supports the conclusion that the legislature contemplated a criminal design. *See Mikaloff v. Walsh*, No. 06CV96, 2007 WL 2572268, at *7 (N.D. Ohio Sept. 4, 2007) (noting the significance of the fact

that county prosecuting attorneys hold the power to enforce Ohio's residency restriction in determining the legislature intended the residency restriction to be penal).

Likewise, the sweeping, over-inclusive, and reactionary nature of Ord. 34 strongly highlights the City's intent to punish sex offenders. As Justice Souter noted in *Smith*, the fact that a statute relies on a past crime and includes people who pose no real threat "serves to feed suspicion that something more than regulation of safety is going on." *Smith*, 538 U.S. at 108-09 (Souter, J., concurring). The circumstances surrounding the enactment of Ord. 34 require looking beyond the City Council's stated purpose, and consider whether the underlying intent was punishment. These facts present at least a disputed issue as to whether Ord, 34 is civil or criminal.[117]

b. The overwhelmingly punitive effect of Ordinance 34 negates any intent to deem it civil.

To determine whether a statute is so punitive in purpose or effect as to negate the government's intent to deem it civil, courts balance seven factors. *Smith*, 538 U.S. at 97. The City relies heavily on the *Miller* case from the Eighth Circuit. *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005). Interestingly, *Miller* illustrates precisely the reason why summary judgment is inappropriate here: looking at the same set of facts and evidence, the judges in *Miller* disagreed about whether they rendered the statute so punitive as to negate the government's civil intent. *Compare id.* at 718-23 (rejecting *Ex Post Facto* Clause challenge to residency restriction) *with id.* at 723-726 (Melloy, Circuit Judge, dissenting as to majority's *ex post facto* analysis.) Several courts considering residency restrictions have determined, based on the specific facts, that they are punitive and thus *ex post facto* laws. *See, e.g. Indiana v. Pollard*, 908 N.E.2d 1145 (Ind.

[117] *See* discussion *supra* Section II(B)(1).

2009); *Mikaloff*, 2007 WL 2572268; *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009); *In re Berlin v. Evans*, 923 N.Y.S.2d 828 (N.Y. Sup. Ct. 2011). Here, Mr. Ryals has developed evidence showing that each of the *Smith* factors weighs in favor of finding Ord. 34 punitive and thus *ex post facto*. Such evidence includes:

i. Ordinance 34 is analogous to banishment.

- Over ninety-nine percent of the City is restricted under Ord. 34.[118]
- The City effectively banned sex offenders from the entire city "by design."[119]
- At least one City Council member was under the impression that Ord. 34 completely banned all sex offenders from the City.[120]
- The detectives who enforced Ord. 34 repeatedly told sex offenders subject to the residency restriction that they would have to find housing outside of the City.[121]
- The City Planner who created the "Official Sex Offender Residency Ban Map" believes that the City "pretty much banned most of the city."[122]
- Information about what limited housing is available in the City is purposefully withheld from sex offenders.[123]
- Sex offenders are told falsely that if they attempt to inquire as to available housing in the few unrestricted areas in the City, they could be charged with trespassing.[124]
- Ord. 34 is similar to probation or parole in that it places restrictions on living conditions, like Ord. 34. *See Pollard*, 908 N.E.2d at 1151 (residency restriction constituted *ex post facto* law). And "the law goes well beyond parole in that it never allows the sex offender to reintegrate into society." *Mikaloff*, 2007 WL 2572268 at *10.

[118] *See* discussion *supra* Section II(B)(3).
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*

- Based on similar facts, courts have found it more "intellectually honest [to conclude] that residency restrictions constitute banishment." *Baker*, 295 S.W.3d at 444.

ii. Ordinance 34 promotes the traditional aims of punishment.

- The text of Ord. 34 states its deterrent aim: "Removing such offenders from regular proximity to places where children are located and limiting the frequency of contact is likely to reduce the risk of an offense." ENGLEWOOD, COLO., CODE § 7-3-1.

- Due to the threat of negative consequences such as having to leave an established residence, Ord. 34 has an inherent deterrent effect.

- The fact that Ord. 34 makes no distinction between sex offenders whose victims were adults and those who targeted children, suggests an element of retribution. *See Baker*, 295 S.W.3d at 444 ("When a restriction is imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be . . . that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones.")

iii. Ordinance 34 imposes an affirmative disability or restraint.

- The City acknowledges that Ord. 34 imposes an affirmative disability or restraint. Def.'s Mot. 34. *See Pollard*, 908 N.E.2d at 1150 (noting "[t]he disability or restraint imposed by the residency restriction statute is neither minor nor indirect. [The Defendant] is not allowed to live in a house he owns . . . ." and concluding that residency restriction was *ex post facto* law).

- There are no sex offenders governed by Ord. 34 currently living in the sliver of the City that is unrestricted.[125]

iv. Ordinance 34 lacks a rational connection to a non-punitive purpose.

- There is no evidence that sex offender residency restrictions protect children against sexual abuse.[126]

- Increasing the number of sex offenders that are homeless or transient as a result of diminished housing availability due to residency restrictions actually makes communities with laws like Ord. 34 *less* safe.[127]

[125] *See* discussion *supra* Section II(B)(3).
[126] *Id.* at Section II(C).
[127] *Id.*

- Ord. 34 does not limit sex offenders from being within proximity of the places where children congregate.[128] *See Baker*, 295 S.W.3d at 445 ("It is difficult to see how public safety is enhanced by a registrant not being allowed to sleep near a school at night, when children are not present, but being allowed to stay there during the day, when children are present.")

- The City has not updated the map of restricted areas, though day care centers have opened and closed since Ord. 34's enactment.[129]

- In at least one instance, Ord. 34 has caused a sex offender to go off the grid.[130]

v. Ordinance 34 is excessive with respect to its purpose.

- Ord. 34 restricts over ninety-nine percent of the City.[131]

- Ord. 34 applies to all sex offenders within the statute, regardless of whether they present a risk of current or present dangerousness to children. *See Pollard*, 908 N.E.2d at 1153 ("Restricting the residence of offenders based on conduct that may have nothing to do with crimes against children, and without considering whether a particular offender is a danger to the general public, the statute exceeds its non-punitive purposes"); *Baker*, 295 S.W.3d at 446 (residency restriction is excessive given the drastic consequences and the fact that there is no individual determination of threat to the public safety); *Mikaloff*, 2007 WL 2572268 at *12 (a residency restriction that "sweeps in individuals regardless of their current risk of recidivism" is excessive with respect to its stated purpose).

- The City does not conduct an individualized risk assessment of sex offenders who seek to reside in the City.[132]

- The fact that an offender has been rehabilitated is in no way significant to the City when enforcing Ord. 34.[133]

Although there are many disputed facts preventing the City from prevailing on its motion for summary judgment on Mr. Ryals' *ex post facto* claims, one fact is plain: because of his prior conviction for a sex offense, and for no other reason, Ord. 34 prohibits Mr. Ryals from living

[128] *Id.* at Section II(B)(2).
[129] *Id.* at Section II(B)(3).
[130] *Id.* at Section II(A)(2).
[131] *See* discussion *supra* Section II(B)(3).
[132] *Id.*
[133] *Id.*

with his wife in their house. The City claims this is not a punishment. At trial, Mr. Ryals will present evidence that Ord. 34 inflicts a greater punishment on him for his sex offense than could have been inflicted on him at the time he committed his offense. This factual dispute precludes summary judgment.

D. Ordinance 34 Deprives Mr. Ryals of Liberty Without Due Process of Law.

Both the U.S. and Colorado constitutions prohibit state and local governments from "[depriving] any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1; COLO. CONST. art. II, § 25. Pursuant to his Fourth and Fifth Claims for Relief, Mr. Ryals contends that Ord. 34 deprives him of liberty without due process of law.

1. Ordinance 34 Intrudes Upon the Fundamental Right of Personal Choice in Matters of Marriage and Family Life.

Ord. 34 makes it a crime for Mr. Ryals to live with his wife in the home he purchased for them, 3072 South Lincoln Street in Englewood. Ord. 34 contains no notice provisions that would have alerted Mr. Ryals to its restrictions prior to committing his savings to the purchase and obligating himself to the payment of the mortgage, and its enforcement imposes financial distress that may force him to live apart from his wife. Courts have acknowledged that such restrictions may impact such vital family matters as "'where an offender's children attend school, access to public transportation for employment purposes, access to employment opportunities . . . even access to medical care and residential nursing home facilities for the aging offender.'" *Mikaloff*, 2007 WL 2572268 at *12.

A law that "regulate[s] the occupancy of its housing by slicing deeply into the family itself" implicates the fundamental right to "personal choice in matters of marriage and family life [which] is one of the liberties protected by the Due Process Clause of the Fourteenth

Amendment." *Moore v. City of East Cleveland*, 431 U.S. 494, 498-99 (1977). Correspondingly, the Court must strictly scrutinize "the importance of the governmental interests advanced and the extent to which they are served by" Ord. 34. *Id*. at 499. The City does not even attempt to argue that Ord. 34 can survive strict scrutiny.

The Eighth Circuit's determination in *Doe v. Miller* that Iowa's statewide residency restriction did not implicate such a fundamental right does not dictate the result in this case. Def.'s Mot. 12 (citing 405 F.3d at 713-14). Aside from that case's extra-circuit origin, a crucial distinction exists between the restriction at issue in *Miller* and Ord. 34: the Iowa statute did not effectively ban sex offenders from establishing legal residencies anywhere in Iowa. *Miller*, 405 F.3d at 705-706. Mr. Ryals, on the other hand, presents evidence that Ord. 34 effectively bans him and other sex offenders from living anywhere in the City.[134] Its effect on family and on marriages is thus not merely incidental, but entirely prohibitive. An individual subject to its restrictions cannot live with his family if they live in the City. The City's "Statement of Material Undisputed Facts" illuminates just how intrusive the law is – the City emphasizes that Mr. Ryals' wife "owns another home in Denver that the couple have available to move into," impliedly dictating what choice Mr. Ryals and his wife should make for their living arrangements, and ignoring that they moved from this residence because it was <u>not</u> suitable for them anymore. Def.'s Mot. 9, ¶ 33.

Viewing this evidence in the light most favorable to Mr. Ryals, summary judgment is clearly inappropriate. Whether and to what extent Ord. 34 represents government intrusion on choices concerning family living arrangements is an issue that must be decided at trial.

[134] Ex. 12, Wagner Report 6.

2. The Relationship of Ordinance 34 to Its Stated Goal Is So Attenuated as to Render It Irrational.

As noted above, strict scrutiny should apply here. But even on rational basis review, Ord. 34 should be declared unconstitutional. While rational basis may be the least intrusive review standard, it is not a rubber stamp. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) (citing *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *United States v. Moreno*, 413 U.S. 528, 535 (1973)).[135] "Furthermore, some objectives – such as 'a bare . . . desire to harm a politically unpopular group' (citation omitted) – are not legitimate state interests" and the law may not give effect to private biases. *Cleburne*, 473 U.S. at 446, 448 (citing, *inter alia*, *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). Justice Souter has acknowledged that the political unpopularity of the broad swath of convicts denoted "sex offenders" warrants skepticism in assessing laws targeting them: "[I]t would be naïve to look no further [than legislative history showing goal of sex offender registration legislation], given pervasive attitudes toward sex offenders . . . ." *Smith*, 538 U.S. at 108-09 (Souter, J., concurring). This caution is especially relevant here, because Ord. 34 is based upon pervasive myths and assumptions,[136] and it is unconstitutional to deny homes to a group of people based upon "mere negative attitudes, or fear, unsubstantiated . . . ." *Cleburne*, 473 U.S. at 448.

As acknowledged by the Supreme Court in its opinion overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), assumptions that sound reasonable to the majority but are nevertheless

[135] As the City acknowledges, cases concerning analysis of equal protection claims are useful guidance for substantive due process claims, as both analyses proceed along the same lines. Def.'s Mot. 12, fn. 2.
[136] Ex. 18, Levenson Report 8-9.

false can create bad precedent. *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003) (earlier Court's decision upholding anti-sodomy law was based in part on misleading "sweeping references" to historical views on homosexuality). The fact that municipalities tend to copy ordinances from others can thus lead to wide adoption of unconstitutional laws.[137] That has exactly what has happened in the case of residency restrictions like Ord. 34.

Under rational basis review, a court must consider both the legislature's goal in enacting a law, and the substance of a restriction intended to achieve it. *Cleburne*, 473 U.S. at 446. The asserted goal of Ord. 34 is to protect children from the dangers posed by sex offenders who are likely to recidivate against them.[138] But even where a goal is legitimate, a law designed to meet it is unconstitutional if it bears no rational relationship to the goal itself. *Id*. While it is true that governments are afforded "wide latitude" in enacting social legislation, such legislation must yet have rational underpinnings. *Id*. at 440.

Ord. 34 severely restricts the locations where certain individuals may reside. The City contends that Ord. 34 does not apply a "blanket restriction to all offenders" but rather is "narrowly tailor[ed] . . . to apply to only a certain subset of sex offenders."[139] But the only subset of sex offenders *not* subject to Ord. 34 are those convicted of a single misdemeanor involving a single victim.[140] Thus the class of individuals whose legal residence is defined in relation to places where children congregate includes individuals with multiple convictions or multiple

[137] Ex. 10, Flaherty Dep. 14:10-17 (noting that cities frequently copy other cities' ordinances, as the City did here).
[138] Ex. B to Def.'s Mot.
[139] Def.'s Mot. 14.
[140] *See* discussion *supra* Section II(B)(3).

victims of such misdemeanor crimes as indecent exposure and public indecency.[141] Likewise, it includes felonies involving only adults, and felonies having nothing at all to do with protecting children in parks, schools, etc. from strangers. *See, e.g.*, C.R.S. § 18-3-405.5 (sexual assault by a psychotherapist on a client); C.R.S. § 18-6-301 (incest).[142]

In its plainest sense, the term "residence" denotes the primary place where one physically dwells. *See, e.g.*, *United States v. Taylor*, 828 F.2d 630, 634 (10th Cir. 1987) (discussing Colorado's statutory definition of "residence"); *People v. Griffin*, No. 08CA2694, 2011 WL 915714 at *3 (Colo. App. 2011) (definition of "residence" under CSORA to be given its common understanding). At its essence, then, Ord. 34 restricts where individuals subject to it may sleep at night, maintain their possessions, and return to after periods away. That it does so with respect to places where children congregate during the day, regardless of whether the offender's crime involved children, renders it irrational. *See Baker*, 295 S.W.3d at 445 ("It is difficult to see how public safety is enhanced by a registrant not being allowed to sleep near a school at night, when children are not present, but being allowed to stay there during the day, when children are present.") The City's response to Ord. 34's inclusion of offenders whose crimes bear no conceivable relationship to children is to cite authority for the proposition that the Court must "'accept a legislature's generalizations.'"[143] But "even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation." *Heller*, 509 U.S. at 321. That requirement is not satisfied here.

[141] *Id.*
[142] *Id.*
[143] Def.'s Mot. 21 (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993)).

The City argues that the Court may not look behind the stated basis for Ord. 34 to determine whether it is rational. But precedent demonstrates otherwise. In *City of Cleburne v. Cleburne Living Center*, the Supreme Court reviewed a law that denied establishment of a group home for a group of mentally disabled adults. In that case, a proposed operator of a group home purchased a property to house it, and thereafter learned that in order to operate the group home, it would have to obtain a special use permit pursuant to a zoning ordinance that excluded group homes from permitted uses of the property. 473 U.S. at 435-37. The City of Cleburne offered four rationales for the zoning law. *Id*. at 448-50. Reviewing the record, the Supreme Court disagreed with the lower court's determination that the City's stated bases were rational. *Id*. at 448-50. In so doing, the Court considered, for example, the validity of the City's assumption that students from the local school would harass residents of the home, and rejected it on the basis of facts in the record showing that the school itself is attended by mentally retarded students. *Id.* Thus, the Court concluded that the law was based on "vague, undifferentiated fears" and was allowing "some portion of the community to validate what would otherwise be an equal protection violation." *Id*. at 449.

Here, too, Mr. Ryals offers facts that, when considered in the light most favorable to him, demonstrate the irrationality of the City's stated basis for Ord. 34.[144] Ultimately, if the Court rejects Mr. Ryals' contention that strict scrutiny is required due to the implication of Mr. Ryals' fundamental right to choice in matters of marriage and family, then determination of Mr. Ryals' substantive due process claims will depend upon whether Mr. Ryals' evidence refutes the stated "conceivable rational basis" for Ord. 34. *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1105

[144] *See* discussion *supra* Section II(C).

(D. Haw. 2012); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973). The undisputed evidence that City Council considered no independent research in enacting Ord. 34 is alone enough to render it devoid of any conceivable rational basis. *Schmidt*, No. 16-2006-MO-010568, at 38 (finding no rational basis for Florida residency restriction because no evidence was presented to the City prior to enactment showing that the law would increase children's protection.)[145] Certainly, *Cleburne* demonstrates that the disputed facts surrounding Ord. 34 preclude summary judgment.

V. CONCLUSION

Mr. Ryals respectfully requests that this Court deny the City's Motion for Summary Judgment on all claims.

Respectfully submitted this 3rd day of June, 2013.

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[145] Ex. 28 (full opinion).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of June, 2013, a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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Responses and Replies

1:12-cv-02178-RBJ Ryals v. City of Englewood

U.S. District Court

District of Colorado

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Document Number: 41

Docket Text:
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[3757ad29a869ad30b26219250c6dd1d232e15a196aca97ca02bc64482b5d978ebd3b
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Document description: Exhibit 7
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-7]
[6a96831c15a9458eac60605f92420afb23fc602eaadcb07d715ed617e04caf7b317c
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Document description: Exhibit 8

Original filename:n/a
Electronic document Stamp:
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Document description: Exhibit 9
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-9] [039e305290e445bce90101c809c6a3770f6955fd524654f0884c6a452541d2e793a203fa33cc31c738a9f5692962e36225dc018835891056826fef91c9d8a7d8]]
Document description: Exhibit 10
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-10] [3036c8eb715cf5bc9c20fc2f8ebf090457c04ce12fa5f5be9d50bb1300433b3ce5b0d8b8f95802aa503718553eea62f70a7ac44bd7ed23e5938d5047f72de813]]
Document description: Exhibit 11
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-11] [727d8309055e19e2290ef91988980cb9a348f57129a083e008046244eb888bf25fb78ea1776a607f2a256e10c4b896408ba2b6ab4d2bf1e541d872eca2244623]]
Document description: Exhibit 12
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-12] [327522bb61c8e2d7950c1932b8c24b2c5775a005aebdb7f6eca60fe27223a6369730c1bc27009a089301328e0714127166b23e81d39a5cbb093663f15774bbcf]]
Document description: Exhibit 13
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-13] [2785ed11e8e0da90b599d1b908137f5b5a8ab1abe6727a16a3f496a7464ac15d7d27759f1498fa0fa283e86d83fd680662b799b490dff762b39428ff2ccd828d]]
Document description: Exhibit 14
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-14] [1071f3f12e625c2ad69cadbf7c6f5c29c6f566cc08cd5a5b47f2830c626f30610871bf0dc5d3b2bc522b58e1d5f02dc85b733fd8784de5985eba5d47cf66211c]]
Document description: Exhibit 15
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-15] [6ae0f3bcc262f82781066670babc79288e6c354b0320c1fee16d06313b0cef086729a6caac0e982e5295f560ed1c37887d76a5deecfff8f41d14303ac62e2777]]
Document description: Exhibit 16
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-16

] [38aefe2b372cc12205d020401af69ac9b585876441fc65c6241b8511feae87ce4a1
9dd64bd5712a670686a6fed258a1d7983553dae64c5fc888079841fab93ae]]
Document description: Exhibit 17
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-17
] [6a4496175fe3d138811cb93081ece8348b81a3d3b1d16c95ac626dd161047f7cc60
17e4e414b1901df19c3292e721747e2be1a1171e38195a05fd276a256cbd7]]
Document description: Exhibit 18
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-18
] [07ea47d922d6665b33f99106720886cb6328cfd11533cb23f2bf7bfb88e9483b788
89be1a24adaffddbb104fca939547b21fb8799c63a1b4b731a351dac3a0fd]]
Document description: Exhibit 19
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-19
] [1da3cd38f2178e193e7fad43a8f66ff8532b5e07c18e8eea4b40d577ebf1db3cbf2
60d3bf888e6624d308bde052aae6903b0c916f73bd0c968a0a75eb060cd37]]
Document description: Exhibit 20
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-20
] [0ba03c2001bbd0b3f1c7b28c33405b62cba45bd3398a9b0a3b46c466ad9bbd6c3a4
dd0318b050845074a8da0d69694eea63cc57b7b79f8bcd415ecfbfd83aa75]]
Document description: Exhibit 21
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-21
] [780002000e78586bcba793064ca45769001d0fe46bb5356c6d633a967a148b6b2a6
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Document description: Exhibit 22
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-22
] [852f18942956d621dd2e738ea78e8e9904292f25f8195a6e37afcda4ce354fbcfd3
8a58c700389c4c4eb08e0cf1d805c50a21f5fb14a7590c9d0eeab365ac153]]
Document description: Exhibit 23
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-23
] [6670477d98708d4a4366ef2e7123ea3b5a02ff9f8eac51d8c274ec88d54507374c7
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Document description:CMECF.widgit.ProcessingWindowDestroy() RONG>Exhibit 24
Original filename:n/a
Electronic document Stamp:
**[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-24
] [05d4d8ce60311ae47345d428fbf1c1bdeb4df025f1c5da7a92cdf1ce6bd341a1871
28466d35bf46b41525f4f21843a39b5a9260160a580eac6f714a3cc130703]]**
Document description:Exhibit 25

Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-25] [4ea72a14f7fbbaed707506871f0f1c243fac16fb11e8688eca9701d21666b25ea2d d9cb19ce060e15b02dc8d0b1102487493c56ea00def559f6fedc04102ce73]]
Document description:Exhibit 26
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-26] [2b8e161178c6503677713994ce56e5f2ebbc1177ca503d9ec49e54e8f354f494529 47f747dc4bddb25a8a12d93a950390b3d4ff7b4a47ab9f105c02af1f68952]]
Document description:Exhibit 27
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-27] [6fd6f5689d9311bf3b48a89d90cf6b02d12ce4da14c59b02832ec0f4210d96e4aa5 c4778161bf82273a64f3daf199b1510bbee05db0b2b44f8e67a76613cf526]]
Document description:Exhibit 28
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071006659 [Date=6/3/2013] [FileNumber=4038005-28] [4aaf7627334c5ed0eb57711395e16e9376eb746ed4ded0f228e5330f3fa93309604 429a17e801172eb4e7faae8b5e5b6697baafecd34fba07cd1ce57e3b6397d]]