UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

AURELIO DUARTE;

WYNJEAN DUARTE;

BRANDI DUARTE; and

SAVANA DUARTE, a Minor,
By and through Wynjean Duarte,
acting as her Next Friend;

No. _____

Plaintiffs

V.

THE CITY OF LEWISVILLE, TEXAS;

Defendant

PLAINTIFFS' ORIGINAL COMPLAINT

TO THE HONORABLE OF SAID COURT:

COME NOW Plaintiffs Aurelio Duarte; Wynjean Duarte, Individually and as Next Friend to Savana Duarte, a Minor; and, Brandi Duarte; and, pursuant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution; the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution; the Ex Post Facto guarantee of Article I, Section 10 of the United States Constitution; and Title 42 U.S.C. Section 1983 and 1988; files this their Original Complaint, and in this connection would respectfully show unto the Court as follows:

I.

JURISDICTION

The Plaintiffs' Complaint raises questions arising under the United States Constitution and federal law, and this Court has "federal question" jurisdiction pursuant to Title 28, U.S.C. Section 1331. Furthermore, the Plaintiffs' Original Complaint includes claims that seek compensatory damages, equitable declaratory and injunctive relief, and attorney's fees, against the Defendant, over which this Court has jurisdiction under Title 28, U.S.C. Sections 1343(a) and 2201. Venue is proper in the Plano Division of the United District Court for the Eastern District of Texas, as the acts and omissions of Defendant City of Lewisville, Texas, about which Plaintiffs complain, occurred in Denton County, Texas.

II.

PARTIES

(A)

Plaintiff Aurelio Duarte resides in a motel room located in the City of Lewisville, Denton County, Texas, and is thus a resident of the said City and County of Texas.

(B)

Plaintiff Wynjean Duarte, Individually and as Next Friend to Savana Duarte, a Minor, resides in a motel room located in the City of Lewisville, Denton County, Texas, and is thus a resident of the said City and County of Texas.

(C)

Plaintiff Brandi Duarte resides in a motel room located in the City of Lewisville, Denton County, Texas, and is thus a resident of the said City and County of Texas.

(D)

Savana Duarte, a Minor, lives with her Father, Aurelio Duarte; with her Mother and Next Friend, Wynjean Duarte; and her Sister, Brandi Duarte; in a motel room located in the City of Lewisville, Denton County, Texas, and is thus a resident of the said City and County of Texas.

(E)

The Defendant City of Lewisville, Texas, is a municipal corporation incorporated under the laws of the State of Texas, and is situated in Denton County, Texas. Service upon this Defendant may be had by serving the City Secretary of Defendant City of Lewisville, Julie Heinze, at her office located at 151 West Church Street, Lewisville, Texas 75057-3927.

III.

FACTS

(A)

In 2004, Plaintiff Aurelio Duarte was indicted by a Dallas County Grand Jury for the Third Degree felony offense of Online Solicitation of a Minor, in violation of Texas Penal Code, Section 15.031, alleged to have been committed on May 28, 2004. On May 19, 2006, Plaintiff Aurelio Duarte was found guilty, after a trial by jury on that offense, in the 282nd Judicial District Court of Dallas County, Texas, in Cause No. F-0427036. For this offense Plaintiff Aurelio Duarte was sentenced to eight (8) years confinement in the Institutional Division of the Texas Department of Criminal Justice, but on the recommendation of the jury, his sentence to confinement was suspended and he was placed on community supervision for a term of ten (10) years.

(B)

On June 5, 2007, Plaintiff Aurelio Duarte's community supervision was revoked by the 282nd Judicial District Court of Dallas County, Texas, and he was sentenced to a term of confinement of three (3) years in the Institutional Division of the Texas Department of Criminal Justice. Plaintiff Aurelio Duarte's sentence to confinement in this case was fully discharged in June of 2010.

(C)

In June of 2010, following the discharge of his sentence arising from his conviction for Online Solicitation of a Minor in May of 2006, Plaintiff Aurelio Duarte returned to the City of Lewisville, Texas, where he had resided with his wife and children prior to the revocation of his community supervision and institutional confinement in 2007. In large part due to the Duarte family's the deep roots in City of Lewisville community Plaintiff Aurelio Duarte commenced efforts at that time to secure residential premises in the City of Lewisville where he, along with his Wife Wynjean Duarte, his older Daughter Brandi Duarte, and his Minor Daughter Savana Duarte, could make a home together.

(D)

Not long after commencing his efforts to secure residential premises in the City of Lewisville, Plaintiff Aurelio Duarte was informed that the Defendant City of Lewisville had enacted an ordinance that all but prohibited him from residing at any location within the city limits of the City of Lewisville, with or without his family. The ordinance in question, Article III, Chapter 8, Sections 8-41 through 8-46 of the City of Lewisville Code of Ordinances (also known as Ordinance No. 3522-01-2008, § II, *eff.* 1-28-

08)(hereinafter referred to as the "Sex Offender Residency Restriction Ordinance" or the "SORRO"), became effective on January 28, 2008.

(E)

By its terms, the SORRO enacted by the Defendant City of Lewisville applies to Plaintiff Aurelio Duarte due to the State law requirement that he register as a convicted "Sex Offender" with the Texas Department of Public Safety, and prohibits Plaintiff Aurelio Duarte from residing, temporarily or permanently, anywhere within the city limits of Lewisville that "is within 1,500 feet of any premises where children commonly gather." Violation of the ordinance carries a punishment of a fine of five hundred dollars ($500.00) for every day that the violation "shall continue or exist."

(F)

After learning of the Defendant City's SORRO, Plaintiff Aurelio Duarte exhaustively sought to purchase residential premises in the Defendant City of Lewisville but was legally foreclosed from doing so due solely to Defendant City of Lewisville's enactment of its SORRO. Similarly, Plaintiff Aurelio Duarte exhaustively sought to lease a suitable residential premises or family dwelling in the Defendant City of Lewisville, but was legally foreclosed from doing so due solely to Defendant City of Lewisville's enactment of its SORRO.

(G)

Although, among other affirmative defenses to its enforcement, Defendant City's SORRO does provide that a person is not subject to its SORRO if the person is currently on community supervision and has been judicially relieved from compliance with the "child safety zone" otherwise required as a condition of supervision of community

supervision under Article 42.12, Section 13B of the Texas Code of Criminal Procedure; the SORRO does not provide a similar affirmative defense for persons, such as Plaintiff Aurelio Duarte, who are not currently subject to community supervision, parole, or any other form a governmental restraint.

(H)

The Defendant City's SORRO does not purport by its terms to be justified by, or rest upon, any factual determination that a person subject to its enforcement (or application) poses any threat to children, or the community at large, due to a lack of sexual control.

(I)

Neither before nor since Plaintiff Aurelio Duarte's indictment for Online Solicitation of a Minor in 2004; or before or since his conviction of that offense in 2006; or before or since the revocation of his parole in 2007; or before or since his release from institutional confinement and his discharge from his criminal sentence in 2010; or before or since enactment by the Defendant City of Lewisville's SORRO in 2008; has any arbiter of fact, including but not limited to any Grand Jury, Trial Jury, Judge, Parole Board Panel, or Agent of Defendant City of Lewisville, even considered or made any findings of fact concerning whether Plaintiff Aurelio Duarte poses now, or has posed in the past, a threat to society by reason of his lack of sexual control.

(J)

As the result of the acts and omissions set out specifically hereafter, Plaintiffs allege, individually, that they have each sustained compensatory damages actionable

under Title 42 U.S.C. Section 1983, for having been deprived or subjected to the derivation of their federal constitutional rights by the Defendant City of Lewisville.

IV.

LEGAL CLAIMS

(A) PROCEDURAL DUE PROCESS:

1.

CLAIMS OF PLAINTIFF AURELIO DUARTE

(a)

Plaintiff Aurelio Duarte alleges the enactment, application and enforcement of the SORRO in question by the Defendant City of Lewisville has deprived him, and will continue to deprive him, of his constitutional rights to procedural due process in violation of the Fourteenth Amendment to the United States Constitution. In this connection, it is alleged that:

i) Plaintiff Aurelio Duarte holds a fundamental right, and a constitutionally protected liberty interest, to reside at the location of his choice, including but not limited to a location anywhere within the City of Lewisville, Texas;

ii) Plaintiff Aurelio Duarte holds a fundamental right to "parental consortium" otherwise enjoyed by him in relation to his biological children, to wit: Plaintiff Brandi Duarte and Savana Duarte, including but not limited to the right to experience a custodial, caring, and nurturing parental relationship with them, which constitutes a constitutionally protected liberty interest that has been (and will continue to be) severely affected adversely by Defendant City's enactment, enforcement and application of the SORRO in question;

iii) the lack of any policy or procedure adopted and implemented by the Defendant City of Lewisville, to determine, *prior to application or enforcement of its SORRO*, whether Plaintiff Aurelio Duarte has ever been a threat to society by reason of his lack of sexual control, has operated to arbitrarily deny or restrict his fundamental right to "parental consortium," and the exercise of his right to choice concerning the location of his residence, and such an omission by Defendant City of Lewisville operates, and on the initial application of the SORRO to Plaintiff Aurelio Duarte did operate, to create a constitutionally intolerable risk of an erroneous deprivation of those liberty interests;

iv) additional procedural safeguards adopted and implemented by the Defendant City of Lewisville could have provided (and would provide) Plaintiff Aurelio Duarte with notice, with an opportunity to be heard, and with knowledge of the factual basis upon which the official action was to be undertaken, whereby the risk of an erroneous deprivation of such liberty interest could be (and would have been) greatly reduced; and

v) there is no (and has never been any) legitimate governmental interest held by the Defendant City of Lewisville that outweighs the benefits of reducing the risk of an erroneous deprivation through use of the procedural safeguards of notice and an opportunity to be heard.

2.

CLAIMS OF PLAINTIFF WYNJEAN DUARTE

(a)

Plaintiff Wynjean Duarte alleges the enactment, application and enforcement of the SORRO in question by the Defendant City of Lewisville has deprived her, and will continue to deprive her, of her constitutional rights to procedural due process in violation of the Fourteenth Amendment to the United States Constitution. In this connection, it is alleged that:

i) Plaintiff Wynjean Duarte holds a fundamental right, and a constitutionally protected liberty interest, to reside with her husband Aurelio Duarte, and with her biological children, Plaintiff Brandi Duarte and Savana Duarte, at the location of her choice, including but not limited to a mutually agreed upon location anywhere within the City of Lewisville, Texas;

ii) the lack of any policy or procedure adopted and implemented by the Defendant City of Lewisville, to determine, *prior to application or enforcement of its SORRO*, whether Plaintiff Aurelio Duarte has ever been a threat to society by reason of an alleged lack of sexual control, has operated to arbitrarily deny or restrict Plaintiff Wynjean Duarte's fundamental right to choose the location of her residence, and such an omission by Defendant City of Lewisville operates, and on the application of the SORRO to Plaintiff Aurelio Duarte did operate, to create a constitutionally intolerable risk of an erroneous deprivation of her liberty interests;

iii) additional procedural safeguards adopted and implemented by the Defendant City of Lewisville could have provided (and would provide) Plaintiff Wynjean Duarte with notice, with an opportunity to be heard, and with knowledge of the factual basis upon which the official action was to be undertaken, whereby the risk of an erroneous deprivation of such liberty interest could be (and would have been) greatly reduced; and

iv) there is no (and has never been) any legitimate governmental interest held by the Defendant City of Lewisville that outweighs the benefits of reducing the risk of an erroneous deprivation through use of the procedural safeguards of notice and an opportunity to be heard.

3.

CLAIMS OF PLAINTIFF BRANDI DUARTE AND SAVANA DUARTE, BY AND THROUGH HER NEXT FRIEND

(a)

Plaintiff Brandi Duarte and Savana Duarte, by and through her Next Friend, allege the enactment, application and enforcement of the SORRO in question by the Defendant City of Lewisville has deprived them, and will continue to deprive them, of their constitutional rights to procedural due process in violation of the Fourteenth Amendment to the United States Constitution. In this connection, it is alleged that:

i) the fundamental right to "parental consortium" otherwise enjoyed by Plaintiff Brandi Duarte and Savana Duarte (by and through her Next Friend), including but not limited to the right to experience a custodial, caring, and nurturing relationship with their biological father, Plaintiff Aurelio Duarte, constitutes a

fundamental liberty interest that has been (and will continue to be) severely affected adversely by the Defendant City's enactment, enforcement and application of the SORRO in question;

ii) the lack of any policy or procedure adopted and implemented by the Defendant City of Lewisville, to determine, *prior to application or enforcement of its SORRO* to Plaintiff Aurelio Duarte, whether Plaintiff Aurelio Duarte poses now, or has ever posed in the past, a threat to society by reason of his lack of sexual control, has operated to arbitrarily deny or restrict this identified liberty interest held by Brandi Duarte and Savana Duarte Ethan (the right to experience a custodial, caring, and nurturing relationship with their biological father), and operates to create a constitutionally intolerable risk of an erroneous deprivation of those liberty interests;

iii) additional procedural safeguards adopted and implemented by the Defendant City of Lewisville could (and would have) easily provided Plaintiff Brandi Duarte and Savana Duarte (by and through her Next Friend) with notice, with an opportunity to be heard, and with knowledge of the factual basis upon which the official action was to be undertaken, whereby the risk of an erroneous deprivation of such liberty interest could be (and would have been) greatly reduced; and

iv) there is no (and has never been) any legitimate governmental interest held by the Defendant City of Lewisville that outweighs the benefits of reducing the risk of an erroneous deprivation through use of the procedural safeguards of notice and an opportunity to be heard.

B) EQUAL PROTECTION:

1.

ADDITIONAL CLAIM OF PLAINTIFF AURELIO DUARTE

(a)

In addition to the foregoing claims, Plaintiff Aurelio Duarte alleges the enactment, application and enforcement of the SORRO in question by the Defendant City of Lewisville has deprived him, and will continue to deprive him, of his constitutional right to Equal Protection of Law in violation of the Fourteenth Amendment to the United States Constitution. In this connection, it is alleged that:

i) Although Defendant City's SORRO does provide that a person is not subject to its SORRO if he or she is currently on community supervision and has been judicially relieved from compliance with the "child safety zone" otherwise required as a condition of supervision of community supervision under Article 42.12, Section 13B of the Texas Code of Criminal Procedure; the SORRO does not provide a similar exception for persons, such as Plaintiff Aurelio Duarte, who are not currently subject to community supervision, parole, or any other form a governmental restraint;

ii) The Defendant City's SORRO is not justified by, and does not rest upon, any factual determination that a person subject to its enforcement (or application) presently poses any threat to children, or the community at large, due to a lack of sexual control;

iii) Neither before nor since Plaintiff Aurelio Duarte's indictment for Online Solicitation of a Minor in 2004; or before or since his conviction of that

offense in 2006; or before or since the revocation of his parole in 2007; or before or since his release from institutional confinement and his discharge from his criminal sentence in 2010; or before or since enactment by the Defendant City of Lewisville's SORRO in 2008; has any arbiter of fact, including but not limited to any Grand Jury, Trial Jury, Judge, Parole Board Panel, or Agent of Defendant City of Lewisville, even considered or made any findings of fact concerning whether Plaintiff Aurelio Duarte poses now, or has ever posed in the past, a threat to society by reason of his lack of sexual control; and,

iv) The Defendant City's SORRO is not justified by, does not rest upon, and does not further or advance, any compelling, or in the alternative any legitimate, substantial or rational governmental interest, by which it can survive constitutional scrutiny.

C) FIFTH AMENDMENT/DOUBLE JEOPARDY CLAUSE VIOLATION:

1.

ADDITIONAL CLAIM OF PLAINTIFF AURELIO DUARTE

(a)

In addition to the foregoing claims, Plaintiff Aurelio Duarte also alleges the enactment, application and enforcement of the SORRO in question by the Defendant City of Lewisville has deprived him, and will continue to deprive him, of his constitutional right not to be subjected to "multiple punishments" contrary to the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as made applicable to

the States and their political subdivisions by the Fourteenth Amendment to the United States Constitution. In this connection it is alleged that:

i) the legislative purpose of the disabilities and restraints occasioned by application and enforcement of the Defendant City of Lewisville's SORRA, reflects on its face an intent to punish or, in the alternative, does not express or manifest an intent to impose the disabilities and restraints for a legitimate, "non-punitive" purpose;

ii) the disabilities and restraints occasioned by application and enforcement of the Defendant City of Lewisville's SORRA have historically been regarded as a punishment (outlawry and banishment);

iii) the disabilities and restraints occasioned by application and enforcement of the Defendant City of Lewisville's SORRA come into play only on a finding of *scienter* (the underlying criminal offense requiring sex offender registration under State law);

iv) the disabilities and restraints occasioned by application and enforcement of the Defendant City of Lewisville's SORRA are purposely designed to promote the traditional aims of punishment — "retribution" and "deterrence";

v) the disabilities and restraints occasioned by application and enforcement of the Defendant City of Lewisville's SORRA have no "non-punitive" purpose to which they may rationally be connected or assigned;

vi) the disabilities and restraints occasioned by application and enforcement of the Defendant City of Lewisville's SORRA are excessive in relation to any "non-punitive" purpose assigned to justify them; and,

vii) in light of the foregoing factors, the disabilities and restraints occasioned by application and enforcement of the Defendant City of Lewisville's SORRA constitute successive, multiple "punishments," arising directly from Plaintiff Aurelio Duarte's prior conviction for a reportable "sex offense," which are prohibited by the Double Jeopardy Clause.

D) EX POST FACTO VIOLATION:

In addition to the foregoing claims, Plaintiff Aurelio Duarte also alleges the enactment, application and enforcement of the SORRO in question by the Defendant City of Lewisville has deprived him, and will continue to deprive him, of his constitutional right not to be subjected to an Ex Post Facto law, as guaranteed by Article I, Section 10, of the United States Constitution. In this connection, it is alleged that the application and enforcement of the Defendant City of Lewisville's SORRO unconstitutionally imposes a constitutionally impermissible retroactive "punishment."

V.

RELIEF REQUESTED

In light of the foregoing facts and claims, the Plaintiff moves the Court to:

A) Issue a declaratory judgment, pursuant to Title 28, U.S.C. Section 2201, that declares the ordinance in question, Article III, Chapter 8, Sections 8-41 through 8-46 of the City of Lewisville Code of Ordinances (Ordinance No. 3522-01-2008, § II, *eff.* 1-28-08), unconstitutional as applied to Plaintiffs;

B) Issue a permanent injunction, pursuant to Title 28, U.S.C. Section 1343, prohibiting the Defendant City of Lewisville, Texas, its agents, successors, assigns, or anyone acting in concert with it, from again applying or enforcing Article III, Chapter 8,

Sections 8-41 through 8-46 of the City of Lewisville Code of Ordinances (Ordinance No. 3522-01-2008, § II, *eff.* 1-28-08);

C) Award Plaintiffs Aurelio Duarte; Wynjean Duarte, Individually and as Next Friend to Savana Duarte; and, Brandi Duarte; their compensatory damages, as incurred by each of them individually, for the deprivation of their constitutional rights by Defendant City of Lewisville, Texas, as determined by a jury on the trial of the merits of Plaintiffs' claims, which Plaintiffs hereby demand pursuant to the Seventh Amendment to the United States Constitution;

D) Award each Plaintiff nominal damages pursuant to Title 42, U.S.C. Section 1983 for the violation of their "absolute" constitutional rights to procedural due process;

E) Award the Plaintiffs reasonable costs, and reasonable attorney's fees pursuant to Title 42, U.S.C. Section 1988, which are shown to have been necessarily incurred by them in the prosecution of this matter; and

F) Grant Plaintiffs such other and further relief to which she may show herself entitled.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs pray that process will issue requiring the Defendant City of Lewisville, Texas, to appear and answer to Plaintiffs' Original Complaint, and that in due course, this Honorable Court will grant the relief requested by Plaintiffs, and will grant such other and further relief to which Plaintiffs may show themselves entitled.

Respectfully submitted,

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