**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF NEW YORK**

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**Danny Terrance,**

**Plaintiff,**

**vs** **10-CV-6450T**

**City of Geneva, New York,**

**Defendant.**

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# MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT CITY OF GENEVA'S MOTION TO DISMISS

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## PRELIMINARY STATEMENT AND FACTUAL BACKGROUND

Defendant City of Geneva (the "City" or "Geneva") respectfully submits this Memorandum of Law in support of its motion to dismiss Plaintiff Danny Terrance's Verified Complaint (the "Complaint") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The facts of this case for the purposes of this motion are set forth in the Complaint and in the accompanying affidavit of H. Todd Bullard, Esq., sworn to December 23, 2010 ("Bullard Aff."). To briefly summarize, on April 2, 2008 the elected officials of Geneva passed a municipal code entitled City of Geneva Municipal Code, Part II, General Legislation, Chapter 285 ("Chapter 285"), a copy of which is attached to the Complaint. *See* Bullard Aff., Exhibit 1, Appendix B. Chapter 285 prohibits any registered level two or level three sex offenders, those classified as having a medium to high risk of committing another sexual offense, from residing one thousand feet from school or five hundred feet from a park, a playground, or a day-care center in Geneva, places where children typically gather. *Id.*

Chapter 285 sets forth Geneva's rationale for passing the residency restriction:

> The City Council finds that sex offenders pose a significant threat to the health and safety of the community and especially to children, whose age and inexperience make them particularly vulnerable to the heinous and reprehensible acts of these offenders; and
>
> The rate of recidivism is high, and programs designed to treat and rehabilitate these types of offenders have been largely ineffective. Limiting the frequency of contact between registered sex offenders and areas where children are likely to congregate reduces the opportunity and temptation and can minimize the risk of repeated acts against minors; and
>
> It is the intention of the City Council to exercise its authority pursuant to Article IX, § 2(c)(i) and (ii)(10) of the New York State Constitution, § 10(1)(ii)(a)(12) of the Municipal Home Rule Law, § 20(13)(22) and (23)

> of the General City Law, and any other applicable or successor law, presently in existence or hereinafter enacted, to protect and safeguard the lives and well-being of the community, and especially children from registered sexual predators while children are in close proximity to schools, parks and playgrounds; and
>
> After careful consideration, the City Council finds that this article is the most narrowly tailored means of limiting, to the fullest extent possible, the opportunity for registered sex offenders to approach or otherwise come in contact with children in places where children would naturally congregate, and that the protection of our residents is a compelling governmental interest.
>
> By the enactment of this or any other legislation, the City Council understands that it cannot remove the threat posed to or guarantee the safety of minors, or assure the public that registered sex offenders will comply with the mandates of this article. This article is intended to create a civil, non-punitive regulatory scheme in order to protect minors to the extent possible under the circumstances and not as a punitive measure of any kind.

*Id.*, § 285-1(A-E).

Chapter 285 explicitly defines what constitutes a school, a park, a playground, and a day-care center. For example, a day-care facility is defined as "[a]ny establishment, whether public, private or parochial, which provides care for children and is registered with and licensed by the New York State Office of Children and Family Services." *Id.*, § 285-2. A playground is similarly defined as "[p]ublic land designated for recreational or athletic purposes by any school, the City of Geneva, the County of Ontario, the State of New York, the United States of America or other governmental subdivision, and located within the City of Geneva." *Id.* Chapter 285 does not prohibit level two or level three sex offenders from travelling to or visiting these locations within Geneva; by its terms it provides only a limitation on where they may reside. *See generally* Bullard Aff., Exhibit 1, Appendix B.

Chapter 285 exempts from its requirements any sex offender who already resides within one thousand feet of a school or within five hundred feet of a park, a playground, or a day-care center as of April 2, 2008. *Id.* Chapter 285 also exempts from its requirements any sex offender who has a residence and a school, a park, a playground, or a day-care center is constructed near the sexual offender's residence after April 2, 2008. *Id.* These sex offenders will not be asked to or required to leave their residences. For sexual offenders that move to a residence that violates Chapter 285, Chapter 285 provides the sex offenders with ninety days to locate a different residence after they receive notice before any civil fine is imposed. There are no criminal penalties for violating Chapter 285. *Id.*

Danny Terrance is a resident of Geneva and is a level three sex offender, classified by the New York State Division of Criminal Justice Services as having a high risk of committing another sexual offense and a possible threat to the public safety. *See* Bullard Aff., ¶ 9. According to the New York State Division of Criminal Justice Services, Danny Terrance was convicted when he was 29 years old of "Sexual Abuse – 1st Degree" of a 13 year old girl and is classified as a "Sexually Violent Offender." *Id.* Danny Terrance is no longer under any probationary or parole supervision but he is a registered sex offender. *Id.* The New York State Division of Criminal Justice Services currently advises registered sex offenders such as Danny Terrance that "[t]here may be local laws in a particular county, city, town or village that restrict where a sex offender may live. For information on local laws, it is recommended that you contact the town, village, city or county in which you are interested." *See* New York State Division of Criminal Justice Services, Frequently Asked Questions, Answer to #13, available at

http://criminaljustice.state.ny.us/nsor/faq.htm (last visited December 23, 2010). A true and accurate "screenshot" from the New York State Division of Criminal Justice Services' website is attached to the Bullard Aff. as Exhibit "2."

The New York Assembly recently passed Assembly Bill 4988 (enacted as Chapter 568, Laws of New York, 2008) which instructs the Division of Probation and Correctional Alternatives to help place sex offenders who are under parole or probation supervision in suitable housing. A true and accurate copy of Assembly Bill 4988, together with the Executive Chamber Memorandum and other material, is attached to the Bullard Aff. as Exhibit "3." The Executive Chamber filed its Memorandum with the Bill and noted that part of the rationale for the new law is "the proliferation of local ordinances imposing even more restrictive residency limitations on registered sex offenders." *Id.* The Assembly Bill did not overrule local ordinances such as Chapter 285 and was instead directed at helping probationary and paroled sex offenders find suitable housing in light of several factors, including these ordinances. *Id.*

On April 26, 2010, over two years after Geneva passed Chapter 285, Danny Terrance notified Geneva that he had moved his residence. *See* Bullard Aff., Exhibit 1, Appendix C. Geneva's City Manager promptly notified Danny Terrance that he was violating Chapter 285 by moving to and living within five hundred feet of a playground as defined in Chapter 285 and provided him with ninety days to locate a different residence. *Id.* The City Manager notified Danny Terrance that failure to move would result in a civil fine. *Id.*

Instead of moving, Danny Terrance filed the Complaint on or about July 23, 2010 challenging Chapter 285. Danny Terrance broadly alleges that Chapter 285 is "unconstitutional, illegal, and unenforceable." As set forth below, the Complaint should be dismissed in its entirety because Chapter 285 is a proper exercise of a local government's authority to promote the welfare of its citizens.

## APPLICABLE STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Valentin Christian v. Town of Riga*, 649 F.Supp.2d 84, 90 (W.D.N.Y. 2009) (Telesca, J.) (dismissing plaintiff's complaint) (citations omitted). In considering a Rule 12(b)(6) motion to dismiss, the Court "must accept as true all allegations in the complaint and draw all reasonable inferences in favor of the non-moving party." *Id*; *see also Avgerinos v. Palmyra-Macedon Central School District*, 690 F.Supp.2d 115, 125-26 (W.D.N.Y. 2010) (J., Telesca); *Rice v. Wayne County*, No. 09-CV-6391T, 2010 WL 4861556, *2 (W.D.N.Y. Nov. 30, 2010) (J., Telesca). However, the court may disregard a plaintiff's "legal conclusions, deductions or opinions couched as factual allegations." *See id.* The court is not required to credit conclusory statements unsupported by factual allegations. *See id*; *see also Davey v. Jones*, No. 06 CIV 4206, 2007 WL 1378428, at *2 (S.D.N.Y. May 11, 2007) ("[B]ald contentions, unsupported characterizations, and legal conclusions are not well-pleaded allegations, and will not suffice to defeat a motion to dismiss.").

When a plaintiff challenges the constitutionality of a legislative enactment, "[t]he burden is on the party challenging the constitutionality of a statute to demonstrate beyond

a reasonable doubt that the act violates the constitutional provision invoked, and to point out with particularity the details of the alleged invalidity." *Fluent v. Salamanca Indian Lease Auth.*, 847 F.Supp. 1046, 1054 (W.D.N.Y. 1994). "It is well-settled that courts will presume that a law is constitutional . . .Thus, the [challenger] bears a heavy burden to show that the statute at issue is unconstitutional." *Turner v. Liverpool Central School Dist.*, 186 F.Supp2d 187, 191 (N.D.N.Y. 2002).

## ARGUMENT

The Complaint broadly alleges that Chapter 285 is "unconstitutional, illegal, and unenforceable." It asserts that Chapter 285 is unconstitutional and unenforceable because it is preempted by state law, constitutes an *ex post facto* punishment, has no legitimate governmental purpose, results in animus to a class, violates procedural due process, and violates the contracts clause. For the following reasons, the Complaint fails as a matter of law and must be dismissed.

### I. New York State Law Does Not Preempt Chapter 285.

The constitutional home rule provision confers broad police powers upon local governments to promote the welfare of its citizens. *See* NY Const., art. IX, §2(c); *People v. Cook*, 312 N.E.2d 452; 34 N.Y.2d 100, 105-06 (1974); *Consolidated Edison Co., v. Town of Red Hook*, 456 N.E.2d 487, 490; 60 N.Y.2d 99, 105 (1983); *see also* New York State Constitution, Article IX, § 2(c)(i) and (ii)(10); Municipal Home Rule Law, § 10(1)(ii)(a)(12); General City Law, § 20(13)(22) and (23). Thus, Danny Terrance bears a heavy burden to show that New York State has intended to preempt the local regulation

he challenges. *See Mott v. Incorporated Village of Hempstead*, 216 A.D.2d 545, 546-47 (2d Dep't 1995) (holding that "the Supreme Court properly determined that Local Law 2-1990 was constitutional since [the challenger] did not demonstrate that in enacting the Emergency Tenant Protection Act, the Legislature intended to preempt the entire field of building regulation . . . "). Indeed, state preemption of a local law applies only when a state law expressly prohibits a local law in clear terms or if state laws are so pervasive that they have intended to prevent localities from issuing any additional regulations. *See Jancyn Mfg. Corp. v. Cnty. of Suffolk*, 518 N.E. 2d 903; 71 N.Y.2d 91, 98 (1987).

Danny Terrance cannot argue that Chapter 285 is expressly prohibited by any State legislation and must instead establish that New York State has issued laws to cover the entire field of sex offender regulations. Danny Terrance asserts that legislation such as the New York State Sex Offender Registration Act (New York's version of Megan's Law), does this. The New York Court of Appeals, however, holds that the fact that "[S]tate and local laws touch upon the same area is insufficient to support a determination that the State has preempted the entire field of regulation in a given area." *Jancyn Mfg Corp., supra,* at 99; *Village of Nyack v. Daytop Village, Inc.*, 583 N.E.2d 928, 930; 78 N.Y.2d 500, 505 (1991); *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 417 N.E.2d 78; 51 N.Y.2d 679, 683 (1980).

In *Village of Nyack, supra*, the New York Court of Appeals held that State laws dealing with substance abuse facilities did not preempt a local law even though they both touched upon the same area. The *Nyack* Court acknowledged there was a "sweeping" amount of State legislation regulating substance abuse facilities (including inspections to approve/disapprove of facilities, periodic reviews of local comprehensive plans, and

suitability/adequacy of the programs). *Id.* at 930. The *Nyack* Court, however, held that "[n]one of this, though, leads inexorably to the conclusion that the State's commitment to fighting substance abuse preempts all local laws . . . ." *Id.* at 931. The Court went on to say, the legislative enactments did

> not expressly withdraw the zoning authority of local governments . . . [t]hus, our analysis necessarily revolves around whether there is implied preemption . . . . The Legislature's use of the word "comprehensive" in describing the State's policy toward substance abuse does not, in and of itself, resolve that question. The analysis is considerably more complex and *must take into effect the interplay between State and local authority in this area. Both the State and the Village have important interests at stake in this controversy . . . [b]ut these interests are not necessarily contradictory* . . . [t]wo separate levels of regulatory oversight can coexist. This, we believe, is one argument against a finding of preemption . . . .

*Id.* at 931. (emphasis added).

Similar to the facts in *Nyack*, in this case the State legislature has not issued an express prohibition on a local government's authority to pass registered sex offender legislation. While New York State has issued certain laws covering sex offenders, such as the database registration requirement under New York's version of Megan's Law, that does not mean the State has intended to prohibit localities from issuing any additional requirements whatsoever. The only minimal residency restriction that the State places on sex offenders is that the State mandates that level three sex offenders on parole or probation may not live within one thousand feet (1,000) of a school. The State does not address what restrictions may be placed on level two sex offenders or what restrictions may be placed on level three sex offenders following parole and probation. The State's silence on this matter leaves localities such as Geneva with the discretion to do so.

Indeed, New York Assembly recently passed Assembly Bill 4988 (enacted as Chapter 568, Laws of New York, 2008) which instructs the Division of Probation and Correctional Alternatives to help place sex offenders who are under parole or probation supervision in suitable housing. The Executive Chamber filed its Memorandum with the Bill and noted that part of the rationale for the new law is "the proliferation of local ordinances imposing even more restrictive residency limitations on registered sex offenders." *See* Bill Jacket to Chapter 568, Laws of New York, 2008, a true and correct copy of which is attached to the Bullard Aff. as Exhibit 3. The Assembly Bill does not condemn or overrule these local ordinances, as would be expected if the State actually wished to preempt them, and is instead directed at helping probationary and paroled sex offenders find suitable housing in light of several factors, including such ordinances. Assembly Bill 4988 is additional evidence that while the State may have taken control over the housing of probationary or paroled sex offenders, it has not preempted local ordinances limiting residency of registered sex offenders. The Assembly could have overridden such local ordinances but it did not do so. Indeed, challengers to Assembly Bill argued that it failed to address the "myriad" of local laws that provide restrictions on where a sex offender may reside but the State nevertheless left such issues to localities. *See id.*

Completely undermining Danny Terrance's preemption argument, New York State has explicitly stated that localities may place additional restrictions related to where a sex offender may reside. New York State's Division of Criminal Justice Services advises registered sex offenders:

> The Sex Offender Registration Act does not restrict where a registered sex offender may live.
>
> However, if the offender is under parole or probation supervision, other New York State laws may limit the offender from living within 1,000 feet of a school or other facility caring for children.
>
> *Additionally, there may be local laws in a particular county, city, town or village that restrict where a sex offender may live. For information on local laws, it is recommended that you contact the town, village, city or county in which you are interested.*

New York State Division of Criminal Justice Services, Frequently Asked Questions, Answer to #13, available at http://criminaljustice.state.ny.us/nsor/faq.htm (last visited December 23, 2010) (emphasis added).

This proclamation is clear evidence that the State recognizes the ability of local municipalities to place residency restrictions on registered sex offenders.

New York's Real Property Law Section 235-f further demonstrates that New York State acknowledges that local ordinances may properly restrict where sex offenders may reside and that it has not preempted such ordinances. While Section 235-f prohibits a landlord from removing a sex offender from his property based solely on that designation, the law allows a landlord to remove the occupant if such occupancy conflicts with "local laws, regulations, ordinances or codes".

In *Knudsen v. Lax*, 17 Misc.3d 350 (N.Y. Sup. Ct. Jefferson Co. 2007), the court held that Real Property Law Section 235-f "could be construed to apply if the leasehold was located in an area which excluded sex offenders." If local ordinances were preempted by State law, there would be no areas that excluded sex offenders based on "local laws, regulations, ordinances or codes". Thus, Real Property Law Section 235-f

and the Court's decision in *Knudsen* confirms that the State has not preempted local municipalities from enforcing residency restrictions.[1]

Chapter 285 and the New York State sex offender laws may co-exist without the implication of state pre-emption because they share the same common interest of protecting and safeguarding the lives and well-being of the community, and especially children, from registered sex offenders who are in close proximity to schools, parks and playgrounds. Geneva has a legitimate interest and a duty to protect the health and safety of the children who live there by minimizing recidivism events.

Indeed, the extraordinary high recidivism rate of sex offenders has been noted and accepted by the United States Supreme Court and lower courts. The Supreme Court noted that "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune v. Lile*, 536 U.S. 24, 33 (2002); *see also U.S. v. Hayes*, 445 F.3d 536, 537 (2d Cir. 2006) (quoting a House of Representative finding that "studies have shown that sex offenders are four times more likely than other criminals to recommit their crimes").

[1] Three judges in unreported decisions have ruled contrary to their sister court's decision in *Knudsen* and have accepted a sex offender's preemption argument. *See Doe v. County of Rensselaer*, 24 Misc.3d 1215(A) (N.Y. Sup. Ct. Rensselaer Co. 2009); *People v. Blair*, 23 Misc.3d 902 (N.Y. Sup. Ct. Albany Co. 2009); *People v. Oberlander*, 22 Misc.3d 1124(A) (N.Y. Sup. Ct. Rockland Co. 2009). These decisions have not been tested on appeal and, therefore, the Appellate Divisions and the New York Court of Appeals have not addressed this issue. Thus, this Court is not bound by these conflicting lower court decisions. *See Levin v. Tiber Holding Corp.*, 277 F.3d 243, 253 (2d Cir. 2002) ("[This Court] must reject inconsistent rulings from [New York's] lower courts."); *Calvin Klein, Ltd. v. Trylon Trucking Corp.*, 892 F.2d 191, 195 (S.D.N.Y. 1989) ("Absent a rule of decision formulated by the New York Court of Appeals, we are not bound by the opinions issued by the state's lower courts."), *citing Stafford v. International Harvester Co.*, 668 F.2d 142, 148 (2d Cir. 1981). While unreported cases may be instructive, but not precedential, if their reasoning is sound, this Court should reject the conflicting opinions because they fail to address (i) New York State's proclamation through the Division of Criminal Justice Services that local laws may place restrictions on where a sex offender may live, (ii) Assembly Bill 4988 which acknowledges, if not endorses, local residency restrictions, and (iii) Real Property Law Section 235-f, which acknowledges that local laws may impose residency restrictions. Further, two of the conflicting decisions involve probation violation questions, which, unlike here, involve criminal, rather than civil, issues.

The extent of the concern of sex offender recidivism was discussed by the Center for Sexual Offender Management ("CSOM"), which is a collaborative effort of the Office of Justice Programs (U.S. Dept. of Justice), the National Institute of Corrections, and the State Justice Institute. CSOM is administered by the Center for Effective Public Policy and the American Probation and Parole Association. CSOM conducted intense studies on sex offenders over long periods of time. Through CSOM's evaluation of particular studies, collection of research data, and collaboration with other sources, CSOM determined that recidivism rates among sex offenders was extraordinarily high, despite the underreporting of sex offenses. Among CSOM's conclusions:

> Studies of the recidivism of child molesters reveal specific patterns of reoffending across victim types and offender characteristics. A study involving mentally disordered sex offenders compared same-sex and opposite-sex child molesters and incest offenders. Results of this five-year follow-up study found that same-sex child molesters had the highest rate of previous sex offenses (53 percent), as well as the highest reconviction rate for sex crimes (30 percent). In comparison, 43 percent of opposite-sex child molesters had prior sex offenses and a reconviction rate for sex crimes of 25 percent, and incest offenders had prior convictions at a rate of 11 percent and a reconviction rate of 6 percent (Sturgeon and Taylor, 1980). Interestingly, the recidivism rate for same-sex child molesters for other crimes against persons was also quite high, with 26 percent having reconvictions for these offenses. Similarly, a number of other studies have found that child molesters have relatively high rates of nonsexual offenses (Quinsey, 1984).
>
> Several studies have involved follow-up of extra-familial child molesters. One such study (Barbaree and Marshall, 1988) included both official and unofficial measures of recidivism (reconviction, new charge, or unofficial record). Using both types of measures, researchers found that 43 percent of these offenders (convicted of sex offenses involving victims under the age of 16 years) sexually reoffended within a four-year follow-up period . . . .
>
> In a more recent study (Rice, Quinsey, and Harris, 1991), extra-familial child molesters were followed for an average of six years. During that time, 31 percent had a reconviction for a second sexual offense. Those who committed subsequent sex offenses were more likely to have been

> married, have a personality disorder, and have a more serious sex offense history than those who did not recidivate sexually. In addition, recidivists were more likely to have deviant phallometrically measured sexual preferences (Quinsey, Lalumiere, Rice, and Harris, 1995).

Tim Bynum, Madeline Carter, Scott Matson & Charles Onley, *Recidivism of Sex Offenders*, http://www.csom.org/pubs/recidsexof.html (last visited December 23, 2010).

Considering the information described by the United States Supreme Court, the United State Court of Appeals for the Second Circuit, and in the CSOM publication, it makes sense that state and local governments would need to become partners in tackling the sex offender issues. Local governments have a different exposure to their respective communities, and are better positioned to make certain decisions regarding the unique needs of their citizens. Similar to the analysis in *Nyack*, this Court should uphold Chapter 285 because State and local interests are not contradictory, and the two separate levels of regulatory oversight can coexist.

Indeed, local municipalities possess a civil commitment procedure to protect its citizens and local populations demand such protection. The United States Supreme Court agrees that there is not a constitutional deprivation if a sex offender continues to be a continuous threat to society. *See Kansas v. Hendricks*, 521 U.S. 346 (1997). In *Hendricks*, the Supreme Court upheld as constitutional a civil commitment law enacted by the Kansas legislature which allowed the state to hold violent sex offenders in custody after incarceration if they posed a future danger to public health and safety. *Id.* In *Hendricks*, the Supreme Court recognized the historical case law perspective that:

> an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context: [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the

> common good. On any other basis organized society could not exist with safety to its members.

*Id.* at 356-57.

Similarly, Geneva has a civil commitment to provide safety to its residents and has the power to do so. Chapter 285 seeks to protect both the sex offender and the society from danger. It provides only a minimal restriction on where a sex offender may reside in Geneva, a local restriction which New York State has explicitly or at least implicitly endorsed. As such, Danny Terrance cannot meet his burden of proving that that Chapter 285 is preempted by State law and the Complaint fails as a matter of law.

## II. Chapter 285 Does Not Violate The *Ex Post Facto* Clause.

The *Ex Post Facto* Clause of Article I, Section 10 of the United States Constitution prohibits the States from enacting laws that increase punishment for criminal acts after they have been committed. *See generally Calder v. Bull*, 3 U.S. 386, 390 (1798). To determine whether a statute violates the *Ex Post Facto* clause, the Court must apply the framework outlined in *Smith v. Doe*, 538 U.S. 84, 92 (2003), where the Supreme Court considered and dismissed an *Ex Post Facto* challenge to an Alaska statute requiring sex offenders to register in a database even though registration was not required when the crimes were committed. As explained by the Supreme Court, the Court must first "ascertain whether the legislature meant the statute to establish *civil* proceedings." *Id.* (internal quotation omitted) (emphasis added). If criminal punishment was the intent, the law is considered punitive. *Id.* If, however, the law was intended to be civil and non-punitive, then the Court must determine whether the law is nonetheless "so punitive either in purpose or effect as to negate" the State's non-punitive intent. *Id.* (internal quotations and citations omitted). *"[O]nly the clearest proof will suffice to override*

*legislative intent and transform what has been denominated a civil remedy into a criminal penalty."* *Id.* (emphasis added) (citations omitted).

Danny Terrance's argument that a post-sentencing residency restriction constitutes an *Ex Post Facto* criminal punishment has already been rejected by the United States Court of Appeals for the Eighth Circuit. *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005). In *Miller*, a class of sex offenders filed suit, contending that Iowa Code § 692A.2A, which prohibited a person convicted of certain sex offenses involving minors from residing within two thousand feet of a school or a registered child care facility, was unconstitutional. The Eighth Circuit disagreed and held that the Constitution did not prevent Iowa from regulating the residency of sex offenders in the manner provided in § 692A.2A in order to protect the health and safety of the citizens of Iowa, and that the residency restriction was not unconstitutional on its face. The court further held that § 692A.2A did not amount to unconstitutional *ex post facto* punishment of persons who committed offenses prior to July 1, 2002 because the sex offenders did not establish by the "clearest proof" as required by United States Supreme Court precedent, that the punitive effect of § 692A.2A overrode the General Assembly's legitimate intent to enact a non-punitive, civil regulatory measure that protected health and safety.

Here, Geneva's intent is for Chapter 285 of the Geneva Municipal Code to be civil and non-punitive. Chapter 285 expresses such intent and states in relevant part that "this article is intended to create a civil, non-punitive regulatory scheme in order to protect minors to the extent possible under the circumstances and not as a punitive measure of any kind."

Next, the Court must determine whether Chapter 285 is nonetheless "so punitive either in purpose or effect as to negate" the non-punitive intent. The Supreme Court in *Smith* offered "guideposts" of whether the regulatory scheme: (i) has been regarded in our history and traditions as a criminal punishment, (ii) imposes an affirmative disability or restraint, (iii) promotes tradition aims of criminal punishment, (iv) has a rational connection to a non-punitive purpose, and (v) is excessive with respect to that purpose. *Smith v. Doe, supra*, at 97. Under this test, Chapter 285 does not constitute criminal punishment.

*1) Considering Sex Offender Laws Are Fairly Recent In Origin, Chapter 285 Can Not Be Regarded As A Mechanism Which Promotes Traditional Aims Of Punishment.*

While analyzing this factor with respect to a sex offender statute, the *Smith v. Doe* Court acknowledged that "[a] historical survey can be useful because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." *Id.* Similar to the way the *Smith v. Doe* court viewed sex offender registration laws, Chapter 285 is "fairly recent in origin, which suggests that the statute was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing." *Id.* Chapter 285 is not analogous to traditional forms of punishment such as banishment because, unlike banishment, Chapter 285 restricts only where offenders may reside. Chapter 285 does not "expel" the offenders from their communities or prohibit them from accessing areas near schools or child care facilities for employment, to conduct commercial transactions, or for any purpose other than establishing a residence.

Although Chapter 285 may have a deterrent effect, a deterrent effect, without much more, does not mean that the restriction is "punishment." The primary purpose of

the law is not to alter a potential offender's path by highlighting the negative consequences that correlate to committing a sex offense, but rather reducing the opportunity and temptation and minimizing the risk of repeated acts against minors by limiting the frequency of contact between registered sex offenders and areas where children are likely to congregate. Moreover, while any minimal restraint or requirement imposed on those who commit crimes is at least potentially retributive in effect, Chapter 285, like the registration requirement in *Smith v. Doe,* is consistent with the objective of protecting the health and safety of children.

*2) An Affirmative Disability/Restraint Does Not Lead To The Conclusion That The Government Has Imposed Punishment.*

The Supreme Court in *Smith v. Doe* reasoned, "[i]f the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* at 100. The *Smith v. Doe* Court upheld the Alaskan Sex Offender Registration Act as nonpunitive in part because "[t]he Act [did] not restrain activities sex offenders may pursue but [left] them free to change jobs or residences." Likewise, Chapter 285 does not prohibit offenders from accessing areas near schools or child care facilities for employment purposes or to conduct commercial transactions, and offenders are able to reside in any area that conforms to Chapter 285.

*3) Chapter 285 Rationally Relates To The Purpose of Protecting Children From Sex Offenders and the Supreme Court Has Stated that this Factor is the Most Important to the Ex Post Facto Analysis.*

The *Smith v. Doe* Court held that "a statute is not deemed punitive simply because it lacks a close or perfect fit with the non-punitive aims it seeks to advance." *Id.* at 103. Geneva has clearly stated that Chapter 285 serves the non-punitive purpose of "protect[ing] and safeguard[ing] the lives and well-being of the community, and

especially children from registered sexual predators while children are in close proximity to schools, parks and playgrounds . . . ." In light of the high risk of recidivism posed by sex offenders, *see discussion supra*, Geneva reasonably concluded that Chapter 285 would protect its citizens by minimizing the risk of repeated sex offenses against minors.

Danny Terrance asserts that the statute is excessive in relation to its purpose because Chapter 285 applies regardless of whether a particular offender is a danger to the public. The lack of an individualized risk assessment does not automatically convert the statute into a punitive law, because "[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith v. Doe*, *supra*, at 103. Indeed, the Supreme Court over the years has held that restrictions on several classes of offenders are non-punitive, despite the absence of particularized determinations, including laws prohibiting the practice of medicine by convicted felons, laws prohibiting convicted felons from serving as officers or agents of a union, *and laws requiring the registration of sex offenders*. *See Doe v. Miller*, 405 F.3d 700, 721-22 (8th Cir. 2005) (citing relevant Supreme Court cases) (emphasis added).

As the Supreme Court stated in *Smith v. Doe*, the *Ex Post Facto* inquiry "is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the non-punitive objective." *Smith v. Doe*, *supra*, at 105. Chapter 285 is not excessive within the meaning of the Supreme Court's decisions because there is a high recidivism rate among sex offenders as a general matter and Chapter 285 is rationally related to deal with this fact and to protect its young citizens.

Thus, the Court should follow the Supreme Court's ruling in *Smith v. Doe*, *supra*, and the Eighth Circuit's instructive ruling in *Doe v. Miller*, *supra*, and hold that Chapter 285 does not amount to *Ex Post Facto* punishment.

### III. Chapter 285 Rationally Advances A Legitimate Government Purpose, And Was Not Enacted With The Desire To Harm A Politically Unpopular Group.

Danny Terrance asserts that Chapter 285 is designed only to harm a politically unpopular group. This argument fails as a matter of law. In cases involving allegations of class discrimination, courts apply a two-part test:

> In analyzing the validity of the equal protection argument, it is important to note that the Supreme Court has set forth two distinct tests, [which] applicability depends upon the nature of the right infringed upon as well as the existence of a discriminatory classification. Thus, in the case of invidious discrimination, *i.e.*, where there is either a patently suspect classification or where the exercise of a fundamental constitutional right is at issue, strict judicial scrutiny is required. However, where either of these two issues is not involved then the test is whether (the legislative scheme) rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

*Toia v. Regan*, 54 A.D.2d 46, 54 (4th Dept. 1976), *aff'd* 356 N.E.2d 276, 40 N.Y.2d 837 (1976) (internal citations omitted).

In the instant case, the class allegedly discriminated against consists of sex offender residents of the City of Geneva. Considering a sex offender classification is not inherently suspect, heightened scrutiny is inapplicable. *See Shapiro v. Thompson,* 394 U.S. 618, 634 (1969). Further, Danny Terrance does not, because he cannot, allege that a constitutionally protected individual right was violated. The test, therefore, to be applied is whether Chapter 285 rationally furthers a legitimate, articulated state purpose. *Id.*

With respect to this test, it is clear that protecting and safeguarding the lives and well-being of the community, and especially children, from registered sex offenders is a legitimate state purpose. Thus, the sole question presented here is whether the residency limitations stated in Chapter 285 rationally advance that purpose or are designed just to harm an unpopular group.

The Supreme Court stated in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985), where individuals in a group, such as convicted sex offenders have

> distinguishing characteristics relevant to interests the [legislature] has authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.

Chapter 285 is a manifestation of legislative common sense thinking that limiting the frequency of contact between sex offenders and areas where children are located is likely to reduce the risk of an offense. Based on the facts presented in this case, the Court cannot conclude that Geneva acted based merely on negative attitudes toward, fear of, or a bare desire to harm a politically unpopular group. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). Instead, the Court must find that Chapter 285 is rationally related to advancing the safety of Geneva's young citizens.

## IV. Chapter 285 Does Not Violate The Due Process Clause.

Danny Terrance asserts that Chapter 285 unconstitutionally forecloses an opportunity to be heard because the statute provides no process for individual determinations of dangerousness. This argument misapprehends the right to procedural due process. As the Supreme Court recently explained in connection with a comparable

and unsuccessful challenge to Connecticut's sex offender registration law, "[p]laintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme." *Conn. Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003). Applicable to this case, the Supreme Court stated,

> [E]ven assuming, *arguendo,* that [the sex offender] has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the [state] statute . . . [T]he fact that [the sex offender] seeks to prove-that he is not currently dangerous-is of no consequence . . . [because] the law's requirements turn on an offender's conviction alone-a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest. No other fact is relevant . . . [thus,] States are not barred by principles of '*procedural* due process' from drawing classifications [among sex offenders and other individuals].

Here, the City of Geneva's residency limitations apply to all offenders previously convicted of certain sexual crimes against minors, despite predictions of future dangerousness an individualized hearing may afford. Once the legislature has drawn a bright line classification additional procedures are unnecessary, because there is not an individual sex offender given an opportunity for an exemption under the statute. Thus, the absence of an individualized hearing in connection with a statute that offers no exemptions does not offend principles of procedural due process.

## V. Chapter 285 Does Not Violate The Contracts Clause.

Article 1, Section 10, Clause 1 of the United States Constitution prohibits enactments of law which impair the obligations of contracts. An alleged violation of the contracts clause was the issue addressed by the Supreme Court in *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 410 (1983). In that case, the Supreme Court held, "[a]lthough the language of the Contract Clause is facially absolute,

its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Id. citing Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 434 (1934). The Supreme Court went on to say,

> [t]he threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship . . . [i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, *such as the remedying of a broad and general social or economic problem.*

(emphasis added) (internal citations omitted) *quoting Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 247, 249 (1978).

Here, Chapter 285 seeks to remedy the broad and general social problem of protecting "the lives and well-being of the community, and especially children from registered sexual predators while children are in close proximity to schools, parks, and playgrounds." Most importantly, the Supreme Court reasoned,

> [o]nce a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption. Unless the State itself is a contracting party, *[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.*

*Energy Reserves Group, supra,* at 412-13; *quoting U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 22-23 (emphasis added). As previously discussed, Chapter 285 advances the legitimate government purpose of protecting children from registered sex offenders. Thus, when analyzing a contracts clause argument, this Court should defer to legislative judgment with respect to Chapter 285 and dismiss the Complaint.

## CONCLUSION

The Court should issue a ruling in favor of Geneva dismissing the Complaint because Geneva has a valid interest in Chapter 285. The local law is not preempted by State law, it constitutes a valid exercise of Geneva's authority, and it does not violate the *ex post facto* clause because it is civil and non-punitive. The law is rationally related to the legitimate government purpose of protecting the health and safety of children. It was not enacted with the desire to harm a politically unpopular group, it does not violate due process, and it does not violate the contracts clause. For these reasons, the Court should hold that Chapter 285 is valid and dismiss the Complaint.

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