IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

WENDY WHITAKER, et al.	:	
	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	
SONNY PERDUE, et al.,	:	4:06-CV-140-CC
	:	
Defendants.	:	
	:	

DEFENDANTS PERDUE, BAKER AND DEAN'S
BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Come now Defendants Sonny Perdue, Governor of Georgia; Thurbert E. Baker, Attorney General of Georgia; and Scot Dean, Probation Officer with the Georgia Department of Corrections; by counsel, the Attorney General of the State of Georgia, and pursuant to LR 56.1, file this Brief in Support of Motion for Summary Judgment. (*See* doc-259, Order permitting excess pages).

I. Statement of the Case

Plaintiffs filed this action on June 20, 2006, complaining that the enactment of changes in O.C.G.A. § 42-1-15 and O.C.G.A. § 42-1-12 contained in House Bill

1059, Georgia's sex offender statute, would cause "catastrophic" results for sex offenders in Georgia. (doc 1, 2). The Complaint alleged that the residence requirements in Georgia's sex offender law were too restrictive, that "Plaintiffs cannot find anywhere to live" and that "hundreds, if not thousands, of people on the registry will lose their jobs." (doc 1, 2,4). The complaint alleged that "[t]he Act banishes Plaintiffs from their homes and communities." (doc 1, 34).

This case has had a long history, with the addition of some claims and the elimination of others, with changes in the law, with altered definitions of classes, and with a variety of motions with varied results. The remaining issues before the Court are as follows:

A. Whether enactment of O.C.G.A. § 42-1-15 violates the Constitutional provision against *Ex Post Facto* laws.

B. Whether portions of O.C.G.A. § 42-1-15 are vague and overbroad.

C. Whether provisions of O.C.G.A. § 42-1-15 violate First Amendment religious rights.

D. Whether the "school bus stop" provision of O.C.G.A. § 42-1-15 violates substantive due process.

The Court has defined the following classes for assertion of these rights:

1. A class of sex offenders who are employed or volunteer at a church or

are impeded from such activities. The issues as to this class are issues B and C above.

2. A class of sex offenders who are not otherwise exempted and live in a county that has designated school bus stops for purposes of O.C.G.A. § 42-1-15. The issues as to this class are issues A and D above.

3. A class of sex offenders who are not otherwise exempted and who were convicted prior to July 1, 2006. The issue as to this class is issue A.

4. A class of all sex offenders as to issue B. (doc 223, 17-18).

There appears to be a remaining individual claim for Plaintiffs Lori Collins and Janet Allison on the issue of whether there is an unconstitutional "taking" of their leasehold property as O.C.G.A. § 42-1-15 is applied to those two individual Plaintiffs. The Court did not certify a subclass of renters nor did the Court certify a subclass of disabled persons. (doc 223, 7, 16, 35-39).

Defendants now submit the instant brief in support of their motion for summary judgment. There are no disputes on material issues and as such, Defendants are entitled to summary judgment.

II. Statement of Facts

Plaintiffs allege that a portion of the Residency Statute is unconstitutional. The statute in question, as amended through 2009, reads, in relevant part, as follows:

> O.C.G.A. § 42-1-15.
>
> (b) No individual[1] shall reside within 1,000 feet of any child care facility, church, school, or area where minors congregate.[2] Such distance shall be determined by measuring from the outer boundary of the property on which the individual resides to the outer boundary of the property of the child care facility, church, school, or area where minors congregate at their closest points.
>
> (c)(1) No individual shall be employed by or volunteer at any child care facility, school, or church or by or at any business or entity that is located within 1,000 feet of a child care facility, a school, or a church. Such distance shall be determined by measuring from the outer boundary of the property of the location at which such individual is employed or volunteers to the outer boundary of the child care facility, school, or church at their closest points.
> (2) No individual who is a sexually dangerous predator shall be employed by or volunteer at any business or entity that is located within 1,000 feet of an area where minors congregate. Such distance shall be determined by measuring from the outer boundary of the property of the location at which the sexually dangerous predator is employed or volunteers to the outer

[1] "Individual" means a person who is required to register pursuant to Code Section 42-1-12. O.C.G.A. § 42-1-15(a)(1).

[2] " 'Area where minors congregate' shall include all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, public libraries, and public and community swimming pools." O.C.G.A. § 42-1-12(a)(3). A school bus stop is defined as that which is designated by local school boards of education or by a private school. O.C.G.A. § 42-1-12(a)(19).

> boundary of the area where minors congregate at their closest points.
>
> (e) Notwithstanding any ordinance or resolution adopted pursuant to Code Section 16-6-24 or subsection (d) of Code Section 16-11-36, it shall be unlawful for any individual required to register pursuant to Code Section 42-1-12 to loiter, as prohibited by Code Section 16-11-36, at any child care facility, school, or area where minors congregate.
>
> (h)(2) Any individual who knowingly violates . . . provisions of this Code Section . . . shall be guilty of a felony and shall be punished by imprisonment for not less than ten nor more than 30 years.

Plaintiffs with leases for their residences

The two named Plaintiffs who have raised a "takings" claim, Lori Collins and Janet Allison, both have valid leases for twelve months or more for their places of residence. (doc-207-2, 207-3; Collins and Allison declarations of September 14, 2009). The property interests of both Plaintiffs, and any plaintiffs in similar situations, are already protected under Georgia law pursuant to the decision in *Mann v. Georgia Department of Corrections*, 282 Ga. 754 (2007). Under that decision, property interests are protected from regulatory taking. Under Georgia law, neither Collins nor Jenkins can be required to move if a "child care center, church, school or area where minors congregate" subsequently opens or moves within 1,000 feet of their leased premises. Neither has alleged that anyone has

asked either person to move or threatened either with arrest . (doc-218, 12; doc-196, ¶ ¶ 35, 67; doc-207-3, 3; Collins and Allison declarations).

Pursuant to the *Mann* decision, the Department of Corrections permits sex offender probationers to remain in their residences if they have a valid lease and a prohibited use locates near them. (doc-206, ¶ 35; doc-262-7, Holt deposition, pp. 44-46). Such sex offenders are allowed to remain during the terms of their leases. (doc-206, ¶ 35; doc-262-7, pp. 44-46).

The Defendant sheriffs have also stipulated that "an individual holding a valid leasehold property interest in a residence and who resides therein shall not be required to move from such residence . . . for the duration of his or her lease" if the lease is sufficient to constitute a protected property interest and a child care facility, church, school or area where minors congregates subsequently moves within 1,000 feet of the rented residence. (doc-254). Plaintiffs have admitted that "property interests are protected from regulatory taking under Georgia law" and that a "valid lease does constitute a property interest under Georgia law." (Response by Plaintiffs to Defendants' Requests for Admissions, 1 and 2).

The Columbia County Sheriff's Office treats sex offenders the same way. "If they're living there prior to the prohibited area coming into play, then they are

allowed to continue to live there." This is true whether they rent or own. "They won't have to move." (doc-262-22, Rush deposition, pp. 41-42).

Compliance with the residence and employment restrictions

As of 2009, there are approximately 5,800 sex offenders on probation under the supervision of the Georgia Department of Corrections. (doc-206-3,3). Over the period from August of 2007 through August of 2009 that number has fluctuated between 5,800 and approximately 6,200, according to Ahmed Holt, Manager of the Sex Offender Administration Unit for the Georgia Department of Corrections. (Holt affidavit, ¶¶ 3,4). During this two year period, from 2007 to 2009, 401 registered sex offenders on probation moved because they were out of compliance with the sex offender law. (Holt affidavit, ¶ 5). Out of the 401, 309 (77%) found another residence either in their own county or in the same judicial circuit. (Holt affidavit, ¶ 6). Of the other 92 that moved beyond their county or circuit, 68 were able to find places to live in neighboring counties or circuits and none had to move more than 50 miles form their original residence. (Holt affidavit, ¶ 7). Of the remaining 24 who moved, 22 found other places to live within the state and 2 relocated out of state. (Holt affidavit, ¶ 8). 201 other sex offenders were at some time out of compliance with the residence restrictions during the same period and

as of September, 2009, 68 of those are still not in compliance and will be required to move. (Holt affidavit, ¶¶ 9,10). The other 133 sex offenders who have been out of compliance have since been re-incarcerated, died, deported or their probation has expired or terminated. (Holt affidavit, ¶ 11).

Since 2004 only fifteen (15) sex offenders have been sentenced to the Georgia Department of Corrections for residing within 1,000 feet of any prohibited location. (Castaing affidavit, ¶ 7). During the same period, only two (2) people have been sentenced to the Georgia Department of Corrections for being employed within 1,000 feet of a prohibited area and only four (4) people have been sentenced for loitering. (Castaing affidavit, ¶¶ 6, 8).

Evidence produced by Sheriffs shows that only a small percentage of registered sex offenders have been required to move or change employment during the years since 2006. Of the 144 sheriffs responding to Plaintiffs' First Interrogatories (for the period from 2006 to 2007) slightly more than 1% of the more than 10,000 sex offenders in the reporting counties had to change their employment for any reason as a result of proximity to a church, child care center, school or place where minors congregate.(Dolby affidavit, ¶¶ 22-30). The majority who had to change employment did so because of proximity to a church, totaling 98 out of the 137 total who had to change employment during that period. (Dolby

affidavit, ¶ 22). For the subsequent period, from 2007 through 2009, a smaller percentage of registered sex offenders were required to change employment. Based on the 126 sheriffs' responses to Plaintiffs' Second Interrogatories, only 57 persons out of 9,976 in those reporting counties, were required to change employment for any reason during the period from 2007 to 2009.(Dolby affidavit ¶ 37). This is a percentage of slightly less than six-tenths of one percent (.6%) who had to change employment over the two year period. (Dolby affidavit, ¶ 37).

Similar results were reported by sheriffs in regard to registered sex offenders who were required to move. Of the 144 sheriffs responding to Plaintiffs' First Interrogatories (for the period from 2006 to 2007), 12.4 %, or a total of 1,272 sex offenders, out of 10,267 were required to move because of proximity to all prohibited areas (school bus stop, school, public or private park, skating rink, recreation facility, public swimming pool, child care facility, neighborhood center, church, playground, or gymnasium). (Dolby affidavit, ¶ 16). 550 of those moved because of proximity to a church. (Dolby affidavit, ¶ 17). For the subsequent period, from 2007 through 2009, a much smaller percentage of registered sex offenders were required to move. Based on the 126 sheriffs' responses to Plaintiffs' Second Interrogatories, only 396 persons, or 4% of the 9,976 sex

offenders in the reporting counties were required to move *for any reason* during the two-year period from 2007 to 2009.(Dolby affidavit, ¶ 35).

These figures do not take into consideration that many of these people would not have to move or change employment since the decision in *Mann v. Georgia Department of Corrections*, 282 Ga. 754 (2007) and the subsequent change in O.C.G.A. § 42-1-15. The *Mann* decision and the statutory change protected sex offenders from any regulatory taking of their property.

Statistics on the total number of arrests statewide for violation of the residence, employment and loitering restrictions are available for the period from May 1, 2007 through the end of May, 2009. (Marsha O'Neal affidavit, ¶¶ 4-8). For the period available in 2007 (May 1, 2007 through the end of December, 2007) there were a total of 58 arrests for violation of any of the residence, employment or loitering provisions. (Marsha O'Neal affidavit, ¶ 5). For the entire year 2008 there were a total of 90 arrests statewide for violation of any of the residence, employment or loitering provisions. (Marsha O'Neal affidavit, ¶ 6). For the first five months of 2009 there were a total of 52 arrests statewide for violation of any of the residence, employment or loitering provision. (Marsha O'Neal affidavit, ¶ 7).

Despite Plaintiffs' claims that the residence statute would lead to high rates of absconders and would drive sex offenders "underground," the percentage of absconders has remained relatively constant over the years from 2005 through 2009. (Laura Tate affidavit, ¶ 6). Since 2004, the rate has actually fallen from 4% of registered sex offenders to 3% in subsequent years and so far in 2009 the rate is only 2.5%. (Laura Tate affidavit, ¶ 7). There are registered sex offenders living in every county in the State of Georgia. (Laura Tate affidavit, ¶ 10, Exhibit B).

Volunteering at Church

Specifically, Plaintiffs challenge the requirement that no registered sex offender "shall be employed by or volunteer at any child care facility, school, or church or by or at any business or entity that is located within 1,000 feet of a child care facility, a school, or a church."

Evidence produced by the 126 sheriffs who responded to Plaintiffs' Second Interrogatories indicates only one-fifth of 1% of registered sex offenders has been restricted in any way from volunteering or being employed at a church. (Dolby affidavit, ¶ 47). In addition, of the 9,976 registered sex offenders in the 126 counties reporting, only two (2) individuals have been arrested for volunteering or being employed at a church. (Dolby affidavit, ¶¶ 47-48).

The Columbia County Sheriff's Office encountered no confusion among sex offenders in regard to volunteering and did not have any instances in which sex offenders were mistakenly told not to volunteer at churches. (doc-262-22, Rush deposition, pp. 39, 40). David Rush, the officer in charge of sex offenders in Columbia County said that volunteering meant "not getting paid for what you're doing." (doc-262-22, Rush deposition, p. 38). Rush said, "that provision of the law I don't remember being an issue with us." (doc-262-22, Rush deposition, p. 40).

According to Tracy Masters, Director of Legal Services for the Board of Pardons and Paroles, the Parole Board has special conditions for sex offenders. (Doc. 206-2, ¶ 9). The Board and its staff have identified a pattern of criminality whereby offenders at an increased risk of committing a sex offense seek to place themselves in positions of trust and respected status in order to gain access to potential victims. (Doc. 206-2, ¶ 11). The Board has reviewed numerous cases for executive clemency in which offenders have sought involvement in extra-curricular activities of religious organizations in an effort to develop trusting relationships among members of the church, or their children, in order to gain access to potential sexual victims. (Doc. 206-2, ¶ 12). Such pattern includes volunteering for positions in religious organizations that communicates to other

members that the offender is a trusted member of the religious organization. (Doc. 206-2, ¶ 13). As a result, the Board restricts volunteering at church or religious groups, children/youth ministries, choirs and activities. (Doc. 206-2, ¶ 14).

Sex offenders on parole are not prohibited from participating "in worship services, including activities such as approaching the altar to pray during service, approaching the altar to accept communion, remaining after service to speak with the pastor, putting money in the offering plate, acting as a pall bearer for funerals, ushering during church service, taking up a collection during a church service or other similar activities." (Doc. 206-2, ¶ 22).

As Manager of the Sex Offender Administration Unit for the Georgia Department of Corrections Ahmed Holt is familiar with the "volunteer" provision in O.C.G.A. § 42-1-15(c)(1) and that the Sex Offender Administration Unit does not prohibit activities at church that constitute worship, service, or any other part of the religious life of a church. (Holt affidavit, ¶ 3; doc. 206-3, ¶¶ 9, 10). Sex offenders on probation are permitted to participate in worship services, assist in worship services (including singing in the choir or playing a musical instrument at a service), teach adult Sunday school, cut the grass at the church, rake leaves or help clean church buildings. (Doc. 206-3, ¶ 11). A sex offender may also act as a pall bearer at funerals, usher during church services, take up a collection, approach

the altar to accept communion, speak to the pastor after service and any other similar activities. (Doc. 206-3, ¶ 27). Sex offenders are not permitted to engage in activities that bring them in direct contact with children. (Doc. 206-3, ¶ 12). The Department of Corrections has transmitted this guidance to probation officers in the field and probation officers are not to prohibit any activity at a church without first obtaining approval from the Sex Offender Administration Unit. (Doc. 206-3, ¶¶ 14, 15). To the best of Holt's knowledge, no sex offender has had probation revoked for violating the "volunteer" provision. (Doc. 206-3, ¶ 18).

Above and beyond the "volunteer" provision of the law, many sex offenders have special conditions placed on them by the sentencing court; they are also given instruction on these conditions by their probation officers. (Doc. 206-3, ¶¶ 19-24).

From his experiences at the Department of Corrections, Ahmed Holt is aware that churches and other religious institutions have facilities and activities that are directed toward minors and used by minors. (Doc 206-3, ¶ 37). Persons employed by a church could easily and frequently come into contact with minors while in the workplace. (Doc 206-3, ¶ 37). Such persons, appearing as part of the church, would be in a position to gain a child's trust and victimize a child. (Doc 206-3, ¶ 37).

School bus stops

For the 2006-2007 school year, only Chatham, Bulloch and Columbia counties designated school bus stops. Other than these three counties located in the Southern District of Georgia, no county or municipal school system in Georgia has designated school bus stops during the years since the 2006-2007 school year.[3]

Even when Columbia County initially designated school bus stops, only 12 of 42 sex offenders in Columbia County would have been required to move. (doc-262-22, Rush deposition, pp. 56, 57 and Exhibit 1).

Most sex offenders in Columbia County who have been required to move have found other places to live within Columbia County.(doc-262-22, Rush deposition, pp. 59,60). Even if sex offenders could not find other places to live in Columbia County, the surrounding counties, none of which have designated school bus stops, are available as places to live.(doc-262-22, Rush deposition, pp. 60-62). Lead Plaintiff Wendy Whitaker, for example, lives in Harlem, Georgia in Columbia County. Even assuming she could not find another place to live in Columbia County, it is only five miles from Harlem to McIntosh County and to Richmond County and less than ten miles to Jefferson County (doc-262-22, Rush

[3] Woodward Academy, a private school in Fulton County, reported in 2008 that they have 4 school bus stops in Cobb County, 25 in Fulton County, 10 in DeKalb County, 3 in Fayette County, 3 in Clayton County, 2 in Douglas County, 2 in Gwinnett County, 1 in Spalding County and 1 in Henry County. Other than Bulloch, Chatham and Columbia counties, no other school system, public or private, is known to Defendants to have designated bus stops.

deposition, pp. 62, 63). This Court also found that Ms. Whitaker has not shown "that she would be unable to find an appropriate residence in the surrounding counties." (doc-217, 4).

Both Bulloch and Chatham County, like Columbia County, adjoin multiple other counties that have not designated school bus stops.(Dolby affidavit, ¶ 67). For a registered sex offender in any of the three counties that have designated school bus stops, there are places to live in surrounding counties. There are sex offenders presently residing in all the counties that surround both Bulloch and Chatham Counties.(Tate affidavit, ¶ 10, Exhibit B).

There is no other evidence in regard to the number of persons in Bulloch, Columbia, and Chatham Counties who would have to move if school bus stops were designated. Neither is there any clear evidence in regard to the number of registered sex offenders in those counties who would be exempted from moving because of ownership of their homes or the existence of a valid lease.

Based on form declarations solicited by Plaintiffs from registered sex offenders in Bulloch, Chatham and Columbia counties, a substantial percentage of sex offenders may own their homes or have a valid lease, thus exempting them from any requirement to move in the event school bus stops are again designated in their counties. In Columbia County, of the twenty-four (24) "declarations"

provided to Defendants by Plaintiffs, nine (9) sex offenders owned their own homes. Another four (4) leased their homes. (Dolby affidavit, ¶¶ 54-55). Thus, thirteen of the twenty-four, a majority of sex offenders reporting, appear exempted under the *Mann* decision and O.C.G.A. § 42-1-15(f). Of the eighty-two (82) sex offenders reporting from Chatham County, twenty-nine (29) report that they rent their homes and another eight (8) reported that they own their homes. (Dolby affidavit, ¶¶ 59-60). Thus, of those reporting, thirty-seven of the eighty-two may be exempted. In Bulloch County, of eighteen (18) reporting, three (3) owned homes and seven (7) rented. (Dolby affidavit, ¶¶ 62-65). It should be noted, however, that the declarations provided by Plaintiffs are only a small percentage of the total number of sex offenders in the three counties. Plaintiffs provided only 24 declarations out of the fifty-five (55) sex offenders reported to be living in Columbia County, only eighty-two (82) out of the three-hundred-seventy-four (374) living in Chatham County and only eighteen (18) of the reported seventy-seven (77) living in Bulloch County.

III. Argument and Citation of Authority

A.

MOOTNESS

" '[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.' " *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287; 120 S. Ct. 1382, 1390 (2000), citing *County of Los Angeles v. Davis*, 440 U.S. 625, 632; 99 S. Ct. 1379, 1383 (1979). "Jurisdiction, properly acquired, may abate if the case becomes moot." *County of Los Angeles v. Davis*, 440 U.S. at 632; 99 S. Ct. at 1383.

When the Georgia Supreme Court determined that property interests were protected from regulatory taking it included not only ownership interests but leasehold interests as well. *Mann v. Georgia Department of Corrections*, 282 Ga. 754 (2007); *Franco's Pizza & Delicatessen, Inc.*, 178 Ga. App. 331 (1986); *Waters v. DeKalb County*, 208 Ga. 741 (1952). Plaintiffs have admitted "that a valid lease does constitute a property interest under Georgia law."(Response to Defendants' Request for Admission, #2). Plaintiffs have admitted that such "property interests are protected from regulatory taking under Georgia law pursuant to the case of *Mann v. Georgia Department of Corrections*, 282 Ga. 754 (2007) and other authority." (Response to Defendants' Request for Admission, #1). The Defendant sheriffs and Plaintiffs have also stipulated that "an individual holding a valid

leasehold property interest in a residence and who resides therein shall not be required to move from such residence . . . for the duration of his or her lease" if the lease is sufficient to constitute a protected property interest and a child care facility, church, school or area where minors congregates subsequently moves within 1,000 feet of the rented residence. (doc-254).

Both Lori Collins and Janet Allison have leases of twelve months or more. Both are protected under existing Georgia law from any taking of their property.

There can be no further relief that can be granted to these Plaintiffs and in that case "any opinion as to the legality of the challenged action would be advisory." *City of Erie v Pap's A.M.*, 529 U.S. 277, 287; 120 S. Ct. 1382, 1390 (2000),

B.

STANDING

"The requirement that a claimant have 'standing is an essential and unchanging part of the case-or-controversy requirement of Article III.'. . . [A] claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v Federal Election Commission*, 554 U.S. ____, 128 S. Ct. 2759, 2768 (2008), citing *Lujan v. Defenders of Wildlife*, 504 U.S.

555, 560; 112 S. Ct. 2130 (1992). The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. *Mills v. Green*, 159 U.S. 651 (1895).

Moreover, a plaintiff's fear of arrest or prosecution for engaging in expressive activity does not establish standing unless that fear is objectively reasonable. *Wilson v. State Bar of Ga*. 132 F. 3d 1422, 1428 (11th Cir. 1998). A generalized fear of prosecution is insufficient to create standing. *Pittman v. Cole*, 267 F.3d 1269, 1283-84 (11th Cir. 2001).

Although this Court determined that various Plaintiffs had sufficient standing for purposes of the Defendants' Motion to Decertify, Defendants renew their challenge to standing in the context of this Motion for Summary Judgment and in light of additional facts relevant to this inquiry. In the following paragraphs, Defendants address whether the named Plaintiffs' class members have standing to pursue the instant action.

Since the previous inquiry into the issue of standing it has become clear, for example, that lead Plaintiff Wendy Whitaker's situation has changed. Since 2007 her name appears on the deed to her home. (doc-217, 1-2). She now has an

ownership interest in the property where she resides and could not be made to move should a new prohibited use locate near her. She is fully protected by her present ownership and the appearance of any new church, school, day care center or school bus stop would not necessitate a move. (doc-176, 4th Amended complaint ¶ 21). Since by her own admission (and claim that she has owned her residence since 2001) she is exempt from the residency restrictions in the bill, she is no longer a class representative.

Plaintiff Whitaker's attempt to retain "standing" by stating that she does not go to church because of "fear" she will be accused of loitering at a church is without merit. Wendy Whitaker has not indicated with specificity whether she was told by law enforcement officers that she would be arrested or prosecuted if she attended a church service or whether she inquired about attending a church service and was told that she could not do so. Again, a generalized fear of prosecution is insufficient to create standing. *Pittman v. Cole*, 267 F.3d 1269, 1283-84 (11th Cir. 2001). Here, Plaintiff's fear of arrest for engaging in conduct that does not violate the statute is not reasonable. *See also Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 761 (11th Cir. 1991).

Mr. Joseph Linaweaver currently resides outside the State of Georgia. Since he currently resides out of state, he no longer has standing to pursue this action.

(doc-196, ¶ 30). Moreover, Plaintiff found housing while in the state, prior to relocating outside the state, but was denied rental by the landlord because of his status as a convicted felon, not because the location of the residence violates the Residency Statute. (Linaweaver Declaration, ¶ 7). Linaweaver's status as a convicted felon is totally separate and aside from him not finding suitable housing due to any residency restrictions. However, if Mr. Linaweaver would have remained in the state of Georgia and maintained his residence and job he would have been exempt from the residence restrictions based on the *Mann* case and would still not be a class representative.

Janet Allison's primary complaint is that a bus stop "might be designated" near her current place of residence and she can not locate suitable housing. First, assuming that school bus stops are designated, Plaintiff Allison would not be required to move. Second, Plaintiff Allison's suggestion that she cannot find suitable housing is not accurate because she has since signed a valid lease on an apartment. (Allison Declaration, ¶ 7). Plaintiff Allison is therefore protected under the *Mann* decision and would not be required to move.

James Wilson also lacks standing to challenge the Residency Statute. Plaintiff Wilson found housing in Clayton County which complies with the Residency Statute, but complains that he "may" have to move in the future.

(Wilson Declaration, ¶ 10). However, Plaintiff Wilson is exempt from the provisions of the challenged law as he held his job and his mortgage prior to July 1, 2006; thus, he will not be required to move or change jobs. (doc-196, ¶¶ 37, 39).

Jeffrey York complains that he was required to move because his home was within 1,000 feet of a daycare center. This Court has indicated that it would not revisit the issues resolved by this district in *Doe v. Baker*, 1:05-CV-2265-TWT (N.D. Ga. 2006). Since this issue was dispositively addressed in *Doe* it is not an issue in this case and York does not have standing to address the remainder of the issues in the case therefore, he is not an adequate class representative.

Even if this Court were to find that this issue was not dispositively addressed in *Doe*, Plaintiff York lacks standing to challenge the Residency Statute because he has not been threatened with prosecution if he fails to move. Plaintiff York merely suggests that he "might" be in violation of the Residency Statute for living with his grandmother. (York Declaration, ¶ 6). There is no evidence that Plaintiff York was told that he would have to move from his current residence.

In addition to York's claim that he "might" be in violation of the residency Statute for living with his grandmother, Plaintiff York also claims that he could not take a job because it was within 1,000 feet of a church. His inability to obtain one job because of its location within 1,000 feet of a church does not give him standing

to challenge the entire statute nor does it make him an appropriate class representative to challenge the work restrictions related to the church provision. As stated above, under Article III, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v Federal Election Commission*, 554 U.S. ____, 128 S. Ct. 2759, 2768 (2008), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560; 112 S. Ct. 2130 (1992). Plaintiff York has not done so and nothing proffered by Plaintiffs shows that he is an adequate class representative.

Dewayne Owens, who was on parole, has since violated his parole and been re-incarcerated. (Affidavit of Carol Adeyeye, ¶¶ 6-8). Prior to being re-arrested, Plaintiff Owens had not been threatened with prosecution, nor had he been denied parole based on the requirements of the Residency Statute. He claimed prior to his incarceration that he feared school bus stops would be designated in his county thus requiring him to move. The potential for school bus stops being designated is insufficient to Article III standing as no harm has yet occurred. This analysis equally applies to Al Marks and Lori Sue Collins.

Plaintiff Marks lacks standing because he merely alleges that he cannot find housing for himself with his parents, with whom he has been living. (Marks

Declaration, ¶¶ 1,8,9). Plaintiff Marks is twenty years old and is not required to live with his parents; this option is his choice. As to the employment claims alleged by Mr. Marks, the playground provisions of the statute are not an issue in this case (*See* doc-109, p. 17, footnote 10) and his claim that he was unable to retain a job at one fast food restaurant because of its proximity to a church does not establish his standing as an adequate class representative.

Plaintiff Collins currently rents a home pursuant to a written lease and is therefore protected under the *Mann* decision. Therefore, Plaintiff Collins does not have standing because she has located a suitable residence. (Collins Declaration, ¶ 12).

As to Plaintiff Collins' other claims, she alleges that she would like to obtain employment and volunteer in a church. She claims that she would like to maintain her volunteer work in Georgia's prisons. First, Ms. Collins' desire to work in a church is insufficient to effectively establish her as a class representative for the "class" on their free exercise claims as she has not alleged that her ability to practice her faith has been impacted in any way, only that she would like to work at a church. Secondly, nothing in the statute prevents her from ministering in prisons or doing other volunteer work on behalf of a church; she is only prevented from volunteering within the church.

None of the above mentioned Plaintiffs have standing to challenge the church provision of the Residency Statute because they are not prohibited from attending church, only living within 1,000 feet of one—and none of the named Plaintiffs have received notice from any law enforcement officer suggesting they are currently in violation of the Residency Statute with respect to churches. Furthermore, inasmuch as none of these Plaintiffs are considered a sexually dangerous predator as defined under Georgia law, none of them have standing to challenge the provision that prohibits employment within 1,000 feet of an area where minors congregate. O.C.G.A. § 42-1-15(b)(2).

The claim by Plaintiffs that they cannot find suitable housing ignores the fact that there is no right to "live where you want." *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) *cert. denied* 546 U.S. 1034 (2005). In *Miller* the court was not persuaded by the argument that Plaintiffs could not find housing in urban areas, live with specific family members, or move to certain areas of town because of Iowa's residency restriction. *Id*., at 706. Merely because the Plaintiffs in the instant complaint **may** need to relocate to a county or town that is not of their choosing does not grant them standing to challenge legislation enacted for legitimate public safety concerns. Until each Plaintiff has shown they have been actually injured by the imposition of the Residency Statute as to each individual

Plaintiff, their "fear" of prosecution is speculative at best and warrants dismissing the instant complaint for lack of Article III standing.

In addition, when considering an Article III standing challenge, the Court should consider it in light of principles which counsel judicial restraint; which principles are whether the complaint falls within the zone of interests protected by the statute, whether the complaint raises abstract questions amounting to general grievances that are more appropriately resolved by the legislative branch, and whether Plaintiffs are asserting their own legal rights as opposed to the legal rights of third parties. *Saladin v. City of Milledgeville*, 812 F.2d 687, 690 (11th Cir. 1987). Plaintiffs' complaint as to the Residency Statute is more appropriately addressed by other governmental institutions. *Warth v. Seldon*, 422 U.S. 490, 500 (1975); *accord Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir. 1994).

Further, Plaintiffs' allegation that the legislators were ill-informed and failed to achieve the legislative purpose in enacting the Residency Statute is not within the province of this Court and flies in the face of basic federalism concerns. *Warth*, 422 U.S. at 508, n.18 (citizens dissatisfied with statutory provisions should not overlook available democratic processes).

To conclude, all of the above mentioned Plaintiffs lack standing to challenge the Residency Statute because they have failed to show actual injury traceable to

conduct by the Defendants. *Warth v. Seldon*, 422 U.S. 490 (1975); *accord Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir. 1994). The injury must be distinct and palpable, not abstract, conjectural, or hypothetical. *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987).

C.

THE EX POST FACTO CLAIMS

Plaintiffs remaining *Ex Post Facto* claims relate to sex offenders convicted prior to July 1, 2006 and sex offenders who reside in the three counties that have designated school bus stops and who are not exempted because of ownership or employment exemptions in O.C.G.A. § 42-1-15(f). It should be noted that the statute in effect prior to July 1, 2006 was ruled upon by Judge Thomas Thrash in *Doe v. Baker*, 1:05-CV-2265-TWT (N.D. Ga. 2006), and this Court indicated that "the residency restrictions in effect prior to the 2006 amendment have been found not to constitute an ex post facto law, and this Court will not consider these restrictions here." (doc-109, p. 17, footnote 10). The pre-2006 version of O.C.G.A. § 42-1-12 already prohibited residence within 1,000 feet of "any child care facility, school or area where minors congregate." The pre-2006 definition of "Area where minors congregate," defined in O.C.G.A. § 42-1-13(a)(1), was to "include all public and private parks and recreation facilities, playgrounds, skating

rinks, neighborhood centers, gymnasiums, and similar facilities providing programs or services directed towards persons under 18 years of age."

It should also be noted that an unknown and perhaps significant percentage of sex offenders convicted prior to July 1, 2006 own or lease their residences and may be exempted by revisions in O.C.G.A. § 42-1-15 and the decision in *Mann*.

Only three widely separated Georgia counties have designated school bus stops at any time since the 2006 enactment of Georgia's sex offender law. Columbia, Bulloch and Chatham Counties designated school bus stops in 2006. It does not appear that these counties have made follow-up designations for the subsequent school years since the 2006-2007 school year.

Reliable statistics in regard to the number of persons who might be required to move are very limited. When Columbia County designated school bus stops, only 12 of the 42 sex offenders in Columbia County were required to move. In addition, most sex offenders in Columbia County who have been required to move have found other places to live within Columbia County. Even for those sex offenders who could not find other places to live in Columbia County, the surrounding counties, none of which have designated school bus stops, are available as places to live. Lead Plaintiff Wendy Whitaker, for example, lives in Harlem, Georgia in Columbia County. Even assuming she could not find another

place to live in Columbia County, it is only five miles from Harlem to McIntosh County and to Richmond County and less than ten miles to Jefferson County. (Rush deposition, pp. 62, 63). Ms. Whitaker's proximity to other counties without designated school bus stops was even noted by this Court in denying Ms. Whitaker's request for Preliminary Injunction. (doc-217).

In Bulloch County and in Chatham County there are no conclusive numbers in regard to the number of people who would be required to move.

Plaintiffs allege that the school bus stop provision and the general residency restrictions of the Residency Statute impose retroactive punishment in violation of the *Ex Post Facto* Clause. Quite the contrary, the statute is regulatory as opposed to punitive, and legislation that is merely regulatory does not violate the *Ex Post Facto* Clause. *Smith v. Doe*, 538 U.S. 84 (2003).

The Georgia General Assembly clearly intended to create a civil regulatory scheme designed to protect the public when it enacted the Residency Statute. *See* 2006 Ga. Laws 379, 381 (HB 1059, Section 1). The intent was judicially noted as being a "safeguard" against encounters between minors and convicted sex offenders, recognizing that while not every sex offender will be a recidivist, the goal of lessening the potential for those offenders inclined toward recidivism "to have contact with, and possibly victimize, the youngest members of society," was

an important one. *Doe v. Baker*, 1:05-CV-2265-TWT (N.D. Ga. 2006), citing *Mann v. State*, 278 Ga. 442, 443-44(2004).

Nothing on the face of the Act as a whole or the specific statute in question suggests it is anything but a regulatory scheme designed to protect the public. *Id.* In *Smith v. Doe*, the Supreme Court found that retroactive application of registry requirements did not violate the *Ex Post Facto* Clause because the requirements were nonpunitive. *Smith*, 538 U.S. at 105-06. Likewise, residency restrictions, specifically the Georgia residency restrictions prior to the 2006 amendment, have been judicially tested and found to be regulatory and nonpunitive. *Doe v. Baker*, 1:05-CV-2265-TWT (N.D. Ga. 2006); *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) *cert. denied* 546 U.S. 1034 (2005).

The Court must then determine whether any alleged punitive effects outweigh the regulatory intent by applying the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)(whether the law was regarded in history and traditions to be punishment, whether it promotes the traditional aims of punishment, whether it imposes an affirmative disability or restraint, whether it has a rational connection to a nonpunitive purpose, and whether it is excessive with respect to that purpose). *See Miller*, 405 F.3d at 719, citing *Smith v. Doe*, 538 U.S.

at 97. These factors are neither "exhaustive nor dispositive," but are useful guidelines. *Smith*, 538 U.S. at 97.

The ultimate question is whether any punitive effect of the law is so severe as to constitute the "clearest proof" that a statute deemed to be regulatory and nonpunitive should nonetheless be deemed to impose *ex post facto* punishment. *Id.* The United States Supreme Court has never held that a law with a nonpunitive purpose violated the *Ex Post Facto* Clause in light of the *Mendoza-Martinez* factors.

The first factor for consideration is whether the law is regarded in history and tradition as punishment. Plaintiffs assert that the Residency Statute is the functional equivalent of banishment which constitutes a historical and traditional form of punishment. However, "banishment" refers to being sent away from a city, place, or country for a specified period of time or life, *United States v. Ju Toy*, 198 U.S. 253, 269-70 (1905), or "expulsion from a country." *Doe v. Miller*, 405 F.3d 700, 719 (8th Cir. 2005) (citing to Black's Law Dictionary 154, 614 (8th ed. 2004)). Historically banished persons were permanently expelled from their community and prevented from returning. *Smith v. Doe*, 538 U.S. at 98.

On its face, Plaintiffs' assertion is unfounded inasmuch as the Residency Statute does not prevent Plaintiffs from accessing those identified areas at any time

of the day or night for any purpose other than establishing residence or loitering as prohibited by O.C.G.A. § 16-11-36. The Residency Statute contains no restriction against owning, visiting, conducting business upon, or leasing the property, nor does the statute prohibit Plaintiffs from going to places which may be within 1,000 feet of one of the identified areas. As such, Plaintiffs are not "expelled" from the community nor are they prohibited from being in the community. Contrary to Plaintiffs assertion, the addition of school bus stops and churches does not bolster their claim that the Residency Statute amounts to banishment. While the identified area may have expanded, sex offenders are still able to utilize their property in other ways, as well as move in and around the community freely for any purpose other than to reside within the identified areas and in some cases work at certain locations within the restricted area. None of the named Plaintiffs are prohibited from working within 1,000 feet of areas where minors congregate, which includes school bus stops.

Furthermore, when contemplating the residency restriction, the fact that housing is available negates Plaintiffs' argument that they are banished. In the instant case, the residency restriction has not prohibited most Plaintiffs from finding a place to live; they merely assert that the new residence is not as desirable or convenient as their current residence.

Information from the various Sheriffs shows that only a tiny percentage of sex offenders had to move or change employment during the three years that the law has been in effect. After the first year of enforcement of the residency restrictions, the number of persons affected has declined enormously.(Dolby affidavit, ¶¶ 41-46).

Likewise, information from the Georgia Department of Corrections shows that few people have been convicted of violating the residency restrictions and those sex offenders on probation have generally been able to find places to live close to where they originally resided. (Casting affidavit, ¶¶ 6-8; Holt affidavit, ¶¶ 6-8). The vast majority of those who moved have been able to find housing either within their judicial circuit or in an adjoining county. (Holt affidavit, ¶¶ 6-7).

Even in counties that designated school bus stops, the numbers do not establish banishment. In Columbia County, for example, when school bus stops were designated for the 2006-2007 school year, only 12 of 42 registered sex offenders were required to move. (In addition, this information was prior to the *Mann* decision in 2007, and did not take into account that some of the twelve may have owned or leased their homes and been exempted from the requirement to move; given that fact the number may have been even smaller). In Columbia County, most sex offenders have been able to find new places to live within the

county. Also, as this Court noted in denying Plaintiff Wendy Whitaker's injunction request, even if one could not find housing in Columbia County, there are places to live in the surrounding counties a short distance away. (doc-217). All three counties in which school bus stops have been designated adjoin multiple counties that have *not* designated school bus stops.

When the Eighth Circuit contemplated a banishment challenge to a similar residency statute, codified at Iowa Code § 692A.2A, the court found that the statute was not banishment, noting that the residency restriction did not expel sex offenders from the community or prohibit them from accessing areas within 2,000 feet of schools or child care facilities with respect to certain opportunities. *Doe v. Miller*, 405 F.3d at 719. The Georgia Residency Statute likewise merely prohibits residency, and in some instances employment, within 1000 feet of schools, child care facilities, or other areas where minors congregate. In addition, pursuant to *Mann v. Georgia Department of Corrections*, 282 Ga. 754 (2007), persons who have a property interest (by ownership or leasehold interest) are exempted.

The second *Mendoza-Martinez* factor is whether the law promotes the traditional aims of punishment, i.e. deterrence and retribution. The mere presence of a deterrent impact of a law should not be overemphasized as a way to criminalize an otherwise regulatory statute because making such an inferential leap

would "severely undermine the Government's ability to engage in effective regulation." *Smith*, 538 U.S. at 102. While the Georgia Residency Statute might deter sex offenders from re-offending, that fact alone does not imply that the restriction is punishment. *Miller*, 405 F.3d at 720. The court in *Doe v. Baker* opined that regardless of the potential for a deterrent effect, the Georgia Residency Statute is "still consistent with a regulatory purpose," and therefore is not sufficiently aimed at deterrence or retribution so as to negate its regulatory intent. *Doe v. Baker*, 1:05-CV-2265-TWT (N.D. Ga. 2006).[4]

The third consideration, whether the Georgia Residency Statute imposes an affirmative restraint or disability, must be answered in the negative. *See Miller*, 405 F.3d at 720-21. The Supreme Court allows states considerable leeway in adopting regulations that impose "substantial disabilities." *Kansas v. Hendricks*, 521 U.S. 346 (1997) (involuntary commitment of mentally ill sex offenders found to be nonpunitive). The Georgia Residency restriction is certainly less disabling than a commitment statute, and is a minor and indirect effect of a conviction for a sexual offense or a criminal offense against a victim who is a minor. It does not significantly restrain or disable Plaintiffs inasmuch as they are still able to own,

[4] The Eighth Circuit likewise found that the residency restriction was consistent with the regulatory objective of protecting the health and safety of children and therefore not punishment. *Doe v. Miller*, 405 F.3d at 700.

visit, lease, or conduct business at their home or any other property within the identified areas. In addition, Plaintiffs are still able to visit or shop at any location without restriction, and none of the named Plaintiffs are prohibited from working within 1,000 feet of an area where minors congregate, which definition includes the challenged school bus stop provision. Registered sex offenders have not been required to move in large numbers, have not been forced to abscond and have seldom been subject to arrest or prosecution. (Dolby affidavit, ¶¶ 16-46; Casting affidavit, ¶¶ 6-8; Holt affidavit, ¶¶ 6-8; Tate affidavit, ¶¶ 7-8; O'Neal affidavit, ¶¶ 5-7). Neither have any significant numbers been required to change employment. (Dolby affidavit, ¶¶ 16-46). And many are exempted by the *Mann* case.

While the residency restrictions might impose some limitations on Plaintiffs, the ultimate issue is whether the law has a "rational connection to a nonpunitive purpose" (deemed the "most significant factor" in an *ex post facto* analysis), and whether it is excessive in relation to that purpose. *Miller*, 405 F.3d at 721; *Smith*, 538 U.S. at 102.

The legitimate, nonpunitive purpose of the Georgia Residency Statute is to protect the public, and specifically minors, from those offenders who have been deemed to have a higher rate of recidivism than any other class of offenders. *See Smith,* 538 U.S. at 103. The Residency Statute is rationally related to that purpose

by preventing those convicted of crimes against children and certain sex offenses from residing near locations where children are likely to congregate, thereby reducing the risk that they will re-offend against innocent child victims. The Georgia General Assembly could rationally conclude that the restriction on residence and employment would reduce the likelihood and opportunities for recidivism. *Doe v. Baker*, 1:05-CV-2265-TWT (N.D. Ga. 2006). The rational basis standard is highly deferential and a court should only find a legislative act unconstitutional in the "most exceptional circumstances." *Doe v. Baker*, 1:05-CV-2265-TWT (N.D. Ga. 2006), *citing Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005).

A statute is not excessive simply because it "lacks a close or perfect fit" with the nonpunitive goals it seeks to advance, and the lack of an individual risk assessment does not convert a regulatory scheme into punishment. *Smith*, 538 U.S. at 103, 105; *Miller*, 405 F.3d at 721-22. The *Ex Post Facto* Clause does not preclude legislative bodies from making categorical judgments that conviction of certain crimes requires certain regulatory consequences. *Miller*. 410 F.3d at 721. In light of the high risk of recidivism posed by sex offenders, and the "imprecision" of determining what measures best prevent recidivism, the Georgia General Assembly acted properly and within its authority by enacting this

regulatory scheme for the purpose of protecting the public from harm. *Miller*, 405 F.3d at 722. Inasmuch as school bus stops are more likely to lack adult supervision than schools and child care facilities, the concern for protecting children at those more vulnerable venues is clearly rationally related to the stated regulatory purpose. Without "clearest proof" that the restriction is excessive in relation to that regulatory purpose such that the statute is retroactive punishment, the Georgia Residency Statute must prevail against Plaintiffs' Constitutional challenge. *Smith*, 538 U.S. at 92. [5] In this case the vast majority of registered sex offenders have not been required to move or change employment. According to the reports from a majority of sheriffs, since the initial passage of the law in 2006 the number of sex offenders being required to move or change place of employment has diminished. (Dolby affidavit, ¶¶ 41-46). Few sex offenders have been arrested for any violations involving residence, employment or loitering.(O'Neal affidavit, ¶¶ 5-7). There is no "clear proof" here.

Legislative refinement of a judicially tested law should not be deemed excessive merely because the General Assembly has seen fit to incrementally deal with the identified problem of sex offenders, recidivism, and crimes against children. In balancing the interests of public safety against the inconvenience to

[5] The Georgia Supreme Court upheld the prior Georgia Statute against *ex post facto* challenges in *Thompson v. State*, 278 Ga. 394 (2004) and *Mann v. State*, 278 Ga. 442 (2004).

sex offenders and those who commit crimes against children, the legislature has seen fit to further identify and protect those areas where children are vulnerable.

The final and most important consideration is the purpose of the governmental regulation. The Court has already determined that there is a strong interest in preventing sex abuse and that this factor weighs in favor of Defendants. (doc-109, p. 30). The analysis is no different in this application. Here, the purpose of the Residency Statute is to protect the public, and specifically minors, from sex offenders who have been deemed to have a higher rate of recidivism than any other class of offenders. *See Smith*, 538 U.S. 84, 103 (2003). This protection derives from a legitimate state interest in light of the finding that "[s]ex offenders are a serious threat in this Nation." *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003), *citing McKune v. Lile*, 536 U.S. 24, 32 (2002). The State's interest in protecting children is "considerable" and was given "substantial weight" by the Georgia Supreme Court in denying a Fifth Amendment challenge to the Residency Statute. *Mann*, 278 Ga. at 443-44. This Court should do likewise.

The Residency Statute prevents registered sex offenders from residing near locations where children are likely to congregate, thereby reducing the risk that they will re-offend against innocent child victims. Additionally, the restriction reduces the likelihood that such offenders will have ready and permanent access to

locations where they can place children under constant predatory surveillance. School bus stops, by definition, are particularly vulnerable to such access because of their locations and general lack of adult supervision.

In light of the high risk of recidivism posed by sex offenders and the imprecision of determining what measures best prevent recidivism, the Georgia General Assembly acted properly and within its authority by enacting this regulatory scheme for the purpose of protecting the public from harm. The Residency Statute rationally advances the State's interest in protecting children, and decisions regarding statutory restrictions such as proximity or length of application are more appropriately within the purview of elected policymakers of the State. The Georgia General Assembly is empowered to weigh the benefits and burdens of this restriction and to make legislative choices of pursuing the State's interest in protecting children from those who would do them harm by the **best means available**. *See Miller,* 405 F.3d 700, 714-16 (8th Cir. 2005).

D.

THE SUBSTANTIVE DUE PROCESS CLAIM

Plaintiffs' surviving substantive due process claim is limited to the subclass of those Plaintiffs living in Bulloch, Chatham and Columbia counties, where there

was, for the 2006-2007 school year, a designation of school bus stops by those counties.

Plaintiffs allege a substantive due process right to family privacy, specifically, the right to cohabitate with their family.(doc-196, ¶ 136).

First and foremost, the United States Constitution does not guarantee a right to family privacy. A right to privacy does exist through the liberty component of the Fourteenth Amendment, which protects fundamental rights and guards against disclosure of certain personal matters or governmental interference in personal and intimate decisions surrounding marriage, contraception, procreation, and the right to engage in sexual behavior in the privacy of one's home. *Padgett v. Donald*, 401 F.3d 1273, 1280 (11th Cir. 2005), *citing Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684 (1977); *Harris v. Thigpen*, 941 F.2d 1495, 1513, n.26 (11th Cir. 1991); *see also Lawrence v. Texas*, 539 U.S. 558 (2003); *Doe v. Baker*, 1:05-CV-2265-TWT (N.D. Ga. 2006), citing *Doe v. Moore*, 410 F.3d at 1343.

Plaintiffs' privacy claim is really an attempt to claim a right to live wherever they want. No such right exists, nor does it qualify as being a legitimate liberty interest. This asserted right is "ambitious" at best and this Court should exercise restraint when considering whether the right to live where one wants warrants

protection under the substantive due process clause. *See Miller*, 405 F.3d at 713-14, *citing Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Prostrollo v. Univ. of S.D.*, 507 F.2d 775, 781 (8th Cir. 1974)(right to choose one's place of residence not recognized as a fundamental right). In *Miller* the court was not persuaded by the argument that Plaintiffs could not find housing in urban areas or many small towns, live with specific family members, or move to certain areas of town because of Iowa's residency restriction. *Id.*, 405 F.3d at 706. Merely because the Plaintiffs in the instant complaint may need to relocate to a county or town that is not of their choosing does not justify a finding of a substantive right to live where they want. The Plaintiffs have not met the burden of showing that the statute facially violates any right to family privacy. No statistics support their claim

Even assuming the right alleged is a right to "privacy," that word is not a constitutional talisman, and courts should be cautious when challenged to expand the right to privacy to include issues involving personal autonomy. In the abstract there is no such right. *See Williams v. Attorney General of Alabama*, 378 F.3d 1232, 1235 (11th Cir. 2004); *see, e.g., Glucksberg*, 521 U.S. at 725 (fundamental rights are "not simply deduced from abstract concepts of personal autonomy").

Undoubtedly, many of the rights recognized by the United States Supreme Court touch on matters of personal autonomy and privacy. However, "[t]hat many

of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected." *Glucksberg*, 521 U.S. at 727. Rights that have been denominated as fundamental are not so denominated simply because they implicate deeply personal and private considerations, but because they have been identified as "deeply rooted" in this Nation's history and tradition and are implied in the concept of ordered liberty, such that "neither liberty nor justice would exist if they were sacrificed." *Id.* at 720-21.

Courts faced with challenges such as this one must proceed with restraint in the area of substantive due process. The United States Supreme Court further counseled a reluctance to "expand the scope of substantive due process" because guideposts are "scarce and open-ended." *Miller*, 405 F.3d at 714; *Glucksberg*, 521 U.S. at 720, quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

The Eighth Circuit was not persuaded by the argument that the Constitution establishes a "fundamental" right to live where you want, such that a strict scrutiny analysis should be applied. *Miller*, 405 F.3d at 714. Here, Plaintiffs' asserted right to live where they want would only violate substantive due process if the Residency Statute was not rationally related to some legitimate governmental purpose. *See Miller*, 405 F.3d at 714. The test is whether the regulation rationally

advances a legitimate governmental purpose. *Glucksberg*, 521 U.S. at 728. Here, the Residency Statute protects children from those who have been legislatively identified as persons who have sought to do harm to children or others. Such identification supports a legitimate state interest in light of the finding that "sex offenders are a serious threat in this Nation" and when convicted sex offenders reenter society, they are much more likely to re-offend. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003). Inasmuch as experts in the field cannot offer confident predictions of whether a particular sex offender would re-offend, legislation designed to restrict sex offenders from areas where the opportunity or temptation may prove too much is clearly a rational reaction for the purpose of protecting the public. *See Miller*, 405 F.3d at 716.

In light of the perceived risk, the Residency Statute rationally advances the State's interest in protecting children. Any decisions on restrictions such as proximity or length of application are more appropriately within the purview of elected policymakers of the State.[6] *See Miller*, 405 F.3d at 715-16. The Georgia General Assembly is empowered to weigh the benefits and burdens of the restriction, and to make a legislative choice of pursuing the States' interest in

[6] Other states with residency restriction statutes require a general prohibition against a sex offender being "near" locations where children are the primary occupants, as well as distance restrictions similar, if not longer, than that required by Georgia law. *See Miller,* 405 F.3d 700, 714, n.4.

protecting children from those who would do them harm by the best means available, and courts should be reluctant to closely scrutinize legislative choices on matters of public safety. *Id.* The expansion of the residency restriction to add school bus stops and churches merely evidences a legislative concern for public safety, and the legislature is more suited to modify existing regulatory schemes in light of experience and data established over time. *Miller,* 405 F.3d at 715.

Plaintiffs claim they are being denied the "right" to family privacy. The Residency Statute at issue, however, does not regulate or restrict what goes on inside a residence, it merely restricts Plaintiffs from **residing** within 1,000 feet of areas where children congregate. As noted previously, Plaintiffs may still visit, conduct business, or even congregate where they like, so long as they comply with O.C.G.A. § 42-1-15. The facts as applied do not show a violation of the claimed right even if one assumes such a right exists.

E.

THE VAGUENESS AND OVERBREADTH CLAIMS

Plaintiffs remaining vagueness and overbreadth claims relate to all registered sex offenders and include the subclass of sex offenders who are employed or volunteer at a church or are impeded from such activities. Plaintiffs claim that the terms "areas where minors congregate" (doc-196, ¶ 120), "school bus stop as

designated by local school boards," (doc-196, ¶ 122, 123), "loitering" (doc-196, ¶ 124), and the prohibition against employment or volunteering at a church (doc 196, ¶ 125) are vague. Plaintiffs claim the statute is overbroad because it interferes with "working, going to church and living with one's family" (doc-196, ¶ 129), treats all sex offenders the same (doc-196, ¶ 130, 131), prevents sex offenders from singing in the choir, baking a pie or working in a church soup kitchen (doc-196, ¶ 132), and prevents them from doing grocery shopping, eating at restaurants, and attending weddings and funerals. (doc-196, ¶ 133),

Vagueness

The term "areas where minors congregate" is not new to the law and has not been substantially altered since *Doe v. Baker*, supra. The term is now specifically defined to "include all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, public libraries, and public and community swimming pools." O.C.G.A. § 42-1-12(a)(3). There is nothing vague about this and only the school bus stops, swimming pools and libraries are new to the definition since 2005.

Plaintiffs complain that defining a school bus stop as "designated by local school boards of education" is somehow vague. Yet for any action to be approved

by a local board of education, or by any other public agencies, there are clear procedures, many set forth in Georgia's Open Meetings law, O.C.G.A. § 50-14-1 *et seq*. Matters should appear on a posted agenda and be voted upon in public. Any matter being considered before any public body would normally contemplate specific action and require a vote of a majority of a quorum of members in attendance at that public meeting. The minutes of a meeting would normally reflect the action taken. There is nothing vague about this process.

Likewise, the term "loitering" is tied to a pre-existing statutory definition. O.C.G.A. § 42-1-15(e) provides that "it shall be unlawful for any individual required to register pursuant to Code Section 42-1-12 to loiter, *as prohibited by Code Section 16-11-36*, at any child care facility, school, or area where minors congregate." (*emphasis added*). The term "loiter" requires use of the definition in the already- existing criminal provision defining that offense. There is nothing vague about it.

It is also evident that the word "volunteer," when not ripped from the context in which it appears, can survive challenge. The language of the preamble to House Bill 1059, the 2006 legislative act that is the subject of this litigation, clearly shows the context in which the words "employed by or volunteer at" are to

be judged. That preamble, found in Section 1 of House Bill 1059, sets forth that the State of Georgia will "implement a strategy that includes: . . .

(6) Prohibiting sexual predators from *working with children, either for compensation or as a volunteer*." (2006 Ga. Laws 379, at 381)(*emphasis added*).

While Plaintiffs have attempted to paint the word "volunteer" as prohibiting every volitional act of religious worship, that is not what the code section proscribes. It clearly refers to employment-type activity, whether or not for pay. Not only is this clearly stated in the preamble, it is also reflected in the words of the statute. The statute provides that no registered sex offender "shall be employed by or volunteer at any child care facility, school or church or by any business or entity that is located within 1,000 feet of a child care facility, school or church." It is only by ignoring the surrounding words of the statute that Plaintiffs can argue that volunteer means the isolated act of singing in the choir, reading scripture, or serving as a pall bearer during a funeral. The statute clearly is not meant to deter participation in religious worship; it is meant to deter registered sex offenders from working at a church, and specifically from circumventing the employment restrictions by claiming that they are simply volunteers, since they are not getting paid to work at the church.

The United States Supreme Court has recently recognized that analysis of a statute, subject to a First Amendment challenge, requires looking at words in the context of the entire statute, not just in isolation. In *United States v. Williams*, 553 U.S.____, 128 S. Ct. 1830, 1839 (2008), the Court noted that "When taken in isolation, the two . . . verbs . . . are susceptible of multiple and wide-ranging meanings. In context, however, those meanings are narrowed by the commonsense canon of *noscitur a sociis*--which counsels that a word is given more precise content by the neighboring words with which it is associated." *citing Jarecki v. G.D. Searle & Co*., 367 U.S. 303, 307; 81 S.Ct 1579 (1961).

Applying similar analysis, the words "employed by" clearly have to be read as closely related to the words "volunteer at." To be "employed by or volunteer at a child care center, school or church" clearly sets forth an employment type situation, with or without pay. It does not prohibit participation in church worship services.

"The vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it

authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 128 S. Ct. at 1845.

"Perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *United States v. Williams*, 128 S. Ct. at 1845, citing *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). The Supreme Court, in reversing the Eleventh Circuit Court of Appeals, noted with disapproval that the Court had used "unproblematic hypotheticals." Evidence does not show arrests of people taking part in a worship service, giving a scripture reading, providing a dish for a pot luck, passing a collection plate or decorating a Christmas tree. The Supreme Court went further and said the Eleventh Circuit's "basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague. That is not so. Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *United States v. Williams*, 128 S. Ct. at 1845

As noted above, the word "volunteer" does not stand alone but in the context of the entire statute. To be "employed by or volunteer at a child care center, school or church" clearly sets forth an employment type situation, with or without pay. It does not prohibit participation in church worship services.

"It will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question.' " *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972), footnote 15, citing *American Communications Assn. v. Douds*, 339 U.S. 382, 412 (1950).

Overbreadth

Plaintiffs complain that the statute is overly broad because it interferes with "working, going to church and living with one's family" (doc-196, ¶ 129), treats all sex offenders the same (doc 196, ¶ 130, 131), prevents sex offenders from singing in the choir, baking a pie or working in a church soup kitchen (doc-196, ¶ 132), and prevents them from doing grocery shopping, eating at restaurants, and attending weddings and funerals. (doc-196, ¶ 133),

The statute does not prevent anyone from going to church. Sex offenders are not prevented from singing in the choir or baking a pie and are not prevented from doing grocery shopping, eating at restaurants or attending weddings. And, the fact that the residence restrictions apply to all registered sex offenders fails to establish that the statute is overbroad. In regard to the volunteer provisions, Plaintiffs fail to show how keeping registered sex offenders from working, with or without pay, at a child care center, school or church makes this statute overly broad.

"Invalidation for overbreadth is " ' "strong medicine" ' " that is not to be "casually employed." *United States v. Williams*, 553 U.S. ____, 128 S. Ct. 1830, 1839 (2008), citing *Los Angeles Police Department v. United Reporting Publishing Corp*., 528 U.S. 32 (1999). The Court in *Williams*, in reversing the Eleventh Circuit Court of Appeals, noted that despite concerns about the potential chilling effects of a statute, "we can hardly say . . . that there is a "realistic danger" that (the code section) will deter legitimate activities." *Williams*, 128 S. Ct. at 1844. "The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Williams*, 128 S. Ct. at 1844, citing *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 800 (1984).

"There must be a realistic danger that the statute itself will significantly compromise recognized *First Amendment* protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Members of City Council of Los Angeles*, 466 U. S. at 801. Such third parties do not exist. Churches have not raised an outcry about their constitutional rights being threatened—the only concerns are raised by registered sex offenders who are already parties to this action.

F.

THE FIRST AMENDMENT

Plaintiffs allege violations of the Free Exercise Clause of the First Amendment. This claim relates to the employment and volunteer provision of the statute. Plaintiffs claim that prohibiting registered sex offenders from working or volunteering at a church "operates as a substantial burden on the religious beliefs and practices" of Lori Collins, Omar Howard and others on the registry. Even with extensive discovery, including statistics from various law enforcement agencies, the Department of Corrections, and the State Board of Pardons and Paroles, Plaintiffs are still unable to present any evidence that Plaintiffs ability to practice their faith has been in any way been impacted.

The First Amendment to the United States Constitution provides in pertinent part as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;…"U.S. Const. amend. I. This provision is known respectively as the Establishment and the Free Exercise Clause. These Clauses are binding on the states through the Fourteenth Amendment. *Cantell v. Connecticut*, 310 U.S. 296 303 (1940).

A Free Exercise Clause analysis is controlled by the decision of the United States Supreme Court in *Employment Division v. Smith*, 494 U.S. 872, 886 (1990),

which held that a valid generally applicable, religious neutral law that has the effect of only incidentally burdening a particular religious practice is constitutional. Supreme Court cases have established that "the free exercise inquiry asks whether the government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden. *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989).

Here, the volunteer and employment provisions of the sex offender statute are neutral in their treatment and do not target any religious practice or organization. The provision being challenged by Plaintiffs requires that no registered sex offender "shall be employed by or volunteer at any child care facility, school, or church." It can hardly be suggested that this applies to religious, but not secular organizations. The statute simply regulates where sex offenders may volunteer or be employed. The statute has nothing to do with any one religious or secular organization in that it applies to ***all*** registered sex offenders with respect to employment or volunteering at ***any*** of the above restricted areas. Child care facilities and schools may be religious or secular. Likewise, the law applies to any business or entity. Nothing in the statute prohibits religious activities.

Plaintiff Whitaker has not been told by any law enforcement officers that she would be arrested or prosecuted if she attended church services nor has she inquired about attending church services and been told that she is not free to do so. Further, sex offenders on parole are not prohibited from participating in "worship services", including activities such as approaching the alter to pray during service, approaching the altar to accept communion, remaining after service to speak with the pastor, putting money in the offering plate, acting as a pall bearer for funerals, ushering during church services, taking up a collection during a church service or similar services. (Doc. 206-2 ¶ 22).

Also, the Sex Offender Administration Unit of the Georgia Department of Corrections does not prohibit activities at a church that constitute worship service, or any part of the religious life of a church. (Doc. 206-3, ¶¶9, 10). Sex offenders on probation are permitted to participate in worship services (including singing in the choir or playing a musical instrument at a service), teach adult Sunday school, cut the grass at the church, rake leaves or help clean church buildings. (Doc.206-3, ¶ 11). Sex offenders are not permitted to engage in activities that bring them in direct contact with children. (Doc. 206-3 ¶ 12).

Therefore, Plaintiff Wendy Whitaker is unable to show that her ability to practice her faith has been in anyway impacted by the statute. Plaintiff Whitaker's

ambiguous statement that she is fearful of attending church because she might be arrested or prosecuted is not an accurate representation of the statute and does not actually represent how various law enforcement agencies, the State Board of Pardons and Paroles, and the Department of Corrections are applying the statute and is simply not substantiated by any evidence.

The volunteer and employment provisions of the sex offender statute are far different from ordinances in cases such as *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). There the City of Hialeah, Florida targeted the Santeria religion by passing an ordinance prohibiting animal sacrifice, which was a part of the religion's ritual. The ordinance applied only to this religion and was expressly enacted to stop this religious practice. This was obviously not a "neutral" law. The statute at issue in this case is "neutral" in that it applies to churches, schools and child care facilities and applies to all registered sex offenders.

Moreover, Plaintiffs have not shown that there has been a substantial burden on their religious practices or that they ability to practice their faith has been impeded. Plaintiffs allege that Lori Collins was unable to apply for a job opening in the media ministry at Mt. Paran Church of God because she is on the sex offender registry. Working in a media ministry at a church has nothing to do with

Ms. Collins exercising her faith in her religion. Again, she is still able to pray, take communion or exercise her faith in any way she chooses.

Similarly, Plaintiff Howard is free to participate and worship in a wide variety of church activities. The only thing that Plaintiffs may not do is participate in activities that put them in direct contact with children. Not allowing sex offenders to teach children's bible study, supervise a youth ministry, or act as the minister of music to a children's choir or any choir in which children are members is certainly not unreasonable and protects innocent children from being victimized by individuals in positions of trust and confidence. No one has told Plaintiffs they could not pray, take communion, or engage in any other activities in which Plaintiffs choose to exercise their faith.

Further, Plaintiffs in this case are not religious organizations but are registered sex offenders; Plaintiffs lack standing to raise this issue on behalf of any religious organizations. The requirement that a claimant have 'standing is an essential and unchanging part of the case-or-controversy requirement of Article III'… [A] claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v. Federal Election*

Commission, 554 U.S. ____, 128 S. Ct. 2759, 2768 (2008), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560; 112 S. Ct. 2130 (1992).

In addition, the statute in question does not regulate church activity; it only regulates activity by registered sex offenders. Plaintiffs have not shown that churches are being prevented from engaging in any constitutionally protected activities. Nothing in the statute injects the state into "substantive ecclesiastical matters," as suggested by Plaintiffs. The statute regulates only the activities of persons who have been convicted of crimes and are required to register as sex offenders.

Plaintiffs have not in any way shown that their ability to practice their faith has been impeded or substantially burdened. Plaintiffs have failed to prove any first amendment violations.

G.

PLAINTIFFS LEASEHOLD INTERESTS ARE FULLY PROTECTED BY GEORGIA LAW FROM ANY 'TAKINGS' CLAIM

Janet Allison rents her home pursuant to a written lease. (doc-196 ¶ 35; doc-260-6, Allison declaration of September 14, 2009, ¶ 3). She does not allege that she has been required to break the lease or that her current residence violates the statute in any way. Janet Allison's chief complaint is that a bus stop "might be

designated," or that another prohibited location might move near her current place of residence.(doc-196, ¶ 35).

Lori Collins also rents a home pursuant to a valid lease. (doc-196, ¶ 67; doc-260-6, Collins declaration of September 14, 2009, ¶ 3). Her current residence is not impacted by the statute. Her claim is limited to the "possibility" that her lease might be impacted at some future date. (doc-196, ¶ 67).

Only these two named Plaintiffs, Janet Allison and Lori Collins, have a valid lease. Neither of these Plaintiffs has a property interest that has been "taken" as their current residence complies with the dictates of the statute. Both Plaintiffs attempt to retain "standing" by stating that "if the local school board designates its school bus stop or if a prohibited location moves within 1,000 feet of the residence" they would be required to relocate or face prosecution. (doc-196 ¶ 35, 67). This generalized fear of prosecution is insufficient to create standing. *Pittman v. Cole*, 267 F.3d 1269, 1283-84 (11th Cir. 2001).

Further, Plaintiffs have admitted "that a valid lease does constitute a property interest under Georgia law."(Response to Defendants' Request for Admission, #2). Plaintiffs have also admitted that such "property interests are protected from regulatory taking under Georgia law pursuant to the case of *Mann v. Georgia Department of Corrections*, 282 Ga. 754 (2007) and other authority."

(Response to Defendants' Request for Admission, #2). The Defendant sheriffs and Plaintiffs have also stipulated that "an individual holding a valid leasehold property interest in a residence and who resides therein shall not be required to move from such residence . . . for the duration of his or her lease" if the lease is sufficient to constitute a protected property interest and a child care facility, church, school or area where minors congregates subsequently moves within 1,000 feet of the rented residence. (doc-254).

This matter is entirely moot. Plaintiffs Collins and Allison are protected from "taking" of any property interest including the interests of a valid lease. Georgia law already fully protects the two named Plaintiffs. No other plaintiffs are involved in this claim since there is no subclass involving the "takings" claim; it is limited to Allison and Collins.

In the *Mann* case, the Georgia Supreme Court found that where the property interest predated the introduction of the prohibitive restriction or restricted condition (i.e. subsequent designation of a school bus stop), the residency restrictions are "unconstitutional to the extent that it permits the regulatory taking of appellant's property...." 282 Ga. 754, 760. Thus, to the extent that the Plaintiffs have a valid property interest under Georgia law, that property interest cannot be taken if, as Plaintiffs suggest, there is a subsequent introduction of a condition that

would be prohibited under the statute. So, to the extent that Plaintiffs might otherwise be able to show a "taking" there could be none resulting from the alleged change of conditions.

H.

PLAINTIFFS HAVE NOT SUSTAINED THEIR BURDEN

Plaintiffs have the burden of proof. They must establish their case by a preponderance of evidence. The claim should be supported by showing facts "consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1969 (2007). This they have not done.

In addition, "[l]egislative classifications . . . are presumed to be constitutional, and the burden of showing a statute to be unconstitutional is on the challenging party, *not* on the party defending the statute." *New York State Club Association v. City of New York*, 487 U.S. 1, 17; 108 S. Ct. 2225, 2236 (1988)(*emphasis in original).* Courts have an obligation to interpret a statute "in a manner that renders it constitutionally valid." *Communications Workers of America v. Beck*, 487 U.S. 759, 762; 108 S. Ct. 2641, 2657 (1988).

Plaintiffs have alleged a class action facial attack on the Residency Statute. Much of their proof, however, is anecdotal and would be more appropriate in individual "as applied" challenges. As the Court noted in regard to the claims in

Ashcroft v. Iqbal, ___U.S. ___, 129 S. Ct. 1937, 1942 (2009), "Respondent's account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some government actors. But the allegations and pleadings with respect to these actors are not before us here." Plaintiffs have alleged that the statute is infirm; they must show by clear proof what they have alleged. A defendant meets its burden on a Motion for Summary Judgment by showing "that there is an absence of evidence to support the [plaintiff's] case." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). *See also Clark v. Coats & Clark, Inc*., 929 F.2d 604 (11th Cir. 1991).

Plaintiffs' evidence is speculative, at best. While some registered sex offenders have been required to move or change job locations, the numbers have been relatively small. Sex offenders who have moved, more often than not, have found housing in the same or adjoining counties. Very few sex offenders have been arrested for violating the sex offender restrictions. Only a handful have been convicted in the more than three years this litigation has been pending. (Dolby affidavit, ¶¶ 16-46; Casting affidavit, ¶¶ 6-8; Holt affidavit, ¶¶ 6-8; Tate affidavit, ¶¶ 7-8; O'Neal affidavit, ¶¶ 5-7). While Plaintiffs complain about inability to volunteer at churches, both the Department of Corrections and the Board of Pardons and Paroles have adopted and carried out policies to make sure that no one

is prevented from exercising religious rights and worshiping as they choose. (doc-206-2, ¶¶ 9-22; doc-206-3, ¶¶ 9-24). The evidence from sheriffs' offices further shows that sex offenders are not being impeded in their attempts to practice religion or engage in any worship services. The sheriffs report very few incidents in which anyone has been prevented from volunteering. And virtually no one has been arrested for volunteering at a church. (Dolby affidavit, ¶¶ 47-48). Plaintiffs simply speculate based on a lack of firm evidence.

Plaintiffs have claimed that sex offenders will be banished. Evidence supporting such a claim is lacking. Most sex offenders have not had to move or change jobs. Those who have moved have not been forced far from their communities. (Holt affidavit, ¶¶ 6-8). As time has passed, it has become obvious that the effects of the law are far milder than claimed. After the initial reaction to passage of the law in 2006, the number of persons affected by it has diminished over time.

Plaintiffs claimed that sex offenders would be forced underground and would abscond in large numbers. Again, evidence supporting this claim is lacking. Evidence that is available shows that the rate of absconders has remained relatively constant over the years and has possibly even declined. (Tate affidavit, ¶¶ 7-8).

Evidence about school bus stops in three counties is likewise speculative. Sex offenders are now exempt from having to move if they own or lease their residence. No one knows how many sex offenders in Bulloch, Columbia and Chatham counties actually own their homes or have a lease. Plaintiffs can only speculate. No one knows how many sex offenders who are not exempt can easily move into another nearby county that has not designated school bus stops. Again, one can only speculate.

Plaintiffs have failed to carry their burden.

III. Conclusion

For all of the above and foregoing reasons, Defendants request that the Court enter summary judgment in their favor and against the Plaintiffs on all claims asserted in this action.

Respectfully submitted this 30th day of September, 2009.

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CERTIFICATION AS TO FONT

Pursuant to N.D. Ga. Local Rule 7.1 D, I hereby certify that this document is submitted in Times New Roman 14 point type as required by N.D. Ga. Local Rule 5.1(b).

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed this MOTION FOR SUMMARY JUDGMENT, BRIEF IN SUPPORT, AND STATEMENT OF MATERIAL FACTS with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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