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

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

PLAINTIFFS' BRIEF IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT AND FOR A PERMANENT INJUNCTION TO ENJOIN ENFORCEMENT OF THE "SCHOOL BUS STOP" PROVISION OF O.C.G.A. § 42-1-15(B) AND O.C.G.A. § 42-1-16(B)

This brief presents the question of whether persons on the sex offender registry – including children and persons with disabilities – may be immediately evicted from their homes and communities every time a local school board designates a school bus stop pursuant to O.C.G.A. § 42-1-15(b) or O.C.G.A. § 42-1-16(b). The material facts are not in dispute. Once a school board designates a school bus stop, any registered sex offender who is subject to the school bus stop provision who knowingly resides within 1,000 feet of the school bus stop is instantly in violation of the law and subject to 10 to 30 years in prison. Thousands of school bus stops have been designated in Bulloch, Chatham, and

Columbia counties, and plaintiffs in those counties stand to be evicted if this Court does not act.[1] Other counties will likely follow suit, depending on this Court's order. There is no factual dispute that, pursuant to § 42-1-12(a)(19), school boards may change designated bus stops at any time, subjecting plaintiffs to recurring evictions. There is further no factual dispute that law enforcement officials across Georgia mistakenly ordered hundreds of people to leave their homes due to their erroneous interpretation of the ambiguous school bus stop provision.[2] The only disputed questions are legal ones – whether the school bus stop provision is unconstitutionally vague or violates the substantive due process clause. Plaintiffs in the "school bus stop" subclass ask this Court to grant them summary judgment and to enjoin the State from expelling them from their homes pursuant to O.C.G.A. § 42-1-15(b) and § 42-1-16(b).

STATEMENT OF FACTS

Per L.R. 56.1(B), the facts are set forth in *Plaintiffs' Statement of Material Facts in Support of Renewed Motion for Summary Judgment.*

---

1 *See* Maps of Chatham, Columbia counties (Ex. 1, 2) (showing the broad scope of the school bus stop provision); P. Wagner Decl. (Ex. 3).

2 *See* Order, July 25, 2006, Doc. 54 at 5 (stating that the Court was "deeply troubled" by the "overwhelming evidence" that local law enforcement authorities prepared to evict plaintiffs pursuant to a mistaken interpretation of the law).

ARGUMENT

I. AS THIS COURT HAS REPEATEDLY HELD, PLAINTIFFS HAVE STANDING TO CHALLENGE THE SCHOOL BUS STOP PROVISION.

A plaintiff has standing when three criteria are met: (1) the plaintiff has experienced an injury; (2) the injury is fairly traceable to the challenged statute; and (3) the plaintiff's harm is likely to be redressed should the court order relief. *See Doe v. Kearney*, 329 F.3d 1286, 1292 (11th Cir. 2003). This Court has repeatedly held that plaintiffs have standing to challenge residence restrictions. In 2007, the Court found that plaintiffs articulated an "actual injury" even if they had not yet been forced from their homes.[3] In 2008 the Court ruled that defendants' claim that lessees lacked standing "does not have legal support." (*See* Order, Doc. 195 at 8). In 2009, when defendants again raised the standing issue, this Court held:

> On numerous occasions throughout this lawsuit, Defendants Perdue, Baker and Dean have taken the position that the named Plaintiffs lack standing because their residences currently comply with the statutory restrictions and because they have not been arrested, threatened with arrest, or asked to move. The Court has previously addressed this contention that the named Plaintiffs lack standing and will not do so again here. *See* Order, Mar. 30, 2009 at 13, n. 2.

Although the identities of the plaintiffs subject to injury have changed, the same standing analysis applies here with the same result. The following proposed

[3] Order, Mar. 30, 2007 at 14 (rejecting defendants' argument that plaintiffs' injuries were "hypothetical").

named plaintiffs are subject to an immediate threat of injury:

- **Walter Smiley** lives in Chatham County. He is blind. Smiley was convicted of statutory rape for an offense that occurred in 2009. Smiley's residence is within 1,000 feet of a school bus stop. Smiley neither owns nor rents his residence and does not qualify for an exemption from O.C.G.A. § 42-1-15. If the consent order enjoining Chatham County from enforcing the school bus stop provision is lifted, Smiley faces immediate eviction. (*See* Smiley Decl. (Ex. 18); Statement of Facts ¶ 48(a)).

- **Ruben Luna** lives in Columbia County with his pregnant wife and their 5-year-old daughter. Luna must register as a sex offender for an offense that occurred after July 1, 2006. The Lunas' rented home is within 1,000 feet of a school bus stop that was designated before the Lunas moved into their residence. The Lunas' lease terminates at the end of 2010. Luna wishes to renew his lease and remain in his home with his wife and child. If the consent order enjoining Columbia County from enforcing the bus stop provision is lifted, Luna faces immediate eviction. (*See* Luna Decl. (Ex. 19); Statement of Facts ¶ 48(b)).

- **G.W.** is 17 and lives in Chatham County. He must register as a sex offender for an incident that occurred in October 2006, when he was 13. G.W.'s parents' home is within 1,000 feet of a bus stop. If the consent order enjoining Chatham County from enforcing the bus stop provision is lifted, G.W. will not be able to live with his family or to re-locate within Chatham County. (*See* G.W. Decl. (Ex. 14); Statement of Facts ¶ 48(c)).

Attached to plaintiffs' motion are maps of Chatham and Columbia counties showing the broad scope of the school bus stop provision.[4] The maps show that nearly all persons on the registry in these counties who are subject to the bus

[4] *See* Maps of Chatham, Columbia counties (Ex. 1, 2); Wagner Decl. (Ex. 3).

stop provision will have to move if the provision is enforced.[5] If the consent orders are lifted, as many as 66 people will be subject to immediate eviction, including approximately 12 from Columbia County, as many as 49 from Chatham County, and 5 from Bulloch County.[6] At least four children are immediately subject to eviction.[7] An additional number may be subject to eviction due to Woodward Academy's 50 bus stops in the metro Atlanta area.[8] The school bus stop subclass class is growing all the time as more people are convicted.[9] Other counties are poised to designate bus stops if the consent order is lifted, and discovery conclusively showed that **less than 1**% of plaintiffs qualify for a homeowner exemption.[10] Few renters in bus stop counties will be protected, moreover, since bus stops were designated in those counties in 2006.[11]

---

5 *See id.;* Statement of Facts ¶ 29(a-d), 44-46.

6 *See* Statement of Facts ¶ 28-30; Wagner Decl. (Ex. 3 ¶ 9, 14, 19).

7 *See* Statement of Facts ¶ 31; *see also* Ex. 13, 14, 22.

8 *See* Statement of Facts ¶ 20; *see also* Ex. 8.

9 *See* Statement of Facts ¶ 29(a), 44-46.

10 *See* Statement of Facts ¶ 25, 29(c); *see also* Ex. 10-12.

11 *See* § 42-1-15(e)(1) (stating that lease must pre-date the school bus stop); *see also* Statement of Facts ¶ 27, 29(d).

Defendants have previously argued that plaintiffs lack standing to raise constitutional claims until the moment they are ordered from their homes. But plaintiffs do not need to wait until they suffer an injury to sue.[12] The Supreme Court, moreover, has recognized an exception to the standing requirement in cases where a plaintiff's claims are capable of repetition yet evading review.[13] Under the bus stop provision, the moment a school bus stop moves within 1,000 feet of the residence in question, the person must either leave or face arrest. The removal will thus be completed by the time a legal challenge has been mounted. Any constitutional injury will be too fleeting to be redressed and hence qualifies as being capable of repetition yet evading review. Plaintiffs have standing.[14]

---

12 *See Pennell v. City of San Jose*, 485 U.S. 1, 7-8 (1988) (landlord had standing to challenge rent control ordinance even though the ordinance had not yet been enforced, where it was not speculation to conclude that the ordinance would be enforced against plaintiff); *31 Foster Children v. Bush*, 329 F.3d 1255, 1265 (11th Cir. 2003) (plaintiffs need not wait for an injury to occur before filing suit).

13 *See Doe v. Kearney*, 329 F.3d 1286, 1293 (11th Cir. 2003). The "capable of repetition" exception applies here since the challenged action is too short in duration to be fully litigated prior to its completion. *See Bourgeois v. Peters*, 387 F.3d 1303, 1308 (11th Cir. 2004).

14 Plaintiffs easily satisfy the two remaining standing tests. The injury they allege is undoubtedly a direct result of the school bus stop provision. *Doe*, 329 F.3d at 1292. Finally, this Court can redress the constitutional injury by granting the injunctive relief plaintiffs seek. *See id.*

II. THE SCHOOL BUS STOP PROVISION, O.C.G.A. § 42-1-15(b), 42-1-16(b), 42-1-12(a)(19), IS UNCONSTITUTIONALLY VAGUE.

This Court certified a class: "for the purposes of asserting vagueness . . . challenges to the statute [of] all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-12." (*See* Order, Mar. 30, 2009 at 16-17). The school bus stop provision, §§ 42-1-15(b), 42-1-16(b), is unconstitutionally vague in violation of due process under the Fourteenth Amendment. The lack of fair notice of what the provision requires is particularly concerning given that a 10 to 30 year prison sentence faces any person charged under it. *See* §§ 42-1-15(g), 42-1-16(g).

A basic tenant of due process is that "[all persons] are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A statute is impermissibly vague if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Skilling v. United States*, 130 S. Ct. 2896, 2904 (2010). A law must provide "fair notice" of proscribed conduct so citizens can conform

their conduct to the law. *Morales*, 527 U.S. at 58. Vagueness standards are particularly stringent when a criminal statute is reviewed.[15]

A. The Undefined "Designated" School Bus Stop Provision of § 42-1-12(a)(19) is Unconstitutionally Vague.

A statute must provide sufficient notice and clarity to enable "ordinary people" to understand "what conduct it prohibits." *Grayned*, 408 U.S. at 108. The school bus stop provision fails this test. It is vague both facially and as applied. *The phrase "school bus stop as designated by local school boards" in § 42-1-12(a)(19) is so ambiguous and unclear that nearly every sheriff's department in Georgia misinterpreted its meaning in 2006.*[16] The phrase produced such confusion that

---

[15] *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998) ("The terms of the provision are undeniably opaque, and if they appeared in a criminal statute . . . they could raise substantial vagueness concerns."); *Santos v. State*, 284 Ga. 514, 516-176, 668 S.E.2d 676, 679 (2008) ("The language of a criminal ordinance cannot be so ambiguous as to allow the determination of whether a law has been broken to depend upon the subjective opinions of complaining citizens and police officials."). *See also Elwell v. Township of Lower*, 2006 WL 3797974 at *14-15, 17 (N.J. Super. Ct. Law Div. Dec. 22, 2006) (ordinance prohibiting sex offenders from residing or loitering within 25 feet of school bus stop was unconstitutionally vague and violated substantive due process clause).

[16] All ten law enforcement officers who testified at the July 2006 preliminary injunction hearing in this case – including Ted Paxton (Forsyth County), Investigator Russell Finely (Cobb County), Captain David Davis (Bibb County), Corporal Stephen Liflan (DeKalb County), Corporal Karen Pirkle (Gwinnett County), Sergeant Jay Baker (Cherokee County), Investigator Charlene Giles (Houston County), Lt. Ezell Brown (Newton County), Investigator Gene Higdon (Rockdale County), and Deputy Glenn Hoover (Fulton County) – believed that

Georgia sheriffs mistakenly ordered hundreds of people to leave their homes,[17] actually evicted numerous people,[18] and came within 48 hours of mistakenly evicting thousands more.[19] Those Sheriffs understood the term "designated" to

---

"school bus stops" referred to places where school buses stopped to pick up children, and all were enforcing the statute accordingly. *See* Tr. of Prelim. Inj. Hearing, July 11-12 [Doc. No. 42, 43] at 23, 37-38, 49-50, 62, 85, 87, 88, 159-60.

[17] Sheriff Paxton of Forsyth County testified that his office notified all sex offenders in his county about the school bus stop provision and planned to give registrants 72 hours to vacate their homes or face arrest. *See* Tr. of Prelim. Inj. Hearing, July 11-12 at 27-28. As of July 11, 2006, the Cobb County Sheriff's Office had already directed most of its 200 sex offenders to vacate by July 1. *See id.* at 37-40. Corporal Stephen Lifland testified that the DeKalb County Sheriff's Office had imminent plans to "start arresting" people who remained at a residence within 1,000 feet of a school bus stop. *See id.* at 65-66.

[18] *See* M. Doctoroff Decl. (Ex. 9) at ¶ 12; Attachment C (compiling sheriffs' discovery responses admitting to at least 43 actual evictions due to the school bus stop provision in 2006). *See also* L. Collins Decl., June 19, 2008 at 6-7 [Doc. No. 187-10] (stating that Collins was forced from her home in Rockdale County due to school bus stop provision); A. Norton Decl., June 12, 2008, [Doc. No. 186, Ex. 5 ¶ 13] (stating that he and his wife and children were forced to move from a rented residence when Cobb County law enforcement officials told them that a school bus stop had been designated within 1,000 feet of his residence); A. Raines Decl., Sept. 3, 2009 (Ex. 21) (stating that he, his wife and their 11-month-old daughter were forced to move from their home in Columbia county due to the bus stop provision); J. Jones Decl., Jan. 29, 2008 [Ex. C to Doc. No. 169] (stating that the bank foreclosed on his home and that he lost approximately $25,000 after a Cobb County sheriff's deputy ordered him to move from his home within 30 days because it was within 1,000 feet of a school bus stop).

[19] *See* n. 16, 17; Statement of Facts ¶ 8-13.

mean any location where a school district's buses regularly pick up students.[20] This position was identical to that of the Bill's sponsor.[21] Some school districts interpreted the phrase differently, to exclude stops at individual students' homes.[22] *See Konikov v. Orange Cty.*, 410 F.3d 1317, 1330-31 (11th Cir. 2005) (differences in interpretation by enforcing agents supports vagueness).[23] The State defendants have insisted that their interpretation of the provision is definitive, but government officials cannot cure vagueness by "settl[ing] upon a

---

[20] *See id.*; *Pls' Br. in Resp. to Court's July 12 Ruling Regarding the Definitions of "School Bus Stops"* [Doc. No 40] at 19.

[21] R. McDonald, *Court Weighs if Laws Will Banish Sex Offenders; State Attorneys at Odds with Legislature, Sheriffs Over Bus Stops*, FULTON COUNTY DAILY REPORT, July 14, 2006 (quoting Rep. Keen as stating "[d]esignated means the appointed areas that a school bus driver is given that they are to go and pick children up.").

[22] *See* Testimony of Robin Blackburn, Seminole County, Tr. of Hearing, July 11, 2006 [Doc. No. 42] at 94-99.

[23] *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (statute requiring persons on public streets to provide "credible and reliable identification" to police was vague because it encouraged arbitrary enforcement). *See also James v. United States*, 550 U.S. 192, 230 (2007) (Scalia, J., dissenting) (The legislature has "abdicated its responsibility when it passes a criminal statute insusceptible of an interpretation that enables principled, predictable application.").

definition" of an otherwise vague term. *See Ga. Pacific Corp. v. Occupational Safety and Health Rev. Comm'n*, 25 F.3d 999, 1005 (11th Cir. 1994).[24]

As this Court correctly predicted, the school bus stop provision continued to cause confusion even after the Court's July 26, 2006 order.[25] In 2008, a private school sought to designate school bus stops, but its attorney told the Attorney General that the statute was unclear:

> The purpose of this letter is for Woodward Academy to designate the bus stops on the enclosed list . . . for the purpose of prohibiting registered sex offenders from residing within 1,000 feet of these bus stops. *Because the statute does not provide private schools with guidance* as to how to designate its school bus stops, the enclosed list is being sent to your office . . . .[26]

---

[24] The combination of patently vague terms and dramatically different interpretations of a statute supports a finding of vagueness. *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1048-51 (1991). In *Gentile*, the Supreme Court determined that a particular rule was void for vagueness because its safe harbor exception contained no clarifying interpretation, requiring one who sought to avail himself of it to guess at its contours. *Id.* at 1048. The vagueness of the language misled the petitioner to think his actions fell within the exception partly because the terminology ("general nature" and "without elaboration") had no settled usage or traditional interpretation in law, effectively blurring the line between what was acceptable and what was forbidden. *Id.* at 1048-1049. Despite petitioner's conscious effort to understand and comply with the exception, the Court noted that the rule ultimately created a trap for those wary and unwary, leading to the impermissible risk of discriminatory enforcement. *Id.* at 1051.

[25] *See* Order, July 25, 2006 at 6 ("This ruling, therefore, may only result in delay, confusion, and inconsistent actions at the local level.").

[26] *See* Ex. 8.

Defendants argued in 2009 that Georgia's Open Meetings law renders the term "school bus stop" clear.[27] Yet, even the state defendants have acknowledged the confusion caused by the school bus stop provision:

> THE STATE: What is troubling, I think, for everybody involved in this situation is there has been an inundated panic with sheriffs holding up maps, saying we don't know.[28]

This admission that the statute caused "panic" and that sheriffs did not know how to interpret it weighs in favor of a finding of vagueness. Compounding this admission, the state acknowledged that the term "designated" is unclear:

> THE STATE: The Legislature made a decision to define school bus stops as those designated by the local school board. Now whether or not it's sufficient to have a designee who creates the list and then has the school board approve it, what criteria is needed, that needs to play itself out, I think, in the Georgia courts . . . .
>
> THE COURT: Most people would assume that if a school board gave you a list of school bus stops they were probably designated by the local school board.
>
> THE STATE: Well, I can't help what people assume. I think the statute speaks for itself, Your Honor.
>
> THE COURT: The statute doesn't clarify that, though.[29]

---

27 *See* Defs' Resp. to Pls' Mot. Summ. J., Oct. 30, 2009, at 21.

28 *See* Tr. of Hearing, July 11, 2006 at 13 [Doc. No. 42] (Sr. Asst. Att'y Gen. Devon Orland).

29 *See id.* at 16.

A statute that infringes so substantially on a person's home and family relationships – and which subjects violators to 10 to 30 years in prison – must provide clear notice of what is required. The school bus stop provision fails so monumentally in this regard that numerous, reasonable law enforcement officials misinterpreted the provision, mistakenly forcing plaintiffs to abandon homes. There is no reason to believe that the confusion that ensued in 2006 will not again ensue if the school bus stop provision is permitted to go into effect.

B. The School Bus Stop Provision Does Not Provide Reasonable Notice of Prohibited Conduct.

Aside from the matter of "designation," the school bus stop provision is vague in that it does not provide plaintiffs with reasonable notice of what conduct is prohibited. There are thousands of school bus stops in counties that have designated them.[30] School bus stops are not always marked. Many are impossible to identify, and plaintiffs do not have access to bus stop lists. Unlike a school or child care center, bus stops have no set boundaries, making it impossible to measure 1,000 feet from each one.[31] Moreover, bus stops are a

---

30 *See* Ex. 1, 2; *Statement of Facts* ¶ 15-17.

31 *Cf. Hill v. Colorado*, 530 U.S. 703, 733 (2000) (rejecting vagueness challenge to criminal statute and explaining that "one of the [statute's] virtues is the specificity of the definitions of the zones described in the statute.").

moving target; they are inherently transient and may be designated by school boards at any time, significantly limiting the permanency of plaintiffs' residences. The school bus stop provision is unconstitutionally vague.

C. Instant Criminal Liability for the School Bus Stop Provision Allows Criminal Sanction Without Fair Warning of Illegality.

O.C.G.A. §§§ 42-1-15, 42-1-16, 42-1-12(a)(12) are unconstitutionally vague because they do not provide fair warning of prohibited conduct such that plaintiffs could take steps to comply with the law. While § 42-1-15(g), 42-1-16(g) provide that residence at a prohibited location must be "knowing," there is no opportunity to move from one's unlawfully located home to avoid criminal sanction. Once a person becomes aware ("knowing") that his home is in a prohibited location, he immediately commits the criminal act and "*shall* be punished by imprisonment" for 10-30 years. *Id.* (emphasis added). O.C.G.A. § 42-1-15 and 42-1-16 premise criminal liability on mere geographic positioning – creating criminal liability as soon as a plaintiff knows of the prohibited location. The lack of notice and time for opportunity to comply is particularly problematic for plaintiffs who find themselves living in proximity to a school bus stop; unlike a school, church, or pool, bus stops do not need to be constructed, but can spring into existence in an instant.

Criminal laws generally provide an intent element *and* an act requirement;[32] here, there is no act, only presence. The moment a plaintiff becomes aware of a school bus stop, the crime is complete. The "act" in question is by a third party who designates a bus stop. And, as the Georgia Supreme Court noted in *Mann v. Georgia Department of Corrections*:

> O.C.G.A. 42-1-15 looms over every location appellant chooses to call home, with its on-going potential to force appellant from each new residence whenever, within that statutory 1,000-foot buffer zone, some third party chooses to establish any of the long list of places and facilities encompassed within the residency restriction. While this time it was a day care center, next time it could be a playground, a school bus stop, a skating rink or a church. 282 Ga. 754, 759 (2007).

The bus stop provision lacks a warning requirement or even a narrow time period to move one's home, an essential element which would form the basis for a criminal act. *Davis v. City of Peachtree City*, 251 Ga. 219, 221 (1983) (application of ordinance to defendant who lacked criminal intent violated due process clause). The bus stop provision fails to provide fair warning of prohibited conduct.

---

[32] *See generally Sheffield v. State*, 281 Ga. 33, 35 (2006); *Moody v. State*, 253 Ga. 456, 456 (1984); *Carr v. State*, 196 Ga. App. 397 (1990).

III. THE SCHOOL BUS STOP PROVISION VIOLATES THE SUBSTANTIVE DUE PROCESS CLAUSE, ESPECIALLY AS APPLIED TO CHILDREN AND PERSONS WITH DISABILITIES.

A. The Freedom to Maintain One's Home and Family Without Being Subject to 10 to 30 Years Imprisonment Is a Protected Liberty Interest that the State Cannot Infringe Upon Absent a Countervailing Interest Sufficient to Justify Such a Massive Intrusion.

The Due Process Clause is a "bulwark[]…against arbitrary legislation." *Hurtado v. California*, 110 U.S. 516, 532 (1884). The liberty guaranteed by substantive due process "includes a freedom from all substantial arbitrary impositions and purposeless restraints," and "recognizes…that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J. dissenting).

Moving away from the traditional substantive due process analysis,[33] where grouping rights as "fundamental," or not, and applying strict scrutiny, or the rational basis test dictated the Due Process inquiry, the United States Supreme Court recently advanced a more nuanced analysis. In 2003, the Court

---

[33] In the classic due process analysis, government actions that interfere with "fundamental rights" protected by the Due Process Clause are subject to strict scrutiny, and will be upheld only if they are "necessary" to achieve a compelling interest and are "narrowly tailored" to that end. *Roe v. Wade*, 410 U.S. 113 (1973). Government actions implicating all other rights are subject to the rational basis test, and pass muster so long as they are rationally related to a legitimate state interest. *See id.*

in *Lawrence v. Texas*, 539 U.S. 558, struck down the Texas sodomy statute as violative of substantive due process. The Court did so without using either the strict scrutiny or rational basis test, holding instead that the statute "furthers no legitimate state interest which can *justify* its intrusion into the personal and private life of the individual." *Id*. at 578 (emphasis added).[34]

Whether using the traditional "fundamental rights" analysis or the newer, more nuanced due process analysis developing in the Supreme Court to scrutinize the school bus stop provision, the significant impact of the provision is central to the inquiry. If the consent orders are lifted, as many as 66 people will be subject to immediate eviction in "school bus stop" counties, driving them away from spouses, children, or other family they do not wish to abandon. (Facts ¶ 29-30). Some, like Walter Smiley, are disabled. (Facts ¶ 48). Others, like G.W., are children. (Facts ¶ 31). Moreover, other counties are waiting in the wings to designate bus stops, upend families and send class members packing.

The school bus stop provision affects not only plaintiffs' homes, but also their family relationships. "The institution of the family is deeply rooted in this Nation's history and tradition," *Moore v. City of East Cleveland*, 431 U.S. 494, 503

---

[34] *See Lofton v. Sec'y of Dep't of Children and Family Serv.*, 358 F.3d 804, 816 (11th Cir. 2004) (recognizing that in *Lawrence v. Texas*, the Supreme Court dispensed with the "standard fundamental-rights analysis").

(1977), and "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974). As the Court stated in *Moore*, "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." 431 U.S. at 499.

Because of the expansiveness of the bus stop provision,[35] spouses, parents, and children of people on the registry will be faced with the Hobson's choice of moving suddenly or being separated. The provision has caused and will continue to cause enormous upheaval and stress for plaintiffs' families. *See Elwell*, 2006 WL 3797974 at *15 (ordinance prohibiting sex offenders from residing near bus stops "substantially intrude[d] upon significant family matters," including "how to raise and care for children").[36]

---

35 *See* Maps (Ex. 1, 2); *see also* Doc. 274 (Ex. 1-4).

36 *See* Luna Decl. (Ex. 19) (stating that he wishes to remain in his home with his pregnant wife and 5-year-old daughter). *See also* Danner Decl., Dec. 19, 2007 (Ex. 20) (stating that she and her late husband, who died of cancer, were forced to move three times due to the Statute; further stating that they were ordered to move a fourth time while her husband was under hospice care); Early Decl., July 27, 2006 [Ex. 1 to Doc. No. 63] (stating that school bus stop provision would

Under traditional due process analysis, the impact on plaintiffs' families is relevant because it shows an imposition on the fundamental right to cohabit with one's family, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984) (describing the life activities entitled to constitutional protection as "those that attend the creation and sustenance of a family," including "cohabitation with one's relatives"). Under the Court's *Lawrence* approach, this Court must consider how the school bus stop provision affects plaintiffs' liberty interest in maintaining their homes and families, and how deeply the provision infringes on those interests. Either way, the question is whether the State's interest justifies such an enormous infringement on plaintiffs' liberty interests.

States are permitted to infringe on basic liberty interests, but only "in

---

separate him from his wife who has multiple sclerosis); Sponsler Decl., June 25, 2006 [Ex. 1 to Doc. No. 12] (describing the stress and uncertainty wrought by the school bus stop provision and its effect on family life as parent of 4-year-old and infant); Mauldin Decl., June 25, 2006 [Ex. 2 to Doc. No. 12] at 2-3 (describing predicament of being expectant mother married to a person on the registry and being faced with the possibility of separation from husband while 8 ½ months pregnant; fearing that statute "will hinder us from raising our child in a stable environment"); Corbin Decl., June 25, 2006 [Ex. 4 to Doc. No. 12] (describing emotional effects of possibility of separation from husband on registry, with emphasis on hardship on special-needs child); Whitaker Decl., June 28, 2006 [Doc. No. 19-6] (expressing concerns about separation from disabled father, for whom registrant was primary caregiver); Hodges Decl., Sept. 4, 2009 (Ex. 15) (stating that he had two strokes, is paralyzed on one side, is confined to wheelchair, relies on family for assistance, and resides within 1,000 feet of a school bus stop in Bulloch County).

certain narrow circumstances."[37] The hallmark of a permissibly narrow infringement in instances where the person's liberty is severely damaged is an individualized assessment to ensure the State does not step beyond what is strictly necessary.[38] The bus stop provision provides for no such assessment.

To give an example, in *Sell v. United States*, 539 U.S. 166 (2003), the Court recognized that individuals have a "liberty interest" in "avoiding the unwanted administration of antipsychotic drugs," and sought to determine whether the government's interest in having a criminal defendant competent to stand trial justified an infringement of the criminal defendant's liberty interest. *Id*. at 176. Because forced medication infringes so seriously on a person's liberty interest in bodily integrity, the Court established *individualized assessment* criteria to ensure

---

[37] *See Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (upholding statute permitting civil commitment of sexually dangerous persons, but only where state provided a full-blown trial on the issue of dangerousness). Under the statute in *Hendricks*, persons at risk of commitment are entitled to: counsel; funds for a mental health examination; the right to cross-examine witnesses; the right to review documents; and annual review to determine whether the state continues to meet its burden to keep the individual confined. *Hendricks*, 521 U.S. at 352-53, 357-58. Upholding this statute against a substantive due process challenge, the Supreme Court was apparently impressed by the pains taken by the state to ensure that it was justified in committing a person under the statute. *See id.*

[38] *See e.g. United States v. Loy*, 237 F.3d 251, 269 (3d Cir. 2001) (a state may not restrict a sex offender's parental rights without first determining in an individualized hearing that the parent's custody threatens the child's safety).

that the government intrusion is justified. *Id.* at 180-181. The *Sell* Court's analysis offers guidance on whether the State's interest in protecting children here justifies enforcement of a law that summarily ousts people from their homes without any individualized determination of dangerousness:

> First, a court must find that *important* governmental interests are at stake…Second, the court must conclude that involuntary medication will *significantly further* those concomitant state interests. It must find that administration of the drugs is substantially likely to render the defendant competent to stand trial. At the same time, it must find that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense…Third, the court must conclude that involuntary medication is *necessary* to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results…Fourth, as we have said, the court must conclude that administration of the drugs is *medically appropriate*, i.e., in the patient's best medical interest in light of his medical condition…

Id. at 180-81. After balancing all factors, the *Sell* Court determined the state interest in making Mr. Sell competent could not justify the intrusion on Mr. Sell's interest in remaining free of forced medication. *Id.* at 185-86.

Losing one's home and being driven from one's community is a similarly serious loss of liberty. Yet plaintiffs stand to be summarily evicted from their homes without *any* assessment as to whether their residence in proximity to a school bus stop poses a risk. Lacking a procedure to determine which individuals could legitimately be subject to the 1,000 foot buffer, the school bus

stop provision "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence*, 539 U.S. at 578.

Finally, for the reasons set forth in Doc. 262, p. 14-19, due process prohibits enforcement of the school bus stop provision even under rational basis review. Disabling plaintiffs from securing a place to live advances no legitimate state interest and is so irrational that it runs afoul of the Due Process Clause.

B. The School Bus Stop Provision Violates the Substantive Due Process Clause As Applied to G.W. and Other Children.

There are 18 children on Georgia's sex offender registry, four of whom live in Chatham County.[39] All four – including R.W., age 15, G.W., age 17, J.M., age 17, and K.M., age 16 – will be unable to live in their homes with their families if the bus stop provision is enforced, in violation of the Due Process Clause.[40]

Parents and children have a right to live together without governmental interference.[41] The "integrity of the family unit" is further protected by the Due

---

39 *See* Statement of Facts ¶ 31.

40 *See id. See also* R.W. and B. W. Decls. (Ex. 13); G.W. and R.W. Decls. (Ex. 14); J.M. Decl. (Ex. 22).

41 *See Troxel v. Granville,* 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Santosky v. Kramer,* 455 U.S. 745, 753 (1982); *Stanley v. Illinois,* 405 U.S. 645, 651 (1972).

Process Clause.[42] The school bus stop provision substantially impedes the right of parents and children to live together by making it impossible for a child on the registry to find a permanent home without facing a perpetual risk of eviction.[43]

Even under the rational basis test, the school bus stop provision cannot stand as applied to children. *See State v. C.M., C.D.M., and S.D.*, 746 So.2d 410, 419 (Ala. Ct. Crim. App. 1999) (striking down residence restriction as applied to juvenile sex offenders whose parents lived within 1,000 feet of child care centers and finding that the "provisions of the Act as applied to juveniles are excessive"). In *C.M., C.D.M, and S.D.,* the Alabama Court of Criminal Appeals held:

> [C.]M. and C.D.M. are under the minimum work age and are unable to support themselves. These juveniles would become wards of the state if they were not allowed to return to their families. . . .We are also concerned about the effect this law has on the parents and siblings of a juvenile sex offender. The Act forces a parent who has children other than the juvenile sex offender to choose which child may live with the parent. Certainly, no parent should have to make this choice. *Id.* at 415, n. 8.

---

42 *Stanley*, 405 U.S. at 651; *Doe By and Through Doe v. Public Health Trust of Dade County*, 696 F.2d 901, 908 (11th Cir. 1983) (recognizing "a constitutional right of continuing parental oversight").

43 *Mann*, 282 Ga. at 755 (finding that O.C.G.A. § 42-1-15 is so extreme that "there is no place in Georgia where a registered sex offender can live without being continually at risk of being ejected.").

It shocks the conscience to turn children into nomads, requiring them to be "repeatedly uprooted and forced to abandon homes." *Mann,* 282 Ga. at 756.

C. The School Bus Stop Provision Violates the Substantive Due Process Clause As Applied to Walter Smiley and Others With Disabilities.

Unlike sex offender residence laws in other states, Georgia's school bus stop provision does not make an exemption for persons who no longer pose a threat due to infirmity, illness, or disability.[44] In 2006, plaintiff class members – including a man in hospice care with weeks to live and an Alzheimer's patient — were forced to seek injunctions to block their evictions from nursing homes.[45] Walter Smiley, who is blind, now faces immediate eviction absent action by this

---

[44] *See* O.C.G.A. 42-1-15, 42-1-16. Pursuant to a new code section adopted in 2010, certain sex offenders may now petition to be released from the residence restrictions if they are in nursing homes, or are "totally and permanently disabled" or "seriously physically incapacitated," but only if they have completed probation or parole. *See* O.C.G.A. 42-1-19(a).

[45] *See* Pls' Mot. for Prelim. Inj., Oct. 12, 2006 [Doc. No. 99]; Consent Order, Oct. 19, 2006 [Doc. No. 105] (agreement between plaintiffs and Cherokee County Sheriff to permit plaintiff to remain in nursing home within 1,000 feet of a church pending resolution of this action); Consent Order, Oct. 17, 2006 [Doc. No. 104] (agreement between plaintiffs and Sheriff of Candler County to permit three plaintiffs to remain in nursing home within 1,000 feet of a church pending resolution of this case); Resp. of Sheriff Whittle to Pls' Mot., Oct. 13, 2006 [Doc. No. 102] (permitting certain plaintiffs to remain in nursing homes pending resolution of this case).

Court.[46] Forcing disabled people out of their homes because they live near a school bus stop "shocks the conscience," *Carr v. Tatangelo*, 338 F.3d 1259, 1271 (11th Cir. 2003), and fails the rational basis test. *See Joel v. City of Orlando*, 232 F.3d 1353, 1358 (11th Cir. 2000). As applied to Smiley and others with disabilities, "the relationship between the classification and the goal" of protecting children from sex offenses is "so attenuated as to render the distinction arbitrary or irrational."[47] A civilized society does not turn persons with disabilities into nomads, requiring them to be "repeatedly uprooted and forced to abandon homes." *Mann,* 282 Ga. at 756.

CONCLUSION

For the foregoing reasons, plaintiffs ask this Court to grant their motion and to issue a permanent injunction against enforcement of the school bus stop provision of O.C.G.A. § 42-1-15(b), § 42-1-16(b), and § 42-1-12(a)(19).

---

[46] *See* Smiley Decl. (Ex. 18) (stating Smiley is on probation, disqualifying him from seeking a "disability exemption" pursuant to § 42-1-19(a)).

[47] *Mikaloff v. Walsh*, 2007 WL 2572268 at *11 (N.D. Ohio 2007) (finding sex offender residence law excessive where "[a] feeble, aging paraplegic must leave his home just as a younger one."); *Open Homes Fellowship, Inc. v. Orange County, Fla.*, 325 F. Supp. 2d 1349 (M.D. Fla. 2004) (finding zoning restrictions on ministry for "substance-addicted" persons, including sex offenders, was unconstitutional under rational basis review because of insufficient showing of "threat to safety").

Respectfully submitted this 15th day of September, 2010.[48]

s/ Sarah Geraghty

SOUTHERN CENTER
FOR HUMAN RIGHTS
Stephen B. Bright
(Ga. Bar No. 082075)
Sarah Geraghty
(Georgia Bar No. 291393)
Gerald R. Weber
(Georgia Bar No. 744878)
83 Poplar Street, N.W.
Atlanta, Georgia 30303-2122
Telephone: (404) 688-1202
Fax: (404) 688-9440
sbright@schr.org
sgeraghty@schr.org
gweber@schr.org

[48] Pursuant to L.R. 7.1, the undersigned counsel hereby certifies that this document has been prepared in compliance with L.R. 5.1B.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon Defendants by causing a true and correct copy thereof to be delivered by the Court's ECF filing system to Defendants' counsel of record at the following addresses:

Mr. Joseph Drolet
Ms. Devon Orland
Office of the Attorney General
40 Capitol Square
Atlanta, GA 30334

Mr. David E. Hudson
Hull Barrett, PC
Sun Trust Bank Building
801 Broad Street, Seventh Floor
Augusta, Georgia 30901

This 15th day of September, 2010.

s/ Sarah Geraghty

Sarah Geraghty
Southern Center for Human Rights
83 Poplar Street, N.W.
Atlanta, Georgia 30303-2122
Tel: (404) 688-1202
Fax: (404) 688-9440

Attorney for the Plaintiffs