EXHIBIT 14

Attorney General Letter (July 14, 2006)

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. BOX 30212
LANSING, MICHIGAN 48909

MIKE COX
ATTORNEY GENERAL

July 14, 2006

Honorable Jacob W. Hoogendyk, Jr.
State Representative
The Capitol
Lansing, MI

Mr. Larry J. Burdick
Isabella County Prosecuting Attorney
200 North Main Street
Mt. Pleasant, MI 48858

Dear Representative Hoogendyk and Mr. Burdick:

Attorney General Cox has asked me to respond to your recent letters in which you ask several questions regarding the amendments made to the Sex Offenders Registration Act (Act), MCL 28.721 *et seq,* by 2005 PA 127. Your questions relate to prohibited conduct within school safety zones. Due to the subject matter of the request, I asked staff in the Criminal Division to review your letters. The following represents their findings.

You first ask whether a registered sex offender is prohibited from using a public library if the library is located within a student safety zone. Section 34(1) of the Sex Offenders Registration Act, MCL 28.734(1), generally prohibits a registered individual from working or loitering within a student safety zone:

> (1) Except as provided in this section and section 36, an individual required to be registered under article II shall not do 1 or more of the following:
>
> (a) Work within a student safety zone.
>
> (b) Loiter within a student safety zone.

A student safety zone is defined as that "area that lies 1,000 feet or less from school property." MCL 28.733(f). The Legislature has defined "loiter" to mean "remain[ing] for a period of time and under circumstances that a reasonable person would determine is *for the primary purpose of observing or contacting minors*." MCL 28.733. (Emphasis added.)

Where the Legislature has defined a term in a statute, that definition supersedes accepted or dictionary definitions and is binding on the courts. *Tryc v Michigan Veteran's Facility,* 451 Mich 129, 136; 545 NW2d 642 (1996). If the statute's language is clear and unambiguous, courts must assume that the Legislature intended its plain meaning and the statute must be enforced as written. *People v Stone,* 463 Mich 558, 562; 621 NW2d 702 (2001). A court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc,* 460 Mich 305, 311; 596 NW2d 591 (1999). Thus, assuming that a registered individual were to travel to and remain in a public library for purposes other than to work or primarily observe or contact minors, he or she would not be loitering as defined by the plain and unambiguous language of the Act. Therefore, 2005 PA 127 would not prohibit this type of activity.

You also seek further clarification of the term "loiter" in connection with registered offenders engaging in such activities as attending their child's school play or sporting event or picking up their children from school.

The Act does not specifically prohibit registered offenders from entering into a school safety zone for the primary purpose of dropping off and picking up their child. If this is the primary purpose for the entry into the school safety zone, the offender is not loitering and has not violated the Act.

However, the case of a registered offender attending a school play or school sporting event is more problematic. Interpreting the statute according to its plain and unambiguous language, and using the "reasonable person" standard incorporated into the definition of "loiter," a registered offender attending a school play or school sporting event would be doing so for the primary purpose of observing minors.

The plain meaning of the Act is that registered offenders are loitering if a reasonable person would determine their primary purpose is to observe minors. Attendance at a school play or sporting event involves the primary purpose to observe minors. This activity falls within the definition of "loiter" as defined unambiguously by the Legislature. Therefore, it would be prohibited by the Act for registered offenders to attend a school play or sporting event. The Act makes no accommodation for school events that may involve a child of the offender and the rules of construction do not allow reading anything into the clear language of a statute that the Legislature did not include. **

Finally, you ask whether, if a building partly resides within a student safety zone, a registered offender may work in the entire building or only in that portion outside the student safety zone. As discussed above, 2005 PA 127 generally prohibits a registered offender from working within a student safety zone. This section is subject to certain exceptions, however. MCL 28.734(3) states that the prohibition against working within a student safety zone provided under section 34(1)(a) does not apply to any of the following:

> (a) An individual who was working within a student safety zone on January 1, 2006. However, this exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone.
>
> (b) An individual whose place of employment is within a student safety zone solely because a school is relocated or is initially established 1,000 feet or less from the individual's place of employment. However, this exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone.

> (c) An individual who only intermittently or sporadically enters a student safety zone for the purpose of work. However, this exception does not apply to an individual who initiates or maintains contact with a minor within a student safety zone. [MCL 28.734(3)(a) – (c).]

In addition, the prohibition against working in a student safety zone stated in section 34 does not apply to certain individuals convicted as juveniles of specified crimes under specified circumstances. MCL 28.736.[1]

Therefore, 2005 PA 127 would not prohibit a registered offender from working in a building that was partially within a student safety zone so long as the offender worked there on January 1, 2006, and does not initiate or maintain contact with a minor within that school safety

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[1] This section provides:

(1) Subject to subsection (2), sections 34 and 35 do not apply to any of the following:

(a) An individual who is convicted as a juvenile under section 520b, 520c, or 520d of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520c, and 750.520d, of committing, attempting to commit, or conspiring to commit a violation solely described in section 520b(1)(a), 520c(1)(a), or 520d(1)(a) of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520c, and 750.520d, if either of the following applies:

(i) The individual was under 13 years of age when he or she committed the offense and is not more than 5 years older than the victim.

(ii) The individual was 13 years of age or older but less than 17 years of age when he or she committed the offense and is not more than 3 years older than the victim.

(b) An individual who was charged under section 520b, 520c, or 520d of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520c, and 750.520d, with committing, attempting to commit, or conspiring to commit a violation solely described in section 520b(1)(a), 520c(1)(a), or 520d(1)(a) of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520c, and 750.520d, and is convicted as a juvenile of violating, attempting to violate, or conspiring to violate section 520e or 520g of the Michigan penal code, 1931 PA 328, MCL 750.520e and 750.520g, if either of the following applies:

(i) The individual was under 13 years of age when he or she committed the offense and is not more than 5 years older than the victim.

(ii) The individual was 13 years of age or older but less than 17 years of age when he or she committed the offense and is not more than 3 years older than the victim.

(c) An individual who has successfully completed his or her probationary period under sections 11 to 15 of chapter II for committing a listed offense and has been discharged from youthful trainee status.

(d) An individual convicted of committing or attempting to commit a violation solely described in section 520e(1)(a) of the Michigan penal code, 1931 PA 328, MCL 750.520e, who at the time of the violation was 17 years of age or older but less than 21 years of age and who is not more than 5 years older than the victim.

(2) An individual who is convicted of more than 1 offense described in subsection (1) is ineligible for exemption under this section.

zone. Nor would the statute prohibit the offender from working there if the student safety zone was created after the offender commenced employment at that location. In situations where the offender seeks to begin employment in such a building, the offender must perform his or her job tasks outside the zone and may only venture within the student safety zone intermittently or sporadically and only for work purposes.

Sincerely,

Gary P. Gordon
Chief Deputy Attorney General

EXHIBIT 15

MIRS Reports

MIRS Capitol Capsule, Thursday, April 7, 2005
available at http://www.mirsnews.com/capsule.php?gid=217#3381

Mortimer Wants Tougher Indecent Exposure Penalties

After receiving feedback from a constituent, Rep. Leslie **MORTIMER** (R-Horton) is leading a charge to increase penalties for indecent exposure.

Mortimer said the woman didn't feel safe in her own home after repeated acts of exposure by a local man. Current laws prevented local law enforcement from taking action against the man.

"Not only was she traumatized by the repeated personal invasions, but she was also frustrated by the limited legal options available to her because of the crime's low-penalty classification," said Mortimer. "The bills we introduced today are about increasing the consequences for a serious sexual offense, which separates it from something like public urination or streaking. I applaud her bravery in coming forward and sharing her experiences with me so I could take action."

Mortimer said the three-bill package introduced today recognizes the difference, and addresses the inequity, between indecent exposure that arises out of an act like streaking and one that arises from someone purposely engaging in lewd and lascivious behavior.

Mortimer's bill increases the penalty for indecent exposure to a two-year misdemeanor if the individual was engaged in a lewd and lascivious act at the time of the exposure.

Another bill, sponsored by state Rep. Rick **JONES** (R-Grand Ledge) would require that a convicted offender be immediately added to the sex offender registry. Currently, a person convicted of indecent exposure does not go on the SOR unless they are convicted three times.

"No more three strikes and you're out for lewd and lascivious indecent exposure," said Jones. "This is a serious crime that has always had serious consequences for the victim. Now we are making sure it has serious consequences for those who commit the crime."

A bill sponsored by state Rep. Kevin **ELSENHEIMER** (R-Bellaire) sets sentencing guidelines for indecent exposure.

"These bills will implement levels of punishment based on the intent of the offender," said Elsenheimer "As a former prosecutor, I know the current law fails to appropriately deal with targeted lewd or lascivious behaviors."

MIRS Capitol Capsule, Thursday, December 15, 2005
available at http://www.mirsnews.com/capsule.php?gid=391#6130

Student Safety Zone Carve Out Snuffed Out

Lawmakers snuffed out an attempt to make an exception to the soon-to-be law that convicted sex offenders cannot be 1,000 feet from school property for attorneys who need to meet with their clients as a course of their job.

On Tuesday morning, the Senate Judiciary Committee adopted the carve-out to the new Student Safety Zone rules, which goes into effect Jan. 1, after a request by Sen. Mark **SCHAUER** (D-Battle Creek). Committee Chair Sen. Alan **CROPSEY** (R-DeWitt), an attorney himself, agreed the change should be put into a bill, HB 5397, sponsored by Rep. Ed **GAFFNEY** (R-Grosse Point Park).

As introduced and promoted, the legislation makes clear that convicted sex offenders caught in a Student Safety Zone after a first conviction for being in the zone face a two-year sentence and $2,000 fee. Schauer's change exempted from the student safety zone "an attorney who initiates or maintains contact with a minor who is his or her client solely within the context of an attorney-client relationship."

The impetus for the change was a circumstance in Schauer's district, where the president of the Jackson County Bar, Ronald **FABIAN**, happens to be on the sex offender registry. Fabian sees young clients as a part of his job as the county's chief defense attorney for drug court defendents. As it so happens, the courthouse happens to be within 1,000 feet of a nearby school. Fabian, 56, is on the sex registry for a 1998 case of criminal sexual conduct (CSC) in which the former Jackson County Democratic Chair allegedly "used alcohol to take advantage" of two men, ages 18 and 19, according to an *Associated Press* account.

Fabian is a past contributor to Democratic caucuses, giving $250 to the Schauer 21st Century Fund last year, which is the Senate Minority Floor Leader's leadership political action committee (PAC).

The change was made on the Senate floor as a Schauer/Cropsey amendment and moved through the legislative meatgrinder quickly. The bill moved through committee unanimously on both the Senate and the House floors on Tuesday. It was only after the bill was enrolled and on its way to the Romney's Building for the Governor's signature that Republican staff started raising questions about the change.

Apparently, Crospey was only told when the amendment was being drafted that the attorney was convicted of a misdemeanor, which CSC 4 is. Once more details of the case were discovered, Republican leadership had the enrollment vacated, the House and Senate stripped out the Schauer/Cropsey amendment and sent the Governor the bill without it.

Rep. Mike **NOFS** (R-Battle Creek) led the charge for removing the amendment and sending it back to the Senate without it.

"I don't think any convicted sex offender should have access to a zone," Nofs said. "If we make an exception for attorneys, who's next? I don't think it's right — especially when they deal with young clients and have a past history of dealing with juveniles in an improper manner."

Nofs said he agrees that the Sex Offender Registry should be purged of the names of old "Romeo and Juliet" cases where a 17-year-old and a 15-year-old had consensual sex years ago unless there are mitigating circumstances. Obviously, they are not a threat to society. But this is a much different matter and he doesn't have much sympathy for those on the list who may need to alter their lives to keep themselves 1,000 feet away from school property.

"It's too bad. That's the price they pay," Nofs said. "They should have thought of that before they did whatever they did to get them convicted."

Contacted on the Senate floor Tuesday about the change, Schauer said his change was initially seen as being a positive addition by every state lawmaker voting on the measure. He questioned whether his idea was dragged up and beat up later for political reasons.

"Every present member of the House and Senate did vote for this," he pointed out. To prove his point, Schauer's team noted that Fabian has been accepted back into the community and that local judges had asked for this change, not just Fabian. If that wasn't the case, why was it that Nofs led the charge against his amendment and not the Jackson-area House members -- Rep. Rick **BAXTER** (R-Hanover) or Rep. Leslie **MORTIMER** (R-Jackson)? Rather Nofs, who is in Schauer's district, but not in Jackson, raised the objections.

EXHIBIT 16

Mikaloff v. Walsh, 2007 WL 2572268 (N.D. Ohio 2007)

Not Reported in F.Supp.2d, 2007 WL 2572268 (N.D.Ohio)
(Cite as: 2007 WL 2572268 (N.D.Ohio))

Only the Westlaw citation is currently available.

United States District Court,
N.D. Ohio.
Lane MIKALOFF, Plaintiff,
v.
Sherri Bevan WALSH, etc., et al., Defendants.

No. 5:06-CV-96.
Sept. 4, 2007.

David A. Singleton, Stephen A. Johnsongrove, Cincinnati, OH, for Plaintiff.

Susan Baker Ross, Office of the Prosecuting Attorney, Akron, OH, Jeffery W. Clark, Richard N. Coglianese, Frank M. Strigari, Office of the Attorney General, Columbus, OH, Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING JUDGMENT FOR PLAINTIFF
JAMES S. GWIN, United States District Judge.

*1 On January 17, 2006, Plaintiff Lane Mikaloff sued Defendant Sherri Bevan Walsh, Summit County Prosecutor and Defendant Douglas J. Powley, Akron Chief City Prosecutor, in their official capacities under 42 U.S.C. § 1983. With this Section 1983 action, Mikaloff seeks to enjoin enforcement against himself of Ohio Revised Code Section 2950.34,[FN1] a law that prohibits sex offenders from residing within 1,000 feet of a school. In support of this action, Mikaloff says Section 2950.34 is unconstitutional as an *ex post facto* law if applied against him. This Court concludes that the residency restriction is an unconstitutional *ex post facto* law, enters judgment against the defendant, and enjoins the defendant from enforcing the law as against Mikaloff.

FN1. Ohio's residency restriction was recodified from 2950.031 to 2950.037 subsequent to trial. 2007 Ohio SB 10. The Court will refer to the restriction at its present place in the code. The recodification within the same Chapter of the Code does not change the Court's analysis.

I. Standing

As an initial matter, "in seeking declaratory or injunctive relief, the plaintiff must demonstrate actual present harm or a significant possibility of future harm to justify pre-enforcement relief." *Peoples Rights Org. v. City of Columbus,* 152 F.3d 522, 527 (6th Cir.). That said, "an individual does not have to await the consummation of threatened injury to obtain preventive relief. Rather, if the injury is certainly impending, that is sufficient." *Id. citing Babbitt v. United Farm Workers Union,* 442 U.S. 289, 298 (1979). Typically, Courts engage in pre-enforcement review under the Declaratory Judgment Act when a statute imposes costly, self-executing compliance burdens. *Nat'l Rifle Ass'n of Am. v. Magaw,* 132 F.3d 272, 284 (6th Cir.1997). A case is ripe for review "only if the probability of the future event occurring is substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Nat'l Rifle Ass'n of Am. v. Magaw,* 132 F.3d 272, 284 (6th Cir.1997).

The Court finds this is a case or controversy within the meaning of Article III. While Defendant has filed no action against Plaintiff, Defendant Walsh has indicated she awaits the outcome of this litigation before she will begin enforcement of O.R.C. § 2950.034 against Plaintiff Mikaloff. He has received a letter stating the Defendant will bring an injunction action against him if he does not move. Plaintiff's injury, therefore, is "certainly impending" and of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *See Peoples Rights Org.,* 152 F.3d at 527; *NRA of Am. v. Magaw,* 132 F.3d at 284.

II. Findings Of Fact

This case stems from Ohio's imposition of residency restrictions on Mikaloff after he was sentenced and completed that sentence. In January 1987, Plaintiff Mikaloff pled guilty to three counts of rape, five counts of aggravated burglary four counts of aggravated robbery, one count of robbery, and one count of felonious assault. [Tr. 67, 18]. The convictions resulted from a series of burglaries that Mikaloff committed with co-defendants in October 1986 and at a time that he was about 18 years old. [Tr. 18]. Regarding the rape convictions, Mikaloff raped an adult woman during a burglary he committed near October 1986. Arrested shortly after the rape, Mikaloff pled guilty and received a sentence of 16-53 years for the rape and related offenses. [Tr. 20]. At the time he pled guilty, Mikaloff was not informed that the rape conviction would foreclose him from residing at his family home. Nothing in the sentencing entry said anything regarding limitations upon where Mikaloff could reside.

*2 On November 1, 2002, and after having been incarcerated for about 16 years, Ohio paroled Mikaloff to his family home at 1174 1/2 Beardsley Street, Akron, Ohio. [Tr. 29-30]. Mikaloff successfully completed parole in December 2004. [Tr. 33]. Plaintiff lives in a guest house on the back of the property. [Tr. 14]. The house has two small bedrooms, a kitchen dining area, and a bathroom.

Plaintiff Mikaloff's mother owns the property and she allows Mikaloff, his life-partner, Mary Moffit, and their two children to live at the Beardsley Street residence rent-free. [Tr. 14, 36]. Mikaloff's family has owned the home for more than half a century. [Tr. 15]. Apparently because of smaller size of 1174 1/2 Beardsley, Moffit and the children often sleep in the main house at 1174 Beardsley, but Plaintiff Mikaloff sleeps in the smaller guest house. [Tr. 17].

Plaintiff Mikaloff and his family face a difficult financial situation. Because of his past convictions, Mikaloff Plaintiff faces difficulty obtaining work. [Tr. 39, 59-61]. Plaintiff Mikaloff hopes to start a painting business but has not found the capital for start-up costs. [Tr. 39-40, 61].

In December 2005, the Summit County Sheriff sent Mikaloff a letter telling Mikaloff that his residence was within 1000 feet of McBright Elementary School and requiring Plaintiff to move by January 1, 2006. [Tr. 35]. Otherwise, the Sheriff would seek an order forcing Mikaloff to move. *Id.* Because of his limited financial resources, Plaintiff Mikaloff likely would be unable to rent another residence and would be separated from his partner and children if he is ordered to leave his home. [Tr. 41].

Section 2950.031, which became effective on July 31, 2003, prohibits sex offenders, like Mikaloff from residing within 1000 feet of school premises. After an amendment that became effective April 29, 2005, prosecutors can seek injunctive relief to require sex offenders to leave their homes within 1000 feet of schools. The Ohio General Assembly has recodified former Section 2950.031 as O.R.C. § 2950.034. Section 2950.034, thus, became effective long after Mikaloff's 1987 conviction.

B. The Ohio Law

Ohio Revised Code § 2950.034 provides:

> (A) No person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises or preschool or child day-care center premises.
>
> (B) If a person to whom division (A) of this section applies violates division (A) of this section by establishing a residence or occupying residential premises within one thousand feet of any school premises or preschool or child day-care center premises, an owner or lessee of real property that is located within one thousand feet of those school premises or preschool or child day-care center premises, or the prosecuting attorney, village solicitor, city or township director of law, similar chief legal officer of a municipal corporation or township, or official designated as a prosecutor in a municipal corporation that has juris-

diction over the place at which the person establishes the residence or occupies the residential premises in question, has a cause of action for injunctive relief against the person. The plaintiff shall not be required to prove irreparable harm in order to obtain the relief.

*3 Section 2950.034 contains no exception or "Grandfather Clause" exempting sex offenders who were convicted before Section 2950.034 became effective, or who owned their homes before its effective date, nor is there any exemption for sex offenders who established his or her residence in compliance with the statute before a school or day care center moves within 1000 feet of him or her.

III. Conclusions Of Law

Plaintiff Mikaloff asks this Court to find that O.R.C. § 2950.034 violates the Constitution's Ex Post Facto Clause because it is punitive and the Ohio General Assembly enacted it long after he had been convicted and after he had served his sentence. He asks the Court to enjoin its enforcement, as against him. In support of his claim that O.R.C. § 2950.034 is an ex post facto law, Mikaloff argues that the Ohio General Assembly intended to impose punishment with O.R.C. § 2950.034. Alternatively, he says O.R.C. § 2950.034 is so punitive in effect that any innocent legislative intent does not save it.

Regarding his claim that O.R.C. § 2950.034 is punitive in effect, Mikaloff argues the statute is punitive because (a) it restricts where offenders can live in a manner similar to probation and parole, prototypical punishments; and (b) applies for the offender's life, irrespective of whether Ohio shows that Mikaloff poses a continuing threat. After considering the parties arguments, the Court concludes that the residency restriction violates the Constitution's Ex Post Facto Clause.

A. Standards of Review

In this case, Plaintiff Mikaloff seeks a declaratory judgment and injunctive relief. Courts considers five factors in determining whether a declaratory judgment is appropriate:

(1) whether the judgment would settle the controversy;

(2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue;

(3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata";

(4) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and

(5) whether there is an alternative remedy that is better or more effective.

Bituminous Casulty Corp. v. J & L Lumber Co., 373 F.3d 807, 813 (6th Cir.2004).

Where a plaintiff establishes a constitutional violation after a trial on the merits, the Plaintiff should receive a permanent injunction if (1) she or he has shown a continuing irreparable injury if the court fails to issue the injunction, and (2) the lack of an adequate remedy at law. *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1067 (6th Cir.1998).

The Ex Post Facto Clause of the Federal Constitution "forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' " *Weaver v. Graham,* 450 U.S. 24, 29 (1981), quoting *Cummings v. Missouri,* 4 Wall. 277, 325-326 (1867). The Clause seeks to require fair warning that certain conduct could lead to punishment and to restrain potentially vindictive legislation. *Id.* It includes laws that enhance criminal penalties: "The heart of the Ex Post Facto Clause, U.S. Const., Art. I, § 9, bars application of a law "that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed...." *Johnson v. United States,* 529 U.S. 694, 700 (2000), quoting *Calder v. Bull,* 3

U.S. 386, 397 (1798) ("The enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty; and therefore they may be classed together."). "To fall within the ex post facto prohibition, two elements must be present: (1) the law must apply to events occurring before its enactment, and (2) it must disadvantage the offender affected by it." *United States v. Abbington,* 144 F .3d 1003, 1005 (6th Cir.1998), quoting *United States v. Reese,* 71 F.3d 582, 585 (6th Cir.1995).

*4 However, the Ex Post Facto Clause is not necessarily implicated when a retroactively applicable statute "produces some ambiguous sort of 'disadvantage,' ... but ... whether [it] ... increases the penalty by which a crime is punishable." *California Department of Corrections v. Morales,* 514 U.S. 499, 506 n. 3, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). The key issue in this case is whether or not the Act is punitive, because only punitive statutes implicate the Ex Post Facto Clause.

Deciding whether a statute imposes punishment involves a two-step inquiry. First, the Court considers whether the Ohio General Assembly "indicated either expressly or impliedly a preference for one label [punitive or civil] or the other." *United States v. Ward,* 448 U.S. 242, 248 (1980). If the Ohio General Assembly indicates, either expressly or impliedly that the legislature's intent was punitive, then the inquiry ends, and the statute is subject to the ex post facto prohibition. *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 169 (1963).

If the Ohio General Assembly did not intend the statute to be punitive, or its intent is ambiguous, then the Court decides whether the statute is "so punitive either in purpose or effect" that it should be considered to constitute punishment. *Ward,* 448 U.S. at 249. This two-step inquiry is known as the "intent-effects."

If the legislature intended the scheme to be civil, " 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson v. United States,* 522 U.S. 93, 100 (1997). If the intent of the legislature is unclear, however, that "does not justify requiring the 'clearest proof' of penal substance." *Smith v. Doe,* 538 U.S. at 110 (Souter, J., concurring in judgment).

To determine whether the statutory scheme is so punitive in effect as to negate a state's intent to deem it civil, the Court considers five factors listed in *Doe:* "whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a non-punitive purpose; or is excessive with respect to this purpose." *Id.* at 96 (majority opinion). These factors are "neither exhaustive nor dispositive." *United States v. Ward,* 448 U.S. 242, 249 (1980).

B. Legislative Intent

Whether a statutory scheme is civil or criminal "is first of all a question of statutory construction." *Hendricks,* 521 U.S. at 361. The Court "must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Hudson,* 522 U.S. 93, 99 (1997). To determine whether the legislature impliedly indicated its intent, the Court will consider the other attributes the Supreme Court noted in *Doe,* including the manner of the law's codification or the enforcement procedures it establishes. *See Doe,* 538 U.S. at 94.

*5 The Court finds that the Ohio General Assembly intended the residency restriction to be penal. There are, however, arguments on both sides. For that reason, the Court considers the law to be somewhat ambiguous. The Court will first consider the law's lack of expressed purpose. The Court will then discuss the law's implied purpose, considering the law's codification in the criminal code and specifically Chapter 2950. The Court will also discuss the law's enforcement procedures, both in terms of the prosecutors who enforce the residency restriction and the injunction remedy. Finally, the Court will consider other courts' construction of the law's purpose.

1. The Ohio Law's Expressed Purpose

The Ohio General Assembly did not expressly indicate whether the residency restriction is criminal or civil. Defendants argue that Section 9 of Senate Bill 5, an uncodified section of the bill that enacted the residency restriction, shows the legislature's intent that O.R.C. § 2950.34 is civil. The language states:

> SECTION 9. This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity is that it is crucial for this state to make the changes in this act as soon as possible, in order to expand the protections and information afforded residents of this state regarding offenders who commit sexually oriented offenses or child-victim oriented offenses and in order to comply with the federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act and standards adopted under that Act and receive related federal funding that is contingent upon compliance. Therefore, this act shall go into immediate effect.

Initially, this language suggests the bill is civil, and for "the immediate preservation of the public peace, health, and safety." But a closer look quickly reveals this is not the case. The language is intended to address the effective date of the law, not the general intent of the law. The Court further notes that Senate Bill 5 included provisions defining certain acts as crimes. *See, e.g.,* 2003 *Legis. Serv. Ann. 29 at 42-43* (codified at O.R.C. § 2907.07); *Id.* at 43 (codified at O.R.C. § 2919.24). It also includes certain sentencing provisions. *Id.* at 48-54 (codified at O.R.C. § 2929.13); *Id.* at 54-58 (codified at O.R.C. § 2929.19); *Id.* at 58-60 (codified at O.R.C. § 2929.21). The entire bill, to which Section 9 applies, cannot be civil when it includes such provisions. For those two reasons, Section 9 does not designate the bill, or the provisions within it, as nonpenal.

2. The Ohio Law's Implied Purpose

a. The Law's Codification

Ohio codified the residency restriction in Section 2950.034 in Ohio's criminal code. Where a legislature chooses to codify a statute suggests its intent. *Hendricks,* 521 U.S. at 361. A statute's codification, however, is not dispositive. *Doe,* 538 U .S. at 94; *see also United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 364-65 (1984) (holding a forfeiture provision civil despite its being in the criminal code). In *Doe,* for instance, placement in the criminal procedure code did not negate the legislature's expressed purpose to create a civil law. *Doe,* 538 U.S. at 94. This case stands in contrast. The legislature did not express a purpose to create a civil law. The Ohio General Assembly's failure to identify the residency restrictions found in O.R.C. § 2950.034 as civil and its decision to include the provisioni in its criminal chapter gives some suggestion that the residency restriction was intended to be punitive. See, *Hendricks.* 521 U.S. at 361.

*6 The General Assembly's treatment of other provisions in the same chapter further supports the inference that Ohio's legislature intended Section 2950.034 to impose criminal, not civil sanctions. In dealing with Ohio's registration and notification requirements for sex offenders, the General Assembly expressly stated that these provisions, have a "non-punitive purpose." O.R.C. § 2950.02; *see also State v. Cook,* 700 N.E.2d 570 (1998) (finding Ohio's sex offender registration and notification laws are non-penal). Yet, Section 2950.034 is tellingly silent regarding whether the residency restriction has a civil or punitive purpose. Based on the statutory construction rule of *expressio unius,* the Ohio legislature's designation of the registration and notifications provisions as non-penal suggests that the other provisions of Chapter 2950, including the residency restriction, are penal.

Defendants rely on a sentence in *State v. Cook* that described Chapter 2950 as "serv[ing] the solely remedial purpose of protecting the public." 700 N.E.2d 570, 585 (1998). The rest of the case, however, focused on the registration and address verification procedures. As described, the General Assembly had explicitly said that these registration and address verification provisions were not intended to be punitive. The Ohio Supreme Court's one-sentence description of Chapter 2950 as remedial adds little. More importantly, O.R.C. § 2950.99 makes failing to comply with other, specific provisions of Chapter 2950 a felony. This inclusion of criminal penalties is penal and not something that "serves the sole remedial purpose of protecting the public." Had the legislature made it a felony to fail to register and made that retroactive, it also would have violated the Ex Post Facto Clause. For these reasons, the Court finds the Ohio General Assembly intended Chapter 2950 to have a civil purpose for those provisions in which the legislature has expressed such an intent but not for other provisions.

In *Cutshall v. Sundquist,* the Sixth Circuit found Tennessee's sex offender registration law non-punitive, despite its placement in the criminal code and without any expressed legislative intent by looking to the law's language. 193 F.3d 466, 474 (6th Cir.1999). The Sixth Circuit considered the provisions "merely require registrants to supply basic information; the burdens imposed are minor, involving only the completion of the appropriate forms." *Id.* These provisions "evidence[d] an intent on the part of the legislature to monitor the whereabouts of convicted sex offenders. Moreover, the authority of law enforcement agencies to disclose registry information is limited to situations in which disclosure is necessary to protect the public." *Id.* Ohio's residency restriction, however, manifests an intent far beyond monitoring the whereabouts of sex offenders. The Tennessee sex offenders could move anywhere, provided they kept the authorities informed of their movements. Ohio, on the other hand, restricts its sex offenders' behavior beyond requiring they notify the authorities of their whereabouts.

b. The Law's Enforcement Procedures

*7 In determining whether the Ohio General Assembly intended the residency provisions to impose a punitive sanction, the Court also looks to the statute's enforcement procedures. Ohio's residency restriction provides for an injunction, and a resident living within 1,000 feet of the school or childcare center or the city prosecuting attorney may bring the action. In *Hudson,* the Supreme Court found non-punitive legislative intent of a law that empowered an administrative banking agency to enforce it. 538 U.S. at 103. By contrast, here county prosecuting attorneys or other municipal chief legal officers hold the power to enforce the law's provisions. O.R.C. § 2950.031(B). While this does not alone establish the General Assembly's intent to make the law penal, it contributes to the argument that the law was so intended.

Defendants argue that county prosecutors enjoy civil, as well as criminal authority. They contend that because the prosecutors have the legal authority to advise and represent the local boards of commissioners, elections, etc., their ability to bring an enforcement action under the residency restriction law does not make the law penal. The county prosecutors, however, only have the authority to bring actions that the civil officer or board *directs* the prosecutor to defend them in suits brought against them. In other words, the county prosecutors act as counsel for civil boards. They do not have their own, independent authority to bring actions that are not criminal in nature. The fact that prosecutors can bring these enforcement actions acting alone, therefore, favors finding a penal intent.

Further, Defendants argue that the County Prosecutors can only seek an injunction and that neighbors can bring these actions. The Court agrees that injunctions are a civil remedy. Further, neighbors' ability to bring an enforcement action gives some support for Defendants argument that Section 2950.034 provides a civil remedy. On balance, because prosecutors can bring the actions but the enforcement mechanism is an injunction, the Court finds the enforcement procedures ambiguous as to whether the law was intended as criminal or civil.

3. Other Challenges to the Ohio Law

Two Ohio Courts have considered similar challenges and have found the legislature intended the residency restriction to be civil. *See Doe v. Petro,* 2005 WL 1038846 (S.D.Ohio May 3, 2005); *State v. Billings,* 860 N.E.2d 831 (Ohio Ct.Com.Pl.2006). *Doe v. Petro,* however, does not engage in any analysis, rather it simply states the statute is nonpunitive as if it were a foregone conclusion. The Court finds this not persuasive.

In finding O.R.C. § 2950.034 nonpunitive, *Billings* found support in its providing injunctive relief; its codification in the same section as the registration and notification provisions that include a statement saying that they are intended to be a civil control, and that the criminal code contains other traditionally civil provisions such as post-conviction relief and victims' rights protections. *Billings,* 860 N.E.2d at 85-86. The Court has already analyzed the first two of these arguments above.

*8 In *Billings* the Ohio trial court also relied on *Doe v. Smith* stating that the imposition of restrictions on sex offenders is a nonpunitive governmental objective. 860 N.E.2d at 85 n. 15 *citing Doe,* 538 U.S. at 93. This just begs the question. The real question is the nature of the restriction. In upholding notification and registration requirements as nonpunitive restrictions, the *Doe* Court explicitly emphasized that these requirements "[did] not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." *Doe,* 538 U.S. at 100. At the very least, this suggests that residency restrictions present a different case from registration and notification provisions. This Court concludes, therefore, that *Billings* is not persuasive.

Finally, the Court finds little importance that the Ohio criminal code contains other civil provisions. Neither post-conviction relief nor victims' rights protections restricts otherwise legal behavior in a manner similar to the residency restriction. As discussed above, Chapter 2950 includes provisions designated failing to register or notify the officials of a move as a felony. O.R.C. § 2950.99. While the underlying duty to register is not punitive, the felony of failing to register is a criminal provision. The victims' rights and post-conviction relief chapters do not include any designations of crimes as felonies. Chapter 2950 clearly has a mixed purpose.

Based on the above stated reasons, this Court finds, on balance, the legislature intended the statute as punitive. Even if it did not, the statute's intent is at the very least unclear. For that reason, the Court will consider the statute's effect.

D. The Effect of the Statute

Where a legislature intends a statute to be punitive, "that ends the inquiry." *Doe,* 538 U.S. at 92. Even if the legislature's intent is unclear, however, the effect of the statute would meet the second prong of *Doe.* Only the "clearest proof" that the overwhelming effect of the law is to impose punishment will negate the legislature's clearly expressed intent. *Id.* An unclear legislative intent "does not justify the 'clearest proof' of penal substance" standard. *Id.* at 110 (Souter, J., concurring).

Turning to the *Doe* factors, the Court finds the residency restriction imposes an onerous affirmative disability and restraint; is analogous to parole and probation, historical forms of punishment; promotes the traditional aims of punishment, deterrence and retribution; the law is at best minimally related to the non-punitive purpose of protecting children and is excessive in relation to this alleged purpose.

1. Affirmative Restraint

As applied to Mikaloff, the residency restriction imposes an onerous affirmative disability and restraint. In determining whether the act imposes a restraint the Court "inquire[s] how the effects of the

Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Doe,* 538 U.S. at 99-100. The *Doe* Court noted that Alaska's notification and registration requirements "do[ ] not restrain activities sex offenders may pursue but leave[ ] them free to change jobs or residences." *Id.* at 100. Not so here. In finding the registration and notification requirements to be constitutional, the Court emphasized that "the record in this case contains no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred." *Id.*

*9 In this case, the law prevents a sex offender from living in his own home, even if he purchased the home before the law took effect or if a daycare or school moved within 1,000 feet of his home after he established residency there. This is a substantial housing disadvantage. While the law does not affect ownership of property, it affects one's freedom to live on one's own property. A sex offender is subject to constant eviction, and there is no way for him or her to find a permanent home. For, there are no guarantees a school or daycare will not open up within 1,000 feet of anywhere. This may prevent an offender from purchasing a home, from remodeling it, or even from entering into long-term service contracts for amenities such as cable television. Judge Sheehan, Kenton District Court, Fourth Division in the Commonwealth of Kentucky discussed how residency restrictions could impact "where an offender's children attend school, access to public transportation for employment purposes, access to employment opportunities, access to residential alcohol and drug abuse rehabilitation programs and even access to medical care and residential nursing home facilities for the aging offender." *Commonwealth v. Baker,* 07-M-00604 (Kenton Dist. C., 4th Div. Apr. 20, 2007) *cert. granted* Aug. 23, 2007, 2007-SC-000347. This Court agrees that "residency restrictions carry major consequences above and beyond the location of one's home." *Id.*

Further, the Ohio law affirmatively restrains Plaintiff in this case. Plaintiff Mikaloff is not "free to change residences," but can only move to homes that are not within 1,000 feet of a school. Even more onerous, Plaintiff is not free to remain in his family home, a home that has been in his family for more than 50 years and where he can live rent-free

Defendants acknowledge the law imposes an affirmative restraint, but argues the imposition does not require a finding that the government has imposed punishment. *See Doe v. Miller,* 405 F.3d 700 (8th Cir.2005). The Court acknowledges that no factor in this analysis is dispositive, as both *Miller* and *Kansas v. Hendricks* found affirmative restraints in the analyzed schemes but neither found the law punitive. *Hendricks,* 521 U.S. 346, 363 (1997); *Miller,* 405 F.3d at 721. This does not change this court's analysis that the residency restriction imposes a restraint.

2. Regarded in our History and Traditions as Punishment

The Court finds the residency restriction analogous to the residency restrictions typical to probation and parole. Probation and parole are regarded by our history and traditions as punishment. "[P]arole is an established variation on imprisonment of convicted criminals.... The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Morrissey v. Brewer,* 408 U.S. 471, 477 (1972). Further, Congress lists probation as among the appropriate types of punishment a judge can impose. 28 U.S.C. § 994.

*10 The residency restriction places a veto-power over the location of the sex offenders' residence in the hands of law enforcement and that veto-power continues after the sex offender establishes his residence. Parole officers and parole boards hold a similar power over parolees. They must approve a parolee's initial residence and can compel the parolee to move. In this case, Plaintiff Mikaloff needed the parole board's approval of his mother's house before the board would release him and the parole board retained the power to force Plaintiff to move if it believed the home may trigger re-offense or otherwise violate a condition of his parole.

The residency restriction actually provides for a more onerous punishment than parole because it is a blanket prohibition. In determining whether a particular home is suitable for a particular parolee, the parole officer or board undertakes a case-specific analysis. The residency restriction engages in no such case-by-case analysis. It limits a sex offender in a way that goes beyond the limits traditionally placed on where a parolee may live.

Further, the residency restriction applies for life, whereas parolees are usually paroled for a certain period of time. The law prevents Plaintiff Mikaloff from ever living in his family home again, regardless of whether he “reintegrate[s] into society as [a] constructive individual.” *Morrissey,* 408 U.S. at 477. In this way, the law goes well beyond parole in that it never allows the sex offender to reintegrate into society.

The Defendants argue that non-compliance with the residency restriction does not trigger criminal sanction, whereas violating a parole or probation condition does. The Court does not believe, however, that the law must be exactly the same as parole to be punitive. Although somewhat different from parole, O.R.C. § 2950.034 is sufficiently similar.

Finally, subjecting a sex offender to constant ouster from his or her home seems a significant deprivation of liberty and property interests. It sentences them to a life of transience, forcing them to become nomads. While such a punishment may be appropriate, it cannot be applied retroactively through ex post facto legislation.

3. Promotes Traditional Aims of Punishment

Punishment aims to impose retribution and deterrence. *Smith v. Doe,* 538 U.S. at 102; *Kansas v. Hendricks,* 521 U.S. at 373 (2002) (Kennedy, J., concurring)(“[R]etribution and general deterrence are [goals] reserved for the criminal system alone.”). Ohio's residency restriction serves both.

The publicity of the residency restrictions increases general deterrence. “Deterrent measures serve as a threat of negative repercussions to discourage people from engaging in certain behavior .” *State v. Cook,* 700 N.E.2d 570, 583 (Ohio 1998). Given the restriction that O.R.C. § 2950.034 places up on sex offenders it serves an obvious deterrent purpose.

Defendants cite *Doe,* stating that “[t]o hold the mere presence of a deterrent purpose renders such sanctions ‘criminal’ ... would severely undermine the Government's ability to engage in effective regulation.” *Smith v. Doe,* 538 U.S. at 102. The Court agrees, but Ohio's residency restriction does more than promote general deterrence.

*11 Ohio's residency restriction significantly furthers retributive purposes. “Retribution is vengeance for its own sake. It does not seek to affect future conduct or solve any problem except realizing justice.” *State v. Cook,* 700 N.E.2d 570, 583 (Ohio 1998). The residency restriction applies regardless of the type of offense committed, the offender's classification level, and his or her risk of re-offense. A feeble, aging paraplegic must leave his home just as a younger one. This lack of any case-by-case determination demonstrates that the restriction is “vengeance for its own sake.” Defendants argue the law is remedial and not punitive in nature, but its failure to make any differentiations between offenders belies this argument.

4. Rational Relation to a Nonpunitive Purpose

The Court heard conflicting expert testimony on the efficacy of the residency restriction. The Court, however, does not believe its duty is to judge the wisdom of the legislature's enactment, only whether it rationally relates to a non-punitive purpose.

Defendants assert the residency restriction is rationally related to the non-punitive purpose of protecting school children from sex offenders near schools. The restriction does limit the access and opportunity that a sex offender will have in re-offending against a child walking in front of his residence to or from school. Yet, it only restricts a sex offender's place of sleep. It does not limit the offender's ability to occupy a residence in proximity to the school during school hours. It dos not limit the offender's ability to go to any public park or drive on any street within 1,000 feet of a school. And it does not limit the offender's access to children in the offender's own neighborhood.

Ohio has found Mr. Mikaloff a sexual predator. But its statute does not and will not prevent him from spending all of his days, while school is in session and while children are traveling to and from school, at his family home within 1000 feet of the school. Indeed, the Court finds it likely that on the facts before it Mr. Mikaloff will do just that. The statute, instead, forces him to sleep in his truck at night, when, presumably, the children are safely at home. *See also Commonwealth v. Baker,* 07-M-00604, at 26 (Kenton Dist. Ct., 4th Div. April 20, 2007) *cert. granted* Aug. 23, 2007, 2007-SC-000347 (noting a sex offender "can return to the family home from which he was forced to move on a daily basis if he so chooses, provided he does not sleep there, and peer out the window in deviant lust at the toddlers frolicking on the playground. While doing so, provided he can conceal his act of self gratification from public view, he can even masturbate. He can do all these things legally, without offending the residency restrictions.").

Both experts agreed that an important question asks whether many children reside around the sex offender's house, not that home's proximity to a school. [Tr. 194-196]. Thus, Ohio's residency restriction shifts the risk of molestation from children living near a school to children living farther away. [Tr. 196]. As Defendant's expert testified: "it's not the magic of the 1000-foot. It's that we can deny access and opportunity to a population that is vulnerable for sex offenders." [Tr. 201]. Indeed, if the sex offender lived near the school, the children's parents would be notified of their presence, due to Ohio's notification law, and therefore could advise their children to stay away from the offender. If the offender is only present during the day, however, the children's parents will have no warning of the potential danger.

*12 Further, Ohio's residency restriction does not address the majority of child sex abuse cases because those cases involve family members or acquaintances. The overwhelming majority of child sex abuse cases involve an abuser who is related to or acquainted with the child victim. [Tr. 87, 91, 93]. Child sex abuse involves an offender who is related to the child (including step-relationships) approximately fifty percent of the time. Yet, the law has no effect on sex offenders who abuse family members, and does not even restrict these offenders ability to live with their previous victims.

It is unclear that the residency restriction denies sex offenders access and opportunity to school children. The Court only considers, however, whether a "rational connection" exists. *See Doe,* 538 U.S. at 102. The Court concludes that to restrict where an individual sleeps at night, even while it does not restrict where he or she spends her days, has some rational relation to restricting access or opportunity to children in those areas.

5. The Statute's Excessiveness with Respect to that Purpose

While the statute is rational, the Court finds the statute is excessive with respect to its stated purpose. The complete lack of individualized risk assessment troubles the Court. As Justice Souter noted in *Doe* "the fact that [the registration and notification law] uses past crimes as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on." *Doe,* 538 U.S. at 109. The Ohio statute sweeps in individuals regardless of their current risk of recidivism.

It would be possible to base a residency restriction on a more individual basis. For instance, Arkansas has a similar statute with individualized risk assessment, as do many other states. *See Weems v. Little Rock Police Dep't,* 453 F.3d 1010, 1017 (8th Cir.2006) (noting the Arkansas residency restriction statute with individualized risk assessment was on "stronger constitutional footing than [an] Iowa statute" without similar individualized assessment). *But see Doe v. Miller,* 405 F.3d 700 (8th Cir.2005) (finding Iowa residency restriction without an individualized assessment did not violate the Ex Post Facto clause of the Federal Constitution); *c.f. id.* at 725-26 (Melloy, J., dissenting) (arguing the law was excessive in relation to its purpose in part because of the lack of individualized assessment).

E. Appropriate Relief

A declaratory judgment is appropriate in this case. It would both completely settle the controversy and readily clarify the legal relations between Plaintiff Mikaloff and Defendants. *See Bituminous Casulty Corp.,* 373 F.3d at 813. Further, no pending state court proceedings currently exist and so the judgment is not a "race to res judicata" nor would it encroach upon state court jurisdiction. Finally, there is no more effective remedy for protecting Plaintiff Mikaloff's rights. *See id.*

*13 Plaintiff has also shown a continuing irreparable injury if the court fails to issue the injunction, and the lack of an adequate remedy at law. *See Kallstrom,* 136 F.3d at1067. This Court has already found that Mikaloff's inability to continue to reside in his home would cause him severe injury. Further, this injury has no adequate legal remedy.

IV. Conclusion

For the reasons stated above, the Court DECLARES that O.R.C. § 2950.034 violates the *ex post facto* clause of the Constitution and ENJOINS defendants from enforcing this law against Plaintiff Mikaloff. This action is terminated under *Fed.R.Civ.P. 58.*

IT IS SO ORDERED.

N.D.Ohio,2007.
Mikaloff v. Walsh
Not Reported in F.Supp.2d, 2007 WL 2572268 (N.D.Ohio)

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EXHIBIT 17

Elwell v. Township of Lower, 2006 WL 3797974 (N.J. Super. Ct. 2006)

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Law Division,
Cape May County.
Steven ELWELL and Jennifer Elwell, Plaintiffs,
v.
TOWNSHIP OF LOWER, Defendant.

Decided Dec. 22, 2006.

Frank L. Corrado (Barry, Corrado, Grassi & Gibson, P.C., Attorneys); Edward Baracas, American Civil Liberties Union of New Jersey Foundation, for plaintiffs.

Anthony Monzo and Thomas Hillegas (Monzo Catanese, P.C., Attorneys) for defendant.

Stephen M. Latimer submitted a brief for amicus curiae New Jersey Chapter of the Association for the Treatment of Sexual Abusers (Laughlin & Latimer, Attorneys).

Richard D. Pompelio submitted a brief for amicus curiae New Jersey Crime Victims' Law Center.

VALERIE H. ARMSTRONG, A.J.S.C.

I. *BACKGROUND*

*1 This action filed on November 28, 2005, presents four legal challenges to the validity of Lower Township's Ordinance No.2005-14 adopted in August 2005, and as amended on December 5, 2005 by Ordinance No.2005-25 (collectively the [illegible]). The Ordinance, codified in Sections 279-1 *et seq.* of the Lower Township Code, is titled [illegible]d Sex Offender Prohibition Zones [illegible]

The Ordinance prohibits registered sex offenders from residing or loitering within 500 feet of any school, park, playground, recreation area, or day care facility or within 25 feet of a school bus stop located in Lower Township (hereinafter the [illegible], or adjacent municipalities. The Ordinance defines [illegible]d sex offender[illegible]as any person over age 18 who is required to register pursuant to *N.J.S.A.* 2C:7-1 *et seq.* [illegible]

Plaintiff Steven Elwell (hereinafter [illegible]) is a Tier 1 registered sex offender. Plaintiff Jennifer Elwell is Elwell's wife and the mother of their two children. The Ordinance was adopted during a period of time when the plaintiffs were in the process of locating a home in order to move into the Township.

Plaintiffs' Complaint challenges the Ordinance on four specific grounds: (1) The Ordinance is preempted by state law; (2) it deprives plaintiffs of substantive due process under the New Jersey Constitution; (3) it violates the *ex post facto* and double jeopardy clauses of the New Jersey Constitution; and (4) the Ordinance is *ultra vires* and unconstitutionally vague.

II. *FACTS*

Plaintiffs and their two young children currently live in Middle Township. Elwell is a registered Tier 1 (lowest risk) sex offender subject to the provisions of Megan's Law. His sex offender registrant status results from a conviction in 2001 for aggravated sexual assault. Hence, he must comply with various post conviction restrictions imposed on Tier 1 offenders by Megan's Law, including registration with the municipality in which he resides.

Pursuant to *N.J.S.A.* 2C:43-6.4, Elwell is also subject to lifetime parole supervision (hereinafter [illegible]y Supervision for Life[illegible]or [illegible]) and limitations on his ability to leave the State of New Jersey. Consequently, his parole officer is required to approve any change in Elwell's residency. Such approval would include relocation to Lower Township, based upon an assessment of the appropriateness of the residence and its location.

Due to having outgrown their current residence, the plaintiffs decided to move from their Middle Township home to Lower Township where they have family ties. Subsequent to the decision to relocate, the Lower Township Council adopted Ordinance No.2005-14 which prohibited all registered sex offenders from residing or loitering within 2,500 feet of any school, park, playground, recreation area, day care facility or school bus stop within the Township or adjacent municipalities. As noted above, the geographical prohibitions were reduced by subsequent amendment. All other provisions of the Ordinance remained intact.

*2 The Ordinance provides that it is to be enforced by the Lower Township Police Department. Penalties for violation of the Ordinance include a fine ranging from $100 to $1,250 and/or imprisonment or community service not to exceed 90 days. A person convicted of violating the Ordinance within one year of a prior violation shall be sentenced to an additional fine of $1,250.

The Ordinance defines "loitering" as a person FN1, who either on foot or in a motor vehicle "wanders or remains idle in essentially one location, sits, lounges, loafs, walks about aimlessly, or repeatedly frequents the same location or repeatedly circles in a motor vehicle."

> FN1. While the Ordinance does not define "person", review of the Ordinance in its entirety implies that "person" as used throughout the Ordinance applies only to Megan's Law registrants.

The Ordinance states that it is the intent of the Township Council ("Council") "to protect and insure the health, safety and welfare of children within the Township and not to penalize registered sex offenders."

The prohibited conduct is set forth in § 279-1:

> The Township Council finds and declares that the health, safety, and welfare of children will be enhanced by prohibiting registered sex offenders from residing or loitering within the Township of Lower within 500 feet of any school, park, playground, recreation area, day care facility or within 25 feet of a school bus stop located within Lower Township or adjacent municipalities.

The plaintiffs opposed the enactment of the Ordinance at the Council's public hearing on the Ordinance. Of particular concern to plaintiffs was the inclusion of Tier 1 offenders in the Ordinance prohibitions.

Plaintiffs assert that enforcement of the Ordinance will effectively banish them from a significant portion of the Township due to the geographic prohibitions, thereby circumscribing their ability to move about freely and to establish residence in a location which will not violate the Ordinance. Additionally, the Ordinance will restrict Elwell's ability (for fear of violating the loitering prohibition), from being within 500 feet of a school, park, playground, recreation area or day care facility, or within 25 feet of a school bus stop, even though he may be engaging in legitimate and lawful activity with his own children.

A certification from Rehana Lewis, the Intake Manager for the American Civil Liberties Union of New Jersey, asserts that at least 45 other New Jersey municipalities have enacted ordinances limiting where sex offenders may reside. The restrictions in these ordinances vary considerably, with the buffer zones ranging from 500 feet to 2,500 feet. Some ordinances include as "prohibited areas" school bus stops, bowling alleys, libraries, convenience stores or recreation areas. Some ordinances exclude Tier 1 offenders. Several ordinances cover almost the entire municipality. Other ordinances exempt homeowners and apply only to renters, while other ordinances include "grandfather" clauses.

III. *LEGAL ANALYSIS OF PLAINTIFFS' CHALLENGES TO THE ORDINANCE*

a. *Does state statutory and common law preempt the Ordinance?*

*3 *N.J.S.A.* 40:48-1 authorizes the governing body of every municipality to "make, amend, repeal, and enforce ordinances" in order to regulate a diverse range of subject matter and behaviors. *N.J.SA.* 40:48-2 provides the following:

> Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law.

N.J. Const. Art 4, § 7, ¶ 11 provides that:

> The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The power of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.

While the authority of a municipality to adopt ordinances reasonably related to the public health, safety and welfare is clear, nevertheless, such authority is not without limit. In addressing this state's constitutional grant of powers to municipalities, the Supreme Court in *State v. Crawley,* 90 N.J. 241, 247-248 (1982) noted that one of the limitations on a municipality's powers is state preemption:

> Nevertheless, two principles limit the permissible scope of municipal legislation. First, as stated in *Wagner v. Newark,* 24 *N.J.* 467, 478 (1957), the grant of legislative powers to municipalities "relates to matters of local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants, and not to those matters involving state policy or in the realm of affairs of general public interest and applicability." Second, municipalities may not enact ordinances on matters otherwise competent for local legislation if the State has preempted the field. *Overlook Terrace Management Corp. v. West New York Rent Control Bd.,* 71 *N.J.* 451, 460-62 (1976); *Summer v. Teaneck Twp.,* 53 *N.J.* 548, 554-55 (1969); *Kennedy v. Newark,* 29 *N.J.* 178 (1959).

In the matter of *Mack Paramus Co. v. Mayor and Council of Paramus,* 103 N.J. 564, 573 (1986), the Court stated that legislative intent was a critical factor in determining whether the state has exhausted a field to such an extent that preemption bars municipal legislation:

> Although it is a judicially-devised standard, the doctrine of state preemption turns upon the intention of the Legislature. If the court determines that the Legislature intended "its own actions, whether it exhausts the field or touches only part of it, to be exclusive," then it will conclude that the State has preempted the field, thereby barring any municipal legislation. *State v. Uletsky,* 54 N.J. 26, 29 (1969); *see Summer v. Teaneck,* 53 N.J. 548, 555 (1969)

*4 In *Overlook Terrace Management Corp., supra,* the Supreme Court enumerated five factors to be considered in preemption analysis:

1. Does the ordinance conflict with the state law, either because of conflicting policies or operational effect, that is, does the ordinance forbid what the Legislature has permitted?

2. Was the state law intended expressly or impliedly to be exclusive in the field?

3. Does the subject matter reflect a need for uni-

formity?

4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?

5. Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature? [Citations omitted]. [71 *N.J.* at 461.]

Megan's Law, including the CSFL provisions, are included within the Code of Criminal Justice. *N.J.S.A.* 2C:1-1 et *seq.* *N.J.S.A.* 2C:1-5(d) provides that

Notwithstanding any other provision of law, the local governmental units of this State may neither enact nor enforce any ordinance or other local law or regulation conflicting with, or preempted by, any provision of this code or with any policy of this State expressed by this code, whether that policy be expressed by inclusion of a provision in the code or by exclusion of that subject from the code.

The Supreme Court, in *Crawley, supra* at 250-251, addressed the fact that the Legislature intended the Code of Criminal Justice to be a clear, complete, and comprehensive system of criminal law designed for uniform statewide treatment. The *Crawley* court observed that there exists general legislative intent to exclude local legislation from areas covered by the Code of Criminal Justice. *See also, State ex. rel. Atlantic County Prosecutor v. Atlantic City,* 379 N.J. *Super.* 515, 520-521 (App.Div.2005).

Both Megan's Law and the CSFL legislation provide comprehensive regulation of almost every aspect of the lives of convicted sex offenders. The constitutionality of Megan's Law, which addresses registration and community notification, as well as Internet posting of personal information regarding convicted sex offenders was upheld in a challenge by a convicted sex offender in *Doe v. Poritz,* 142 N.J. 1 (1995). While *Doe v. Poritz* did not address state preemption since the challenge was to a state statute, the Supreme Court's decision underscored the magnitude of Megan's Law, and its impact on the lives of convicted sex offenders. The Township's minimization of the intent, purpose and impact of Megan's Law as “merely” addressing registration of sex offenders and community notification fails to recognize that the statute is broad, comprehensive and far reaching.

The Legislature's findings and declarations set forth in Megan's Law at *N.J.S.A.* 2C:7-1 provide the following:

The Legislature finds and declares:

a. The danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.

*5 b. A system of registration of sex offenders and offenders who commit other predatory acts against children will provide law enforcement with additional information critical to preventing and promptly resolving incidents involving sexual abuse and missing persons.

Megan's Law not only requires convicted sex offenders to register with local law enforcement agencies, it also requires such offenders to verify their addresses annually, and to report any change of address. *N.J.S.A.* 2C:7-2.

N.J.S.A. 2C:7-8 requires each convicted sex offender to undergo individualized assessment of the risk of re-offense and establishes the levels of community notification of the risk of re-offense for each offender. Specifically, *N.J.S.A.* 2C:7-8(c) provides the following:

c. The regulations [FN2] shall provide for three levels of notification depending upon the risk of re-offense by the offender as follows:

FN2. A reference to "Attorney General Guidelines" promulgated as required by *N.J.S.A.* 2C:7-8 providing for procedures for the notification required under Megan's Law. The guidelines identify factors relevant to risk of reoffense and provide for three levels of notification ("tiers") depending upon the degree of the risk of re-offense.

(1) If risk of re-offense is low, law enforcement agencies likely to encounter the person registered shall be notified;

(2) If risk of re-offense is moderate, organizations in the community including schools, religious and youth organizations shall be notified in accordance with the Attorney General's guidelines, in addition to the notice required by paragraph (1) of this subsection;

(3) If risk of re-offense is high, the public shall be notified in accordance with the Attorney General's guidelines designed to reach members of the public likely to encounter the person registered, in addition to the notice required by paragraphs (1) and (2) of this subsection.

N.J.S.A. 2C:7-13(g) requires that detailed personal information about registered sex offenders remain publicly available on the Internet, including among other things, the street address, zip code, municipality, and county in which the offender resides.

N.J.S.A. 2C:43-6.4 subjects most convicted sex offenders to community supervision for life. The Senate Judiciary Committee Statement, Senate No. 320-L.1994, c. 130 attached to this statutory provision provides that

This community supervision would begin upon completion of any term of imprisonment imposed and persons on community supervision would be monitored as if on parole and would be subject to conditions appropriate to protect the public and foster rehabilitation ... [emphasis added]

N.J.S.A. 2C:43-6.4(b) provides in pertinent part:

... Persons serving a special sentence of parole supervision for life shall remain in the legal custody of the Commissioner of Corrections, shall be supervised by the Division of Parole of the State Parole Board, shall be subject to the provisions and conditions set forth in subsection c. of section 3 of P.L.1997, c. 117 (C.30:4-123.51b) and sections 15 through 19 and 21 of P.L.1979, c. 441 (C.30:4-123.59 through 30:4-123.63 and 30:4-123.65), and shall be subject to conditions appropriate to protect the public and foster rehabilitation ... [emphasis added]

*6 Pursuant to *N.J.S.A.* 2C:43-6.4, the State Department of Corrections (DOC) adopted regulations which establish uniform and detailed conditions to be imposed upon certain convicted sex offenders whose offenses were committed prior to January 14, 2004. *N.J.A.C.* 10A:71-6.11. *N.J.A.C.* 10A:71-6.12 imposes identical uniform, detailed and wide-ranging conditions upon certain convicted sex offenders whose offenses were committed on or after January 14, 2004.

In the interest of brevity, not all of the DOC regulatory conditions will be addressed in this decision. However, among those conditions relevant to the preemption issue before the court, are the following:

1. An offender may only reside at a residence approved by the assigned parole officer. *N.J.A.C.* 10A:71-6.11(b)(5); *N.J.A.C.* 10A:71-6.12(d)(5).

2. An offender must obtain the permission of the assigned parole officer prior to any change of residence. *N.J.A.C.* 10A:71-6.11(b)(6); *N.J.A.C.* 10A:71-6.12(d)(6).

3. An offender must obtain the permission of the assigned parole officer prior to leaving the state of the approved residence for any purpose. *N.J.A.C.* 10A:71-6.11(b)(7); *N.J.A.C.* 10A:71-6.12(d)(7).

4. An offender must obtain the permission of the assigned parole officer prior to securing, accepting, or engaging in any employment, business, or volunteer activity and prior to a change of employment. *N.J.A.C.* 10A:71-6.11(b)(14); *N.J.A.C.* 10A:71-6.12(d)(14).

5. If the offender's victim is a minor, the offender must refrain from initiating, establishing, or maintaining contact with any minor; refrain from attempting to initiate, establish or maintain contact with any minor; and refrain from residing with any minor without the prior approval of the assigned parole officer. *N.J.A.C.* 10A:71-6.11(c); *N.J.A.C.* 10A:71-6.12(e).

6. Exceptions to the regulations discussed in paragraph 5 above exist when (1) the minor is engaged in a lawful commercial or business activity; in such case, the offender may engage in the lawful commercial or business activity, if the activity takes place in an open area to the public view; (2) the minor is in the physical presence of his or her parent/legal guardian; (3) the offender is present in a public area as long as the offender is not associating with a minor, and the public area is not one frequented mainly or exclusively by minors; or (4) the appropriate court authorizes contact with the minor. *N.J.A.C.* 10A:71-6.1(d); *N.J.A.C.* 10A:71-6.12(f).

In addition to the provisions of Code of Criminal Justice discussed above, the Legislature's intense interest in preventing recidivism by sex offenders is evident in other legislation known as the "Sex Offender Monitoring Pilot Project Act," *N.J.S.A.* 30:4-123.80. The legislative findings and declarations for this statutory provision establishing continuous satellite-based monitoring of certain sex offenders as part of a two-year pilot program approved by the Legislature on August 11, 2005 provide the following at *N.J.S.A.* 30:4-123.81:

*7 The Legislature finds and declares:

a. Offenders who commit serious and violent sex crimes have demonstrated high recidivism rates and, according to some studies, are four to five times more likely to commit a new sex offense than those without such prior convictions, thereby posing an unacceptable level of risk to the community.

b. Intensive supervision of serious and violent sex offenders is a crucial element in both the rehabilitation of the released inmate and the safety of the surrounding community.

c. Technological solutions currently exist to provide improved supervision and behavioral control of sex offenders following their release.

d. These solutions also provide law enforcement and correctional professionals with the new tools for electronic correlation of the constantly updated geographic location of reported crimes, to possibly link released offenders to crimes, or to exclude them from ongoing criminal investigations.

e. Continuous 24 hours per day, seven days per week, monitoring is a valuable and reasonable requirement for those offenders who are determined to be a high risk to reoffend, were previously committed as sexually violent predators and conditionally discharged, or received or are serving a special sentence of community or parole supervision for life. A pilot program should be established to study its effectiveness.

Megan's Law, including the CSFL requirements, and the DOC administrative regulations enacted pursuant to Megan's Law, regulate most aspects of the lives of convicted sex offenders in the interest of (1) protecting the public, and (2) fostering the rehabilitation of sex offenders. The Division of Parole has oversight, among other things, of an offender's ability to own firearms; alcohol use; location of residence; employment; ability to travel;

contact with minors; curfew; association in volunteer activities; counseling; drug and alcohol, medical and/or psychological examination and so on.

While it is clear that the Legislature intended that the lives of convicted sex offenders be subject to intense supervision and oversight by the state, nevertheless, the Legislature was also concerned that publicly available information about convicted sex offenders not be utilized to prohibit them from availing themselves of certain amenities and significant rights which are indigenous to everyday common life. *N.J.S.A.* 2C:7-16(c) specifically provides that:

> Except as authorized under any other provision of law, use of any of the information disclosed pursuant to this act for the purpose of applying for, obtaining, or denying any of the following, is prohibited:
>
> (1) Health insurance;
>
> (2) Insurance;
>
> (3) Loans;
>
> (4) Credit;
>
> (5) Education, scholarships, or fellowships;
>
> (6) Benefits, privileges, or services provided by any business establishment, unless for a purpose consistent with the enhancement of public safety; or
>
> (7) Housing or accommodations.
>
> *8 [emphasis added]

In addition to providing that any person who uses information about a sex offender disclosed pursuant to Megan's Law to deny a sex offender the rights set forth in the above statutory provision, is guilty of a crime of the third degree, any offender aggrieved by the misuse of information available through Megan's Law is authorized to bring a civil action in the appropriate court to request preventive relief. Such relief includes permanent or injunctive relief, in addition to any other remedies or procedures that may be available under other provisions of law. *N.J.S.A.* 2C:7-16(b) and (d).

In *Doe v. Poritz* at 12-13, the Supreme Court acknowledged the difficult and complex task confronted by the Legislature in balancing the need for protection of the public, in particular women and children, against minimizing intrusion into the lives of sex offenders who have served their period of incarceration.

> The essence of our decision is that the Constitution does not prevent society from attempting to protect itself from convicted sex offenders, no matter when convicted, so long as the means of protection are reasonably designed for that purpose and only for that purpose, and not designed to punish; that the community notification provided for in these laws, given its remedial purpose, rationality, and limited scope, further assured by our opinion and judicial review, is not constitutionally vulnerable because of its inevitable impact on offenders; that despite the possible severity of that impact, sex offenders' loss of anonymity is no constitutional bar to society's attempt at self-defense. The Registration and Notification Laws are not retributive laws, but laws designed to give people a chance to protect themselves and their children. They do not represent the slightest departure from our State's or our country's fundamental belief that criminals, convicted and punished, have paid their debt to society and are not be punished further.
>
> They represent only the conclusion that society has the right to know of their presence not in order to punish them, but in order to protect itself. The laws represent a conclusion by the Legislature that those convicted sex offenders who have successfully, or apparently successfully, been integrated into their communities, adjusted their lives so as to appear no more threatening than anyone else in the neighborhood, are entitled not to be disturbed simply because of that prior

offense and conviction; but a conclusion as well, that the characteristics of some of them, and the statistical information concerning them, make it clear that despite such integration, reoffense is a realistic risk, and knowledge of their presence a realistic protection against it.

The choice the Legislature made was difficult, for at stake was the continued apparently normal lifestyle of previously-convicted sex offenders, some of whom were doing no harm and very well might never do any harm, as weighed against the potential molestation, rape, or murder by others of women and children because they simply did not know of the presence of such a person and therefore did not take the common-sense steps that might prevent such an occurrence. The Legislature chose to risk unfairness to the previously-convicted offenders rather than unfairness to the children and women who might suffer because of their ignorance, but attempted to restrict the damage that notification of the public might do to the lives of rehabilitated offenders by trying to identify those most likely to reoffend and limiting the extent of notification based on that conclusion.

*9 The above discussion in conjunction with a brief review below of the *Overlook Terrace* factors as applied to the instant matter, leads to the inescapable conclusion that the Ordinance is preempted by the applicable provisions of the Code of Criminal Justice:

(1) *The Ordinance conflicts with state law, not only because of conflicting policy, but because it forbids what the Legislature has permitted.*

When enacting Megan's Law and the CSFL statute, the Legislature was clearly concerned with a wide variety of activities and behaviors engaged in by convicted sex offenders. The law provides parole officers with authority to approve sex offenders' residences and require them to comply with the intensive lifetime supervision conditions. The Legislature recognized that "reoffense is a realistic risk," entitling society to protect itself and its children through comprehensive registration, community notification laws, and CSFL which has as its purpose protection of the public and rehabilitation of the offender. Simultaneously, the Legislature confronted the reality that some convicted sex offenders are non-threatening and entitled not to be unduly disturbed purely because of prior offense and conviction.

Of particular significance to the conflict between the Ordinance and Megan's Law is the statutory provision which prohibits anyone from using a sex offender's status as a Megan's Law registrant to deny, among other things, "housing or accommodations." *N.J.S.A.* 2C:7-16. The Ordinance is in direct conflict with this prohibition. The Ordinance which imposes geographical prohibitions on a sex offender's residence patently violates *N.J.S.A.* 2C:7-16(c)(7) by prohibiting convicted sex offenders from residing in the restricted areas.

Further, determination as to where a sex offender may reside is statutorily vested with his parole officer and not with the municipality. The Ordinance's buffer zones interfere with a parole officer's discretion to approve the most appropriate residence location for a convicted sex offender.

For a variety of reasons related to a sex offender's individual circumstances, it is entirely possible that the most appropriate residence for a particular sex offender could be in one of the Township's buffer zones. Considering the very strong emphasis by the Legislature in permitting public access to information as to where sex offenders reside, if it had intended to limit sex offenders' residences via the imposition of prohibited "buffer zones," clearly it would have done so.

(2) *State law was intended to be exclusive in the field.*

The Ordinance specifically provides that "It is the intent of the Township Council to protect and ensure the health, safety and welfare of children within the Township and not to penalize registered sex offenders."

While the Township argues that Megan's Law is nothing more than a registration statute, the Supreme Court, in *Doe v. Poritz, supra* at 25, emphasized that Megan's Law was crafted to protect the public through thoughtful and carefully designed legislation which specifically focused on the risk of offense posed by each offender who is required to register:

> *10 All of these provisions of the laws, the requirements for registration, the provisions for notification, the Tiers, and the many other related parts, are tied together by the statement of legislative purpose mentioned above found at the beginning of the Registration Law: to aid law enforcement in apprehending sex offenders and to enable communities to protect themselves from such offenders. Together these laws are fairly designed to achieve those purposes. The Community Notification Law, along with the Attorney General's Guidelines, provide a coherent system of notification calibrated to the degree of risk of reoffense: low risk offenders or higher will trigger notification of law enforcement who will thereby have ready access to all offenders in the area when needed either because of reported or perceived threats, or actual incidents when quick response is most important; moderate offenders and higher will trigger a notification calculated to alert organizations charged with the supervision and care of children or women, which are likely to encounter them, to their potential presence and risk; and high-risk offenders will trigger notification to that portion of the community likely to encounter them.
>
> We are aware of the uncertainties that surround all aspects of the subject of sex offender recidivism and the effectiveness of preventive measures. Legislatures, despite uncertainty, must sometimes act to deal with public needs, basing such action on what they conclude, in a welter of conflicting opinions, to be the probable best course. Our Legislature could reasonably conclude that risk of reoffense can be fairly measured, and that knowledge of the presence of offenders provides increased defense against them. Given those conclusions the system devised by the Legislature is appropriately designed to achieve the laws' purpose of protecting the public. [emphasis added]

The Court also confronted the potential ostracism of sex offenders and the Legislature's attempt to address such concerns in Megan's Law through the establishment of the three tiers. The Court discussed the fact that the Legislature carefully addressed what the Court characterized as a "pressing societal problem," namely, a threat to public safety:

> There is no point in predicting the extent of potential ostracism, in avoiding the conclusion that some ostracism will result, or in calming concerns by observing that the offenders themselves are responsible for their plight for having committed their crimes in the first place, for that justification would apply to any excessive punishment by government. Here government has done all it can to confine that impact, allowing it only where clearly necessary to effect public safety, and if the Tier level selected and the methods of notification conform to the statute and its intent, as defined and limited herein, Tier Two and Tier Three public notification will be appropriately confined and applied only to those whose apparent future dangerousness requires it, and the statute will not only have survived constitutional attack, but in fact will operate as the Legislature intended. We must not prejudge society with the ogre of vigilantism or harassment, although its potential obviously calls for the vigorous steps suggested by the Attorney General, and we must not assume that those in responsible positions will violate the intent of this law by giving notification far beyond that which is authorized, and we must not assume that the press, for whatever reason, will disregard the notification confinement which this law requires. [emphasis added]
>
> *11 We are satisfied that this statute, rationally

> and carefully addressed to a pressing societal problem, is not what those who drafted the Constitution had in mind as an abuse of government's power to punish. What government faced here was a difficult problem, a question of policy, and it understandably decided that public safety was more important than the potential for unfair, and even severe, impact on those who had previously committed sex offenses. *Id.* at 110. [emphasis added]

In rejecting the various attacks upon Megan's Law, the Supreme Court observed that it was sailing on "truly uncharted waters, for no other state has adopted such a far-reaching statute." *Id.* at 109. In upholding the constitutionality of the statute, the Court stated

> To rule otherwise is to find that society is unable to protect itself from sexual predators by adopting a simple remedy of informing the public of their presence. That the remedy has a potentially severe effect arises from no fault of government, or of society, but rather, from the nature of the remedy and the problem; it is an unavoidable consequence of the compelling necessity to design a remedy. *Id.* at 109-110.

State v. Leahy, 381 N.J.Super. 106, 111 (App.Div.2005) decided a decade after *Doe v. Poritz,* reemphasized that public safety concerns about sex offender recidivism are at the heart of Megan's Law:

> In enacting Megan's Law the Legislature made the judgment that convicted sex offenders represent a risk because of a high rate of recidivism and that knowledge of their identities and whereabouts is necessary for public safety. *N.J.S.A.* 2C:7-1; *John Doe v. Poritz,* 142 *N.J.* 1, 93, 662 *A.*2d 367 (1995).

That the state law through (1) the enactment of extremely comprehensive legislation, (2) the development of the Attorney General guidelines, and (3) the adoption of DOC regulations regulating and monitoring sex offenders' post-conviction behaviors (including location of the sex offender's residence through parole officer approval) is exclusive in the field both expressly and impliedly, is patently clear.

(3) *The subject matter reflects a need for uniformity.*

The Legislature has recognized that in protecting the public from sex offender recidivism, uniformity regarding the post conviction treatment of convicted sex offenders is essential. State law uniformly regulates sex offenders' lives, taking into account their "tier" rating and the unique factors involved in each offender's life and employment circumstances. *N.J.S.A.* 2C:7-8(d) requires that the Attorney General develop procedures "to promote uniform application of the notification guidelines required by this section."

In the matter of *Summer v. Township of Teaneck,* 53 N.J. 548, 552-553 (1968), the Supreme Court addressed the issue of "uniform treatment," noting that while *N.J.S.A.* 40:48-2 is to be construed liberally in favor of local government, nevertheless, there are implied limitations upon what the court described as this "pervasive grant":

> *12 As said in *Wagner v. Mayor and Municipal Council of City of Newark,* 24 *N.J.* 467, 478 (1957), the grant "relates to matters of local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants, and not to those matters involving state policy or in the realm of affairs of general public interest and applicability." So, for example, a municipality cannot legislate upon the subject of wills or title to real property. The needs with respect to those matters do not vary locally in their nature or intensity. Municipal action would not be useful, and indeed diverse local decisions could be mischievous and even intolerable. Hence the municipality may not legislate upon an aspect of a subject "inherently in need of uniform treatment." *In re Public Service Election and Gas Co.,* 35 *N.J.* 358, 371 (1961).

It is difficult to take issue with the observations of plaintiffs at pages 16-17 of their brief:

> Ordinances like the Lower Township ordinance, multiplied with variations across the state, have created an unworkable, confusing and inequitable patchwork of divergent restrictions on where sex offenders can or cannot live. Proliferation of local ordinances has also created the prospect of an unseemly "race" among municipalities to exclude sex offenders, so that certain communities or areas would become "sex offender ghettoes."
>
> Even worse, were the matter left to local legislation, much or all of the state could become off limits to sex offenders in a piecemeal, uncoordinated fashion. Moreover, and particularly in smaller municipalities, ordinances like Ordinance 279-1 could easily result in complete banishment of sex offenders from a particular municipality.
>
> Such consequences, when accomplished randomly and without statewide consideration, would be intolerable.

The Township is correct in observing that the unique demographics within each municipality, including municipal land area and population density, preclude uniform statewide treatment of geographical sex offender residency prohibitions. However, the Legislature clearly recognized that concerns about sex offender recidivism and the implications for public safety is an issue of statewide importance requiring uniform treatment, specifically, uniform treatment through regulating the degree of risk each offender poses and providing for individualized supervision, including approval of living arrangements. The imposition of prohibited buffer zones within the Township which are applicable to all sex offenders regardless of their likelihood to reoffend flies in the face of the uniform treatment of sex offenders, based upon individualized assessment of the risk of recidivism.

(4) *The state scheme is so pervasive and comprehensive that it precludes coexistence of municipal regulations; and* (5) *The Ordinance stands as an obstacle to the accomplishment and execution of the full purposes of the objectives of the Legislature.*

*13 These factors have, for the most part, been addressed. However, at the risk of some redundancy, state law governing the behavior and activities of registered sex offenders is pervasive, comprehensive, and has several purposes: (1) to protect public safety by providing notification to the public as to location of sex offenders; (2) to minimize or eliminate recidivism by sex offenders; (3) to permit sex offenders to conduct their daily lives without unnecessary ostracism or retaliation due to their sex offender registrant status; and (4) to provide an opportunity for rehabilitation and reintegration into society.

Limitation by a municipality as to where sex offenders may reside within that municipality clearly collides with a parole officer's authority to determine the most appropriate place of residence for a sex offender. Further, such limitations directly collide with the intent of the Legislature in providing that a sex offender may not be denied housing or accommodations due to his status as a Megan's Law registrant.

b. *Does the Ordinance offend substantive due process because it is overbroad and unnecessarily impairs plaintiffs' rights?*

N.J. Const. art. I, Paragraph 1 provides that

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

In the matter of *Caviglia v. Royal Tours of America,* 178 N.J. 460, 471-473 (2004), the Supreme Court stated the following:

> The Fourteenth Amendment to the United States Constitution guarantees that no state may

"deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *N.J. Const. art. I,* § 1.

Although Article I, Paragraph 1 does not contain the express terms "equal protection" or "due process," we have construed the expansive language of that provision as guaranteeing those fundamental constitutional rights. *Greenberg v. Kimmelman,* 99 *N.J.* 552, 568, 494 *A.*2d 294 (1985); *see also Sojourner A. v. New Jersey Dep't of Human Servs.,* 177 *N.J.* 318, 332, 828 *A.2* d 306 (2003). Under both constitutions, a statute is invalid on substantive due process grounds if it "seeks to promote [a] state interest by impermissible means," and is invalid on equal protection grounds when it does not apply "evenhandedly" to similarly situated people. *Greenberg, supra,* 99 *N.J.* at 562, 494 *A.*2d 294. Analyses under equal protection and due process "proceed[ ] along parallel lines," and "overlap" to some degree. *Id.* at 569, 494 *A.*2d 294.

A state statute generally does not run afoul of federal substantive due process protections if the statute "reasonably relates to a legitimate legislative purpose and is not arbitrary or discriminatory." *Id.* at 563, 494 *A.*2d 294 (citing *Nebbia v. New York,* 291 *U.S.* 502, 537, 54 *S.Ct.* 505, 516, 78 *L. Ed.* 940, 957 (1934)). If the statute is founded on some conceivable rational basis to promote a public purpose, it will survive constitutional scrutiny. *Ibid.* A more exacting standard applies to a statute that infringes on a fundamental right. *See Roe v. Wade,* 410 *U.S.* 113, 155, 93 *S.Ct.* 705, 728, 35 *L.Ed.*2d 147, 178 (1973) (requiring compelling state interest); *Moore v. East Cleveland,* 431 *U.S. 494, 499, 97 S.Ct.* 1932, 1936, 52 *L.Ed.*2d 531 (1977).

*14 When evaluating substantive due process and equal protection challenges under the New Jersey Constitution, this Court applies a balancing test. *Sojourner, supra,* 177 *N.J.* at 332, 828 *A.*2d 306; *Greenberg, supra,* at 99 *N.J.* at 567, 494 *A.*2d 294; *Barone v. Dep't of Human Servs., Div. of Med. Assistance & Health Servs.,* 107 *N.J.* 355, 368, 526 *A.*2d 1055 (1987). That test weighs the "nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." *Greenberg, supra,* 107 *N.J.* at 368, 526 *A.*2d 1055. We require that the means selected by the Legislature "bear a real and substantial relationship to a permissible legislative purpose." *Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp.,* 80 *N.J.* 6, 44, 364 *A.*2d 1016 (1976), *cert. denied,* 430 *U.S.* 977, 97 *S.Ct .* 1672, 52 *L.Ed.*2d 373 (1977) (citing *Nebbia, supra,* 291 *U.S.* at 525, 54 *S.Ct.* at 505, 78 *L.Ed.* at 950); *see also Katobimar Realty Co. v. Webster,* 20 *N.J.* 114, 123, 118, *A.*2d 824 (1955).

Hence, in applying the balancing test in reviewing and analyzing a substantive due process challenge under the state Constitution, the court must weigh "the nature of affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." *Visiting Homemaker Service of Hudson County v. Hudson Cty. Bd. of Freeholders,* 380 N.J. *Super.* 596, 610 (App.Div.2005), quoting *Greenberg,* 99 N.J. at 567.

That the Ordinance violates substantive due process and must be invalidated does not require elaborate discussion. Clearly, the state has a legitimate interest in protecting the public, in particular women and children, from recidivism by sex offenders. In upholding the constitutionality of Megan's Law, the Supreme Court referred to the legislation as a "far-reaching statute." *Doe v. Poritz* at 109. The Court further recognized that the remedies provided for by Megan's Law will have a "potentially severe effect" on convicted sex offenders. Nevertheless, such result was deemed "an unavoidable consequence of the compelling necessity to design a remedy." *Ibid.* The "potentially severe effect" identified by the court, of course, did not include the intrusive regulation by the Council in prohibiting all Megan's Law registrants (regardless of the risk of offense) from residing in certain areas of the Township. That the residency prohibition in the Ordinance is more draconian than the "potentially severe effect" of the Megan's Law remedies is quite obvious.

Notwithstanding the valid, comprehensive, and potentially "severe" steps taken by the Legislature in protecting the public from convicted sex offenders through the enactment of Megan's Law, the Ordinance, in a purported attempt to protect the public, regulates the location of sex offenders' residences in a manner that is overly broad. It fails to balance the nature of the rights affected and the extreme intrusion upon those rights by the Ordinance, with the public need for the prohibitions set forth in the Ordinance.

*15 The Ordinance does not differentiate the various tiers of offenders, or attempt to assess the actual risk posed by a particular offender (critical factors considered by the *Doe* Court in upholding Megan's Law). Rather, the Ordinance paints all sex offenders with the same broad brush, namely, that they are all equally likely to reoffend, but are less likely to do so if they are "geographically" limited with regard to residence and loitering.

The geographical restrictions on where the plaintiff (or any other sex offenders for that matter) may reside or "loiter," substantially intrude upon significant family matters involving private and personal choices about how to raise and care for children, and decision-making about where to reside. The Ordinance restricts Elwell, a low risk offender, from accompanying his children to the school bus stop, going into a school or to a public park with his children, for fear of being charged with "loitering" because he is a convicted sex offender. The rights affected are significant, and are unnecessarily burdened by the Ordinance.

As noted in *Doe v. Poritz, supra,* at 110, in upholding the constitutionality of Megan's Law:

> Here government has done all it can to confine that impact [potential for ostracism], allowing it only where clearly necessary to effect public safety, and if the Tier level selected and the methods of notification conform to the statute and its intent, as defined and limited herein, Tier Two and Tier Three public notification will be appropriately confined and applied only to those whose apparent future dangerousness requires it, and the statute will not only have survived constitutional attack, but in fact will operate as the Legislature intended.

c. *Does the Ordinance constitute* punishment *and therefore violate both the ex post facto and double jeopardy clauses of the state Constitution?*

The *ex post facto* clause of the state Constitution, N.J. Const. art. IV, § 7, ¶ 3 provides that "The Legislature shall not pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract that existed when a contract was made." Hence, the state is prohibited from enacting retroactive punishment for prior offenses or for an act that was not punishable at the time it was committed. *State v. Coruzzi,* 95 *N.J.* 557, 578 (1984). The *ex post facto* clause is applicable to municipal ordinances as well as state statutes. *State v. C.I.B. Int'l.,* 83 *N.J.* 262, 270 (1980).

The double jeopardy clause, N.J. Const., art. I, ¶ 11, provides that "no person shall, after acquittal be tried for the same offense." Hence, in reviewing plaintiffs' challenge under the *ex post facto* and double jeopardy clauses of the state Constitution, the court must determine whether the Ordinance is so punitive either in its purpose or effect, that while it may have been intended as a civil remedy, in reality, it is tantamount to a criminal penalty. *Auge v. NJ Dept. of Corrections,* 327 *N.J.Super.* 256, 262-263 (App.Div.1999).

*16 In *Doe v. Poritz, supra* at 46, the Supreme Court addressed whether Megan's Law constituted "punishment":

> ... The determination of punishment has ordinar-

> ily consisted of several components. An initial inquiry is whether the legislative intent was regulatory or punitive: if the latter, that generally is the end of the inquiry, for punishment results; if the former, the inquiry changes to whether the impact, despite the legislative intent to regulate, is in fact punitive, usually analyzed in terms of the accepted goals of punishment, retribution and deterrence. Despite some ambivalent language, a punitive impact-one that effects retribution or accomplishes deterrence-renders the law or the specific provision of the law that is attacked, punishment, but only if the sole explanation for that impact is a punitive intent. In other words, the law is characterized as regulatory in accordance with the legislative intent even if there is some punitive impact, if that impact is simply an inevitable consequence of the regulatory provisions themselves. The law is characterized as punitive only if the punitive impact comes from aspects of the law unnecessary to accomplish its regulatory purposes-that is, if the law is "excessive," the excess consisting of provisions that cannot be justified as regulatory, that result is a punitive impact, and that, therefore can only be explained as evidencing a punitive intent.

The Ordinance specifically states that "It is the continuing intention of the Township Council to protect and ensure the health, safety and welfare of children within the Township and not to penalize registered sex offenders .... " [emphasis added] Such disclaimer, however, does not end the inquiry.

The plaintiffs have provided as part of the record in this matter a guest column published in The Press of Atlantic City written by a Councilman who voted in favor of the Ordinance. The column stated among other things:

> And if Elwell is representative of a Tier 1 offender, then we made the right decision to include them in our ordinance. As a teacher myself, I think we should reserve the deepest dungeons in the castle for those who take advantage of their authority and betray our students. [emphasis added]

While the above language from the guest column suggests that at least one Councilman may have intended to punish sex offenders, including Tier One sex offenders, through the enactment of this Ordinance, this court is reluctant to conclude based upon this newspaper column alone, that the intent of the Ordinance was punitive. However, a close examination of the specific provisions of the Ordinance does indeed suggest that the intent was punitive.

First, the Ordinance constitutes an express prohibition on sex offender residency in particular geographic areas of the Township, as opposed to registration and/or notification requirements. The inclusion of a grandfather clause to exclude from the requirements of the Ordinance sex offenders who established a residence within a prohibited area prior to the effective date of this section, suggests that the Council recognized the rather draconian measures undertaken when imposing geographical prohibitions.

*17 If a sex offender resides within a prohibited area, there is no grace period within which the offender is permitted to relocate prior to being subjected to the Ordinance's monetary/incarceration/community service sanctions. Such penalties, which include the possibility of incarceration, equate to traditional quasi criminal consequences providing a strong indication that Council intended the Ordinance to be punitive. Hence, if Elwell purchases a home in the Township in a non-prohibited area, he could be charged with a violation of the Ordinance, if a new bus stop is located within 25 feet of his home subsequent to his purchase of the property and he does not immediately relocate.

While all indications are that the intent of the Council in enacting the Ordinance constituted a punitive measure, the effect of the Ordinance is clearly punitive. The Ordinance imposes restrictions on the residency and movement only of convicted sex offenders, as opposed to other criminals who have committed serious offenses. The Ordinance does not take into account an individual sex offender's propensity to reoffend. It assumes that all sex offenders pose the same degree of risk.

The Ordinance, in the guise of protecting the public, does no such thing. By way of brief example, a convicted Tier 1 (low risk) sex offender may not "loiter" within 25 feet of a school bus stop while waiting to place his school age child safely on the bus, yet a Tier Three (highest risk) sex offender may "loiter" 25.5 feet from a school bus stop without violating the Ordinance. Elwell may not reside within 500 feet of a playground, yet a Tier Three sex offender may reside within 501 feet of the same playground and not be charged with violating the Ordinance.

In contrast to Megan's Law which survived an *ex post facto* challenge, the Ordinance is not regulatory and remedial. Its sole purpose is deterrence, to keep sex offenders away from certain areas of the Township. It limits residency and movement of all Megan's Law registrants without distinction as to the sex offender's tier ranking, nature of offense, or whether the offender's victim was an adult or a minor.

It is clear that the Ordinance violates the ex post facto and double jeopardy clauses of the State Constitution, and therefore must be invalidated.

d. *Is the ban on loitering ultra vires and void for vagueness?*

In *State v. Crawley,* 90 *N.J.* 241 (1982), the City of Newark appealed a ruling of the Superior Court Law Division that a municipal loitering ordinance was preempted by the Code of Criminal Justice. In upholding the judgment of the Superior Court, the Supreme Court, relying upon *N.J.S.A.* 2C:1-5(d) stated at 252:

> To summarize, the basic purpose of the New Jersey Code of Criminal Justice is to create a comprehensive system of criminal law. The legislative history does not suggest that the Legislature intended to leave this area of criminal law to a patchwork of municipal regulations. The exclusion of a loitering provision from the Code expressed state policy not to penalize such conduct.

*18 The Township has no authority to regulate loitering. The fact that the Ordinance is directed only at sex offenders does not render it valid. The Ordinance does not include a *mens rea* requirement. In other words, sex offenders, and only sex offenders, may not loiter in the prohibited areas regardless of their purpose in doing so. This is in contrast to existing anti-loitering statutes which require an actual intent to engage in either criminal or quasi-criminal conduct while loitering. *See N.J.S.A.* 2C:33-2.1 (loitering for purpose of obtaining or distributing controlled dangerous substances); *N.J.S.A.* 2C:34-1.1 (loitering for purpose of engaging in or promoting prostitution); *N.J.S.A.* 19:34-6 (loitering at a polling place with purpose to obstruct or interfere with a voter). The Ordinance is *ultra vires.*

In addition to being *ultra vires,* the Ordinance is unconstitutionally vague, and therefore, void. In *State v. Golin,* 363 *N.J.Super.* 474, 481-482 (App.Div.2003), the Appellate Division underscored the fact that municipal ordinances are presumed to be valid.

However,

> A penal ordinance offends due process if it does not provide legally fixed standards and adequate guidelines for police and others who enforce the laws. *Betancourt v. Town of W. New York, supra,* 338 *N.J.Super.* at 422, 769 *A.*2d 1065 (citing *Papachristou v. City of Jacksonville,* 405 *U.S.* 156, 170, 92 *S.Ct.* 839, 847, 31 *L. Ed.*2d 110, 120 (1972)); *Town Tobacconist v. Kimmelman,* 94 *N.J.* 85, 118, 462 A.2d 573 (1983)). "Vague language and inadequate standards permit the subjective and therefore impermissible enforcement of penal ordinances by the police." *Betancourt v. Town of W. New York, supra,* 338 *N.J.Super.* at 422, 769 A.2d 1065 (citing *Grayned v. City of Rockford,* 408 *U.S.* 104, 108-09, 92

S.Ct. 2294, 2299, 33 *L. Ed.*2d 222, 227-28 (1972)). To withstand a void-for-vagueness challenge, a penal ordinance must define the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 *U.S.* 352, 357, 103 *S.Ct.* 1855, 1858, 75 *L. Ed.*2d 903, 909 (1983).

Id. at 482-483.

In *State v. Hoffman,* 149 N.J. 564 (1997), the Supreme Court addressed whether *N.J.S.A.* 2C:33-4 (a) (a portion of the harassment statute) was unconstitutionally vague. The court stated at 581-582:

> A statute that is vague creates a denial of due process because of a failure to provide notice and warning to an individual that his or her conduct could subject that individual to criminal or quasi-criminal prosecution. *Screws v. United States,* 325 *U.S.* 91, 102-02, 656 *S.Ct.* 1031, 1035, 89 *L.Ed.* 1495, 1503 (1945). This Court has stated that
>
> "[c]lear and comprehensible legislation is a fundamental prerequisite of due process of law, especially where criminal responsibility is involved. Vague laws are unconstitutional even if they fail to touch constitutionally protected conduct, because *unclear or incomprehensible legislation places both citizens and law enforcement officials in an untenable position.* Vague laws deprive citizens of adequate notice of proscribed conduct, and fail to provide officials with guidelines sufficient to prevent arbitrary and erratic enforcement.
>
> *19 [*State v. Afanador,* 134 *N.J.* 162, 170, 631 A.2d 946 (1993) (alteration in original) (quoting *Town Tobacconist v. Kimmelman,* 94 *N.J.* 85, 118, 462 A.2d 573 (1983)) (emphasis added.)]

The Ordinance does not provide clear notice to a sex offender as to what behavior is permitted and what behavior is prohibited. Section 279-2 of the Ordinance defines loitering as:

> Whether on foot or in a motor vehicle, a person who wanders or who remains idle in essentially one location, sits, lounges, loafs, walks about aimlessly, or repeatedly frequents the same location, or repeatedly circles in a motor vehicle.

Pursuant to the definition of loitering, it is difficult to determine objectively, how many visits within 25 feet of a school bus stop by a sex offender constitutes "repeated" visits and over what period of time. Or, what is meant by "walking about aimlessly", or "loafing", or "lounging", or "remaining idle"? Does the term "remaining idle" at the school bus stop apply to Elwell who may be standing there with his child until the bus arrives?

In *Betancourt v. Town of West New York,* 338 *N.J.Super.* 415, 424 (App.Div.2001), the Appellate Division held that a juvenile curfew ordinance was unconstitutionally vague:

> ... The ordinance's language does not give a clear standard as to what conduct is forbidden. This, in turn, gives the police officer on the street broad discretion to decide which activities and which juveniles fall within the ordinance's exceptions.

Enforcement of the loitering provision in the instant Ordinance lies with the Township Police Department. The anti-loitering provision targets only Megan's Law registrants and vests unacceptably broad discretion with law enforcement to determine whether a sex offender has "loitered" within 25 feet of a school bus stop, let alone 500 feet of a school, park, playground, recreation area or day care facility.

In the matter of *State v. Caez,* 81 *N.J.Super.* 318, 319 (App.Div.1963) when reversing a conviction of a defendant who allegedly violated the City of Hackensack's loitering ordinance, the Appellate Division addressed concerns about arbitrary enforcement of ordinances which restrict a person's ability to move about or stand still:

> We begin with the fundamental proposition that no ordinance may unreasonably or unnecessarily interfere with a person's freedom, whether it be to move about or to stand still. *Territory of Hawaii v. Anduha,* 48 *F.* 2*d* 171 (9 *Cir.* 1931); *City of St. Louis v. Gloner,* 210 *Mo.* 502, 109 *S.W.* 30, 15 *L.R. A., N. S.,* 973 (*Sup.Ct.* 1908); *Pinkerton v. Verberg,* 78 *Mich.* 573, 44 *N.W.* 579, 7 *L.R.A.* 507 (*Sup.Ct.* 1989). An ordinance which proposes to restrict such freedom must contain standards which make it reasonable and prevent arbitrary enforcement. "It is offensive to fundamental concepts of justice and violative of due process of law to impose sanctions for violations of laws whose language is doubtful, vague and uncertain." *Maplewood v. Tannenhaus,* 64 *N.J.Super.* 80, 89 (App.Div.1960). Penal laws must be clear enough so that "... all men subject to their penalties may know what acts it is their duty to avoid ... Before a man can be punished, his case must be plainly and unmistakably within the statute. *State v. Gaynor,* 119 *N.J.L.* 582, 584 (*E. & A.* 1937).

*20 In *Camarco v. City of Orange,* 61 N.J. 463 (1972), the New Jersey Supreme Court affirmed the Appellate Division's decision in *Camarco v. City of Orange,* 116 *N.J.Super.* 531 (1971) in a case involving a constitutional challenge to a loitering ordinance in the City of Orange. In so affirming, the Court stated:

> The Appellate Division readily recognized that if the ordinance broadly proscribed loitering or idling without more it would be unconstitutional. 116 *N.J.Super.* at 534; see *State v. Caez,* 81 *N.J.Super.* 315 (App.Div.1963); *People v. Diaz,* 4 *N.Y.S.* 2 *d* 313, 151 *N.E.*2d 871 (1958; *cf. Coates v. Cincinnati,* 402 *U.S.* 611, 91 *S.Ct.* 1686, 29 *L. Ed.*2d 214 (1971). On the other hand it recognized with equal readiness that if the ordinance simply proscribed loitering which obstructs, molests or interferes with others lawfully in public places or which threatens an immediate breach of the peace it could withstand constitutional attack.

The City of Orange loitering ordinance included a definition of loitering (somewhat similar to the definition in the Township's Ordinance), but thereafter articulated specifically what kinds of loitering were prohibited, e.g., obstructing the passage of pedestrians; obstructing, molesting or interfering with any person lawfully in a public place. On the other hand, the Township's Ordinance simply prohibits convicted sex offenders from loitering in specific locations which are readily accessible to other members of the public, without proscribing what specific types of loitering are prohibited.

That the anti-loitering provision of the Ordinance which singles only sex offenders is vague and uncertain, is not subject to debate.

Therefore, I conclude that the loitering provision of the Ordinance is invalid as being void for vagueness.

IV. *CONCLUSION*

Plaintiffs' request to invalidate the Ordinances on all grounds articulated is hereby granted.

This decision will be posted on *www.njcourtsonline.com.* An order will be prepared by the court.

N.J.Super.L.,2006.
Elwell v. Township of Lower
Not Reported in A.2d, 2006 WL 3797974 (N.J.Super.L.)

END OF DOCUMENT

EXHIBIT 18

Whitaker v. Perdue, 4:06-cv-0140, Order (N.D. Georgia, March 30, 2007

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

WENDY WHITAKER, et al., Plaintiffs,	:	
vs.	:	CIVIL ACTION NO. 4:06-CV-0140-CC
SONNY PERDUE, et al., Defendants.	:	

ORDER

This matter is presently before the Court on Defendants' Motion to Dismiss in Lieu of Answer [Doc. No. 34], Defendants' Motion to Dismiss Amended Complaint [Doc. No. 55], and Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint [Doc. No. 78]. The Court **DENIES** Defendants' Motion to Dismiss in Lieu of Answer and Defendants' Motion to Dismiss Amended Complaint **as moot**, insofar as Plaintiffs amended their complaint after the filing of those motions.[1] The Court will consider only Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint in this Order.

I. BACKGROUND[2]

On June 20, 2006, Plaintiffs Wendy Whitaker, Joseph Linaweaver, Janet Jenkins Allison, James Victor Wilson, Jeffery York, Dewayne Owens, Al Reginald Marks, Lori Sue Collins, and Reverend Joel Jones filed the instant class action

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[1] The Court notes, however, that Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint incorporates by reference all material contained in the previous motions to dismiss. The Court will accordingly refer to the previous motions to dismiss in this Order, as appropriate.

[2] Insofar as this matter is before the Court on Defendants' motion to dismiss, the Court has accepted the factual allegations in Plaintiffs' Second Amended Complaint as true for the purposes of this Order.

complaint challenging certain provisions of Act No. 571 (HB 1059), Ga. Laws 2006, codified at O.C.G.A. § 42-1-15 (hereinafter the "Act"). The Act provides, in pertinent part, that no individual required to register as a sex offender "shall reside or loiter within 1,000 feet of any child care facility, church, school, or area where minors congregate." § 42-1-15(a). The Act defines "areas where minors congregate" as including "school bus stops," § 42-1-12(a)(3), and "school bus stops" are defined as school bus stops "as designated by local school boards of education or by a private school." § 42-1-12(a)(19). In addition, the Act provides that no individual required to register as a sex offender "shall be employed by any child care facility, school, church, or by any business entity that is located within 1,000 feet of a child care facility, a school, or a church." § 42-1-15(b)(1).

The Act was scheduled to take effect on July 1, 2006. On June 22, 2006, Plaintiffs filed a Motion for Temporary Restraining Order, which this Court granted in part by oral ruling on June 26, 2006, and by written Order entered on June 27, 2006 [Doc. No. 16]. By this Order, the Court temporarily restrained Defendants[3] from taking any action to enforce the provision of the Act that prohibits registered sex offenders from living within 1,000 feet of a school bus stop (hereinafter the "school bus stop provision"). The Court scheduled a hearing on Plaintiffs' Motion for Preliminary Injunction and instructed Plaintiffs to produce information regarding the number and location of school bus stops

[3] The original Defendants in this case were Sonny Perdue, in his official capacity as Governor of the State of Georgia; Thurbert Baker, in his official capacity as Attorney General of the State of Georgia; Scot Dean, in his official capacity as Chief of Probation, Cedartown, Polk County, Georgia; and Robert Sparks, in his official capacity as Sheriff of Polk County. Defendants Perdue and Baker have been the only Defendants to address the substantive constitutional challenges to the Act. Subsequent references to "Defendants" and "parties" in this Order include only Defendants Perdue and Baker, unless otherwise noted.

before the hearing. On June 29, 2006, the Court provisionally certified, for the duration of the temporary restraining order, a class of Plaintiffs consisting of all persons who registered as sex offenders on or before July 1, 2006, and who reside within 1,000 feet of a currently-designated school bus stop or a school bus stop so designated in the future.

On July 11, 2006, the Court held an evidentiary hearing on Plaintiffs' Motion for Preliminary Injunction. That same day, the Court entered an Order extending the temporary restraining order for an additional ten days or until the Court ruled on the Motion for Preliminary Injunction [Doc. No. 38]. After hearing evidence and oral argument at the hearing, the Court ordered the parties to submit briefing on the proper interpretation of the phrase "school bus stop," as used in the Act. The parties complied with the Court's request, and on July 25, 2006, the Court entered an Order denying without prejudice Plaintiffs' Motion for Preliminary Injunction on the grounds that the motion was premature, insofar as the evidence failed to establish that any school bus stop had been designated by local school boards of education, as provided in the Act. The next day, on July 26, 2006, Plaintiffs filed a Motion for Temporary Restraining Order [Doc. No. 58], alleging that the District Attorney of the Augusta Judicial Circuit, which encompasses Burke, Columbia, and Richmond counties, had announced an intention to enforce the school bus stop provision and that the Columbia County local school board of education had officially designated school bus stops. That same day, Plaintiffs filed a motion to amend their complaint to assert claims against the Sheriffs of Burke, Columbia, and Richmond counties [Doc. No. 59], which the Court granted on July 27, 2006. On July 28, 2006, the Court held a hearing to consider Plaintiffs' Motion for Temporary Restraining Order and also heard argument on Plaintiffs' Motion for Class Certification [Doc. No. 46]. At that hearing, the Columbia County Sheriff, Clay Whittle, indicated his willingness to consent to an injunction regarding the enforcement of the school bus stop provision while the Court considered the constitutionality of that provision. On July 28, 2006, the Court entered an Order denying Plaintiffs' Motion for Temporary Restraining Order as to the Sheriffs of Burke and Richmond counties, insofar as it appeared that the local school boards of education in those counties had not designated school bus stops, and directing Plaintiffs and the Sheriff of Columbia County to file a consent order reflecting the agreement reached at the hearing. That same day, the Court entered an Order certifying, for the duration of this litigation, a Plaintiff class consisting of all persons who are registered, who are required to register, or who in the future will be required to register as sex offenders under Georgia law. On August 24, 2006, this Court entered an Order certifying, for the duration of this litigation, a Defendant class consisting of all Sheriffs in the State of Georgia and naming the Sheriff of Columbia County as the class representative.

Plaintiffs estimate that there are approximately 11,000 registered sex offenders in Georgia, 9,000 of whom live in the community. (Second Am. Compl. [Doc. No. 75], ¶ 2.) Plaintiffs Wendy Whitaker, Joseph Linaweaver, Janet Jenkins Allison, James Victor Wilson, Jeffery York, Dewayne Owens, Al Reginald Marks, and Lori Sue Collins are registered sex offenders. When Ms. Whitaker was 17, she engaged in a single consensual act of oral sex with a 15-year-old male while on school property; she pled guilty to charges of sodomy and received a sentence of 5 years probation. (Id. at ¶ 10.) Plaintiff Joseph Linaweaver is on the sex offender registry because, when he was 16, he participated in single consensual act of oral sex with a 14-year-old girl; he pled guilty to sodomy and received a sentence of 5 years probation. (Id. at ¶ 15.) Plaintiff Janet Allison was convicted of being party to a crime of statutory rape and party to a crime of child molestation after her 15-year-old daughter became pregnant and Ms. Allison allowed her daughter's boyfriend (and future husband) to move into their household; she received a sentence of 15 years probation. (Id. at ¶ 18.) Plaintiff James Wilson pled guilty to sexual abuse in the first degree for inappropriately touching an adult female college friend while highly intoxicated at a freshman party; he was sentenced to 5 years probation. (Id. at ¶ 22.) Plaintiff Jeffery York pled guilty to one count of sodomy for engaging in a consensual act of oral sex with a 15-year-old male when he was 17 years old; he was sentenced to 5 years probation. (Id. at ¶ 26.) Plaintiff Dewayne Owens was convicted of incest when he was 13 years old, for allegedly having sex with his sister; he was found to have violated the terms of his probation in 2004 and was incarcerated with a tentative parole date of December 2006, assuming that he provided a home plan to the Board of Pardons and Paroles. (Id. at ¶¶ 29-30.)[4] Plaintiff Al Marks pled guilty to child molestation after being charged with hand-to-genital and mouth-to-genital sexual contact with a 7-year-old male son of a family friend when he was 14 years old; he was sentenced to probation. (Id. at ¶ 32.) Plaintiff Lori Collins was convicted of statutory rape for having consensual sex with a 15-year-old male when she was 39 years old; she served three years in prison and since her release has been living in a faith-based halfway home. (Id. at ¶¶ 37-38.)

Plaintiff alleges that the Act will force thousands of registered sex offenders from their homes, jobs, and churches. (Id. at ¶ 1.) Ms. Whitaker, whose current residence is within 1,000 feet of where a school bus stops to pick up a child, has not been able to find another affordable residence in the Augusta

[4] The Court has no information regarding whether Mr. Owens was in fact paroled in December 2006.

area (which is where her husband works) that is not within 1,000 feet of a school bus stop. (Id. at ¶¶ 12-13.) Mr. Linaweaver was notified of the Act by the Columbia County Sheriff on June 1, 2006; he has been unable to find anywhere in the Augusta area to meet the Act's requirements and has not found employment that complies with the Act's restrictions. (Id. at ¶ 16.) Ms. Allison was informed by an officer with the Lumpkin County Sheriff's Office that her residence is within 1,000 feet of a school bus stop and that she must leave her home. (Id. at ¶ 19.) Ms. Allison and her family searched for a new home in White, Pickens, Dawson, Lumpkin, and Gilmer counties without success. (Id.) Mr. Wilson is the co-owner of a home that is within 1,000 feet of a school bus stop, and his place of employment is within 1,000 feet of a church. (Id. at ¶ 22.) Mr. Wilson searched the metro-Atlanta area for a residence that complies with the Act's provisions; Mr. Wilson found only a motel in an industrial area that may meet the Act's requirements. (Id. at ¶ 24.) Mr. York received two letters from the Polk County Sheriff's Office stating that his home may be within 1,000 feet of a school bus stop. (Id. at ¶ 27.) Mr. Owens, who is incarcerated, may be unable to qualify for parole because he cannot afford accommodations himself and the residences of his family members and the accommodations available in halfway houses do not comply with the Act's requirements. (Id. at ¶ 30.) Mr. Marks was informed by the Cobb County Sheriff's Office that his home is within 1,000 feet of a school bus stop and that he must leave the residence. (Id. at ¶ 34.) Mr. Marks and his family have searched for a residence that complies with the Act for six weeks, but have unable to find housing. (Id. at ¶ 35.) Ms. Collins was notified by the Rockdale County Sheriff's Office that she would need to leave Door of Hope in Rockdale County because a school bus stop was located within 1,000 feet of the residence. (Id. at ¶ 39.) Ms. Collins searched for a new home for three weeks without success before moving to the Door of Hope in Polk County. (Id. at ¶¶ 39-42.) Because the Door of Hope in Polk County conducts religious programs and services, however, the residence may not be suitable under the Act. (Id. at ¶ 43.)

Plaintiff Reverend Joel Jones, who is not a member of the Plaintiff class in this case, is a minister and serves on the Board of Directors of the Door of Hope Ministry in Rockdale County, which is a faith-based halfway house that ministers to women who have been released from prison, including Plaintiff Collins. (Id. at ¶ 45.) Plaintiff Jones alleges that his spiritual beliefs compel him to provide assistance and spiritual leadership to people released from prison and jail. (Id.) The Second Amended Complaint alleges that the Door of Hope in Rockdale County "will no longer be able to house women on the registry because residents engage in religious worship and because the ministry's . . . location is within 1,000 feet of a school bus stop." (Id.)

Plaintiffs contend that the Act is unconstitutional because it violates (1) U.S. Const. art. I, § 10, prohibiting *ex post facto* laws, Bills of Attainder, and laws that impair the obligation of contracts; (2) the procedural component of the Due Process Clause; (3) the substantive component of the Due Process Clause and the right to family privacy; (4) the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2006) ("RLUIPA"); (5) the Free Exercise Clause and the right to freedom of association; (6) the Takings Clause; (7) the right to interstate and intrastate travel; and (8) the Eight Amendment's prohibition on cruel and unusual punishment.[5] Plaintiffs request that the Court declare certain portions of the Act unconstitutional and permanently enjoin the enforcement of those provisions. Defendants Perdue and Baker have moved to dismiss Plaintiffs'

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[5] Plaintiffs also seek a declaration that the Act is vague and overbroad.

Second Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. STANDARD OF REVIEW

Pursuant to Rule 12(b)(6), a defendant may seek to dismiss a complaint for failure to state a claim upon which relief can be granted. "A motion to dismiss should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief. 75 Acres, L.L.C. v. Miami-Dade County, 338 F.3d 1288, 1293 (11th Cir. 2003) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). "In evaluating such a motion, [the court] accept[s] the factual allegations in the complaint as true and . . . construe[s] them in the light most favorable to the plaintiff." 75 Acres, 338 F.3d at 1293 (citing Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003)). A court evaluating a Rule 12(b)(6) motion may not consider matters outside the pleadings unless the court treats the motion to dismiss as a motion for summary judgment under Federal Rule of Civil Procedure 56 and gives all parties "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b); see also Moss v. W & A Cleaners, 111 F. Supp.2d 1181, 1185 (M.D. Ala. 2000).

Federal Rule of Civil Procedure 12(b)(1) provides that a defendant may move for dismissal on the grounds that a court lacks subject matter jurisdiction. Rule 12(b)(1) motions may involve facial or factual attacks on a court's subject matter jurisdiction. The Eleventh Circuit recently summarized the court's inquiry when, as here, a standing challenge is raised in a motion to dismiss:

> When standing is questioned at the pleading stage . . . general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. We accept as true all material allegations contained in the complaint and construe the complaint in a light most favorable to the complaining

> party. Moreover, in the context of a Rule 12(b)(1) challenge to standing, we are obligated to consider not only the pleadings, but to examine the record as a whole to determine whether we are empowered to adjudicate the matter at hand.

Elend v. Basham, 471 F.3d 1199, 1208 (11th Cir. 2006) (citation and internal marks omitted). With this standard in mind, the Court will proceed to consider the merits of Defendants' arguments.

III. LEGAL ANALYSIS

A. Standing

Defendants first assert that Plaintiffs lack standing in the instant case because they cannot show actual injury. (Brief in Support of Defs.' Motion to Dismiss in Lieu of Answer [Doc. No. 34-2] (hereinafter "Defs.' Brief"), p. 6.) Defendants argue that Plaintiffs lack standing to challenge that portion of the Act that prohibits registered sex offenders from residing or loitering within 1,000 feet of a church, § 42-1-15(a), because Plaintiffs are not prohibited from attending church and no Plaintiff is currently in violation of the residency requirement pertaining to churches. Defendants further contend that Plaintiffs cannot challenge that portion of the Act that prohibits sexually dangerous predators from being employed within 1,000 feet of an area where minors congregate, § 42-1-15(b)(2), because no Plaintiff is a sexually dangerous predator. Defendants finally argue that certain Plaintiffs lack standing to challenge the school bus stop provision.

The standard that this Court uses to evaluate whether Plaintiffs have standing is well-settled. As stated by the Eleventh Circuit,

> First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the

injury will be "redressed by a favorable decision."
Doe v. Pryor, 344 F.3d 1282, 1285 (11th Cir. 2003) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 550, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (citations, footnote, and some internal marks omitted)). Importantly, as previously noted, insofar as the instant case is before the Court on a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct may suffice," and the Court "presume[s] that general allegations embrace those specific facts that are necessary to support the claim." Id. (citation and internal marks omitted). The Court "may consider affidavits and other factual materials in the record." Nat'l Ass'n of State Utility Consumer Advocates v. Federal Communications, 457 F.3d 1238, 1251 (11th Cir. 2006). In addition, the Court does not consider Plaintiffs' likelihood of success on the merits when evaluating standing. Warth v. Seldon, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

The Court notes that "[i]n order to bring a claim on behalf of other similarly situated persons, the named plaintiff must have standing to bring the claim." Cummings v. Baker, 130 Fed. Appx. 446, 449 (11th Cir. 2005) (citation omitted); see also Jackson v. Okaloosa County, 21 F.3d 1531, 1536 (11th Cir. 1994) ("In order for this court to have jurisdiction over the claims before us, at least one named plaintiff must have standing for each of the claims."). In the instant case, the Second Amended Complaint does not indicate that any of the named Plaintiffs are classified as sexually dangerous predators, and the Court has not uncovered any such evidence elsewhere in the record. Plaintiffs do not dispute that they lack standing to challenge the enforcement of residency restrictions applicable only to sexually dangerous predators and state that those restrictions are not challenged in this case.

As to Plaintiffs' claims regarding the portion of the Act that prohibits registered sex offenders from living or working within 1,000 feet of a church, the Court finds that Plaintiffs Victor Wilson and Lori Collins have standing to challenge the constitutionality of that portion of the Act. According to the allegations of the Complaint, Mr. Wilson has received an offer of full-time employment from an accounting firm at which he previously worked while pursuing a college degree. (Second Am. Compl. ¶ 21.) The accounting firm is located within 1,000 feet of a church. (Id. at ¶ 23.) Therefore, if the Act is enforced, Mr. Wilson will have to resign his current position and will be unable to accept the firm's full-time employment offer. Mr. Wilson satisfies the requirements of imminent injury-in-fact caused by the operation of the Act, for which the instant action seeking injunctive relief provides a remedy. Ms. Collins lived at the Door of Hope residential ministry in Rockdale County until June 2006, when she moved to the Door of Hope residential ministry in Polk County after being informed that her former residence was within 1,000 feet of a school bus stop. (Id. at ¶¶ 37, 42.) The Door of Hope in Polk County conducts religious programs and services and hosts religious events, prayer, and worship. (Id. at ¶ 43.) As previously noted, the Act prohibits anyone registered as a sex offender from living within 1,000 feet of a church. § 42-1-15(a). "Church" is defined as "a place of public religious worship." § 42-1-12(a)(7). If the Act is enforced, Ms. Collins likely will have to abandon her current residence.[6] She satisfies the requirements of imminent injury-in-fact caused by the operation of the Act, for which the instant action seeking injunctive relief provides a remedy.

Defendants do not challenge the standing of Plaintiff Jones to bring a claim under RLUIPA. However, Plaintiffs address this issue in their response brief and

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[6] Whether the Door of Hope would be considered to be a place of public religious worship is not a proper determination at this stage of the proceedings.

the Court finds it appropriate to consider Mr. Jones' standing here. Mr. Jones is a minister and serves on the Board of Directors of the Door of Hope residential ministry in Rockdale County. (Second Am. Compl. ¶ 45.) Door of Hope operates a halfway house that ministers to women who have been released from prison. (Id.) As previously noted, Door of Hope in Rockdale County is located within 1,000 feet of a school bus stop and its residents engage in religious worship. (Id.) Plaintiff argues that, because of the Act, Mr. Jones cannot provide a residence for registered sex offenders. Standing to assert a claim under RLUIPA is determined "by the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000cc-2(a). RLUIPA prevents governments from imposing a "substantial burden" on the religious exercise of a person or a religious assembly by imposing a land use regulation, unless that land use regulation is necessary to further a compelling state interest. 42 U.S.C. § 2000cc(a)(1). In addition, governments may not impose land use regulations that treat religious institutions on less than equal terms with secular institutions. 42 U.S.C. § 2000cc(b)(1). A land use regulation is defined as a zoning or landmarking law "that limits or restricts a claimant's use or development of land . . . if the claimant has an ownership, leasehold, easement, servitude or other property interest in the regulated land." 42 U.S.C. § 2000cc-5(5). The term "claimant" is in turn defined to mean "a person raising a claim or defense under this Act." 42 U.S.C. § 2000cc-5(1). Plaintiffs do not allege that Mr. Jones has an ownership interest in the Door of Hope in Rockdale County. The Court has been unable to locate any authority holding that a minister or church board member has standing to assert claims under RLUIPA where that minister does not own a property interest in the property at issue. The Court therefore cannot determine whether Mr. Jones has standing to pursue a claim under RLUIPA, and the Court would ordinarily permit Plaintiffs an opportunity to amend their complaint to sufficiently allege standing. However, in the instant case, the Court finds that even if Mr. Jones had standing to pursue claims under RLUIPA, Plaintiffs fail to state a RLUIPA claim, see infra, and any such amendment accordingly would be futile.

As to Plaintiffs' standing to challenge that portion of the Act that prohibits anyone on the sex offender registry from residing within 1,000 feet of a school bus stop, Defendants argue that Plaintiff Whitaker has a suitable housing option that complies with the Act; that Plaintiff Linaweaver found suitable housing but his rental application was rejected because of his status as a convicted felon; that Plaintiff Allison has "failed to negate the fact that there is available housing;" that Plaintiff Wilson has found suitable housing; that Plaintiff York has not been threatened with prosecution if he fails to move; that Plaintiff Owens is currently incarcerated and has not been denied parole based on the Act; that Plaintiff Marks' allegation that he has not found housing for himself and his parents is insufficient; and that Plaintiff Collins has found suitable housing.[7] Defendants argue that Plaintiffs do not have the right to live where they want. This argument, however, plainly reaches into the merits of this case and is not an appropriate consideration when evaluating standing.

As an initial matter, the Court disagrees with Defendants' position that all named Plaintiffs who have located housing that complies with the Act's requirements (according to Defendants, Plaintiffs Whitaker, Linaweaver, Wilson and Collins fall within this category) have not suffered an injury-in-fact sufficient to satisfy standing requirements. Defendants do not explain why the forced

[7] Defendants also argue that Mr. Jones does not have standing to challenge the school bus stop provision because he is not a registered sex offender. The Court agrees with this position.

relocation of those individuals pursuant to a potentially unconstitutional legislative enactment would not constitute an injury-in-fact. The mere fact that Plaintiffs are able to comply with the Act's residency restrictions does not remove the injury associated with that compliance. In addition, the Court is unpersuaded by Defendants' argument that Plaintiffs Allison and Marks lack standing to bring this challenge because their allegations that they have not found housing are insufficient or because they have failed to "negate" that housing is available. Defendants cite no authority for this position and have cited nothing to indicate that Plaintiffs are obligated to come forward with any evidence regarding the nature and extent of housing options in order to support standing in this case.

Finally, Defendants contend that Plaintiff York lacks standing because he has not been threatened with prosecution if he fails to move. Defendants more generally take the position that, "[u]ntil each Plaintiff has shown they have been actually injured by the imposition of the [Act] as to each individual Plaintiff, their 'fear' of prosecution is speculative at best." (Defs.' Brief, p. 9.) Defendants are essentially arguing that the injury is hypothetical. The Court does not find this position persuasive. As an initial matter, the Court agrees with Plaintiffs' conclusion that the prior Orders in this case have effectively halted the enforcement of the school bus stop provision. It is undisputed that Plaintiffs, with the exception of Mr. Jones, are registered sex offenders who are subject to the Act. Before this lawsuit was filed, Plaintiffs Linaweaver, Allison, York, Marks, and Collins were notified by local Sheriffs' offices that they will need to relocate to comply with the school bus stop provision. Plaintiff Collins has already relocated to a residence to comply with the school bus stop provision, but that residence may not comply with the requirement that registered sex offenders not reside within 1,000 feet of a church. Plaintiffs Whitaker and Wilson have become aware that their current residences are within 1,000 feet of where a school bus stops to pick up a child and have been searching for other residences. Plaintiff Owens cannot afford to pay for a residence and all available residences of family members and all halfway houses are within 1,000 feet of where a school bus stops to pick up a child. Mr. Owens therefore cannot submit an acceptable home plan to the parole board. These Plaintiffs have suffered or are in imminent danger of suffering an actual injury occasioned by the enforcement of the school bus stop provision. These injuries are caused by the operation of the Act, and an injunction barring the enforcement of the Act would provide a remedy to Plaintiffs. Defendants' standing challenge speaks more directly to the merits of Plaintiffs' constitutional claims than to this Court's subject matter jurisdiction.

B. *Ex Post Facto* Prohibition

Article I, § 10 of the United States Constitution provides that states may not pass *ex post facto* laws. *Ex post facto* laws impose retroactive punishment; in other words, they increase the punishment for criminal acts after they have been committed. Defendants argue that the Act is regulatory rather than punitive, precluding a finding that the Act is an unconstitutional *ex post facto* law. This Court disagrees. While the Court recognizes that residency restrictions have been upheld in other cases, the Act at issue in the instant case imposes more severe residency restrictions than those evaluated in those opinions.

The Supreme Court reviewed the framework used to evaluate an *ex post facto* challenge in Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). Pursuant to that framework, this Court first considers whether the Act was intended to establish civil or criminal proceedings. Smith, 538 U.S. at 92. "If the intention of the legislature was to impose punishment, that ends the inquiry." Id. If the legislature intended to enact a civil, nonpunitive regulatory scheme, however, the Court further examines whether the Act is "so punitive either in purpose or in effect as to negate [the State's] intention to deem it civil." Id. (citation and internal marks omitted).

The Court "considers the statute's text and its structure to determine the legislative objective." Id. (citation omitted). The Court must give "considerable deference" to the legislature's stated intent. Id. at 93. In this case, as in Smith, the legislature stated its intention with regard to the registration requirement: "The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes." HB 1059, § 1. In the instant case, however, the legislature did not include any statement specifically addressing its intention as to the residency restrictions. Indeed, the residency restrictions are not included in the list of strategies purportedly implemented by the legislature in Section 1 of HB 1059. The Court's inquiry into legislative intent, therefore, is not aided by the stated intention of the legislature in the instant case.[8]

As to the prior residency restrictions, the Georgia Supreme Court stated:

> The Statute is designed to safeguard against encounters between minors and a convicted sex offender by requiring at least a 1,000 foot distance between places where the former congregate and the latter resides. While not every convicted sex offender will be a recidivist, the statute aims to lessen the potential for those offenders inclined toward recidivism to have contact with, and possibly victimize, the youngest members of society.

Mann v. State, 278 Ga. 442, 443-444, 603 S.E.2d 283, 286 (2004). Defendants interpret the above statement as a finding of legislative intent. Even if the Court

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[8] Plaintiffs argue that the Court must accept, as true, their allegations that the intent of the Act was to punish registered sex offenders by removing them from Georgia. (Pls.' Resp. to Defs.' Motion to Dismiss [Doc. No. 88], p. 10.) The Court considers Plaintiffs' allegation as to this issue to be conclusory and does not find that it is bound by this conclusion in addressing Defendants' motion to dismiss.

were to agree with Defendants' interpretation of this language,[9] the Court does not find this statement controlling in the instant case, which challenges subsequent revisions to the residency requirements.[10]

"Other formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent." Smith, 538 U.S. at 94 (citation omitted). The Act is codified in Title 42 of the Georgia Code, which is entitled "Penal Institutions." It appears in Chapter 1, "General Provisions," at Article 2, "Sexual Offender Registration Review Board." Other matters addressed in Title 42 include correctional institutions, conditions of detention, probation, pardons and paroles, and transfer of prisoners. The provisions in Title 42 appear to relate exclusively to criminal administration, but they do not appear punitive. See Smith, 538 U.S. at 95. As for enforcement procedures, the Act does not appear to provide any specific enforcement procedures; it merely provides that registered sex offenders who fail to comply with the Act "shall be guilty of a felony and shall be punished by imprisonment for not less than ten nor more than 30 years." O.C.G.A. § 42-1-15(d). With the exception of the harsh penalty imposed for those offenders who fail to comply with the Act, the Court agrees with Defendants' position that "[n]othing on the face of the Act as a whole or the specific statute in question suggests that it is anything but a regulatory scheme designed to protect the

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[9] This statement appears in the Georgia Supreme Court's analysis of the state interest underlying the residency restrictions, in connection with evaluating a takings challenge to the former statute. Accordingly, legislative intent was not directly at issue in that case.

[10] As Defendants note, 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. See Doe v. Baker, No. 1:05-CV-2265-TWT (N.D. Ga. 2006).

public." (Defs.' Brief, p. 11.)

The Court next determines whether, assuming that the legislature's intent was to establish civil, nonpunitive residency restrictions, the effect of the Act is nonetheless so punitive in effect as to negate the legislative intent. The Court recognizes that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." Smith, 538 U.S. at 92. In undertaking this inquiry, the Court considers the "guideposts" described in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). Smith, 538 U.S. at 97 (noting that the factors are "neither exhaustive nor dispositive"). The following factors are evaluated to determine if a statute is punitive: (1) whether the statute "has been regarded in our history and traditions as punishment;" (2) whether it "imposes an affirmative disability or restraint;" (3) whether it "promotes the traditional aims of punishment;" (4) whether it "has a rational connection to a nonpunitive purpose;" and (5) whether it "is excessive with respect to this purpose." Id.

The Court first evaluates whether the Act has been regarded in our history and traditions as punishment. "[A] State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." Id. Banishment has been regarded historically as a punishment, id. at 98, and Plaintiffs argue that the Act sufficiently resembles banishment to support a finding that this factor weighs in their favor. Defendants argue that the Act does not effectively banish registered sex offenders because the Act does not mandate that those individuals be "permanently expelled from their community and prevented from returning," which is the historic definition of banishment. (Defs.' Brief, p. 13.) Because the Act addresses only residency and loitering and does not impact any other activities in "restricted" areas, Defendants contend that the Act cannot be considered banishment.

While the Court acknowledges that the Eighth Circuit found this position persuasive in Doe v. Miller, 405 F.3d 700 (8th Cir. 2005), the Court disagrees with its application in the instant case.[11] In particular, the Court finds that it could reasonably conclude, when presented with evidence regarding the availability of housing and the areas impacted by the Act, that the Act "sufficiently resembles banishment to make this factor weigh towards finding the law punitive." Miller, 405 F.3d at 724 (Melloy, J., dissenting). The Court agrees with Judge Melloy's opinion that a statute found to be substantially similar to banishment could support a finding of punitive effect. In this case, Plaintiffs may be able to establish that they are effectively excluded from many communities in Georgia by operation of the Act. If the Court required Plaintiffs to prove banishment as historically defined in order to pursue an *ex post facto* challenge, the Georgia legislature could prohibit sex offenders from living anywhere in the State of Georgia without raising a question of punitive effect relevant to an *ex post facto* determination. This position goes too far. The Act may be found to sufficiently resemble banishment so as to support a finding that it is punitive in effect.

The Court next considers whether the law imposes an affirmative disability or restraint. "Here, we inquire how the effects of the Act are felt by those subject to it." Smith, 538 U.S. at 99-100. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." Id. at 100. In the instance case,

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[11] The Miller decision considered several constitutional challenges to an Iowa statute prohibiting certain registered sex offenders from living within 2,000 feet of a school or a registered child care facility. The statute considered in Miller included a grandfather clause that permitted registered sex offenders to retain residences established prior to the effective date of the statute, even if those residences did not comply with the new statutory requirements. See Miller, 405 F.3d at 719. The Act at issue in this case, however, does not include a grandfather provision.

unlike Smith, the Act imposes a physical restraint on the available residences of registered sex offenders. See also Miller, 405 F.3d at 721 (statute imposed affirmative disability or restraint). The Act at issue in this case does not leave registered sex offenders "free to change jobs or residences." Smith, 538 U.S. at 100. Registered sex offenders are not "free to move where they wish and to live and work as other citizens, with no supervision." Id. at 101. Moreover, school bus stops are inherently transient and may be designated by local school boards of education at any time under the Act, significantly limiting the permanency of residences that can be established by registered sex offenders and impairing their ability to form relationships in their chosen communities. On its face, the Act does not require that any notice be provided to a sex offender who is in violation of the Act's requirements and does not provide any specified time period within which that person can locate a new residence that complies with the Act. The Court cannot agree with Defendants' argument that the residency restriction "is a minor and indirect effect of a conviction for a sexual offense." (Defs.' Brief, p. 16.)

Thirdly, the Court evaluates whether the Act promotes the traditional aims of punishment. The parties do not dispute that one of the purposes of the Act is deterrence, a traditional aim of punishment. Consistent with Smith, the Court recognizes that "[a]ny number of governmental programs might deter crime without imposing punishment." Smith, 538 U.S. at 102. While the Court does not rely on this factor alone to conclude that Plaintiffs state an *ex post facto* claim, the Court does consider this factor to weigh in favor of finding the law punitive in effect.

Finally, the Court considers whether the Act has a rational connection to a nonpunitive purpose and whether it is excessive as to that purpose. "The Act's rational connection to a nonpunitive purpose is a 'most significant' factor in our determination that the statute's effects are not punitive." Smith, 538 U.S. at 102 (citation omitted). Plaintiffs admit that the Act has a rational connection to a nonpunitive purpose but contend that the Act is excessive. The Act is rationally connected to the nonpunitive purpose of protecting the public, particularly children, from the risk that a registered sex offender will reoffend by limiting the ability of registered sex offenders to reside and work near (and thereby presumably to reduce their opportunity to access) children.

Plaintiffs argue that the Act is excessive because it fails to differentiate between people on the sex offender registry – it treats everyone the same, regardless of whether the person engaged in a consensual act or a violent offense. Plaintiffs additionally allege that the Act may actually foster recidivism by creating instability in housing and employment. Defendants disagree, noting that a perfect or close fit between the Act and its goals is not required and arguing that the legislature acted properly in this case. The Court acknowledges that a close or perfect fit is not required; however, the Court nonetheless finds that the Act's failure to distinguish among sex offenders and failure to identify those registered sex offenders who are most likely to reoffend, when coupled with the fact that the instability created by the Act may be harmful to the public, could support a finding that the Act is excessive.

In addition to the factors set forth in Smith, the Court additionally finds it appropriate to consider the consequences of violating the Act. The sanction of residing within 1,000 feet of a school bus stop is particularly severe. The Act provides that any registered sex offender who "knowingly" violates the Act's provisions "shall be guilty of a felony and shall be punished by imprisonment for not less than ten nor more than 30 years." O.C.G.A. § 42-1-15(d). This harsh sanction supports a finding that the Act is punitive in effect.

In short, the Court finds that, when taken in the light most favorable to Plaintiffs, the allegations in the Second Amended Complaint are sufficient to raise a question regarding whether the Act impermissibly increases the punishment for previously-committed crimes. The Court acknowledges the obvious fact that some individuals required to register as sex offenders have committed serious, violent offenses. However, to the extent that the Act is ultimately found to be punitive in effect, it is the function of the criminal laws of the state, and not residency restrictions imposed after the sentence has been determined and fulfilled, to punish those individuals for this conduct.

Plaintiffs state a claim that the Act violates the *ex post facto* prohibition. Defendants' motion to dismiss this portion of Count 1 of Plaintiffs' Second Amended Complaint is **DENIED**. See Gibbs v. Buck, 307 U.S. 66, 76, 59 S. Ct. 725, 83 L. Ed. 1111 (1939) ("Where the [case] makes an attack upon the constitutionality of a state statute, supported by factual allegations sufficiently strong, as here, to raise 'grave doubts of the constitutionality of the Act' in the mind of the trial court, the motion to dismiss for failure to state a cause of action should be denied.").

C. Eighth Amendment

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. Defendants argue that the Act does not violate the Eighth Amendment because it is not punitive, and, even if the Act is punitive, the punishment imposed by the Act is not severe enough to constitute cruel and unusual punishment. Plaintiffs do not address the Eighth Amendment in their response brief, and the Court deems the Eighth Amendment claim to be abandoned. See Local Rule 7.1B; Roberts v. City of Hapeville, No. 1:05-CV-1614-

WSD, 2007 U.S. Dist. LEXIS 10508 (N.D. Ga. Feb. 15, 2007); City of Lawrenceville v. Ricoh Electronics, Inc., 370 F. Supp. 2d 1328, 1333 (N.D. Ga. 2005).

Even if Plaintiffs had not abandoned this claim, the Court finds that the Act does not impose cruel and unusual punishment within the meaning of the Eighth Amendment. A punishment will be found to be cruel and unusual if it is barbaric or excessive. Coker v. Georgia, 433 U.S. 584, 591-92, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) (plurality). "[A] punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." Id. The Court finds no support for the position that the Act's residency restrictions or the requirement that Plaintiffs register as sex offenders satisfies this standard. Count 8 of Plaintiffs' Second Amended Complaint is **DISMISSED**.

D. Procedural Due Process

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. Defendants argue that the Act does not violate the procedural requirements of due process because the triggering event for the imposition of the Act's residency restrictions is the conviction of a sexual offense or crime against a child and no individualized determination of dangerous is required. According to Defendants, because the Act does not provide for an exemption from its requirements, additional procedures are unnecessary, insofar as any fact other than the requirement that an individual register as a sex offender is irrelevant under the statute. Plaintiffs argue that they have a constitutionally protected interest in life, liberty, and property, which encompasses their homes and professions, and that in order to deprive them of these interests, adequate procedures must be employed.

The Court finds Connecticut Department of Public Safety v. Doe, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003) to be instructive here. In Connecticut, the Supreme Court considered a due process challenge to Connecticut's sex offender registry statute. The plaintiff in that action, a convicted sex offender subject to the state's registration statute, argued that the registration requirement deprived him of a liberty interest, in the form of his reputation, without notice or an opportunity to be heard. Connecticut, 538 U.S. at 6. The Supreme Court assumed that the plaintiff had been deprived of a liberty interest but found that "due process does not entitle him to a hearing to establish a fact that is not material under the Connecticut statute." Id. at 7. The residency requirements "turn on an offender's conviction alone – a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." Id. (citation omitted).

The Supreme Court stated,

> In short, even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of all sex offenders – currently dangerous or not – must be publicly disclosed. Unless respondent can show that that substantive rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise. . . . States are not barred by principles of "procedural due process" from drawing . . . classifications.

Id. at 7-8 (emphasis removed and citation omitted); see also Doe v. Miller, 405 F.3d 700, 709 (8th Cir. 2005) ("Thus, the absence of an individualized hearing in connection with a statute that offers no exemptions does not offend principles of procedural due process.").

Similarly, in this case, Plaintiffs argue that prior to being forced to leave their residences, they should have an opportunity to challenge the "appropriateness of such an eviction." (Pls.' Resp. to Defs.' Motion to Dismiss, p. 21.) Plaintiffs argue that the Act is defective because it fails to provide for “individualized consideration of dangerousness.” (Id.) For the reasons stated in Connecticut, Plaintiffs’ procedural due process challenge cannot succeed.[12] Count 2 of Plaintiffs’ Second Amended Complaint is **DISMISSED**.

E. Substantive Due Process

The substantive component of the due process clause protects certain fundamental rights from infringement, regardless of the procedures provided, unless the infringement satisfies the strict scrutiny analysis. U.S. CONST. amend. XIV; see Doe v. Moore, 410 F.3d 1337 (11th Cir. 2005). Defendants contend that Plaintiffs do not have a legitimate liberty interest that can be described as a fundamental right. Plaintiffs disagree, arguing that the Act impermissibly burdens their fundamental right to live with their families.

Fundamental rights protected by substantive due process are those rights “that are so ‘implicit in the concept of ordered liberty’ that ‘neither liberty nor justice would exist if they were sacrificed.’” Moore, 410 F.3d at 1342 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 152, 82 L. Ed. 288 (1937); McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc)). “When a state enacts legislation that infringes fundamental rights, courts will review the law under a strict scrutiny test and uphold it only when it is ‘narrowly tailored to serve a compelling state interest.’” Id. at 1343 (quoting Reno v. Flores, 507 U.S.

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[12] Plaintiffs do not address Connecticut in their response brief. Instead, Plaintiffs rely on Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) to support their position. The Matthews decision addressed the issue of whether procedural due process required that the recipient of Social Security disability benefits payments be afforded an opportunity for an evidentiary hearing prior to the payments’ termination; the Court found that it did not. Plainly the existence of a continuing disability would be relevant to a determination of whether the disability benefits payments should continue. In contrast, in this case, the dangerousness of the registered sex offender is not a statutory prerequisite for the application of the residency restrictions.

292, 302, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993)). A substantive due process claim is analyzed by "first crafting a 'careful description of the asserted right.'" Id. (quoting Flores, 507 U.S. at 302, 113 S. Ct. at 1447). "Second, we must determine whether the asserted right is one of those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Id. (citations and internal marks omitted).

The Court begins with a careful description of the fundamental right at issue. In the instant case, as noted, Plaintiffs allege that the Act interferes with their fundamental right to live with their families. Fundamental rights that have received protection under substantive due process include "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." Washington v. Glucksberg, 521 U.S. 702, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); see also Roberts v. United States Jaycees, 468 U.S. 609, 617-618, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) ("[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."). The Supreme Court has expressed a reluctance to "expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Glucksberg, 521 U.S. at 720. The Eleventh Circuit has additionally noted that the Supreme Court "has not created a broad category where any alleged infringement on privacy and liberty will be subject to substantive due process protection." Moore, 410 F.3d at 1344. Consistent with the Moore decision, the Court begins by defining the scope of the claimed fundamental right in this case by referencing the

Act itself. Id.

Under this formulation, the right at issue in this case could be described as the right of a person registered as a sex offender under Georgia law to reside with his or her family in a location within 1,000 feet of a school bus stop and/or a church. Such a narrowly-defined right plainly would not be fundamental within the meaning of substantive due process jurisprudence. The Court is not satisfied, however, that the right as stated above is the only appropriate description of the right at issue in this case. As this case proceeds and the factual background is more fully developed, the contours of the right at issue may emerge in sharper focus. The Act may reach deeper into intimate family relationships and choices regarding child rearing and marriage than is immediately apparent. While the Court does not disagree with Defendants' assertion that there is no right to live where you want, the Court suspects that a different right ultimately may be at issue in this case. At this stage of the litigation, the Court cannot find that there are no circumstances under which Plaintiffs' substantive due process claim might succeed. The Court acknowledges, however, that this claim presents a close question.

Because the Court has not defined the claimed fundamental right in this case, the Court cannot proceed to determine if that right is indeed fundamental by evaluating whether the right is deeply rooted in the history and tradition of this Nation such that it is implicit in the concept of ordered liberty. The Court finds that Plaintiffs state a claim for a substantive due process violation, and Defendants' motion to dismiss Count 3 of Plaintiffs' Second Amended Complaint is hereby **DENIED**.

F. Takings Clause

The Fifth Amendment provides that private property may not be taken for public use without just compensation. U.S. CONST. amend. V, XIV. Defendants argue that the Act does not take Plaintiff Wilson's property,[13] it merely limits his ability to live there. Defendants contend that the Act does not restrict Mr. Wilson from owning, visiting, conducting business upon, leasing, selling, or otherwise using or enjoying the property. Plaintiffs argue that the Act is a partial regulatory taking because it prevents them "from living in their homes and forc[es] many to sell their property." (Pls.' Resp. to Defs.' Motion to Dismiss, p. 35.)[14]

The Supreme Court recognized that a regulatory taking could violate the Fifth Amendment in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922) (noting that "if regulation goes too far, it will be recognized as a taking"). The Court has not provided specific guidance for determining when a regulation "goes too far," instead relying on "essentially ad hoc, factual inquiries." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (quoting Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631(1978)). Certainly, where a regulation "denies all economically beneficial or productive use of land," a categorical finding that the land has been taken is

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[13] Defendants correctly note that Mr. Wilson is the only named Plaintiff who is alleged to own real property. Accordingly, Mr. Wilson is the only named Plaintiff who would have standing to assert a takings challenge to the Act, and the only named Plaintiff who can establish the possession of a property interest. See Givens v. Alabama Dep't of Corrections, 381 F.3d 1064 (11th Cir. 2004). For purposes of consistency, however, the Court will continue to use the term "Plaintiffs" in this section.

[14] The Court notes that the instant case plainly does not involve a physical taking, or a direct appropriation of property, as to which little analysis is required. Lucas, 505 U.S. at 1014.

appropriate. Lucas, 505 U.S. at 1015. Where, as here, no per se rule applies, the Court must engage in a factual inquiry, as described in Penn Central. The Court examines "[t]he economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." Penn Central, 438 U.S. at 124. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Id.

Plaintiffs contend that the Act has forced many property owners from their homes and that it "significantly diminishes the value of [P]laintiffs' homes and disrupts their investment-backed expectations." (Pls.' Resp. to Defs.' Motion to Dismiss, p. 36.) Specifically, Plaintiffs argue that, because they are barred from living in their residences, the economic value of the residence is reduced. Plaintiffs contend that, even though they may be able to sell or lease their property, they will be unable to obtain a fair value for the property because they will be required to vacate quickly. Defendants argue that the economic impact of the Act is minimal because Plaintiffs may continue to own the property or they may sell the property; in either case, the economic value of the land is not reduced. This Court agrees with Defendants' position and finds that the economic impact of the Act is fairly minimal. Plaintiffs are not forced to sell their homes and are not otherwise deprived of the homes' value because of the Act. The Act limits their ability to use the property as a residence.

The Court next considers the extent to which the Act interferes with Plaintiffs' reasonable investment-backed expectations regarding the property. Defendant argues that Plaintiffs' investment in their homes is not diminished in that the economic value of the home is not reduced. Plaintiffs contend that they invested in their property in accordance with the expectation that the property could be used as a residence. At the time Plaintiffs purchased their homes, Plaintiffs doubtlessly expected that the properties could be used as residences and likely invested in the property for the purpose of establishing a residence. Because the Act prohibits Plaintiffs from using the property for this purpose, it interferes with their reasonable expectations. The Court notes, however, that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." Andrus v. Allard, 444 U.S. 51, 65-66, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979). Accordingly, although the Act interferes with Plaintiffs' reasonable investment-backed expectations, this factor does not weigh strongly in their favor.

Finally, Plaintiffs do not seriously dispute that the State has a strong interest in preventing sexual abuse and that the purpose of the Act is to limit contact between registered sex offenders and children, thereby reducing the potential for recidivism among sex offenders. While Plaintiffs urge the Court to determine how much of an interest the State has in requiring Plaintiffs to move from their homes, the Court finds that such a determination is not supported by law. The nature of the state's interest is "critical in determining whether a taking has occurred." Vesta Fire Ins. Corp. v. State of Florida, 141 F.3d 1427, 1433 (11th Cir. 1998). This factor weighs in favor of Defendants.

After weighing these factors, the Court concludes that Plaintiffs' takings claim cannot succeed. "The standard for whether regulation effects a taking is whether the landowner has been denied all or substantially all economically viable use of his land." Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1072 (11th Cir. 1996) (noting that "[t]he standard is not whether the landowner has been denied those uses to which he wants to put his land"). Plaintiffs have not been denied all or substantially all economically viable use of their properties. Accordingly, the Court finds that Plaintiffs have failed to state a claim pursuant to the Takings Clause. Count 6 of Plaintiffs' Second Amended Complaint is **DISMISSED**.

G. RLUIPA

As previously noted, RLUIPA prevents governments from imposing a "substantial burden" on the religious exercise of a person or a religious assembly by imposing a land use regulation, unless that land use regulation is necessary to further a compelling state interest. 42 U.S.C. § 2000cc(a)(1). In addition, governments may not impose land use regulations that treat religious institutions on less than equal terms with secular institutions. 42 U.S.C. § 2000cc(b)(1). Defendants argue that Plaintiffs' RLUIPA claims cannot succeed because the Act does not regulate land use; rather, it limits the residences of registered sex offenders. Defendants contend that land belonging to religious institutions is not substantially burdened in the exercise of religion because a sex offender cannot live there.

Although Plaintiffs correctly fault Defendants for failure to comply with the Local Rules of this Court by not citing any authority to support their position that Plaintiffs' RLUIPA claims must be dismissed, the Court nonetheless finds that Plaintiffs' RLUIPA claims cannot succeed because the Act is not a land use regulation, as defined in RLUIPA. A land use regulation is defined as a zoning or landmarking law "that limits or restricts a claimant's use or development of land . . . if the claimant has an ownership, leasehold, easement, servitude or other property interest in the regulated land." 42 U.S.C. § 2000cc-5(5). "[A] government agency implements a 'land use regulation' only when it acts pursuant to a 'zoning or landmarking law' that limits the manner in which a claimant may develop or use property in which the claimant has an interest." Prater v. City of Burnside, 289 F. 3d 417, 434 (6th Cir. 2002). Zoning laws may be generally defined as those rules that regulate "uses and development by means of zones or districts." Artistic Entertainment, Inc. v. City of Warner Robins, 331 F.3d 1196, 1205 (11th Cir. 2003) (citations and internal marks omitted) (discussing the definition of a zoning ordinance under Georgia law). The Act cannot be considered a zoning law, in accordance with the plain meaning of that term. Moreover, the Court notes that zoning is traditionally a local government function, rather than a state-wide exercise.

The Court has found only one interpretation of the term "landmarking law" in its research of published federal cases. In that case, the Western District of New York concluded that "[l]andmarking laws generally involve the 'regulation and restriction [of] certain areas as national historic landmarks, special historic sites, places and buildings for the purposes of conservation, protection, enhancement and perpetuation of those places of natural heritage.'" Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 254 (W.D. N.Y. 2005) (quoting N.Y. Village L. § 7-700.) Plainly, the Act does not fall within this definition. Even if the Court were inclined to define the term "landmarking law" more broadly than the New York district court, the Act could not be fairly described as a landmarking law.[15]

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[15] Plaintiffs, citing Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004), argue that the "equal terms" provision of RLUIPA does not require a showing that the law regulates land use. The Court does not read Midrash to support Plaintiff's argument. While the "substantial burden" provision of RLUIPA describes the scope of its application in terms that do not appear in the "equal terms" provision, both provisions prohibit only the imposition or implemental of a "land use regulation." Plainly if no land use regulation has been imposed by the government, RLUIPA simply does not afford relief. Such is the case here.

The Court notes that Plaintiffs have not taken the position that the Act should be considered a landmarking law. Accordingly, insofar as RLUIPA applies only to zoning or landmarking laws, Plaintiffs' RLUIPA claims cannot succeed. Count 4 of Plaintiffs' Second Amended Complaint is hereby **DISMISSED**.

H. Free Exercise Clause[16]

States may not pass laws that prohibit the free exercise of religion. U.S. CONST. amends. I, XIV. Defendants argue that Plaintiffs are not prohibited from participating in religious activities on church property but are merely prohibited from living within 1,000 feet of a church. Defendants contend that the Act does not restrict Plaintiffs' ability to exercise their religious beliefs. Plaintiffs argue that the Act's prohibition on living or working within 1,000 feet of a church imposes an unequal burden on secular and religious organizations, in violation of the Free Exercise Clause. Plaintiffs urge the application of strict scrutiny and submit that there is no justification to support treating secular halfway houses differently from religious halfway houses.

The Free Exercise Clause protects both religious beliefs and religious practices. Generally, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (citation omitted). As to the neutrality requirement, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." Lukumi, 508 U.S. at 532. "Although a law

[16] The Court notes that Defendants have not moved to dismiss Plaintiffs' claim that the Act violates the right to freedom of association, U.S. CONST. amend. I.

targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." Id. at 533. To determine the object of a law, the Court begins by considering the text itself. Id. In the instant case, the Act prohibits registered sex offenders from living or working within 1,000 feet of a church. According to Lukumi, "a law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." Id. The Act does not refer to a religious practice without a secular meaning – indeed, it does not refer to a religious practice at all.

As to the second requirement of the Free Exercise Clause, the Supreme Court has stated that "laws burdening religious practice must be of general applicability." Lukumi, 508 U.S. at 542 (citing Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 879-881, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)). Where a law has "the incidental effect of burdening religious practice," "categories of selection are of paramount concern." Id. The Free Exercise Clause guarantees "that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." Id. at 543. To establish a Free Exercise Clause violation, a plaintiff must demonstrate "a substantial burden on the observation of a central religious belief or practice." Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989). The Court finds that the Act's provision prohibiting registered sex offenders from residing within 1,000 feet of a church does not impose a substantial burden on religious practices. Plaintiffs' argument that the law treats faith-based halfway houses differently from secular halfway houses is unpersuasive. The Act does not preclude sex offenders from residing in faith-based halfway houses, it only provides that those halfway houses cannot be located on church grounds or within 1,000 feet of a church. Plaintiffs do not allege any particular religious belief that would mandate the location of a halfway house on church property. The Act similarly does not preclude Mr. Jones from providing spiritual leadership and assistance to people released from prison. It does not limit registered sex offenders from attending church or worship services and does not limit Mr. Jones' activities in counseling and ministering to recently-released registered sex offenders. It only provides that Mr. Jones may not house these individuals on church grounds or within 1,000 feet of a church. The Court does not find this restriction to impose a substantial burden on religious practices such that strict scrutiny would be required.

In contrast to the residency provision, however, the Court finds that Plaintiffs potentially state a claim for violation of the Free Exercise Clause as to that portion of the Act that prohibits Plaintiffs from working within 1,000 feet of a church. This provision would effectively exclude all registered sex offenders from serving as clergy or ministers in religious organizations. This provision may operate as a substantial burden on religious practice that does not survive scrutiny; however, the Court does not read Plaintiffs' Second Amended Complaint as alleging that any named Plaintiff seeks employment in a religious organization such that a named Plaintiff would have standing to assert this claim. The Court will nonetheless provide Plaintiffs an opportunity to amend their complaint to adequately allege standing as to this claim.

Plaintiffs additionally contend that the Act violates "the ministerial exception of the Free Exercise Clause" because it interferes with employment decisions of churches. (Plfs.' Resp. to Defs.' Motion to Dismiss, p. 33.) The ministerial exception has been described as "a rule adopted by several circuits that civil rights laws cannot govern church employment relationships with ministers without violating the free exercise clause because they substantially burden religious freedom." Hankins v. Lyght, 441 F.3d 96, 100 (2d Cir. 2006). It has been applied almost exclusively as a bar to discrimination suits against churches and religious organizations – it is an exception to employment discrimination claims. See Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000) (finding that the Free Exercise Clause prohibits "a church from being sued under Title VII by its clergy"). The Court's research has failed to reveal any authority for applying the ministerial exception to invalidate a state statute. Plaintiffs' Free Exercise claim that is based on the portion of the Act that prohibits registered sex offenders from living within 1,000 feet of a church is **DISMISSED**. The Court will, however, permit Plaintiffs an opportunity to amend their complaint to state a claim that the portion of the Act that prohibits registered sex offenders from working within 1,000 feet of a church violates the Free Exercise Clause.

I. Right to Interstate or Intrastate Travel

Defendants argue that, because the Act does not restrict Plaintiffs from traveling to other states or moving around in any local community for socializing, shopping, or working, the Act does not violate the right to interstate or intrastate travel. (Defs.' Brief, p. 31.) Plaintiffs have failed to respond to Defendants' argument as to this claim, and, accordingly, have abandoned it. See Local Rule 7.1B; Roberts v. City of Hapeville, No. 1:05-CV-1614-WSD, 2007 U.S. Dist. LEXIS 10508 (N.D. Ga. Feb. 15, 2007); City of Lawrenceville v. Ricoh Electronics, Inc., 370 F. Supp. 2d 1328, 1333 (N.D. Ga. 2005). Even if Plaintiffs had not abandoned this claim, the Court finds that it is without merit. See Saenz v. Roe, 526 U.S. 489, 499, 119 S. Ct. 1518, 1524, 143 L. Ed. 2d 689 (1999); Doe v. Moore, 410 F.3d 1337, 1348-49 (11th Cir. 2005); Doe v. Miller, 405 F.3d 700, 711-12 (8th Cir. 2005). Count 8 of

Plaintiffs' Second Amended Complaint is **DISMISSED**.

J. Bill of Attainder

Article I, § 10 of the United States Constitution provides that states may not pass bills of attainder. Pursuant to this clause, legislatures may not pass "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." United States v. Brown, 381 U.S. 437, 448-48, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965). Defendants argue that because the Act does not inflict punishment, it cannot be an unconstitutional bill of attainder.

Three requirements must be met before a legislative act will be considered an unconstitutional bill of attainder: "specification of the affected persons, punishment, and lack of a judicial trial." Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 847, 104 S. Ct. 3348, 82 L. Ed. 2d 632 (1984). In this case, the first requirement is met, insofar as the Act specifically affects only registered sex offenders. See § 42-1-15(e) (noting that the residency restrictions apply only to individuals required to register as sex offenders under Georgia law).

The definition of punishment in the Bill of Attainder context is set forth in Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 277, 53 L. Ed. 2d 867 (1977). The Court first considers whether the Act "falls within the historical meaning of legislative punishment," in the context of the history of bills of attainder Nixon, 433 U.S. at 475. Such historical punishments include death, imprisonment, banishment, confiscation of property, and employment or vocational restrictions. Id. at 473-74. The Court next looks beyond historical experience to consider whether the law "reasonably can be said to further nonpunitive legislative purposes." Id. at 475-76 (citations omitted). The Court finally considers whether "the legislative record evinces a congressional intent to punish." Id. at 478. The Court ultimately applies the same analysis here as it applied in connection with Plaintiffs' *ex post facto* challenge. See United States v. O'Neal, 180 F.3d 115, 122 n.7 (4th Cir. 1999) (noting that "it is apparent that the Court applies the same test for 'punishment' for at least the Ex Post Facto, Double Jeopardy, and Bill of Attainder Clauses, and for substantive due process"); see also Flemming v. Nestor, 363 U.S. 603, 612, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960) (applying the same analysis of punishment to *ex post facto* and bill of attainder challenges). For the reasons stated in connection with this Court's analysis of Plaintiffs' *ex post facto* challenge to the Act, the Court finds that, when the allegations in the Second Amended Complaint are viewed in the light most favorable to Plaintiffs, the Act could be found to inflict punishment.

The Court finally must consider whether the Act inflicts punishment without a judicial trial. In the instant case, the Act imposes residency restrictions based on an individual's status as a registered sex offender. The triggering event for the operation of the Act is the requirement of registration. Prior to imposing the registration requirement, each Plaintiff was afforded a judicial trial (or was provided the opportunity to challenge the charges that ultimately required registration as part of a judicial proceeding). The Court accordingly cannot find that the Act constitutes punishment that is imposed without the protections of a judicial trial. Plaintiffs do not specify what would be shown at trial that would be relevant to the application of the Act. For this reason, Plaintiffs' bill of attainder challenge must fail, and the Court **DISMISSES** this claim, which is contained in Count 1 of Plaintiffs Second Amended Complaint.

K. Impairment of Contractual Obligations

Article I, § 10 of the United States Constitution provides that states may not pass any law that impairs the obligations of contracts. Defendants argue that Plaintiffs' claim that the Act impairs the obligation of contracts by forcing them to break leases cannot succeed because Plaintiffs cannot show a substantial impairment. Plaintiffs have not responded to this argument, and the Court accordingly finds that Plaintiffs have abandoned this claim. See Local Rule 7.1B; Roberts v. City of Hapeville, No. 1:05-CV-1614-WSD, 2007 U.S. Dist. LEXIS 10508 (N.D. Ga. Feb. 15, 2007); City of Lawrenceville v. Ricoh Electronics, Inc., 370 F. Supp. 2d 1328, 1333 (N.D. Ga. 2005).[17]

Even assuming that Plaintiffs did not abandon this claim, the Court finds that it is due to be dismissed. To determine whether a change in the law improperly impairs contractual obligations, the Court considers whether that change "has operated as a substantial impairment of a contractual relationship." General Motors Corp. v. Romein, 503 U.S. 181, 186, 112 S. Ct. 1105, 1109, 117 L. Ed. 2d 328 (1992) (internal marks and citations omitted). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." Romein, 503 U.S. at 186. As the Supreme Court has explained, "it is well settled that the prohibition against impairing the obligation of contracts is not to be read

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[17] In addition, Plaintiffs do not clearly state a claim based on the impairment of contracts in their complaint. Although the phrase is mentioned in the heading associated with Count 1 of Plaintiffs' Second Amended Complaint, it is not referenced in any paragraphs in the text of that Count. The Court does not consider the inclusion of a phrase in a heading sufficient to state a claim as to that issue. Furthermore, Plaintiffs have not included any specific factual allegations addressing the contracts they are alleging to have been impaired by the Act, although Count 1 asserts that Plaintiffs will be forced to break their leases.

literally." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 502, 107 S. Ct. 1232, 1251, 94 L. Ed. 2d 472 (1987) (citation omitted).

The Court finds that, to the extent that Plaintiffs allege they are parties to lease agreements, Plaintiffs could establish the existence of a contractual relationship. To the extent the Act operates to restrict Plaintiffs' ability to reside in premises leased for that purpose, the contracts are impaired. The Act "alter[s] contractual rights or obligations," National R. Passenger Corp. v. Atchison, T. & S.F.R. Co., 470 U.S. 451, 472, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985), because Plaintiffs may no longer reside at the leased premises, even though the lease presumably would include the right to reside at the property. The Court accordingly must consider whether the impairment is substantial.

"The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." Energy Reserves Group v. Kansas Power & Light Co., 459 U.S. 400, 411, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983) (citation omitted). If contractual obligations are only minimally altered, the claim must fail, and no additional analysis is required. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978). "Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." Id. In the instant case, the Act's alteration of Plaintiffs' contractual right to use leased premises as residences is a substantial impairment requiring an examination of the nature and purpose of the legislation.

"If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem." Energy Reserves, 495 U.S. at 411-12. "[I]t is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States;" "[t]he police power [] is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." Flanigan's Enterprises, Inc. v. Fulton County, Georgia, 242 F.3d 976 (11th Cir. 2001) (citations and internal marks omitted) (Fulton County Code provision prohibiting the sale and consumption of alcoholic beverages in adult entertainment establishments did not unconstitutionally impair the obligations of contracts where the defendants' leases provided that the premises be used for topless nudity bar and required the maintenance of a liquor license). In the instant case, the Act has a legitimate public purpose – to lessen the potential for registered sex offenders who are inclined towards recidivism to have contact with children. The Court must next "satisfy itself that the legislature's adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." Keystone, 480 U.S. at 505 (citations and internal marks omitted). "[W]e have repeatedly held that unless the State is itself a contracting party, courts should properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." Id. (internal marks and citations omitted). The Act survives scrutiny under this standard, and the Court will **DISMISS** this claim from Count 1 of Plaintiffs' Second Amended Complaint.

L. Overbreadth/Vagueness

The Due Process Clause of the Fourteenth Amendment requires that state legislative enactments be neither impermissibly vague nor overbroad. A statute is unconstitutionally vague if it either "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, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999).[18] A law must provide "fair warning" of proscribed conduct so that citizens (or, in this case, registered sex offenders) can conform their conduct to the law. Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 503, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1983); Morales, 527 U.S. at 58. A statute is unconstitutionally vague "only if the enactment is impermissibly vague in all of its applications." Hoffman Estates, 455 U.S. at 495. A statute that is overbroad similarly will not survive against a constitutional challenge. "Under the overbreadth doctrine, a statute that prohibits a substantial amount of constitutionally protected [conduct] is invalid on its face." United States v. Williams, 444 F.3d 1286, 1296 (11th Cir. 2006); see also Houston v. Hill, 482 U.S. 104, 114, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

Although Defendants contest Plaintiffs' ability to assert claims that the Act is vague and/or overbroad, the Court notes that the only mention of these claims in Plaintiffs' Second Amended Complaint is in Plaintiffs' prayer for relief. The claims are not addressed in the listed Counts of Plaintiffs' Second Amended Complaint. As such, to the extent that Plaintiffs assert claims based on these theories, Plaintiffs have failed to adequately allege these claims. Plaintiffs have not set forth their basis for alleging that Act is vague and overbroad. In particular, Plaintiffs failed to allege the particular portions of the Act that Plaintiffs contend are vague and to identify the constitutionally protected conduct that forms the grounds for their overbreadth challenge. The Court will permit Plaintiffs to

[18] The Court notes that the Morales court considered a vagueness challenge to a criminal law; however, the Court finds nothing to indicate that the same analysis would not apply in this case, where a violation of the Act's residency restrictions is punishable as a felony with a minimum sentence of ten years.

amend their complaint to correct these pleading deficiencies and **DENIES**, at this time, Defendants' motion to dismiss these claims.

IV. CONCLUSION

Defendants' Motion to Dismiss in Lieu of Answer [Doc. No. 34] and Defendants' Motion to Dismiss Amended Complaint [Doc. No. 55] are **DENIED** as moot. Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint [Doc. No. 78] is **GRANTED in part and DENIED in part**, as stated herein. The Court will permit Plaintiffs to amend their complaint within twenty (20) days of the date of this Order to assert a claim that the provision of the Act that prohibits registered sex offenders from working within 1,000 feet of churches violates the Free Exercise Clause and to assert vagueness and overbreadth claims, as provided in this Order.

SO ORDERED this 30th day of March, 2007.

s/ CLARENCE COOPER

CLARENCE COOPER
UNITED STATES DISTRICT JUDGE

EXHIBIT 19

Blood, Watson & Stageberg, Iowa Department of Criminal and Juvenile Justice Planning, *State Legislation Monitoring Report* (2008)

(selected pages)

State Legislation Monitoring Report: FY2007

Iowa Department of Human Rights
Division of Criminal and Juvenile Justice Planning

Paul Stageberg, Ph.D., Administrator

Primary Authors:
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February, 2008

CJJP
Criminal & Juvenile Justice Planning

Introduction

The Division of Criminal and Juvenile Justice Planning issued its first state legislation monitoring report in February 2002, covering the first six months' impact of Senate File 543 (which enacted a number of sentencing changes) on the justice system; monitoring of the correctional impact of this bill was at the request of several members of the legislature. Since then, the Criminal and Juvenile Justice Planning Advisory Council has requested that CJJP monitor the correctional impact of enacted legislation of particular interest. This report covers monitoring results or future plans to monitor the following:

- No "good time" if offender refused sex offender treatment (effective FY2006, see p. 4).
- Drug commitments to prison, continuing evaluation of the impact of drug laws on the prison population. (See p. 4 .)
- Lascivious acts with a child, changed classification and penalties (effective FY2006, see p.5).
- Fines and administrative license suspensions (HF641, payment schedules). (See p. 7)
- Establishment of parole eligibility at 70% of time served for persons sentenced under the "85% law" provisions of *Iowa Code* Section 902.12. (effective FY2005, see p. 7).
- Smuggling and tax stamp convictions due to changes in cigarette taxes (effective April, 2007). (See p. 9.)
- 2000 ft residency restrictions for convicted sex offenders with child victims (implemented September, 2005, see p. 9).
- Keg registration and Under-age possession of alcohol (see p.11).
- Contraband in Jails (see p. 11).

Summary of Findings

Effect of "no good time" for refusing sex offender treatment. More time needs to elapse before any effect of this policy change could be noticed.

Drug commitments. The number of new commitments to prison for drug offenses decreased again in FY2007, mainly due to a continuing decrease in the number of commitments for methamphetamine. This represented the 3rd year in which drug offense commitments fell. However, there appears to be an increase in the number of new commitments for marijuana and cocaine.

Lascivious Acts, C felony, offender age changes. Although the act increased the number of charging options for C felony sex offenses, there has not been a significant increase in the number of C felony sex offense convictions. There are fewer D felony convictions, and a slight increase in the number of Aggravated misdemeanor convictions. There has been no impact on the juvenile system due to the age change.

Financial impact, fine payment schedules.. No reliable source of data has been identified.

"85%" law parole eligibility. During the 2004 legislative session, changes were made to Code sections dealing with what had previously been referred to as "85% sentences," establishing parole eligibility at 70% for all inmates previously sentenced under these sections. The first of these inmates became eligible for release consideration in FY05. Through November 21, 2007, 182 inmates serving sentences covered by this provision had been released from Iowa prisons. Only 116 of these would have been released under the previous 85% provisions. Another 64 inmates were eligible for release on November 21, and another 59 will become eligible for release during calendar 2008.

Cigarette smuggling/tax stamp convictions. There have been no convictions of smuggling or tax stamp evasions for tobacco products through September 30, 2007.

Monitoring the impact of the 2000 ft residency restrictions. The enforcement of the 2000-ft residency restrictions does not appear to have had an effect on reducing the number of sex offenses with child victims. However, there has been an effect on the justice system in terms of registry violations, "lost" registrants, resources diverted to enforce the provision, and negative consequences for the treatment and supervision of offenders in the community.

Keg registration and Under-age possession of alcohol. Since July 1, 2007, the effective date of the legislation, there have been no convictions for keg registration violations. It is too soon to tell if there will be a lasting impact on the number of convictions for supplying alcohol to minors or for underage possession of alcohol.

Possession of Contraband in a Correctional Facility. There was an increase in the number of charges filed in the first quarter of FY08 compared to the first quarter of FY07.

After 2015 the potential impact of SF2275 will rise, as those sentenced under 85% Class B provisions become eligible for parole consideration. The first of these offenders becomes eligible for release in 2014, but, assuming release midway between expiration of the mandatory term and expiration of sentence, none are projected for release until 2015. As of June 30, 2007, there were 440 of these inmates housed in Iowa's prisons, 38 of whom were committed to prison in FY06. The potential impact of sentence reduction for these Class B inmates is greater than is the case for the Class C 85% commitments, as the possible reduction for the latter inmates is 18 months per inmate, while the same figure for Class B offenses is 45 months for 25-year terms and 90 months for 50-year terms. Realization of these savings will depend on the extent to which the Board of Parole sees release of these inmates as being consistent with public safety.

Cigarette smuggling/Tax stamp violations.

Provisions. S.F.128, effective at signing in March, 2007 increased the cigarette tax by $1. Concern was expressed that there would be an increase in violations of the cigarette tax stamp and smuggling provisions in Iowa Code 453A.

Monitoring Plan. CJJP used data from the Justice Data Warehouse to look at convictions for tax stamp evasion or smuggling. The impact on sales or revenue is not a part of the CJJP monitoring plan.

Impact. Although there was one reported theft of a significant number of cigarettes from a warehouse, there have been no convictions for smuggling or tax stamp evasions for tobacco products between April 1, 2007 and September 30, 2997.

2000 ft Residency Restrictions for Sex Offenders with Minor Victims

Provisions. In September, 2005, after the Courts determined that the provisions in Iowa Code 692A.2A(3), residency restrictions for sex offenders with minor victims, was constitutional, law enforcement officials began enforcing the law. This law is called the 2000-foot law.

Monitoring Plan. CJJP has used data from the Justice Data Warehouse to evaluate the impact the law has had on convictions for both violations of the law and convictions for sex abuse crimes involving minors.

Impact. CJJP compared the disposed charges for sex offenses with minor victims and charges where there were likely to be minor victims for the 12 months prior to the enforcement of 692A.2A(3) with 24 months after (September 2004 – August 2005 to September 2005 – August 2007).

Time Period	Charges filed	Charges dismissed/acquitted	Convictions
9/2004 – 8/2005	913	425	433
9/2005 – 8/2006	928	400	445
9/2006 – 8/2007	1,095	482	490

The law does not seem to have led to fewer charges or convictions, indicating that there probably have not been fewer child victims.

The same trend is seen in convictions for the same offenses. A comparison was made of convictions that occurred in the 6 months prior to enforcement, and those that were recorded after the law had been in effect for 6 months (March 2005 – August 2005 compared to March 2006 – August 2006). In the pre-enforcement time period there were 236 convictions while in the post-enforcement period there were 244. The difference is not significant.

For the full fiscal year of 2007, July, 2006 through June, 2007, there were 422 convictions for the same offenses (child or likely child victims). This is consistent with the 6-month figures above, and does not demonstrate any effect due to the 2000 foot law.

The number of offenders entering prison for sex abuse crimes with child victims also has not been affected by the enforcement of 692A.2A(3). The numbers for the first two quarters of FY2006 (pre-enforcement) were 113 offenders with child victims; the number for the first two quarters of FY2007 (post-enforcement) was 114.

Based upon these numbers, it does not appear, at this time, that there has been a reduction in the number of child victims of sexual abuse in Iowa.

However, there has been an impact on the offenders required to register on the Sex Offender Registry and on offenders covered by the residency restriction. During the 12 months prior to the enforcement of 692A.2A(3), there were 258 convictions for failure to register as a sex offender. In the 12 months after enforcement, that number had risen to 442. In addition, there were 137 convictions for violating the residency restrictions. When looking at fiscal year figures, it appears as if the registry violations remain higher than before enforcement, with 399 convictions during FY2007. The residency violations, however, appear to be lower, at 72 for FY2007.

Prison commitments for registry violations have increased since the enforcement of the 2000-ft law.

	FY2005	FY2006	FY2007
# of prison admits for registry violations	48	72	89

EXHIBIT 20

Minnesota Department of Corrections, *Residential Proximity and Sex Offense Recidivism in Minnesota (2007)*

Residential Proximity & Sex Offense Recidivism in Minnesota

April 2007

MINNESOTA DEPARTMENT OF CORRECTIONS

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April 2007

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EXECUTIVE SUMMARY

In an effort to curb the incidence of sexual recidivism, state and local governments across the country have passed residency restriction laws. Designed to enhance public safety by protecting children, residency restrictions prohibit sex offenders and, in particular, child molesters from living within a certain distance (500 to 2,500 feet) of a school, park, playground or other location where children are known to congregate. Given that existing research has yet to fully investigate whether housing restrictions reduce sexual recidivism, the present study examines the potential deterrent effect of residency restrictions by analyzing the sexual reoffense patterns of the 224 recidivists released between 1990 and 2002 who were reincarcerated for a sex crime prior to 2006.

In order to determine whether the 224 cases might have been affected by residency restrictions, four basic criteria were used.

1. Because housing restrictions are geared primarily towards deterring sex offenders—namely, child molesters—from initiating contact with potential victims, offenders had to establish direct contact with the victims, as opposed to gaining access to their victims through another person they know such as a significant other (e.g. wife, fiancée, girlfriend, etc.), friend, co-worker, or acquaintance.
2. The contact had to have occurred within at least one mile of the offender's residence at the time of the offense.
3. The first contact location had to have been near a school, park, daycare center, or other prohibited area.
4. The victim had to have been under the age of 18 at the time of the offense.

Data on the most recent sex offense for the 224 recidivists were derived from the criminal complaint, the pre-sentence investigation (PSI) report, the Statewide Supervision (SSS) database, and the Minnesota Department of Corrections' (DOC) Correctional Operations Management System (COMS) database.

Results

Not one of the 224 sex offenses would likely have been deterred by a residency restrictions law. Only 79 (35 percent) of the cases involved offenders who established direct contact with their victims. Of these, 28 initiated victim contact within one mile of their own residence, 21 within 0.5 miles (2,500 feet), and 16 within 0.2 miles (1,000 feet). A juvenile was the victim in 16 of the 28 cases. But none of the 16 cases involved offenders who established victim contact near a school, park, or other prohibited area. Instead, the 16 offenders typically used a ruse to gain access to their victims, who were most often their neighbors.

Residential proximity had very little impact on the 224 sex offenses examined here for several reasons. First, the results clearly indicated that what matters with respect to sexual recidivism is not residential proximity, but rather social or relationship proximity. A little more than half (N = 113) of the 224 cases were "collateral contact" offenses in that they involved offenders who gained access to their victims through another person, typically an adult. For example, one of the most common victim-offender relationships found in this study was that of a male offender developing a romantic relationship with a woman who has children. The sex offender recidivists examined here used their relationships with these women to gain access to their victims—the women's children. Likewise, it was relatively common for offenders to gain access to victims through babysitting for an acquaintance or co-worker, or living with friends who had children.

Second, even when offenders established direct contact with victims, they were unlikely to do so close to where they lived. This may be due mostly to the fact that offenders are more likely to be recognized within their own neighborhoods. As a result, when direct contact offenders look for a victim, they are more likely to go to an area relatively close to home (i.e. within 20 miles of their residence), but still far enough away (i.e. more than one mile) to decrease the chances of being recognized.

Additional Key Findings

- Of the 224 sex offenses, 85 percent occurred in a residential location such as the offender's home, while the remaining 15 percent took place in a public location.
- The vast majority (79 percent) of the 224 offenders victimized someone they knew.
- When the offender victimized a stranger, 28 percent committed the offense in their own residence, 23 percent within one mile of their home, and 49 percent committed the crime more than one mile from their residence.
- Whereas only 35 percent established contact directly with their victims, half (50 percent) of the sex offender recidivists gained access to their victims through a form of collateral contact such as a girlfriend, wife, co-worker, friend, or acquaintance. For the remaining 14 percent, the offenders were biologically related to their victims.
- Compared to the other 145 recidivists, the 79 direct contact offenders were more likely to use alcohol and/or drugs prior to the offense, to use physical force during the offense, and to have a history of victimizing adult strangers. These offenders were the least likely to victimize children in either their previous or current offense.
- The 113 collateral contact offenders were more likely to have longer criminal histories and a history of victimizing female acquaintances under the age of 18. In their reoffense, more than half (53 percent) victimized a female acquaintance under the age of 18.
- The 32 recidivists who offended against a biological family member were more likely to be older white males who had a history of victimizing family members and children under the age of 13.

Policy Implications

A statewide residency restrictions law would likely have, at best, only a marginal effect on sexual recidivism. Although it is possible that a residency restrictions law could avert a sex offender from recidivating sexually, the chances that it would have a deterrent effect are slim because the types of offenses it is designed to prevent are exceptionally rare and, in the case of Minnesota, virtually non-existent over the last 16 years. Rather than lowering sexual recidivism, housing restrictions may work against this goal by fostering conditions that exacerbate sex offenders' reintegration into society.

EXHIBIT 21

Iowa County Attorneys Association, *Statement on Sex Offender Residency Restrictions in Iowa* (Dec. 11, 2006)

Iowa County Attorneys Association

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STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA

December 11, 2006

The Iowa County Attorneys Association believes that the 2,000 foot residency restriction for persons who have been convicted of sex offenses involving minors does not provide the protection that was originally intended and that the cost of enforcing the requirement and the unintended effects on families of offenders warrant replacing the restriction with more effective protective measures.

The ICAA has the following observations concerning the current restriction:

1. Research shows that there is no correlation between residency restrictions and reducing sex offenses against children or improving the safety of children.
2. Research does not support the belief that children are more likely to be victimized by strangers at the covered locations than at other places.
3. Residency restrictions were intended to reduce sex crimes against children by strangers who seek access to children at the covered locations. Those crimes are tragic, but very rare. In fact, 80 to 90 percent of sex crimes against children are committed by a relative or acquaintance who has some prior relationship with the child and access to the child that is not impeded by residency restrictions. Only parents and caretakers can effectively impede that kind of access.
4. Law enforcement has observed that the residency restriction is causing offenders to become homeless, to change residences without notifying authorities of their new locations, to register false addresses or to simply disappear. If they do not

register, law enforcement and the public do not know where they are living. The resulting damage to the reliability of the sex offender registry does not serve the interests of public safety.

5. There is no demonstrated protective effect of the residency requirement that justifies the huge draining of scarce law enforcement resources in the effort to enforce the restriction.
6. The categories of crimes included in the restriction are too broad, imposing the restriction on many offenders who present no known risk to children in the covered locations.
7. A significant number of offenders have married or have been reunited with their victims; and, in those cases, the residency restriction is imposed on the victims as well as the offenders.
8. Many offenders have families whose lives are unfairly and unnecessarily disrupted by the restriction, causing children to be pulled out of school and away from friends, and causing spouses to lose jobs and community connections.
9. Many offenders are physically or mentally disabled but are prohibited from living with family members or others on whom they rely for assistance with daily needs.
10. The geographic areas included in the prohibited 2,000 foot zones are so extensive that realistic opportunities to find affordable housing are virtually eliminated in most communities. The lack of transportation in areas not covered by the restriction limits employment opportunities. The adoption of even more restrictive ordinances by cities and counties exacerbates the shortage of housing possibilities.
11. The residency restriction has no time limit; and, for many offenders, the restriction lasts beyond the requirement that they be listed on the sex offender

registry. For this reason, there are many offenders who are subject to the residency restriction but who are not required to inform law enforcement of their place of residence, making enforcement nearly impossible.

12. There is no accommodation in the current statute for persons on parole or probation supervision. These offenders are already monitored and their living arrangements approved. The restriction causes many supervised residential placements to be unavailable even though they may be the most appropriate and safest locations for offenders to live.

13. Many prosecutors have observed that the numerous negative consequences of the lifetime residency restriction has caused a reduction in the number of confessions made by offenders in cases where defendants usually confess after disclosure of the offense by the child. In addition, there are more refusals by defendants charged with sex offenses to enter into plea agreements. Plea agreements are necessary in many cases involving child victims in order to protect the children from the trauma of the trial process. This unforeseen result seriously jeopardizes the welfare of child victims and decreases the number of convictions of sex offenders to accurate charges. Consequently, many offenders will not be made fully accountable for their acts and will not be required to complete appropriate treatment or other rehabilitative measures that would enhance the safety of children. Similar unintended negative effects often accompany well-intended efforts to increase prison sentences with mandatory provisions.

14. The drastic reduction in the availability of appropriate housing, along with the forced removal of many offenders from established residences, is contrary to well-established principles of treatment and rehabilitation of sex offenders. Efforts to rehabilitate offenders and to minimize the rate of reoffending are much

more successful when offenders are employed, have family and community connections, and have a stable residence. These goals are severely impaired by the residency restriction, compromising the safety of children by obstructing the use of the best known corrections practices.

For these reasons, the Iowa County Attorneys Association supports the replacement of the residency restriction with more effective measures that do not produce the negative consequences that have attended the current statute. For example, the ICAA would support a measure that includes the following:

- A statute creating defined protected areas ("child safe zones") that sex offenders would be prohibited from entering except in limited and safe circumstances. Such areas might include schools and childcare facilities.
- Entrance into the protected areas would be allowed only for activities involving an offender's own child and only with advance notice and approval from those in charge of the location.
- The restriction should cover offenses against "children" (under age 14), rather than "minors" (under 18).
- The statute should specifically preempt local ordinances that attempt to create additional restrictions on sex offenders. Such ordinances result in a variety of inconsistent rules and promote apprehension among local authorities that they must act to defend themselves from the perceived effects of the actions of other communities.
- Most important, any restriction that carries the expectation that it can be effectively enforced must be applied to a more limited group of offenders than is covered by the current residency restriction. This group should be

identified by a competent assessment performed by trained persons acting on behalf of the state. The assessment should be directed at applying the statutory restriction only to those offenders that present an actual risk in public areas to children with whom the offender has no prior relationship

- Children will be safer with clarification and strengthening of certain child sex abuse laws, including, sex abuse by deception, sexual exploitation of a person "reasonably believed to be a minor," using a position of authority to cause children to engage in a sex act, and requiring admission at trial of a defendant's prior acts of sexual abuse.
- Sex offender treatment both inside and outside of prison should be fully funded and improved.
- Measures should be enacted that aim at keeping <u>all</u> young people safe from <u>all</u> offenders. This should include programs that focus on the danger of abuse that may lie within the child's family and circle of acquaintances. It is important to help children and parents recognize the signs and dangers of sex abuse by persons with ordinary access to children.
- Recognize that child safety from sex offenses is not amendable to simple solutions by creating a Sex Offender Treatment and Supervision Task Force to identify effective strategies to reduce child sex offenses.

These observations of Iowa prosecutors are not motivated by sympathy for those committing sex offenses against children, but by our concern that legislative proposals designed to protect children must be both effective and enforceable. Anything else lets our children down.

The Iowa County Attorneys Association strongly urges the General Assembly and the Governor to act promptly to address the problems created by the 2,000 foot residency restriction by replacing the restriction with measures that more effectively protect children, that reduce the unintended unfairness to innocent persons and that make more prudent use of law enforcement resources, and strengthen the child sex abuse laws and prosecution. The ICAA stands ready to assist in any way with this effort.

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EXHIBIT 22

Misguided Measures, ABC News (March 7, 2007)

Misguided Measures

By JIM AVILA, MARY HARRIS and CHRIS FRANCESCANI ABC News Law & Justice Unit
March 7, 2007 —

go.com

New Sex Offender Laws May Cause Bigger Problems Than They Prevent

Megan Kanka, Polly Klaas, Jessica Lunsford -- the names break your heart at their very mention. All were victims of child sex predators.

But laws passed in their names may be making matters worse.

Across the nation, communities and legislators are enacting a wide variety of new laws to fight back against sex offenders. Some communities have set residency restrictions on sex offenders, others require GPS monitoring, and in Ohio there's a proposal that would require registered sex offenders to put bright green license plates on their vehicles.

But a growing chorus of experts said that many laws targeting sex offenders have backfired. And the consequences could be far-reaching.

"In 2005, we had a series of very high-profile, very violent brutal sex crimes against children," said Jill Levenson, a professor of human services at Lynn University in Florida. "And that really sparked a nationwide panic."

'Cluster' Communities of Sex Offenders

Residency restriction laws are among the most common new legislative efforts to address community concerns. Many states have enacted laws that bar offenders from living within 2,000 feet of a school or day care center. In California, the required distance is a quarter mile.

But the not-in-my-backyard mentality that has understandably prompted much of this legislation may be producing the opposite effect.

In Cedar Rapids, Iowa, Sheriff Don Zeller said new residency restrictions are forcing offenders into rural parts of the county where they are far harder to keep track of -- or worse, forcing them underground, where they can be lost track of completely.

"We're finding that it's almost impossible to keep track of individuals we have registered in the county," Zeller told ABC News' Law & Justice Unit. "Five years ago, we knew where about 95 percent of those individuals were. Now we're lucky if we know where 50, 55 percent of them are."

And paradoxically, Zeller said, the new restrictions are also creating creepy sex offender "clusters" -- like the Ced-Rel Motel in Lynn County, where more than two dozen sex offenders lived at one time.

"What if some individual comes in there with a family and decides that they're going to stay there overnight, not knowing that 26 sex offenders are living there? And what happens if then they expose their family because most families will send their kids down to get pop or ice and, unbeknown to them, there are 26 sex offenders living in that same complex?" Zeller said.

Polly Boland knows how that feels. Her family's farm sits beside a sex offender cluster.

"We told our kids that if anything peculiar is going on, to go back to the house," she said. "They're really aware of it. Our dog Henry is a good watchdog. … We don't feel unsafe, we wish they didn't live there," Boland said. "Other neighbors have thought about leaving, [but] we farm, and that's not something we can do."

On the Run

Worse still for Zeller are offenders who are driven underground by the sometimes draconian residency restrictions in some cities. Overlapping exclusion zones keep sex offenders from finding residence in most of downtown Tulsa, Okla., and Atlanta.

ABC News found Mike Chalk, a 23-year-old registered sex offender, living in an EconoLodge hotel room in Iowa with three other offenders.

"It's a place to lay down and know that I'm out of the cold," he said. "I know that the sheriff's department knows that I'm off the street, and they don't have to worry about me roaming the streets looking for a place to stay."

But they are about to. Chalk said he can no longer afford the room, and that he'll have to move out soon. Where to, he doesn't yet know. He can't find a job because of his offender status.

"What it's done is driven people to -- rather than come in and register and comply with the law -- there's no way they can find housing, so it forces them to be on the run or lie about where they are at," Zeller said. "So that's not creating a safe environment for the public at all."

Paul Zandbergen, in the University of South Florida's geography department, did a study in which he mapped the effects of residency restrictions in his state and found that "if you add up all the restrictions -- almost nothing is left (that people can live in) fairly quickly."

Low Recidivism Rate

One of Levenson's aims is to dispel myths about sex offenders and base new legislation on research rather than reactionary politics.

"There is no research to suggest there there really is a relationship between where sex offenders live and whether or not they'll repeat their crimes, and there also isn't any evidence to demonstrate that these laws are really effective in preventing sexual crimes," she said.

In fact, only 7 percent of sex crimes against kids are committed by strangers, according to Justice Department statistics.

Studies show that -- contrary to popular belief -- sex offenders have a lower recidivism rate than other types of criminals, re-offending in about 14 percent of cases.

"So, ironically, what happens with residency restrictions is that we end up creating exactly the types of risk factors that we know lead to higher recidivism rather than lower recidivism," Levenson said. "In other words, we know that stability, social support and employment are really important factors to help criminals maintain a productive life and not resume a life of crime, so disrupting the stability of criminal offenders is not likely to be in the best interest of public safety."

The 'Stranger Danger' Myth

Levenson said, the residency restrictions fail completely to address the 90 percent of sex offenders whose victims are children they already know.

"The myth of 'stranger danger' is the idea that … sex offenders are lurking in parks and playgrounds," she said. "And the unfortunate truth is that most children who are sexually molested are victimized by someone that they and their families know and trust -- often family members [themselves]."

Danger Close to Home

Nancy Sabin is the executive director of the Jacob Wetterling Foundation, named for a Minnesota boy who was abducted at gunpoint in 1989 and never heard from again. The foundation spearheads preventive education programs aimed at protecting children from both stranger predators and sex offenders in their own communities or homes.

"Can you help me understand where all these sexual predators are coming from?" she asked rhetorically. "They're coming from our homes!

"Why do we pretend we don't know where they are?" she asked, adding that Americans "need to see ourselves as part of the solution."

Like Levenson and Zeller, Sabin is an unlikely opponent of sex offender residency restrictions.

"There's not one case in the entire U.S. where a child or adult was not assaulted because of residency restrictions -- it's one of the largest wastes of resources and false sense of security things we've done yet," she said.

Doomed to Failure?

Sheriff Zeller said he understood the intent behind residency restrictions and other enacted measures that target sex offenders. But he said we need to re-evaluate our strategies against sex offenders and come up with smarter solutions that are going to have better long-term impact on the problems.

While he said he's certainly not an advocate for sex offenders, he does fear new laws make it tougher for them to walk the line.

"We're taking their hope away," he said. "We're taking a place [to] stay and a [work]place they can become a productive part of. We are placing all kinds of restrictions on them. They are doomed to failure. … That's the problem."