UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No.15-14336

JOHN DOE #1, *et al.*,

Plaintiffs-Appellants,

v.

MIAMI-DADE COUNTY,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

BRIEF OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants state, pursuant to Federal Rule of Appellate Procedure 26.1and Eleventh Circuit Rules 26.1-1 through 26.1-3, that the following individuals and entities have an interest in the outcome of this appeal:

Abudu, Nancy G. (Counsel for Plaintiffs-Appellants)

American Civil Liberties Union, Inc. (Counsel for Plaintiffs-Appellants)

American Civil Liberties Union Foundation, Inc. (Counsel for Plaintiffs-Appellants)

American Civil Liberties Union Foundation of Florida, Inc. (Counsel for Plaintiffs-Appellants)

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Bajger, John J. (Counsel for Defendant Florida Department of Corrections below)

Buskey, Brandon (Counsel for Plaintiffs-Appellants)

Cherry Eaton, Carrol Y. (Counsel for Movant Florida Department of Corrections)

Doe #1, John[1] (Plaintiff-Appellant)

Doe #2, John (Plaintiff-Appellant)

Doe #3, John (Plaintiff-Appellant)

[1] At docket entry 30, the district court entered a minute order granting Plaintiffs' motion for leave to proceed anonymously.

Florida Action Committee, Inc. (Plaintiff-Appellant)

Florida Department of Corrections (Defendant below)

Huck, Hon. Paul C. (District Court judge)

Miami-Dade County (Defendant-Appellee)

Rosenthal, Oren (Counsel for Defendant-Appellee)

Tilley, Daniel B. (Counsel for Plaintiffs-Appellants)

Valdes, Michael B. (Counsel for Defendant-Appellee)

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, Plaintiffs-Appellants state that there are no corporate disclosures.

/s/ Daniel B. Tilley
Daniel B. Tilley

STATEMENT REGARDING ORAL ARGUMENT

Given the importance of the issue presented in this appeal—pertaining to residency restrictions that undermine public safety and cause widespread homelessness—Plaintiffs-Appellants respectfully request oral argument.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The district court had subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343(a)(3) (civil rights). This Court has appellate jurisdiction because the order and judgment on appeal are final and dispose of all parties' claims. *See* 28 U.S.C. § 1291 ("Final decisions of district courts"). The appeal is timely because the district court's order dismissing the Amended Complaint with prejudice was entered on April 3, 2015, Doc. 60; the district court did not enter judgment in a separate document, *see* Civil Docket for Case No. 1:14-cv-23933-PCH (hereinafter "Dkt."); and Appellants filed their Notice of Appeal on September 25, 2015, Doc. 68. This Court's March 4, 2016, order granting in part and denying in part Appellees' motion to dismiss the appeal for lack of jurisdiction confirms the timeliness of this appeal as to the district court's April 3, 2015, order.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellants present one question for this Court's review: whether the Amended Complaint plausibly alleges that Miami-Dade County's restriction on those convicted of certain sexual offenses from living within 2500 feet of a school violates the Ex Post Facto Clause of the United States Constitution, where the

restriction causes widespread homelessness, applies permanently without exception, and objectively undermines public safety.

STATEMENT OF THE CASE

At issue in this case is whether the Amended Complaint adequately alleges that an unyielding residency restriction that leaves hundreds of people homeless and transient while undermining public safety constitutes an ex post facto law.

Course of Proceedings and Dispositions Below

Plaintiffs-Appellants (the "Does") filed their Complaint on October 23, 2014. Compl., Doc. 1. They filed an Amended Complaint on December 20, 2014. Am. Compl., Doc. 25. In Count IV of their Amended Complaint, Plaintiffs alleged that the retroactive application of Miami-Dade County's Lauren Book Child Safety Ordinance (the "Ordinance") violates the federal and state Ex Post Fact Clauses because its debilitating effects are punitive. *Id.* ¶ 176. Defendants below moved to dismiss, Miami-Dade County's Mot. to Dismiss, Doc. 29, Def. Florida Department of Corrections' and Def. Sunny Ukenye's Mot. to Dismiss Pls.' Am. Compl., Doc. 39, and the district court held oral argument on the motions on March 31, 2015, Docs. 54, 57. On April 3, 2015, the district court entered an order dismissing the Amended Complaint with prejudice. Order Granting Mot. to Dismiss, Doc. 60. The district court did not set out the judgment in a separate document. *See* Dkt. Plaintiffs filed a motion seeking relief under Rule 60 of the Federal Rules of Civil

Procedure. Pls.' Rule 60 Mot. for Relief from Court's Order Dismissing this Action with Prejudice, Doc. 61. The district court held oral argument on that motion on June 12, 2015, Not. of Oral Arg., Doc. 63, then denied the motion on June 23, 2015, Order Denying Mot. for Relief from J., Doc. 67. Plaintiffs filed their notice of appeal on September 25, 2015. Pls.' Notice of Appeal, Doc. 68.

Statement of the Facts

Miami-Dade County amended its sexual offender residency restriction in January 2010, after its original scheme of limiting housing to those formerly convicted of sexual offenses resulted in the notorious homeless encampment under the Julia Tuttle Causeway. Am. Compl. ¶ 69. The Ordinance pre-empted municipal residency restrictions, while maintaining a county-wide restriction on covered individuals residing within 2500 feet of a school. *Id.* ¶ 71. The restriction applies for life, regardless of an individual's risk of recidivism over time. *Id.* ¶ 73.

Miami-Dade County's residency restriction remains among the strictest in the nation despite the 2010 amendments, and it still drastically exacerbates transience and homelessness among those covered. *Id.* ¶ 74. The Ordinance directly caused Does #1 and #3 to become homeless. *See id.* ¶¶ 23, 27-28, 50-51, 53-54. John Doe #1's homelessness is uniquely damaging. He is mentally disabled, and the residency restriction has prevented him from living with his sister. *Id.* ¶¶ 15-19.

Hundreds of others have also become transient or homeless because of the residency restriction. *Id.* ¶ 147. Dozens of these individuals reside at an encampment beside active railroad tracks in unincorporated Miami-Dade County. *See id.* ¶¶ 4-5. Many were directed to the encampment by their probation officers. *E.g.*, *id.* ¶ 119. The railroad encampment has no adequate shelter, sanitation facilities, or potable water, and it presents an ongoing threat of physical danger to those present. *See id.* ¶¶ 6, 120-25.

There is no evidence that residency restrictions such as Miami-Dade's have any impact on recidivism or public safety, nor is there any evidence that an individual's residential proximity to a school is at all relevant to one's risk of recidivism. *Id.* ¶ 140. The only demonstrated means of effectively managing recidivism are targeted treatment, along with maintaining supportive, stable environments that provide access to housing, employment, and transportation. *Id.* ¶ 143. By these measures, the residency restriction is worse than ineffectual; it is counterproductive. Forcing individuals into homelessness and transience undermines Plaintiffs' and others' efforts to receive treatment and obtain and maintain employment. These combined effects threaten public safety by escalating the risk of recidivism. *See id.* ¶¶ 144-151.

Though the Ordinance contains a grandfather clause that allows covered individuals to remain in residences they established either before the law's

effective date or the opening of a nearby school, any mitigating effects are limited. The grandfather clause does not apply to those who are initially approved for a residence, only to find themselves in a restricted zone due to the County's error in identifying schools. *Id.* ¶ 80. Compounding this problem, the Ordinance lacks a reliable process for maintaining an accurate list of schools. *Id.* ¶ 78-79. Miami-Dade County also refuses to vouch for the accuracy of its online map identifying areas covered by the restriction. *See id.* ¶¶ 78-80. Covered individuals must always assume the risk of the County's mistakes.

The County's arbitrary enforcement of the Ordinance has resulted in the evictions of covered individuals. For example, because of the County's inability to interpret the term "school," *see id.* ¶ 77. Fifty-four individuals were wrongfully evicted from the River Park Mobile Home Park on August 14, 2013. *See id.* ¶¶ 86-118. Only 14 of those evicted were able to locate compliant housing. *Id.* ¶ 105. The rest either became homeless or absconded. *Id.* None were sheltered by the grandfather clause.

Meanwhile, John Doe #2 remains at risk of eviction because of the County's own confusion over what constitutes a school. His first probation officer directed him to the railroad encampment in January 2014. *Id.* ¶¶ 37-38. John Doe #2 stayed at the encampment for eight months, when a new probation officer allowed him to move to River Park in September 2014, a full year after the River Park

evictions. *See id.* ¶¶ 42-43. John Doe #2 lives in constant fear that he may again be forced into homelessness if he is evicted from River Park. *Id.* ¶ 44. The grandfather clause does not protect him against eviction or arrest for violating the restriction.

Statement of the Standard or Scope of Review

This Court reviews de novo a district court's grant of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Glover v. Liggett Grp., Inc.*, 459 F.3d 1304, 1308 (11th Cir. 2006).

SUMMARY OF THE ARGUMENT

The Amended Complaint outlines the uniquely harsh and undeniably dangerous effects of the Ordinance's 2500 feet residency restriction from schools for those formerly convicted of certain sexual offenses. These allegations establish that the residency restriction is punitive, and that its retroactive application violates the Ex Post Facto Clause. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68(1963).

The law so drastically limits available housing in Miami-Dade County that it has rendered hundreds of covered individuals homeless or transient. Many of the affected have been directed by law enforcement to homeless encampments. There, they face squalid conditions and constant threats to their physical safety. Miami-Dade County knowingly imposes these hardships despite the overwhelming

scientific and emerging legal consensus that residency restrictions undermine public safety. Exacerbating matters, the residency restriction applies for life based solely upon conviction of the enumerated crimes. Covered individuals can never apply for an exemption. It is entirely irrelevant whether they successfully complete state-mandated probation or sexual abuse treatment, or whether they commit no other sexual offense for the rest of their lives. If they remain in Miami-Dade County, they must always brave the risk that they will be herded to a homeless encampment whenever they must find a new residence.

This regulation has no basis in logic or fact. Whatever the county's intent in passing the law, it only operates to punish. A faithful application of the *Mendoza-Martinez* factors requires that the Court of Appeals reverse the district court's dismissal of Plaintiffs' ex post facto claim.

ARGUMENT

Miami-Dade County's prohibition on certain former sexual offenders living within 2500 feet of a school violates the Ex Post Facto Clause of Article I, Section 9 of the United States Constitution. The Ex Post Facto Clause prohibits any law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. 386, 390 (1798); *see also* U.S. Const. art. 1, § 9, cl. 3. While Miami-Dade County's stated intent is for the residency restriction to serve public safety, the Does' amended complaint

alleges the "clearest proof" that the residency restriction's effects are patently punitive. *See Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 1146 (2003).

The most relevant factors for this case to determine if the residency restriction's effects are impermissibly punitive are: (1) whether the act imposes an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether its operation will promote the traditional aims of punishment – retribution and deterrence; (4) whether there is a rational connection to a non-punitive purpose; (5) whether the scheme appears excessive in relation to its non-punitive, regulatory purpose; and (6) whether the law applies only to individuals already convicted of a crime. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68 (1963); *see also Smith*, 538 U.S. at 97, 123 S. Ct. at 1149 (2003). These factors "often point in differing directions," and no single factor is dispositive. *Hudson v. United States*, 522 U.S. 93, 101, 118 S. Ct. 488, 494 (1997) (internal quotation marks omitted) (quoting *Kennedy*, 372 U.S. at 169, 83 S. Ct. at 568). However, balancing these factors conclusively demonstrates the Ordinance's punitive nature.

Reversal is required in this case. The Amended Complaint thoroughly alleges how the Ordinance's residency restriction punishes covered individuals by causing widespread homelessness and transience. This housing insecurity does not advance public safety. Rather, it threatens public safety by making it more

difficult for law enforcement to track registered sexual offenders, and by substantially increasing the likelihood that covered individuals might recidivate. Based on the *Mendoza-Martinez* factors discussed below, the Amended Complaint alleges a viable ex post facto claim. *Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 347 (2014) (holding under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009), that "substantive plausibility" requires only that plaintiffs state "simply, concisely, and directly events that" entitle them to relief).

A. The Residency Restriction Imposes an Affirmative Disability or Restraint.

The Ordinance's residency restriction imposes an undeniable affirmative disability or restraint on housing availability in Miami-Dade County. *See Commonwealth v. Baker*, 295 S.W.3d 437, 445 (Ky. 2009) ("We find it difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability or restraint."). Individuals subject to the Ordinance are not free to reside where they wish "as other citizens, with no supervision." *Smith*, 538 U.S. at 101, 123 S. Ct. at 1144. The restriction "impact[s] where an offender's children attend school, access to public transportation for employment purposes, access to employment opportunities, access to drug and alcohol rehabilitation programs and even access to medical care and residential nursing home facilities for the aging offender." *Baker*, 295 S.W.3d at 445 (internal quotation marks

omitted). The residency restriction's debilitating effects are enhanced by the fact that violating the prohibition is a jailable offense, and that covered individuals can never earn an exemption from the restriction. *See Doe v. State*, 111 A.3d 1077, 1095 (N.H. 2015).

The Amended Complaint establishes that the residency restriction "has led to substantial . . . housing disadvantages for former sex offenders that would not have otherwise occurred." *Smith*, 538 U.S. at 100, 123 S. Ct. at 1151. Studies have long documented that residency restrictions make it difficult to locate available housing. Am. Compl. ¶ 151 n.11.[2] This difficulty is increased in more densely populated areas like Miami-Dade County. The residency restriction has forced hundreds of individuals in Miami-Dade County into homelessness and transience. *Id.* ¶¶ 1, 146-47. It does so by "arbitrarily render[ing] off-limits broad swaths of housing," *id.* ¶2, thereby severely restricting housing for covered individuals. *Id.* ¶¶ 28, 54, 58, 68, 74.

Because the residency restriction excludes so much available housing, probation officers for the Florida Department of Corrections direct supervisees

[2] *See also* Tewksbury *et al., Prohibiting Registered Sex Offenders from Being at School: Assessing the Collateral Consequences of a Public Policy*, 7 Just. Pol. J. 1, 6 (2010) (listing difficulty finding housing as one of the most common collateral consequences of residence restrictions); Zevitz *et al.*, National Institute of Justice, *Sex Offender Community Notification, Assessing the Impact in Wisconsin* (2000), https://www.ncjrs.gov/pdffiles1/nij/179992.pdf(same).

who cannot find homes to an encampment beside active railroad tracks in unincorporated Miami-Dade County. *See id.* ¶¶ 4-5, 106, 119. There, they face unsanitary living conditions and constant threats of physical danger. *Id.* ¶¶ 4-6, 120-25. The encampment is the latest in a series of homelessness emergencies caused by the residency restriction. The Ordinance led to a similar encampment in Miami's Shorecrest neighborhood that persisted for nearly two years immediately after the 2010 amendments to the Book Ordinance. *Id.* ¶¶ 82-85. In 2013, Defendants evicted 54 covered individuals from the River Park Mobile Home Park, although Defendants previously approved this location under the Ordinance. *Id.* ¶¶ 86-105. Of the evicted, 34 became transient and three absconded, compared to just 14 who were able to locate new housing. *Id.* ¶ 105.

The Amended Complaint further describes how the Ordinance has directly caused Plaintiffs John Does #1 and #3 to become homeless. After John Doe #1 could not locate compliant housing following his release from prison in January 2014, his probation officer directed him to the encampment. *Id.* ¶ 23. Since then, John Doe #1 has been unable to locate housing due to the restriction. *Id.* ¶¶ 27-28. The Ordinance has similarly frustrated John Doe #3's efforts to locate housing. John Doe #3 moved out of his apartment in March 2014 because he could no longer afford the rent. *Id.*¶ 50. John Doe #3's probation officer also directed him to the encampment. Though he is currently employed and has made repeated

attempts to find housing, the Ordinance has blocked him at every turn. *Id.* ¶¶ 53-54.

Despite these allegations, the district court concluded that the Ordinance's residency restriction is not an affirmative disability or restraint. The district court's conclusion is incorrect for three reasons. First, the court's opinion does not accept as true Plaintiffs' allegations about the Ordinance's sweeping effects on housing in Miami-Dade County. It ignores them. *See* Order Granting Mot. to Dismiss ("Order"), Doc. 60 at 11. The court only cites Plaintiffs' assertion that the residency restrictions "are so onerous that they have caused hundreds of individuals in Miami-Dade County to become homeless or transient." *Id.* The court labels this statement conjectural. *Id.* But that statement does not come from the Amended Complaint; it comes from Plaintiffs' Opposition to Defendant Miami-Dade County's Motion to Dismiss. *See* Pls.' Opp'n to Def. Miami-Dade County's Mot. to Dismiss, Doc. 40 at 4. Absent from the Order is any reference to Plaintiffs' allegations about the extent to which the residency restriction prevents covered individuals from locating housing in Miami-Dade County. *Compare* Order at 11, *with* Am. Compl. ¶¶ 1, 2, 23, 27-28, 53-54, 58, 62-63, 67-68, 74, 83-84, 86-105, 146-47.

Second, the court found that Plaintiffs failed to allege that the restriction is the "sole and exclusive cause of homelessness" for covered individuals or that

Miami-Dade "has no housing that is compliant with the Book Ordinance[]." Order at 12-13. This standard is without precedent. The authorities the court relies on merely require that the residency restriction constitute a "but for" and direct cause of housing scarcity. *See Smith*, 538 U.S. at 100, 123 S. Ct. at 1151 (requiring but for causation); *Wallace v. New York*, 40 F. Supp. 3d 278, 327 (2014) (requiring direct causation). Plaintiffs have adequately alleged both.

Finally, the district court engaged in misleading fact-finding. Taking issue with Plaintiffs' assertion that Miami-Dade County is predominantly urban, the district court countered that Miami-Dade County "contains extensive urban, suburban, and rural neighborhoods." Order at 12 (citing MiamiDade.gov, *About Miami-Dade County*).[3] But the court's citation – Miami-Dade County's official government website – says nothing about the proportion of urban, suburban, and rural neighborhoods in Miami-Dade County.

Further, while the district court accurately states that Miami-Dade County is "larger than the states of Rhode Island and Delaware," *id.*, it neglects to mention that the largely uninhabited Everglades National Park accounts for one-third of the county's landmass.[4] Within the remaining area reside over 2.5 million people,[5]

[3] http://www.miamidade.gov/info/about_miami-dade.asp.
[4] *See* Miami-Dade County At-A-Glance, http://www.miamidade.gov/info/library/at-a-glance.pdf.
[5] *See id.*

making Miami-Dade the seventh most populous county in the nation.[6] Moreover, Miami-Dade County is home to the fourth largest school district in the nation.[7] This omitted context lends additional plausibility to Plaintiffs' contention that preventing covered individuals from living within 2500 feet of a school is uniquely harmful in Miami-Dade.

B. The Ordinance is Excessive in Relation to the Goal of Public Safety.

The residency restriction is vastly excessive to its purported goal of public safety. The Amended Complaint details two reasons why the Ordinance is excessive. First, there is a uniform scientific judgment that residency restrictions do not advance public safety. Second, research consistently demonstrates that the residency restriction directly undermines public safety. These points are described in detail below and would have been further developed if the parties had been allowed to engage in discovery.

There is absolutely no evidence that residency restrictions serve public safety. Am. Compl. ¶¶ 140-142. The Ordinance fails to address public safety in part because it is not based on an individual's actual risk of recidivism. *See Doe v.*

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[6] Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015, 2015 Population Estimates (United States Census Bureau), https://www.census.gov/popest/data/counties/totals/2015/CO-EST2015-01.html (follow "All States" hyperlink; then follow "Modify Table" hyperlink; then click the down arrow under "2015"; then click "OK").

[7] *See* "Welcome to Miami-Dade County Schools," http://www.dadeschools.net/.

Dep't of Pub. Safety and Corr. Servs., 62 A.3d 123, 146 (Md. 2013) (Harrell, J., concurring) (citing research establishing that blanket offender restrictions "do not reduce recidivism by sex offenders"). The Ordinance applies for life based on the crime committed, without exception. This remains true even if an individual successfully completes Florida's mandated treatment programs for sexual abuse, Fla. Stat. § 948.30(1)(c), or earns an exemption from the State of Florida's registration requirement for certain juveniles convicted of nonviolent sexual offenses against other juveniles. *See* Am. Compl. ¶ 72. It also remains true for an individual with a low risk of reoffending upon release or who otherwise has not committed a new offense after 15 years, even though such an individual presents a minimal risk public safety.[8]

Governments are of course not required to assess individual risk for every public policy decision. Still, numerous courts recognize that a law's lack of individualization favors a finding of excessiveness. *See Doe v. State*, 189 P.3d 999, 1017 (Alaska 2008) (finding restriction excessive in part because it applied for life without regard to completion of treatment or risk of re-offense); *Baker*, 295 S.W.3d at 446 (citing residency restriction's lack of individualized assessment to support excessiveness); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (finding

[8] R. Karl Hanson, et al, *High Risk Sex Offenders May Not Be High Risk Forever*, 29 (15) J. of Interpersonal Violence 2792, 2792-813 (2014).

restriction excessive in part because covered individual could not seek exemption from statute "even on the clearest proof of rehabilitation"); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009) (finding ex post facto violation where offender registration applied for life); *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011) (finding ex post facto violation where requirements applied based solely on crime "without regard to . . . future dangerousness").

The Ordinance also fails to advance public safety because it does not limit an individual's access to children. As the Kentucky Supreme Court explained in rejecting any connection between public safety and that state's residency restriction:

> [The statute] prohibits registrants from residing (i.e. sleeping at night, when children are not present) within 1,000 feet of areas where children congregate, but it does not prohibit registrants from spending all day at a school, daycare center, or playground (when children are present). It allows registered sex offenders to sit across the street and watch children, and even to work near children. [The statute] does not even restrict an offender from living with the victim, so long as they live and sleep outside of the prohibited area. All [the statute] prohibits is residing in a home within the prohibited zone. It does not regulate contact with children. It is difficult to see how public safety is enhanced by a registrant not being allowed to sleep near a school at night, when children are not present, but being allowed to stay there during the day, when children are present.

Baker, 295 S.W.3d at 445. The same is true of Miami-Dade's restriction, which also only regulates where an individual sleeps at night. Moreover, the research

consensus cited in the Amended Complaint shows that the overwhelming majority of sexually abused children are victimized by someone they know. Am. Compl. ¶142 n.9. The perpetrator's proximity to a school at night is almost always irrelevant.

The most significant fact establishing the Ordinance's excessiveness is that the residency restriction undermines public safety, the very goal it purports to serve. Citing research from the United States Department of Justice, the Amended Complaint unequivocally alleges that "[t]he only demonstrated means of effectively managing reentry and recidivism are targeted treatment, along with maintaining supportive, stable environments that provide access to housing, employment, and transportation." *Id.* ¶ 143 n.9. The residency restriction thwarts rehabilitation by forcing individuals into homelessness and transience. These individuals must contend with numerous safety and public health risks. *Id.* ¶¶ 120-24. They also constantly face arrest for trespassing. *Id.* ¶¶ 125-32. These threats make covered individuals more likely to recidivate. *Id.* ¶¶ 144-151.

Echoing Plaintiffs' claims in the Amended Complaint and relying on factual findings made by the trial court after a full evidentiary hearing, the California Supreme Court recently found:

> Blanket enforcement of the residency restrictions against these parolees has severely restricted their ability to find housing in compliance with the statute, greatly increased the incidence of homelessness among them, and hindered

> their access to medical treatment, drug and alcohol dependency services, psychological counseling and other rehabilitative social services available to all parolees, while further hampering the efforts of parole authorities and law enforcement officials to monitor, supervise, and rehabilitate them in the interests of public safety.

In re Taylor, 343 P.3d 867, 869 (Ca. 2015); *see also* Am. Compl. ¶¶ 133-151. Courts across the country are increasingly recognizing that residency restrictions make communities less, not more, safe. *See Doe v. City of Lynn*, 36 N.E.3d 18, (Mass. 2015); *Ryals v. City of Englewood*, 962 F.Supp.2d 1236, 1243-44, 1250-51 (D. Colo. 2013) (concluding that residency restrictions "pose a potentially substantial obstruction to the realization of the reintegration goals" (citing *Fross v. Cty. of Allegheny*, 20 A.3d 1193, 1207 (Pa. 2011) (concluding that county's residency restriction "interferes with the goal of Megan's Law to reduce recidivism among sex offenders and improve public safety"))). Miami-Dade's insistence on maintaining the residency restriction despite overwhelming evidence that it is inherently dangerous illustrates the policy's excessiveness.

The district court did not contest Plaintiffs' allegations that the County's residency restriction undermines public safety. It instead attempted to minimize the restriction's lifetime application by referencing "empirical research showing that most reoffenses do not occur within the first several years after release, but may occur as late as 20 years following release." Order at 11 (internal quotations omitted) (quoting *Smith*, 538 U.S. at 105, 123 S .Ct. at 1153). The study backing

this claim is Robert A. Prentky, Raymond A. Knight, and Austin F.S. Lee, *Child Sexual Molestation: Research Issues*, National Institute of Justice Research Report, NCJ 163390 (1997). A recent examination of this source thoroughly undermines its value:

> The study's offender sample consisted of rapists and child molesters released from the Massachusetts Treatment Center for Sexually Dangerous Persons, established in 1959 "for the purpose of evaluating and treating individuals convicted of repetitive and/or aggressive sexual offenses." *Id.* at 637. As Prentky and his coauthors themselves observe, "Sexual offenders sampled from general criminal populations, from offenders committed to a state hospital, and from a maximum security psychiatric hospital, are likely to differ in ways that would affect their recidivism rates and make cross-sample comparisons difficult." *Id.* at 636. The data in this older study are also difficult to interpret because we aren't given the number of offenders followed for any given length of time. We are told, however, that the total sample of offenders convicted of child molestation was just 115. Clearly, the subset they were able to follow for ten or fifteen years was much smaller, but we do not know how much smaller because they do not provide that number.[9]

In sum, this 20-year old study is out-of-date, the sample size was too small, its findings are tenuous at best, and it does not support the court's ultimate decision.

[9] Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Const. Comment. 495, 503 n.29 (2015).

The district court also held that the residency restriction is not excessive because it includes a grandfather clause that allows individuals to remain in residences they established before the Ordinance's effective date or before a new school opens. *See* Order at 10. However, there are no facts to substantiate the court's assumption that the clause mitigates the Ordinance's effects. As John Doe #3 learned, the grandfather clause only protects those who never move. At any rate, it is not known how many people are currently covered by the grandfather clause.[10] What is known is that hundreds remain homeless despite it.

The district court's reliance on the Ordinance's grandfather clause also ignores Plaintiffs' contention that the law has no exemption for individuals who move to a location that the County approves, but are then forced to move due to the County's error in classifying nearby facilities as schools. *See* Am. Compl. ¶ 80. This omission is problematic, given that the county has "no centralized, accurate, or reliable process under the Ordinance for regularly classifying new schools, accounting for previously omitted schools, or declassifying and removing facilities that are no longer schools." *Id.* ¶ 78. The County also refuses to vouch for the accuracy of the online mapping assistance it provides the public for identifying

[10] At oral argument on the County's motion to dismiss, the district court expressed confusion as to how it could possibly make such a factual finding. *See* Tr. of the Mot. to Dismiss 31:16-33:17, Doc. 72. The task is not difficult. The court could simply ask the County to produce this information.

areas covered by the residency restriction. *Id.* ¶ 79. The County's arbitrary enforcement of the Ordinance resulted in the wrongful evictions of 54 individuals from the River Park Mobile Home Park. *Id.* ¶¶86-118. The grandfather clause did not protect the exiled.[11]

C. The Ordinance Bears No Rational Connection to Public Safety.

The Ordinance's residency restriction is not rationally related to promoting public safety. The district court's order posits that the residency restriction advances public safety "by reducing opportunities for contact between sex offenders and children." Order at 7. But there is no reasonable state of facts to justify this conclusory assertion, *see* Am. Compl. ¶¶ 140 & n.8,[12] and none of the

[11] Evidence that Plaintiffs obtained from Miami-Dade County after filing the Amended Complaint suggests the River Park evictions may easily be repeated. Miami-Dade County provided Plaintiffs with a list of facilities that it enforces as schools under the Ordinance. Pls.' Rule 60 Mot. For Relief From Ct.'s Order Dismissing This Action With Prejudice, Doc 61-1 at 7. Miami-Dade County maintains that any facility that public school officials consider a school counts as a school under the Ordinance. Am. Compl. ¶ 144. But Plaintiffs' comparison of the County's list with the Florida Department of Corrections' official list of public schools in Miami-Dade revealed approximately 44 facilities on the list that are not included on Miami-Dade County's list. Plaintiffs' estimate that nearly 170 covered individuals live within the exclusion zone of these 44 facilities. *See* Pls.' Rule 60 Mot. For Relief From Ct.'s Order Dismissing This Action With Prejudice, Doc 61 at 6 n.5. All of these people could be evicted at the county's whim.

[12] The Department of Justice has similarly concluded: "Restrictions that prevent convicted sex offenders from living near schools, daycare centers, and other places where children congregate have generally had no deterrent effect on sexual reoffending, particularly against children. In fact, studies have revealed that proximity to schools and other places where children congregate had little relation

authorities the court cites provide one. Order at 7-8 (citing *Weems v. Little Rock Police Dep't,* 453 F.3d 1010, 1015 (8th Cir. 2006); *Wallace*, 40 F. Supp. 3d at 318; and *Doe v. Baker*, No. 1 :05-cv-2265, 2006 WL 905368 at *5 (N.D. Ga. Apr. 5, 2006).

The courts that have seriously examined the issue reject any rational basis for residency restrictions. For instance, the California Supreme Court, applying the federal standard for rational basis review, found that the only reasonable conclusion about San Diego County's residency restriction was that it hampered public safety and did nothing to protect children. *Taylor*, 343 P.3d at 882. The Kentucky Supreme Court, also applying the federal standard, found it implausible that merely regulating where an individual stays at night – a time when children are not in school – could reduce that individual's contact with children. *Baker*, 295 S.W.3d at 445-46.

But even if this Court could identify a specific rational basis for the Ordinance's residency restriction, that finding would not be dispositive. *Hudson*, 522 U.S. at 101, 118 S. Ct. at 494.

D. The Ordinance is Analogous to Historic Forms of Punishment.

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to where offenders met child victims." Kevin Baldwin, Ph.D. et al., U.S. Dep't of Justice, Sex Offender Management Assessment and Planning Initiative xvi, http://www.smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf.

The Ordinance is also analogous to the historical punishments of banishment and probation or parole. *See Doe v. State*, 111 A.3d 1077, 1097 (N.H. 2015) ("[T]his factor inquires only whether the act is *analogous* to a historical punishment, not whether it is an exact replica."). The Amended Complaint details how the Ordinance has repeatedly created homeless encampments around the county, along with forcing numerous others into isolated homelessness and transience. *E.g.*, Am. Compl. ¶¶ 67-69, 82-85. Residency restrictions as expansive as Miami-Dade's thus mimic banishment. *See Baker*, 295 S.W.3d at 444 (finding residency restriction that covered large portions of community was "decidedly similar to banishment"); *see also McGuire v. City of Montgomery*, No. 2:11-CV-1027-WKW, 2013 WL 1336882, at *6 (M.D. Ala. Mar. 29, 2013), *appeal docketed*, No. 15-10958 (11th Cir. Mar. 6, 2016) ("While [residency] restrictions do not literally 'expel' registrants from their communities or prevent them from accessing prohibited areas except to live or work, they could have, depending on the facts shown, a practical effect similar to expulsion in some communities.").

The Ordinance also approximates probation or parole. *See Doe v. Dep't of Pub. Safety and Corr. Servs.*, 62 A.3d 123-124, 139-40 (Md. 2013) (concluding that sex offender restrictions "have the same practical effect" as probation or parole) (citing *Doe v. State*, 189 P.3d at 1012 (Alaska 2008) and *Wallace*, 905 N.E.2d at 380-80). Indeed, residency restrictions are a mandatory condition of

probation in Florida for certain sexual offenses. Fla. Stat. § 948.30(1)(b). Violating the Ordinance also exposes covered individuals to additional penal sanctions, like a probation violation.

E. The Ordinance Promotes the Traditional Aims of Punishment.

As the district court recognized, Miami-Dade County's residency restriction serves the goal of deterrence. Order at 14. The residency restriction is also retributive. That the County's goal is retribution, rather than regulation, is evident in the fact that the restriction applies based solely on the crime committed, without regard to an individual's risk of recidivism over time. *Doe v. State*, 111 A.3d 1077, 1098 (N.H. 2015) (finding restriction retributive for those affected because it was "based only upon their past action, and not on any individualized assessment of current risk or level of dangerousness"); *Doe v. State*, 189 P.3d at 1013-14 (Alaska 2008) (restrictions for former sexual offenders "based not on a particularized determination of the risk the person poses to society but rather on the criminal statute the person was convicted of violating . . . provide a deterrent and retributive effect that goes beyond any non-punitive purpose and that essentially serves the traditional goals of punishment"); *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004, 1028 (Okla. 2013) ("In evaluating the . . .factor of retribution and deterrence we find the retroactive extension of SORA's registration based solely upon the individual's prior conviction leads us to weigh this factor in favor of a

punitive effect."); *Baker*, 295 S.W.3d at 444 ("When a restriction is imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones."); *see also Smith*, 538 U.S. at 102, 123 S. Ct. at 1152 (approving requirements "reasonably related to the danger of recidivism").

For instance, an individual's completion of offender treatment is irrelevant under the Ordinance, even though covered individuals are required to receive such treatment, and even though targeted treatment reduces recidivism. *See* Am. Compl. ¶ 143. The Ordinance also makes no exceptions for those unable to find compliant housing, despite the devastating effects of housing instability on rehabilitation. *Id.* ¶¶ 143-151. The Ordinance is also blind to the particular vulnerabilities of covered individuals that require additional support, such as John Doe #1's mental disability. *See id.* ¶¶ 15-19. These features are highly retributive.

F. The Residency Restriction Applies to Behavior that is Already a Crime.

The final factor that reveals the residency restriction's punitive nature is its exclusive application to those already convicted of a crime. Quoting Justice Souter's concurrence from *Smith*, the New Hampshire Supreme Court recently concluded:

> The fact that the Act uses past crime 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; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.

Doe v. State, 111 A.3d 1077, 1099 (N.H. 2015) (quoting *Smith*, 538 U.S. at 113, 123 S. Ct. at 1158 (Souter, J., concurring)). The supreme courts of Alaska, Indiana, Kentucky, Maine, and Oklahoma, have all concurred in this judgment. *Doe v. State*, 189 P.3d 999, 1014-15 (Alaska. 2008); *Wallace* 905 N.E.2d at 382 (Ind. 2009); *Baker*, 295 S.W.3d at 444-45; *Letalien*, 985 A.2d 4, 21-22 (Me. 2009); *Starkey*, 305 P.3d 1004, 1028 (Ok. 2013). Triggering a regulation based on a conviction is both over- and underinclusive. It is overinclusive in that many individuals convicted of sexual offenses may pose little or no risk of recidivism. It is underinclusive in that many individuals who are never convicted of sexual offenses may pose serious public safety risks, such as those who are charged with a sexual offense but plead guilty to a non-sexual offense, those who have their convictions overturned for reasons unrelated to the sufficiency of trial evidence, or those who are acquitted despite substantial evidence of guilt. *See Doe*, 189 P.3d at 1015 (Alaska 2008). The residency restriction clearly is more tailored to criminal culpability than civil regulation.

CONCLUSION

Of the six *Mendoza-Martinez* factors discussed above, only one – rationality – arguably weighs in favor of the residency restriction, and just barely. The facts alleged in the Amended Complaint amply satisfy the facial plausibility test for an ex post facto claim. The Does are entitled to present evidence supporting their claim. This Court should reverse the district court's order dismissing the Amended Complaint and remand to that court for further proceedings.

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Respectfully Submitted,

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Certificate of Compliance

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), Plaintiffs-Appellants state that this brief complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6279 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

Certificate of Service

Today, I electronically filed this document with the Clerk of Court using CM/ECF, which will serve opposing counsel Michael B. Valdes (mbv@miamidade.gov) and Oren Rosenthal (orosent@miamidade.gov) and FDOC Counsel Carrol Cherry Eaton (Carrol.CherryEaton@myfloridalegal.com) via electronic transmission of Notices of Docket Activity generated by CM/ECF.

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