**No. 15-14336**

# United States Court of Appeals
# For the Eleventh Circuit

**John Doe #1, *et al.*,**

*Plaintiffs/Appellants,*

*—v.—*

**Miami-Dade County,**

*Defendant/Appellee.*

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

## Appellee's Answer Brief

**ABIGAIL PRICE-WILLIAMS**
Miami-Dade County Attorney
Stephen P. Clark Center
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128
(305) 375-5151

**Michael B. Valdes**
Assistant County Attorney
Counsel for Appellee

## Corporate Disclosure Statement

This appeal involves a governmental defendant, Miami-Dade County, which is a political subdivision of the State of Florida. There are no parent companies, subsidiaries, or affiliate companies that have issued shares to the public.

## Certificate of Interested Parties

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Appellee certifies that the following persons and entities may have an interest in the outcome of this case:

1. Abudu, Nancy – *Counsel for Appellants*
2. American Civil Liberties Union ("ACLU") – *Counsel for Appellants*
3. ACLU Foundation, Inc. – *Counsel for Appellants*
4. ACLU Foundation of Florida, Inc. – *Counsel for Appellants*
5. ACLU of Florida, Inc. – *Counsel for Appellants*
6. Bajger, John J. – *Counsel for Defendant Florida Department of Corrections*
7. Buskey, Brandon – *Counsel for Appellants*
8. Cherry Eaton, Carrol Y. – *Counsel for Florida Department of Corrections*
9. Doe #1, John – *Appellant*
10. Doe #2, John – *Appellant*
11. Doe #3, John – *Appellant*

12. Florida Action Committee, Inc. – *Appellant*

13. Florida Department of Corrections – *Defendant*

14. Huck, Hon. Paul C. – *District Court Judge*

15. Miami-Dade County – *Appellee*

16. Miami-Dade County Board of County Commissioners - *Appellee*

17. Price-Williams, Abigail – *County Attorney, Counsel for Appellee*

18. Rosenthal, Oren – *Counsel for Appellee*

19. Tilley, Daniel B. – *Counsel for Appellants*

20. Valdes, Michael B. – *Counsel for Appellee*

*/s/ Michael B. Valdes*
Michael B. Valdes
Assistant County Attorney

## Statement Regarding Oral Argument

Appellee, Miami-Dade County, does not request oral argument. This case presents a single issue on appeal that was fully addressed by the District Court in a thoroughly reasoned decision. Accordingly, Miami-Dade County does not believe that oral argument is necessary.

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## Statutes



## Other Authorities

## Statement of Jurisdiction

This appeal deals with an order that dismissed all claims against Miami-Dade County with prejudice, D.E. 60. Because that order adjudicated all claims against all parties, it constitutes a final decision that this Court has jurisdiction to review pursuant to 28 U.S.C. § 1291.

The District Court's order was entered on April 3, 2015. D.E. 60. Appellants then filed a Motion for Relief from Judgment under Fed. R. Civ. P. 60(b) on April 24, 2015. D.E. 61. On June 23, 2015, the District Court issued an Order Denying Motion for Relief from Judgment. D.E. 67. Appellants did not file their notice of appeal until 95 days later on September 25, 2015. D.E. 68.

Previously, Miami-Dade County moved to dismiss this appeal as untimely. On March 4, 2016, this Court issued an order granting in part and denying in part Miami-Dade County's Motion to Dismiss. Specifically, this Court's order held that the appeal was "timely as to the April 3 order because the district court did not enter judgment in a separate document," but that the appeal was "untimely as to the June 23 order."

## Statement of the Issue

Did the District Court correctly dismiss Appellants' ex post facto claim when the relevant ordinance does not impose additional punishment but rather, in the interest of public safety, simply prohibits individuals convicted of certain sexual offenses against children—a class of individuals whose recidivism rate is frighteningly high and whose reoffenses may occur as late as 20 years following release—from establishing a new residence within 2,500 feet of an existing kindergarten, elementary, middle, or high school?

## Statement of the Case

In 2005, the Miami-Dade County Board of County Commissioners enacted Ordinance No. 05-206, which created Article XVII of Chapter 21 of the Code of Miami-Dade County and prohibited individuals convicted of certain sexual offenses in which the victim was 15 years of age or less from residing within 2,500 feet of any school in particular areas of Miami-Dade County.[1] As part of its legislative findings, the Board of County Commissioners explicitly found "that the recidivism rate for released sexual offenders is alarmingly high, especially for those who commit crimes against children." D.E. 29-1 at 3. Consequently, the Board of County Commissioners was justifiably "concerned about sexual offenders and sexual predators who are released from custody and repeat the unlawful acts for which they had originally been convicted." *Id.* In order to address that concern, the Board of County Commissioners determined that "prohibiting sexual offenders and sexual predators from living within 2,500 feet of schools . . . will reduce the amount of incidental contact sexual offenders and sexual predators have

[1] Under Ordinance No. 05-206, Chapter 21, Article XVII applied to unincorporated Miami-Dade County and to all municipalities that did not adopt a resolution within ninety (90) days providing that the ordinance would not apply in that municipality. For any municipality that chose to opt out, those municipalities were permitted to "adopt more restrictive requirements than the requirements contained [in the ordinance]." *See* D.E. 29-1 at 4. As explained below, that provision was subsequently amended.

with children" and that "reducing the amount of incidental contact will decrease the opportunity for sexual offenders or sexual predators to commit new sexual offenses against children." *Id.*

On January 21, 2010, the Board of County Commissioners enacted Ordinance No. 10-01, which amended Chapter 21, Article XVII of the Code of Miami-Dade County. D.E. 29-2. The amendment preempted and repealed all of the municipal regulations relating to sexual offender or predator residency requirements that were more restrictive and made the relevant provisions of the County Code applicable countywide (i.e., throughout incorporated and unincorporated Miami-Dade County). *See* D.E. 29-2 at 7; MIAMI-DADE COUNTY CODE § 21-279. As noted in Ordinance No. 10-01, this amendment was enacted in order to "strike a proper balance between protecting children around the crucial and vulnerable areas of schools while still *leaving available residential units in which sexual offenders can find housing*" because (1) "almost all of the municipal ordinances enacted to date" expanded the types of locations subject to the 2,500-foot residency restriction beyond schools (i.e. daycares, parks, playgrounds, bus stops, and other locations where children congregate), (2) these measures tended "to create zones in which sexual offenders are almost completely excluded from available housing [within that municipality]" and (3) sexual offenders and predators residing in Miami-Dade County were therefore

disproportionately concentrated in only a few neighborhoods within unincorporated Miami-Dade County and cities that had not enacted more restrictive residency requirements. *See* D.E. 29-2 at 5 (emphasis added).[2]

Appellants are convicted sex offenders of children subject to the residency restrictions in Miami-Dade County's Lauren Book Child Safety Ordinance.

John Doe #1 is currently in his midfifties. *See* D.E. 25 at ¶ 15. In 1992, when he was approximately in his early-to-mid-thirties, John Doe #1 was convicted of lewd and lascivious conduct on a 14-year-old. *Id.* at ¶ 17. And, since his release from prison in 1994, he has been incarcerated on at least two other occasions. *Id.* at ¶ 18, 21.

John Doe #2 is currently in his late-forties. *Id.* at ¶ 30. In 2006, when he was approximately in his late-thirties, John Doe #2 was convicted of lewd and lascivious conduct on a 14-year-old. *Id.* at ¶ 32. And, since his release from prison in 2010, he has been incarcerated on at least one other occasion. *Id.* at ¶ 37. In 2010, John Doe #2 was able to find compliant housing by renting a trailer at the River Park Mobile Home Park ("River Park") in Miami, Florida. *Id.* at ¶ 33. However, he moved

[2] The ordinance was later renamed the "Lauren Book Child Safety Ordinance." *See* D.E. 29-3 (Miami-Dade County Ordinance No. 10-67).

out of his trailer after he was unable to secure employment and could no longer afford the rent. *Id.* at ¶ 34. But, in September 2014, John Doe #2 moved back into a trailer at River Park. *Id.* at ¶ 43.

John Doe #3 is currently in his fifties. *Id.* at ¶ 46. In 1999, when he was approximately in his late-thirties-to-early-forties, John Doe #3 was convicted of lewd and lascivious conduct with a 15-year-old and unlawful sexual activity with a 16/17-year-old. *Id.* at ¶ 48. In 2011, John Doe #3 lived in a residence in the Shorecrest neighborhood of Miami-Dade County that complied with the ordinance. *Id.* at ¶ 50. In March 2014, he moved out of that residence because he was unable to afford the rental payments. *Id.*

On October 23, 2014, Appellants filed a suit pursuant to 42 U.S.C. § 1983 that sought to invalidate Miami-Dade County's ordinance through four separate constitutional challenges. D.E. 1.[3] Miami-Dade County then filed a Motion to Dismiss, D.E. 21, and, in lieu of a response to the motion, Appellants filed an Amended Complaint, D.E. 25. In the Amended Complaint, three of the original constitutional challenges

[3] The Florida Department of Corrections and Sunny Ukene—Circuit Administrator for the Miami Circuit Office of the Florida Department of Corrections—were co-defendants in this suit. They, however, are not parties on appeal.

remained: (1) void for vagueness, (2) substantive due process, and (3) ex post facto.[4] *See id.*

Once again, Miami-Dade County moved to dismiss Appellants' complaint. D.E. 29. The matter was fully briefed, D.E. 40, 51, 56, and oral argument was held, D.E. 72. On April 3, 2015, the District Court entered an Order granting Miami-Dade County's Motion to Dismiss and dismissing all claims with prejudice. D.E. 60. Appellants then filed a motion seeking relief from that order pursuant to Fed. R. Civ. P. 60(b). D.E. 61. That motion concerned the District Court's disposition of Appellants' void for vagueness challenge. *See id.* On June 23, 2015, the District Court issued an order denying Appellants' motion. D.E. 67. This appeal followed.

[4] The only matter on appeal is Appellants' ex post facto claim.

## Standard of Review

This Court reviews *de novo* the dismissal of a complaint under FED. R. CIV. P. 12(b)(6). *See Kentner v. City of Sanibel*, 750 F.3d 1274, 1278 (11th Cir. 2014) (citation omitted). It also reviews "questions of constitutional law *de novo*." *Id.* "This Court may affirm a district court's decision to grant . . . a motion for any reason, regardless of whether it was raised below." *Id.*

## Summary of the Argument

"Sex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality opinion). "[T]he victims of sexual assault are most often juveniles," and "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.* at 32-33. As an express response to these concerns, Miami-Dade County—like countless states and municipalities—enacted a residency restriction that prohibits any person who has been convicted of certain enumerated sexual crimes in which the victim was 15 years of age or less from establishing a ***new*** residence within 2,500 feet of an ***existing*** public or private kindergarten, elementary, middle, or high school. *See* CODE OF MIAMI-DADE COUNTY § 21-277, *et seq.* (hereinafter the "Lauren Book Child Safety Ordinance").

Appellants are convicted sex offenders of children subject to the residency restrictions in Miami-Dade County's Lauren Book Child Safety Ordinance. All three of them were convicted of engaging in lewd and lascivious conduct with a child between the ages of 14 and 15 when they were in their thirties or forties. And two of the three were incarcerated again on at least one occasion after being released from prison for their sexual offenses. Yet, Appellants nevertheless contend that prohibiting them—and others with similar criminal histories—from residing within close proximity of a location where children regularly congregate in large

numbers for approximately eight hours every weekday "bears no rational connection to public safety." *See* D.E. 40 at 9.

On appeal, Appellants have exclusively raised an ex post facto constitutional challenge to the Lauren Book Child Safety Ordinance and both parties agree that Miami-Dade County intended for the ordinance to be a civil non-punitive statutory scheme to protect the public. As a result, the only question for this Court to resolve is whether the District Court was correct in holding that the ordinance, on its face, was not so punitive either in purpose or effect as to negate Miami-Dade County's intention.

This ex post facto claim, however, is not new, novel, or undecided. Similar statutes have been challenged in the Eighth Circuit and in at least 16 federal district courts. In all but one of those federal cases, the courts have held similar restrictions to be constitutional. And, if anything, the Lauren Book Child Safety Ordinance provides an even narrower tailoring to the specific public safety purpose it intends to address. Specifically, the ordinance does not force any individual to move from an existing residence; it also does not impair any individual from seeking employment, moving freely, or establishing a residence at any location not within 2,500 feet of a school in Miami-Dade County. The only restriction that the ordinance imposes is on the ability of sexual offenders who have victimized children 15 years of age or less to

establish a new residence near an existing school in order to hopefully reduce the amount of incidental contact these sexual offenders have with children and thereby decrease the opportunity for these sexual offenders to commit new sexual offenses against children. This restriction is eminently reasonable in purpose, sufficiently limited in scope, and conclusively constitutional in law.

## Argument

The only issue that Appellants raise on appeal is a claim that the Lauren Book Child Safety Ordinance is an unconstitutional ex post facto law. *See generally* Initial Br. at 14-15. Under Article 1, Section 10 of the Constitution, governments are prohibited from enacting "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, 28 (1981). In *Smith v. Doe*, the Supreme Court laid down the framework for analyzing such claims:

> We must first ascertain whether the legislature meant the statute to establish 'civil' proceedings. If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'

538 U.S. 84, 92 (2003) (internal quotations and citations omitted).

As an initial matter, it is undisputed that the purpose of the Lauren Book Child Safety Ordinance was to create a civil non-punitive statutory scheme to protect the public. This is evinced by the very language of the ordinance which states that the intent "is to serve the County's compelling interest to promote, protect and improve the health, safety, and welfare of the citizens of the County, particularly children . . ." CODE OF MIAMI-DADE COUNTY § 21-278(b) *See also* D.E. 29-1 at 3

(providing relevant whereas clauses that were "recitals of legislative intent and fully incorporated . . . as part of th[e] ordinance"). And "where a legislative restriction is an incident of the State's power to protect the health and safety of its citizens, it will be considered as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment." *Smith,* 538 U.S. at 93-94 (quoting *Flemming v. Nestor,* 363 U.S. 603, 616 (1960) (internal marks omitted)). In addition, Appellants have conceded this fact. *See* D.E. 60 at 5; D.E. 72 at 15:1-2.

Because all parties agree that Miami-Dade County intended to enact "civil proceedings," we now turn to the question of whether the Lauren Book Child Safety Ordinance is "so punitive either in purpose or effect as to negate [the County's] intention' to deem it 'civil.'" *Smith*, 538 U.S. at 92. In making that determination, the Supreme Court articulated five factors as particularly relevant: (1) whether the sanction involves 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 it has a rational connection to an alternative, nonpunitive purpose; and (5) whether it appears excessive in relation to the alternative purpose assigned. *Id.* at 97 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)). However, "[b]ecause [courts] ordinarily defer to the legislature's stated intent, 'only the clearest proof' will suffice to override legislative

intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* at 92 (internal citations omitted).

In *Smith*, the Supreme Court considered an ex post facto challenge to an Alaska statute requiring sexual offenders to register their residences and held that "the intent of the Alaska Legislature was to create a civil, nonpunitive regime." *Id.* at 96. And the Eighth Circuit has applied the *Smith* analysis to uphold an Iowa statute that imposed residency restrictions on sexual offenders similar to those imposed by Miami-Dade County's Lauren Book Child Safety Ordinance against an ex post facto challenge. *See Doe v. Miller,* 405 F.3d 700, 718-23 (8th Cir. 2005). Other local and state residency restrictions for sexual offenders have been challenged in at least sixteen other federal cases and, in all but one, the ordinance prevailed. *See Wallace v. New York*, 40 F. Supp. 2d. 278, 312, n.29-30 (E.D.N.Y. 2014) (listing federal cases that have considered such challenges to residency restrictions). "Notably, several of these courts rendered decisions on this issue at the motion to dismiss stage." *Id.* at 312, n.30 (citing *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1017 (8th Cir. 2006), *Does v. Snyder*, 932 F. Supp. 2d 803, 807 (E.D. Mich. 2013), and *Doe v. Baker*, No. 05-CV-2265, 2006 WL 905368 (N.D. Ga. Apr. 5, 2006)). Drawing heavily upon the persuasive analysis in those decisions, Miami-Dade County addresses each of the relevant factors in turn.

## I. The Ordinance Does Not Impose an Affirmative Disability or Restraint

The affirmative disability or restraint prong is analyzed by examining "how the effects of the [ordinance] are felt by those subject to it." *Smith*, 538 U.S. at 99. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* Here, the ordinance "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *Smith*, 538 U.S. at 99. In addition, the District Court correctly noted that those who are subject to the ordinance's residency requirement are still "able to seek employment, move freely throughout Miami-Dade County, establish a residence at any location not within 2,500 feet of a school, and remain in an existing residence pursuant to the ordinance's 'grandfather clause.'"[5] D.E. 60 at 11. *See also* CODE OF MIAMI-DADE COUNTY §§ 21-281(a) & 21-282(1); *Wallace*, 40 F. Supp. 3d at 317 ("Although sex offenders to whom these restrictions apply may be less free than the average person to live or even travel where they want, these restrictions are not the equivalent of imprisonment, and the

[5] The "grandfather clause" provides that a sexual offender does not violate the ordinance if he or she established their residence prior to the ordinance's enactment or if the nearby school was opened after he or she established the residence. *See* CODE OF MIAMI-DADE COUNTY § 21-282(1). Thus, no individual will be required to move from a current residence that complied with the ordinance at the time the residence was established.

offenders are not akin to prisoners, without any freedom of movement.").

In fact, the Supreme Court has had occasion to consider other laws with arguably more restrictive effects and held that they were not considered punishment. For example, in *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997), the Kansas Sexually Violent Predator Act, which established procedures for the civil commitment of certain sexual offenders after they had served their criminal sentences, was found to not violate the ex post facto law because detention of mentally unstable individuals was a "legitimate nonpunitive governmental objective." *See also id.* at 363 (holding that the imposition of an affirmative restraint "does not inexorably lead to the conclusion that the government has imposed punishment."). Moreover, *Hudson v. United States*, 522 U.S. 93 (1997), upheld the validity of a statute that provided for occupational debarment of certain individuals after they had served their sentence. *Id.* at 104 ("While petitioners have been prohibited from further participating in the banking industry, this is certainly nothing approaching the infamous punishment of imprisonment.").

Nevertheless, Appellants contend that the Lauren Book Child Safety Ordinance constitutes an affirmative disability or restraint because its residency restrictions have "forced hundreds of individuals in Miami-Dade County into homelessness and transience." Initial Br. at 15. That

claim, however, relies on at least four categories of insufficient allegations and misstatements of law.

First, Appellants' Amended Complaint offered nothing more than conclusory statements, generalized studies, and contradicting allegations in an attempt to establish that the residency restriction is an affirmative disability or restraint. *See, e.g.*, D.E. 25 at ¶¶ 1,2, 28, 54, 146, 147 (conclusory statements); ¶ 151 (generalized studies); ¶¶ 27, 34, 50 (allegations providing that Appellants have difficulty finding housing for reasons other than ordinance). Indeed, the Supreme Court has indicated that the types of broad, conjectural claims offered by Appellants in the Amended Complaint are insufficient. For example, in *Smith*, the Supreme Court discounted the petitioners' unsubstantiated contention that Alaska's registration and notification requirements were likely to render the impacted sex offenders unemployable and incapable of finding housing. 538 U.S. at 100. In particular, the Supreme Court found that there was "no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders *that would not have otherwise occurred* through the use of routine background checks by employers and landlords." *Id.* (emphasis added). Similarly, the District Court correctly found that Appellants "pled no facts indicating that their difficulty in obtaining housing 'would not have otherwise

occurred' due to their personal financial circumstances." D.E. 60 at 12. [6] On the contrary, the Amended Complaint explicitly provides alternative causes for the Appellants' living situations besides the Lauren Book Child Safety Ordinance. *See, e.g.,* D.E. 25 at ¶ 34 (John Doe #2 became homeless because he was unable to obtain employment and had to move out of his trailer); ¶ 50 (John Doe #3 "lost his apartment because he could no longer afford rental payments"). *See Wallace*, 40 F. Supp. 3d at 327 (finding "no support for Plaintiffs' allegation that these restrictions directly cause forced or de facto homelessness among the County's registered sex offenders").

Second, Appellants argue that the District Court did not "accept as true [the] allegations about the Ordinance's sweeping effects on housing in Miami-Dade County." Initial Br. at 17. But the allegations that Appellants' reference, *see id.*, are conclusory or irrelevant and, therefore, should not have been considered for purposes of Miami-Dade County's Motion to Dismiss. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555

[6] In attempting to attribute complete fault on Miami-Dade County's ordinance, the plaintiffs also neglect to mention that other statutes unrelated to Miami-Dade County's residency restrictions provide additional limitations on where sexual offenders may reside. *See, e.g.*, 42 U.S.C. § 13663 ("Notwithstanding any other provision of law, an owner of federally assisted housing shall prohibit admission to such housing for any household that includes any individual who is subject to a lifetime registration requirement under a State sex offender registration program.").

(2007) (instructing federal courts that they "are not bound to accept as true a legal conclusion couched as a factual allegation.").

Third, Appellants contend that the District Court "engaged in misleading fact-finding," Initial Br. at 18, by taking judicial notice that Miami-Dade County is a "vast and varied geographical area" . . . "larger than the states of Rhode Island and Delaware and contains extensive urban, suburban, and rural neighborhoods," D.E. 60 at 12-13. However, this was not improper because courts are entitled to take judicial notice "of facts known at once with certainty by all the reasonably intelligent people in the community without the need of resorting to any evidential data at all," and this includes, for example, "the location of the boundaries of the state, in which the court is sitting, of counties, districts, and townships." *Weaver v. United States*, 298 F.2d 496, 498-99 (5th Cir. 1962). Furthermore, the District Court only took notice of Miami-Dade County's vast size and varying densities in response to Appellants' argument that provided an implausible characterization that Miami-Dade County was predominantly urban and therefore more impacted by the 2,500 foot restriction.[7]

[7] As noted by the District Court, this claim was undermined by the fact that the Amended Complaint alleged that two of the Appellants were able to obtain compliant housing in some of Miami-Dade County's most densely populated areas. In addition, Appellants had "pled no facts supporting a plausible inference that such a vast and varied

Lastly, Appellants based their analysis of this prong by citing to decisions from the Supreme Courts of Kentucky and New Hampshire that purportedly found residential restrictions of sexual offenders to qualify as an affirmative disability or restraint. Initial Br. at 14-15 (citing to *Commonwealth v. Baker*, 295 S.W. 3d 437, 445 (Ky. 2009) and *Doe v. State*, 111 A.3d 1077, 1095 (N.H. 2015)). Although certainly not binding, these decisions are not even persuasive when fully analyzed.

The statute at issue in *Baker* is significantly distinguishable on multiple grounds from the Lauren Book Child Safety Ordinance, and it was many of those distinguishing characteristics that proved critical to that court's holding. In particular, the relevant law in *Baker*, KRS 17.545(2)(b), contained no "grandfather clause"; instead, it required sex offenders to move from their current residence within 90 days of the statute's enactment or the opening of a new school if the residence would no longer comply with the restrictions. *See Baker*, 292 S.W. 3d at 444 ("It also expels registrants from their own homes, even if their residency predated the statute or arrival of the school, daycare, or playground.").[8] Thus, rather than demonstrating support for Appellants'

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geographical area has no housing that is compliant with the Book Ordinance's residency restriction." D.E. 60 at 12-13.

[8] Aside from this substantive difference, the Kentucky law also expanded the types of facilities that would trigger the residency restrictions to preschools, publicly owned playgrounds, and licensed

position, *Baker* does the opposite: it demonstrates the type of facts—absent from this case—that are necessary to support a finding that a residency restriction constitutes an affirmative restraint or disability.

With respect to *Doe v. State*, that suit exclusively dealt with a challenge that was raised under New Hampshire's Constitution, which has a distinct ex post facto law and, therefore, does not rely on federal cases as precedent. *See Doe v. State*, 111 A.3d at 1089 ("As the petitioner brings his claims solely under the New Hampshire Constitution, we rely on federal law only to aid our analysis."). In addition, the New Hampshire Supreme Court expressly noted that the state law was devoid of any legislative findings or stated purpose and also had numerous amendments that, over time, imposed increasingly onerous burdens on sexual offenders. *Doe v. State*, 111 A.3d at 1091. In this case, Miami-Dade County's Lauren Book Child Safety Ordinance contains explicit legislative findings denoting a regulatory intent and the only amendment to the ordinance came in 2010, which had the effect of repealing more restrictive municipal requirements in order to "strike a proper balance between protecting children around the crucial and vulnerable areas of schools while still *leaving available residential units in which sexual offenders can find housing*." D.E. 29-2 at 5.

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day care facilities. It also imposed the same residency restrictions on sex offenders whose victims were adults. *See id.*

As a result, the residency restrictions in the Lauren Book Child Safety Ordinance do not impose an affirmative restraint that is so severe as to constitute punishment towards sexual offenders whose victims are children. This factor should therefore weigh in Miami-Dade County's favor in this Court's ex post facto analysis.

## II. The Ordinance is Not Excessive with Respect to its Purpose

The Lauren Book Child Safety Ordinance was enacted to "serve the County's compelling interest to promote, protect and improve the health, safety, and welfare of the citizens of the County, particularly children" from the threat of sexual offenders who prey on children and present an extreme threat to the public safety. CODE OF MIAMI-DADE COUNTY § 21-278. Consequently, the ordinance was specifically tailored to minimize the risk of sexual offenses being committed against minors by restricting where sexual offenders that have previously victimized children 15 years of age or younger—who have a risk of recidivism that is "frightening and high," *see McKune*, 536 U.S. at 33—may reside. In addition, Miami-Dade County's efforts to ensure that the ordinance's residency restrictions were not excessive is supported by at least two key elements of the law. First, the ordinance's "grandfather clause" grants exceptions to the residency restriction to covered individuals who established their residences either before the school's opening or the ordinance's effective date. *See* CODE OF MIAMI-DADE COUNTY § 21-

282(1)(a) & (c). *See Wallace*, 40 F. Supp. 3d at 326 (noting that a similar "grandfather clause" also mitigated "any excessiveness relating to the lifetime application of these restrictions"); *Snyder*, 932 F. Supp. 2d at 8 1 1-12 ("grandfather clauses" also "significantly negate the harshest potential consequences of the Act."). Second, Miami-Dade County amended the ordinance in 2010 to preempt more restrictive municipal regulations that tended "to create zones in which sexual offenders are almost completely excluded from available housing [within that municipality]" in order to "strike a proper balance between protecting children around the crucial and vulnerable areas of schools while still leaving available residential units in which sexual offenders can find housing." *See* D.E. 29-2 at 5.

Notwithstanding these provisions, Appellants argue that the ordinance is excessive because "there is a uniform scientific judgment that residency restrictions do not advance public safety" and "research consistently demonstrates that the residency restriction directly undermines public safety." Initial Br. at 19. As an initial matter, Appellant's claim that their position is backed by a "uniform" scientific consensus and presumably unrebutted research, while certainly strongly worded, is ultimately wrong. Indeed, Appellants not only cherry pick the relevant literature, they ignore studies and findings that have been cited in cases that are binding precedent. For example, *McKune*, 536 U.S. at 32,

provided studies from the Dept. of Justice that found: (1) "the population of imprisoned sex offenders [between 1980-1994] increased at a faster rate than for any other category of violent crime," (2) the victims of sexual assaults are mostly children, and (3) convicted sex offenders "are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *See also* Samantha Imber, *Sexual Offenses: Prohibit Sexual Predators from Residing Within Proximity of Schools or Areas Where Minors Congregate*, 20 Ga. St. U. L. Rev. 100 (2003) ("[S]tudies show that sexual predators tend to strategically place themselves near potential victims."). Appellants' argument also ignores the fact that, notwithstanding the prevalence of empirical research, the Miami-Dade County Board of County Commissioners is entitled to make its own legislative findings. *See, e.g., Smith*, 538 U.S. at 103 (noting the legislature's findings). And, in this case, the Board of County Commissioners made explicit findings that (1) "that the recidivism rate for released sexual offenders is alarmingly high, especially for those who commit crimes against children;" (2) "prohibiting sexual offenders and sexual predators from living within 2,500 feet of schools . . . will reduce the amount of incidental contact sexual offenders and sexual predators have with children;" and (3) "reducing the amount of incidental contact will decrease the opportunity for sexual offenders or sexual predators to commit new sexual offenses against children." D.E. 29-1 at 3

However, Appellants' position suffers from an even broader defect: it improperly asks the judiciary to make evaluations of public policy rather than judgments of law. As noted in *Smith*, "the excessiveness inquiry of our ex post facto jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy" but rather the court is tasked with making an inquiry into "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *See Smith*, 538 U.S. at 105. Here, the reasonableness of the regulatory means chosen by Miami-Dade County is beyond debate, and Appellants' contentions to the contrary are unavailing.

First, Appellants argue that the ordinance is excessive because it purportedly lacks any individualized risk assessment. However, Appellants provide no binding case law demonstrating that such factors are legally required under these circumstances. S*ee Wallace*, 40 F. Supp. 3d at 326 (citing cases upholding residency restrictions that did not include any individualized determination of risk and that, in many cases, applied to any offender). In fact, the Supreme Court has made clear that legislative policymakers are empowered to impose "regulatory burdens on individuals convicted of crimes without any corresponding risk assessment." *Smith*, 538 U.S. at 104 (citations omitted). And, with specific respect to public safety regulations relating to sex offenders,

"[t]he State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the Ex Post Facto Clause." *Id.*

Although *Smith* clearly affords legislatures with far broader latitude than Appellants' argument would suggest, the Miami-Dade Board of County Commissioners opted to exercise its discretion far more narrowly than what was legally required: it tailored its ordinance to only cover the class of sexual offenders that it determined to pose the greatest danger to children. Specifically, the ordinance's residency restrictions only apply to sexual offenders convicted of five enumerated Florida sexual crimes in which the victim was a minor 15 years of age or younger. *See* CODE OF MIAMI-DADE COUNTY § 21-281(a). As the District Court correctly noted, "it was certainly within the County Commissioners' policymaking discretion to consider offenders convicted of such crimes to pose the greatest risk to the public." D.E. 60 at 9. *See Wallace*, 40 F. Supp. 3d at 321 (noting that a conviction of a sexual offenses in which the victim was a minor "demonstrates that the offender is capable of harming children and, thus, poses precisely the threat that these restrictions "seek to neutralize.").

Second, the fact that the Lauren Book Child Safety Ordinance applies for life does not, on its own, mandate a finding of excessiveness. For

example, the Supreme Court upheld the Alaska statute in *Smith* that provided for a lifetime restriction on certain sex offenders based on "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." *Smith*, 538 U.S. at 105 (citation, quotations omitted).[9] Based on that research, the Board of County Commissioners was also entitled to reasonably conclude that a lifetime residency restriction would best protect the public from the risk of repeat sexual offenses against minors, which may occur long after the offender's release from prison. *See also Valentine v. Strickland*, No. 5:08-CV-00993-JRA, 2009 WL 9052193, at *5 (N.D. Ohio Aug. 19, 2009) (upholding lifetime residency restriction applied to sex offenders even without explicit regard for the victim's age); *Gautier v. Jones*, No. ClV-08-445-C, 2009 WL 1444533, at *8-9 (W .D. Okla. May 20, 2009) *rev'd on other grounds*, 364 F. App'x 422 (10th Cir. 2010) (upholding lifetime residency and registration restrictions).

[9] Although Appellants claim that a recent study has raised questions about the study from the National Institute of Justice relied upon in *Smith*, *see* Initial Br. at 24 n.9, it is not for the Court to decide, as a matter of law, which of the two studies should guide our public policy decisions. That task is reserved for our duly elected officials. And, if anything, this issue only further proves that the ordinance is not excessive because it is backed by empirical research, no matter how flawed Appellants or Ira and Tara Ellman may consider that research to be.

Third, Appellants attempt to bootstrap an additional challenge on excessiveness grounds by raising issues over the enforcement of the ordinance by local officials. *See* Initial Br. at 28-29. In particular, these issues deal with the possibility of error in classifying a school or the online mapping assistance that Miami-Dade County provides the public to identify areas covered by the restriction. *Id.* These concerns, however, are not a proper matter to consider when examining possible excessiveness for purposes of an ex post facto analysis. As the Supreme Court has instructed, the "[*Mendoza-Martinez*] factors must be considered in relation to the statute ***on its face***." *Mendoza-Martinez*, 373 U.S. at 168 (emphasis added).

## III. The Ordinance Bears a Rational Connection to Public Safety

Although the *Martinez-Mendoza* factors are "neither exhaustive nor dispositive," the Supreme Court has recognized that "[t]he [statute's] rational connection to a nonpunitive purpose is a 'most significant' factor in [the Court's] determination that the statute's effects are not punitive." *Smith*, 538 U.S. at 102 (citations, punctuation omitted). Here, the Lauren Book Child Safety Ordinance has a rational connection to a legitimate, nonpunitive purpose, namely public safety. In short, Miami-Dade County has legitimately-founded concerns about the heightened danger that sexual offenders can pose to the public. *See McKune,* 536 U.S. at 33 ("When convicted sex offenders reenter society, they are much

more likely than any other type of offender to be rearrested for a new rape or sexual assault"); *Doe v. Moore*, 410 F.3d 1337, 1345-46 (11th Cir. 2005) ("We join with other courts . . . in holding that the [Florida] Sex Offender Act is rationally related to a legitimate government interest; *Westerheide v. State*, 831 So. 2d 93, 112 (Fla. 2002) (holding state's legislative findings that sexual predators require special treatment under Florida law because of the "high risk they pose to the public" valid). *See also* D.E. 29-1 at 3 (providing relevant whereas clauses that were "recitals of legislative intent and fully incorporated . . . as part of th[e] ordinance"). Given those concerns, it is certainly reasonable for Miami-Dade County to conclude that placing restrictions on how close sexual offenders who have previously victimized children can reside to schools will promote public safety by "minimizing the risk of repeated sex offenses against minors." *Miller*, 405 F.3d at 721; *Doe v. Baker*, 2006 WL 905368, at *5 (N.D. Ga. April 5, 2006) ("Prohibiting a sex offender from living near a school . . . is certainly an appropriate step in achieving the ultimate goal of protecting children.").

Notwithstanding the clear rational basis recognized by the District Court, the 8th Circuit, and numerous federal district courts, Appellants contend that this ordinance "is not rationally related to promoting public

safety." Initial Br. at 26.[10] But Appellants' argument amounts to little more than a simple disagreement with the policy decision made by Miami-Dade County (and the vast number of other local and state government who have passed similar legislation). In so doing, Appellants seek to transform traditional rational basis review into a significantly stricter standard. And courts have routinely declined that invitation. *See Blue Martini Kendall LLC v. Miami-Dade County*, 816 F.3d 1343, 1350-51 (11th Cir. 2016) ("Our courts have explained that rational basis scrutiny is a highly deferential standard that proscribes only the very outer limits of a legislature's power."); *Doe v. Bredesen*, 507 F.3d 998, 1006 (6th Cir. 2007) ("[T]he Tennessee General Assembly could rationally conclude that sex offenders present an unusually high risk of recidivism . . . Where there is such a rational connection to a nonpunitive purpose, it is not for the courts to second-guess the legislature's policy decision as to which measures best effectuate that purpose.").

Instead, this Court must simply decide whether the Lauren Book Child Safety Ordinance advances a legitimate governmental interest. *See Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1015 (8th Cir. 2006). As explained above, the County's interest in protecting children from the threat of repeat offenses posed by sex offenders is obvious, and it is

[10] Despite this contention, Appellants concede in their conclusion that this factor "arguably weighs in favor of the residency restriction." Initial Br. at 32.

certainly reasonable for Miami-Dade County to conclude—like other state and local governments—that the ordinance's residency restrictions advance that interest by reducing opportunities for contact between sex offenders and children. *See Miller*, 405 F.3d at 716 ("[I]t is just "common sense" that limiting the frequency of contact between sex offenders and areas where children are located is likely to reduce the risk of an offense").[11] In fact, most federal courts faced with an ex post facto challenge have found that a rational connection exists between the public interest in protecting children from the risk of repeat offenses and residency restrictions for convicted sex offenders. *See Weems*, 453 F.3d at 1015 ("[W]e believe that a residency restriction designed to reduce proximity between the most dangerous offenders and locations frequented by children is within the range of rational policy options available to a state legislature charged with protecting the health and welfare of its citizens."); *Wallace*, 40 F. Supp. 3d at 318 ("By minimizing contact between children and convicted sex offenders after their release from prison, these restrictions reduce the chance that a sex offender might re-offend against a child victim."); *Baker*, 2006 WL 905368 at *5.

[11] Although Appellants argue that "there is no resasonable state of facts" supporting this assertion, "[a] state is under no obligation to produce evidence supporting the rationality of the legislation." *Blue Martini Kendall, LLC*, 816 F.3d at 1351.

## IV. The Ordinance is Not Analogous to Historical Forms of Punishment

In evaluating whether a particular statute is punitive, courts are instructed to analyze whether the statute is analogous to a historical form of punishment "because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." *Smith*, 538 U.S. at 97. In this case, public safety regulations concerning sexual offenders—such as restricting how close a convicted sex offender of children can reside near a school—"are of fairly recent origin, which suggests that the statute was not meant as a punitive measure." *Id.* (citation omitted). Moreover, Miami-Dade County's ordinance only limits where these sexual offenders may reside, it does not prevent them from traveling within the community, conducting business, or going to their place of employment. And, for certain sexual offenders in Miami-Dade County, the ordinance does not even require them to change their residence because sexual offenders are exempt from the residency restrictions if (1) they established their residence prior to the enactment of the ordinance or (2) the nearby school was opened after they had established their residence in that area. *See* CODE OF MIAMI-DADE COUNTY § 21-282. Accordingly, these factors further support a finding that the Lauren Book Child Safety Ordinance was not intended to be analogous to a historical form of punishment

because it only governs a narrow sphere of future conduct that is directly related to addressing a legitimate public safety concern.

Both below and on appeal, Appellants have argued that the ordinance is tantamount to the historic criminal punishments of banishment and probation.[12] The District Court, however, correctly held that this interpretation is "unsupported by the ordinance's plain terms." D.E. 60 at 13. In particular, the continued ability for convicted sexual offenders subject to the ordinance to travel, work, and live anywhere in Miami-Dade County, as long as their residence is not within 2,500 feet of a school, "is a far cry from the historic punishment of banishment, which 'entailed the inability to ever return to the place from which an individual had been banished.'" *Id.* (quoting *Doe v. Miller*, 405 F.3d 700, 719 (8th Cir. 2005) ("unlike banishment, [Iowa's residency restriction] restricts only where offenders may reside.")); *Wallace*, 40 F. Supp. 3d at 3 16-17 (citations omitted) (holding that New York's residency restrictions "cannot be equated to the historic punishment of banishment," because they "do not have the effect of either putting the affected individuals on

[12] The cases relied upon by Appellants are not analogous. First, Miami-Dade County has already explained why Appellants' reliance on *Commonwealth v. Baker* and *Doe v. State* is misplaced. *See supra* Part I. Second, *Doe v. Dep't of Pub. Safety and Corr. Servs.*, 62 A.3d 123, 139-40 (Md. 2013) exclusively concerned a sex offender registration statute—not a residency restriction—that was analyzed under the Maryland Declaration of Rights and the court there expressly decided to reject adopting the Supreme Court's analysis from *Smith*.

display for ridicule or 'running them out of town'"). Additionally, the Ordinance does not subject anyone "to the mandatory conditions, supervision, or threat of revocation imposed on probationers." D.E. 60 at 13. *See Smith*, 538 U.S. at 101 (determining that Alaska's registration and notification requirements were not similar to probation, because "offenders subject to the [ ] statute are free . . . to live and work as other citizens, with no supervision").

## V. The Ordinance Does Not Promote the Traditional Aims of Punishment

Miami-Dade County concedes that the Lauren Book Child Safety Ordinance does aim to promote deterrence of future criminal activity, which is one traditional aim of punishment. However, that fact—standing alone—should not establish that the ordinance was intended as punishment. *See Smith*, 538 U.S. 84, 87 (2003) ("That it might deter future crimes is not dispositive."); *id.* at 102 ("Any number of governmental programs might deter crime without imposing punishment."); *Miller*, 405 F.3d at 720 (holding that lowa's residency restriction "could have a deterrent effect, but we do not agree that the deterrent effect provides a strong inference that the restriction is punishment"). In addition, Appellants' contention that the ordinance should be found to be retributive because it does not take into account an individual assessment as to the risk of recidivism over time is misplaced. The Lauren Book Child Safety Ordinance already limits its

applicability to only those sexual offenders who committed specific sexual offenses against victims that were 15 years of age or younger. And that specific class of individuals was explicitly found by the Board of County Commissioners to possess an alarmingly high recidivism rate, D.E. 29-1 at 3, and other cases have provided expert opinion testimony indicating that, for these individuals, "there are never any guarantees that they might not reoffend." *Miller*, 405 F.3d at 707. Therefore, "to the limited extent that the ordinance poses some retributive effect, this effect is incidental to the ordinance's civil, regulatory aim of protecting the public from the risk of recidivism posed by sex offenders convicted of crimes involving victims aged 15 and under." D.E. 60 at 14.

## VI. The Ordinance Does Not Apply to Behavior that is Already a Crime

The last factor to consider is whether the ordinance is exclusively applied to those already convicted of a crime. While the restrictions are limited to sexual offenders convicted of specific crimes, the Lauren Book Child Safety Ordinance's non-punitive effect and public safety focus is evident by the other obligations that it imposes. For example, the ordinance imposes an equal obligation on landlords to ensure that no place or structure within 2,500 feet of a school is let or rented to a sexual offender, and failure to comply with this provision merits a similar penalty as those imposed on sex offenders themselves. CODE OF MIAMI-DADE COUNTY § 21-283. It is difficult to fathom how imposing new

regulations and possible penalties on landlords would serve any intent to punish sexual offenders. Rather, the obligations imposed on landlords suggest that Miami-Dade County is taking all necessary steps to ensure that its legitimate public safety concerns are being fully addressed. Additionally, Appellants' claim that "[t]riggering a regulation based on a conviction is both over- and underinclusive," Initial Br. at 31, ignores the large body of federal precedent that has arisen upholding registration and other regulatory measures against convicted sexual offenders. All of those measures, including those upheld by the Supreme Court in *Smith*, require a conviction in order to be triggered. As a result, this factor cannot be dispositive or even significant to this Court's analysis, or else every one of those other decisions would have been decided differently.

## Conclusion

For the foregoing reasons, Miami-Dade County asks this Court to recognize that "an imposition of restrictive measures on sex offenders adjudged to be dangerous is 'a legitimate nonpunitive governmental objective and has been historically so regarded,'" and consequently affirm the dismissal of Appellants' ex post facto challenges to the Lauren Book Child Safety Ordinance. *Smith*, 538 U.S. at 93 (internal citation omitted).

Respectfully submitted,

ABIGAIL PRICE-WILLIAMS
Miami Dade County Attorney
Stephen P. Clark Center
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128

By: */s/ Michael B. Valdes*
Michael B. Valdes
Assistant County Attorney
Florida Bar No. 93129
Phone: (305) 375-5151
Fax: (305) 375-5634
E-Mail: mbv@miamidade.gov

## Certificate of Compliance

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5), the type style requirements of FED. R. APP. P. 32(a)(6), and the type-volume limitation of FED. R. APP. P. 32(a)(7)(A) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Garamond for text and 14-point Source Sans Pro for headings, and it contains 7,823 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

*/s/ Michael B. Valdes*
Michael B. Valdes
Assistant County Attorney

## Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served on counsel for Appellants and the Florida Department of Corrections via Appellate CM/ECF on May 23, 2016.

*/s/ Michael B. Valdes*
Michael B. Valdes
Assistant County Attorney