No. 17-1061

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOSHUA VASQUEZ and MIGUEL CARDONA,	)	
Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Northern District of Illinois
v.	)	
	)	District Court No. 16 C 8854
CITY OF CHICAGO, et al.,	)	
	)	Hon. Amy J. St. Eve,
Defendants-Appellees.	)	Judge Presiding

BRIEF OF PLAINTIFFS-APPELLANTS JOSHUA VASQUEZ AND MIGUEL CARDONA

Law Office of Adele D. Nicholas
5707 W. Goodman Street
Chicago, Illinois 60630
847-361-3869

Law Office of Mark G. Weinberg
3612 N. Tripp Avenue
Chicago, Illinois 60641
773-283-3913

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1061

Short Caption: Vasquez et al. v. Foxx et al.

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Miguel Cardona

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Law Office of Adele D. Nicholas

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Attorney's Signature: s/ Adele D. Nicholas Date: 4-6-17

Attorney's Printed Name: Adele D. Nicholas

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ⊗ **No** ○

Address: Law Office of Adele D. Nicholas/ 5707 W. Goodman St./ Chicago, Illinois 60630

Phone Number: 847-361-3869 Fax Number: 312-528-7670

E-Mail Address: adele@civilrightschicago.com

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Attorney's Signature: s/ Mark G. Weinberg Date: 4-6-17

Attorney's Printed Name: Mark G. Weinberg

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ⊗ **No** ○

Address: Law Office of Mark G. Weinberg / 3612 N. Tripp Ave. / Chicago, Illinois 60641

Phone Number: 773-283-3913 Fax Number: 312-528-7670

E-Mail Address: mweinberg@sbcglobal.net

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JURISDICTIONAL STATEMENT

This action was originally filed in the United States District Court for the Northern District of Illinois. Plaintiffs' complaint is an action under 42 U.S.C. §1983, alleging violations of the United States Constitution. The District Court had federal question jurisdiction under 28 U.S.C. §1331.

The United States Court of Appeals for the Seventh Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. §1291 in that Plaintiffs have filed a timely notice of appeal from the District Court's dismissal with prejudice of all claims as to all parties.

The District Court granted Defendants' Motion to Dismiss Plaintiffs' Complaint on December 9, 2016. Dkt. 43, Appx. at 1.[1] The Court converted the dismissal to a dismissal with prejudice on December 19, 2016, and entered judgment in favor of Defendants. Dkt. 47, Appx. at 20. Plaintiffs filed a notice of appeal on January 9, 2017. Dkt. 48.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in dismissing Plaintiffs' claim that 720 ILCS 5/11-9.3(b-10), a section of the Illinois Criminal Code that imposes severe, life-long restrictions on where people classified as child sex offenders can live, violates the Ex Post Facto Clause.

2. Whether the District Court erred in dismissing Plaintiffs' claim that 720 ILCS 5/11-9.3(b-10), under which Plaintiffs have been notified that they must

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[1] References in this brief to "Appx." and "Dkt." refer to the Appendix and the District Court docket entries, respectively.

vacate their homes due to a third party's opening a home daycare within 500 feet of their residences, violates the Fifth Amendment Takings Clause.

3. Whether the District Court erred in dismissing Plaintiffs' claim that 720 ILCS 5/11-9.3(b-10) violates Plaintiffs' Procedural Due Process rights because it operates to deprive Plaintiffs of their property without first being afforded a hearing.

4. Whether the District Court erred in dismissing Plaintiffs' claim that 720 ILCS 5/11-9.3(b-10) violates Plaintiffs' Substantive Due Process rights because it is not rationally related to a legitimate government objective given the absence of any evidence supporting a connection between housing restrictions and the safety of children.

STATEMENT OF THE CASE

I. Introduction

This case challenges the constitutionality of 720 ILCS 5/11-9.3(b-10) ("the Residency Restrictions"), a section of the Illinois criminal code that prohibits individuals classified as "child sex offenders" from living within 500 feet of certain prohibited locations, including daycare centers and playgrounds.[2] The statute contains no grandfather clause, meaning that individuals classified as child sex offenders are forced to move any time that a daycare or other prohibited facility opens within 500 feet of their homes even after they have lived in their homes for

[2] Illinois law labels as a "child sex offender" anyone who has been convicted of an offense enumerated in 720 ILCS 5/11-9.3(d)(2.5). Some of the offenses do not involve a sexual component (*e.g.*, "kidnapping") and others do not involve an offense against a child (*e.g.*, "indecent solicitation of an adult"). Appx. at 21–22.

years without incident. Plaintiffs are two individuals who were convicted more than 10 years ago of crimes that have resulted in their being classified as child sex offenders. Plaintiffs have received notices from the City of Chicago that they must move out of their homes due to new home daycares being licensed to operate within 500 feet of their residences. In this lawsuit, Plaintiffs challenge the constitutionality of the statute on the grounds that it violates the Ex Post Facto Clause, the Fifth Amendment Takings Clause, and the Fourteenth Amendment guarantees of Substantive Due Process and Procedural Due Process.[3]

II. The Plaintiffs

A. Joshua Vasquez

Plaintiff Joshua Vasquez was convicted of one count of possession of child pornography in 2001, making him a child sex offender under Illinois law. Dkt. 1, Complaint, at ¶22. Vasquez resides in the second-floor apartment at 4834 W. George Street in Chicago, Illinois, with his wife and their nine-year-old daughter. *Id*. at ¶24. Vasquez's daughter attends a Chicago public school that is within walking distance of their home. Mr. Vasquez and/or his wife walk their daughter to school every day. *Id*. at ¶25.

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[3] Plaintiffs also have challenged the manner in which the City of Chicago enforces the statute. The City argued in its motion to dismiss that it was not a proper party to the suit because it is compelled to enforce Illinois law. The District Court declined to address the City's arguments. Dkt. 43, p. 6, n4 ("Because the Court concludes that Plaintiffs' claims fail on the merits, it need not consider whether Plaintiffs fail to state a *Monell* claim against the City.") Accordingly, Plaintiffs do not address the arguments raised by the City in this brief but are prepared to submit briefing on this topic if the Court requests it. For purposes of clarification, Plaintiffs also note that pursuant to Fed. R. Civ. P. 5.1, they provided notice of this constitutional challenge to the Illinois attorney general on September 19, 2016. Dkt. 16. The Illinois Attorney General declined to appear in this case to defend the statute.

When Mr. Vasquez and his family rented this residence in 2013, Chicago police confirmed that it was compliant with the restrictions set forth in 720 ILCS 5/11- 9.3(b-10). *Id*. at ¶26. Vasquez and his family currently have a lease for this apartment that runs until August 19, 2017. *Id*. at ¶24.

On August 25, 2016, Vasquez went to Chicago police headquarters to complete his annual registration requirements. *Id*. at ¶27. After Vasquez completed his registration, Chicago Police Officer Scott Brownley handed him a form stating that his address is in violation of 720 ILCS 5/11-9.3(b-10) because of a home daycare at 4918 W. George Street, which is approximately 480 feet from Vasquez's residence. *Id*. at ¶28. The form stated that Vasquez must move by no later than Saturday, September 24, 2016, and that if he failed to move by that date he can be arrested and prosecuted. *Id*.

This is the second time in five years that Vasquez and his family have been informed that they must move because of a home daycare facility opening in his neighborhood. *Id*. at ¶32. In 2013, Mr. Vasquez's family was forced to move because someone obtained a home daycare license within 500 feet of their apartment. *Id*. Vasquez does not want to disrupt his daughter's life by making her move (and potentially change schools) again, but Vasquez does not want to live apart from his wife and daughter and cannot, in any case, afford separate housing for himself and for his wife and daughter. *Id*. at ¶29, 34.

Since 2014, there has been a home daycare center at 4924 W. George Street—two doors west of the new daycare and approximately 550 feet from Vasquez's

residence. *Id*. at ¶31. There have been no problems posed by Vasquez's family living in this proximity to a home daycare center. *Id*. Vasquez works during the day and is not home during the hours that a daycare would typically be open. *Id*. at ¶23.

B. Miguel Cardona

Plaintiff Miguel Cardona was convicted of indecent solicitation of a child in 2004, making him a child sex offender as defined in 720 ILCS 5/11-9.3(d)(1). *Id*. at ¶35. Cardona has not re-offended since his 2004 conviction. *Id*. at 36. Since his release from custody, Cardona has obtained a cosmetology license from the State of Illinois and is a hairstylist. *Id*. at ¶36. Cardona is also the caretaker for his mother, who has lung cancer. *Id.* at ¶37.

Cardona resides with his mother at 3152 S. Karlov Street in Chicago, Illinois. Cardona has lived at this address for more than 25 years. *Id* at ¶38. He has been the owner of the building since 2010. *Id*. From 2006 to 2015, each time that Cardona completed his annual sex offender registration, Chicago police have confirmed that the address is compliant with the restrictions set forth in 720 ILCS 5/11-9.3(b-10). *Id*. at 39. On August 17, 2016, Cardona went to Chicago police headquarters to complete his annual registration requirements. *Id*. at ¶40. After Cardona completed his registration, Chicago Police Officer Scott Brownley handed him a form stating that his address is in violation of 720 ILCS 5/11-9.3(b-10) because of a home daycare at 3123 S. Keeler Street, which is approximately 475 feet from Cardona's residence. *Id*. at ¶41. The form stated that Cardona must move by no later than Friday, September 16, 2016, and that if he failed to move by that date,

he could be arrested and prosecuted. *Id*.

Cardona is unable to afford to pay for separate housing apart from the home that he owns, and does not want to force his ailing mother to move out of the home where she has lived for most of her adult life. *Id*. at ¶42. However, Cardona's mother needs substantial help with daily activities such as grocery shopping, preparing meals and going to doctor's appointments. If Cardona is forced to move, his mother will be left without needed daily assistance. *Id*. at ¶43.

According to the website for the Illinois Department of Children and Family Services, there has been a group day care home at 3123 S. Keeler since 2014. Chicago police did not consider Cardona's property to be non-compliant until this year, and there have been no problems with Cardona and his mother living in such proximity to this home daycare. Cardona was not aware of this daycare until receiving a notice from the Chicago police department. *Id*. at ¶45.

III. The Challenged Statute

The Illinois legislature enacted 720 ILCS 5/11-9.3(b-10) in 2000. When first enacted, the statute's restrictions were limited to prohibiting individuals classified as child sex offenders from living within 500 feet of a "playground or a facility providing programs or services exclusively directed toward persons under 18 years of age." Appx at 21. The legislature amended the statute in 2006 to add a prohibition on individuals classified as "child sex offenders" from living within 500 feet of "a child care institution, day care center, or part day child care facility." *Id*. The legislature amended the statute again in 2008 to add a prohibition on

individuals classified as "child sex offenders" from living within 500 feet of "a day care home or group day care home." *Id*. The statute applies to all individuals classified as child sex offenders whether their offense was committed before or after the effective date of the statute.[4] Whether an individual is subject to the residency restrictions imposed under 720 ILCS 5/11-9.3(b-10) is based solely on whether the individual was convicted of an enumerated offense under 720 ILCS 5/11-9.3(d)(1) and not on any individual assessment of the risk posed by a particular person. Appx. at 22.

An individual classified as a child sex offender who purchased his or her home after the effective date of the statute is subject to its restrictions and can be forced to move if a prohibited location or facility opens within 500 feet of the home, even if the individual's residence was in compliance with the statute's restrictions at the time he or she purchased the home. Likewise, an individual classified as a child sex offender who rents his or her residence can be forced to move if a prohibited location or facility opens within 500 feet of the residence, even if the residence complied with the restrictions set forth in 720 ILCS 5/11-9.3(b-10) at the time he or she rented the property.

People classified as child sex offenders are subject to 720 ILCS 5/11-9.3(b-10) for the rest of their lives. Thus, Illinois residents classified as child sex offenders

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[4] The only exception is that an individual designated as a child sex offender who owns his or her home and purchased it prior to the effective date of the statute (and each amendment thereto) is not subject to the restrictions set forth in the relevant amendment. This exception does not apply to either Plaintiff because Mr. Vasquez is a renter and Mr. Cardona did not own his home until 2010.

face the possibility of being repeatedly uprooted and forced to abandon their homes to comply with the restrictions in 720 ILCS 5/11-9.3(b-10) for decades after their convictions.

IV. There Is Scant Evidence that the Residency Restrictions Advance Public Safety

The restrictions on where individuals classified as "child sex offenders" can live are premised on the assumption that all individuals convicted of sex offenses pose a risk to public safety, which justifies restrictions on where they are allowed to reside. Dkt. 1 at ¶55. Such an assumption is not based on sound evidence. The evidence shows that the vast majority of sex offenses are committed not by past offenders but by individuals without prior sex offense convictions. For example, one analysis showed that 95 percent of people arrested for sex offenses had no prior sexual offense conviction. *Id*. at ¶56 (citing Sandler, J. C., Freeman, N. J., & Socia, K. M., *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, Psychology, Public Policy and Law, 14(4), 284-302 (2008)). Likewise, data does not support the assumption that recidivism rates are particularly high among individuals convicted of sex offenses as opposed to other types of crimes. *Id*. at ¶57. The largest-ever study of sex offense recidivism, which was conducted for the U.S. Department of Justice Bureau of Justice Statistics in 2003, showed a 5.3 percent rate of sex offense recidivism among sex offenders within three years of their release from prison compared to a 17.1 percent re-arrest rate for violent offenders and 43 percent overall re-arrest rate for the same period. *Id*. (citing Langan, P., Schmitt, E., & Durose, M., *Recidivism of Sex*

Offenders Released From Prison in 1994, Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (2003)). Moreover, current data and studies show that a previous conviction is not a good predictor of the risk of future offenses. Rather, recidivism rates vary based on the age of the offender and the time that the ex-offender has been living in the community offense-free. In particular, research shows that the risk of re-offending is reduced by half when a person has spent more than five years offense-free in the community, and the risk continues to decline the more time the person spends offense-free. The risk for recidivism also declines substantially with age. *Id*. at ¶58 (citing Harris, A.J.R., Phenix, A., Hanson, R. K., & Thornton, D., Static-99 Coding Rules, at 24 (Figure showing Age Distribution of Sexual Recidivism in Sexual Offenders) (available at: http://www.static99.org/pdfdocs/static-99-coding-rules_e.pdf).

The Residency Restrictions are also premised on the idea that keeping individuals deemed child sex offenders away from places where children gather is likely to prevent crimes against children. *Id*. at ¶59. However, research shows that proximity to schools, daycares and other places where children congregate has no effect on re-offense rates. *Id*. at ¶60. A 2010 study compared the residential proximity of sex-crime recidivists and non-recidivists to schools and daycares in Florida. The study showed that those who lived within 1,000, 1,500, or 2,500 feet of schools or daycare centers did not reoffend more frequently than those who lived farther away and that there was no correlation between recidivism and the number of feet the offender lived from a school. *Id*. (citing Zandbergen, P. A., Levenson, J.

S., & Hart, T., *Residential Proximity to Schools and Daycares: An Empirical Analysis of Sex Offense Recidivism*, Criminal Justice Behavior, 37(5), 482–502 (2010)).

In addition, according to the Department of Justice Bureau of Justice Statistics, 93 percent of child victims of sexual abuse are victimized by a relative or trusted family acquaintance rather than a stranger. About 40 percent of sexual assaults take place in the victim's own home, and 20 percent take place in the home of a trusted friend, neighbor, or relative. *Id*. at ¶61 (citing Bureau of Justice Statistics, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault*, Washington, DC: U.S. Department of Justice (1997)). Only 7 percent of child sex abusers are strangers to their victims. *Id*. (citing Berliner, L., Schram, D., Miller, L., & Milloy, C.D., *A sentencing alternative for sex offenders: A study of decision-making and recidivism*, Journal of Interpersonal Violence, 10(4), 487-502 (1995); Bureau of Justice Statistics, *Criminal Victimization*, Washington, D.C., U.S. Department of Justice (2002)).

V. The Complaint and Litigation Status

Plaintiffs claim the Residency Restrictions are unconstitutional for four reasons. First, Plaintiffs claim that the restrictions violate the Ex Post Facto Clause because they retroactively increase the punishment for past crimes. Dkt. 1, Complaint, at ¶64–71. Second, Plaintiffs claim that the restrictions violate the Fifth Amendment Takings Clause because they deprive Plaintiffs of the use of their property without compensation. *Id*. at ¶72–79. Third, Plaintiffs claim that forcing

someone to vacate his or her home without any hearing to determine whether the individual poses a current threat to the community violates Plaintiffs' right to procedural due process. *Id.* at ¶48-52. Finally, Plaintiffs claim that the Residency Restrictions violate the Fourteenth Amendment guarantee of substantive due process because they fail rational basis review. *Id.* at ¶53–63.

Plaintiffs Vasquez and Cardona moved for a Temporary Restraining Order (Dkt. 4), which was granted by the District Court on September 15, 2016 (Dkt. 14). The parties have agreed to an extension of temporary injunctive relief during the pendency of these proceedings. Dkt. 22. Accordingly, Plaintiffs remain in their homes at this time.

Both Defendants moved to dismiss the Complaint. Dkts. 23 and 26. The District Court granted the Defendants' motions, finding that all of Plaintiffs' claims failed. Dkt. 43, Order on Motion to Dismiss, Appx. at 1–19. Because the District Court rejected the viability of all of Plaintiffs' constitutional theories, Plaintiffs requested that the dismissal be made final so they could appeal. Dkt. 47.

SUMMARY OF THE ARGUMENT

First, the District Court erred in dismissing Plaintiffs' claim that the statute at issue violates the Ex Post Facto Clause. In particular, the District Court misapplied and misinterpreted *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011). In *Leach*, this Court explained that there are two ways to show that a statute violates the Ex Post Facto Clause—one, that the penalties imposed for violation of the statute are retroactive; or two, that the restrictions imposed under the statute

amount to punishment. The District Court stopped after the first theory, finding it dispositive of Plaintiffs' ex post facto claim and concluding that the Residency Restrictions do not violate the Ex Post Facto Clause because the penalties for violating the Residency Restrictions are not retroactive (that is, a person who lived within 500 feet of a home daycare before the enactment of the statute would not be punished for having done so). But, as explained more fully below, it was never Plaintiffs' claim that the Residency Restrictions' *penalties* were retroactive. Plaintiffs' claim is that the onerous burdens imposed under the Residency Restrictions amount to punishment. The District Court did not even consider or analyze whether Plaintiffs had stated a claim that the restrictions themselves amount to punishment. Properly applying the Supreme Court decisions in *Smith v. Doe*, 538 U.S. 84 (2003) and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), Plaintiffs have stated a claim that the Residency Restrictions amount to punishment and Plaintiffs therefore deserve the right to proceed with this claim in the District Court.

Second, the District Court erred in finding that Plaintiffs have not stated a claim for violation of the Takings Clause. The District Court ruled that the residency statute does not affect a taking because it "amounts to an adjustment of economic burdens to promote the common good." Appx. at 16-17. The District Court acted prematurely reaching this conclusion at the Motion to Dismiss stage without the benefit of a factual record concerning any of the relevant factors (*e.g.*, the economic burdens on Plaintiffs; whether the Plaintiffs were left with any

economically beneficial use of their property; and the legitimacy of the governmental interests purportedly served by ousting Plaintiffs from their homes).

Third, the District Court erred in finding that the Complaint did not state a claim for violation of the right to procedural due process. In particular, the Court erred in likening this case to *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003). In *Doe*, the Court found that people who have been convicted of sex offenses were not entitled to a hearing before having their information listed on a public registry. The statute at issue here is fundamentally different. It does not simply require an individual to list his information on a law enforcement registry. Rather, it interferes with critical liberty and property interests. The logic of *Doe* should not be extended to this case because Residency Restrictions impose much more onerous burdens and infringe fundamental rights.

Finally, the District Court's determination that Plaintiffs have failed to state a claim for violation of their right to substantive due process also should be reversed. The Court erred in concluding as a matter of law—without any evidentiary record—that the "residency statute bears a rational relationship to a legitimate end: protecting children from convicted child sex offenders." Appx. at 12. Plaintiffs intend to bring forth evidence demonstrating that restrictions such as those at issue actually run counter to their claimed public safety purpose and that individuals who have not reoffended for more than ten years, such as Plaintiffs, pose no greater risk to children than any other member of the community who has never been previously convicted. Plaintiffs should be permitted to develop this

record and proceed on this claim.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal of a claim pursuant to Rule 12(b)(6), "construing the allegations in the complaint in the light most favorable to the non-moving party and giving that party the benefit of reasonable inferences from those allegations." *Bogie v. Rosenberg*, 705 F.3d 603, 608 (7th Cir. 2013) (citing *Citadel Group Ltd. v. Washington Regional Medical Center*, 692 F.3d 580, 591 (7th Cir.2012); *Reger Development v. National City Bank*, 592 F.3d 759, 763 (7th Cir.2010)). When ruling on a motion to dismiss, a district court is tasked only with considering whether the complaint sets forth a claim for relief that is plausible on its face. *Adams v. City of Indianapolis*, 742 F.3d 720, 728 (7th Cir. 2014) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

I. Plaintiffs Have Stated a Claim that the Residency Restrictions Violate the Ex Post Facto Clause

Plaintiffs contend that the Residency Restrictions violate the Ex Post Facto Clause because they impose retroactive punishment. Plaintiffs Vasquez and Cardona were convicted of their crimes in 2001 and 2004, respectively. Both have completed the sentences imposed by the criminal courts and neither has committed another offense. Both are gainfully employed and live with their families—Cardona in a home he owns and has lived in for more than 25 years and Vasquez in an apartment he rents with his wife and nine-year-old daughter.

In 2008, Illinois altered Plaintiffs' lives by amending the Residency Restrictions and making it illegal for people classified as child sex offenders to live within 500 feet of home daycares. The law applies retroactively and does not contain a grandfather clause for residences established before a daycare is opened. The new law subjects Plaintiffs and their families to a lifetime of instability. Plaintiffs now live in constant peril of being ousted from any home they establish merely as a result of someone obtaining a license to operate a home daycare nearby.[5] Indeed, Vasquez and his family have already been forced to move once due to a home daycare and now face a second eviction in five years. Likewise, the addition of home daycares to the list of prohibited locations puts large swaths of residential housing off limits to Plaintiffs. There are more than 10,000 licensed daycare providers in the state and over 2,600 in Chicago alone (see, Illinois Department of Children and Family Services Provider Index, available at: https://sunshine.dcfs.illinois.gov/Content/Licensing/Daycare/Search.aspx (last visited April 2, 2017), and there is now a 500-foot buffer zone around each of these locations. Combined with the restrictions on living within 500 feet of schools, playgrounds, and "facilit[ies] providing programs or services exclusively directed toward persons under 18 years of age," the restriction on living within 500 feet of daycares makes compliant housing increasingly scarce.

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[5] The locations of schools and playgrounds are typically known, longstanding and fixed. Thus, one can be relatively confident that a residence that is more than 500 feet from a school or playground will remain so. In contrast, any private residential property can become a home daycare. Therefore, the likelihood that an offender will be forced to move after establishing a residence at a compliant address is now much greater than at the time of Plaintiffs' convictions.

Plaintiffs should be given the opportunity to establish that these new burdens placed on their lives because of their past convictions constitute punishment. Accordingly, the District Court's dismissal of this claim should be overturned.

A. The Law Forbids the Imposition of Retroactive Punishment

The Ex Post Facto Clause of Article I, §9, cl.3 of the Constitution forbids government entities from imposing retroactive punishment or retroactively increasing the punishment for a previously committed crime. *Smith v. Doe*, 538 U.S. 84, 89 (2003); see also *United States v. Couch*, 28 F.3d 711, 714 (7th Cir. 1994) ("The purpose of the Ex Post Facto Clause is to prohibit a law that criminalizes or increases punishment" for conduct after its commission.)

The Supreme Court has observed that ex post facto laws are "condemned by the universal sentence of civilized man" as "manifestly unjust and oppressive." *Carmell v. Texas*, 529 U.S. 513, 532 (2000). The Ex Post Facto Clause is intended to address two problems with retroactive laws—lack of fair notice and vindictive lawmaking. *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). First, the Court has observed that retroactivity is dangerous because it gives the legislature "unmatched powers ... to sweep away settled expectations suddenly and without individualized consideration." *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). The Ex Post Facto Clause "assure[s] that legislative Acts give fair warning of their effect." *Graham*, 450 U.S. at 28-29. Second, the Ex Post Facto Clause "restricts governmental power by restraining arbitrary and potentially vindictive legislation."

Id. at 29. The Court noted that legislators' "responsivity to political pressures poses a risk that [they] may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 266.

As the Sixth Circuit recently noted in *Does 1-5 v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016), a case finding unconstitutional Michigan's legal scheme regulating the residency and presence of individuals classified as sex offenders, it is particularly vital for courts to uphold the principles underlying the prohibition on retroactive punishments where, as here, public sentiment may favor the passage of excessively punitive laws against a despised group of people.

> [T]he fact that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the Ex Post Facto clause. As the founders rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government ... to punish people without prior notice. Such lawmaking has 'been, in all ages, [a] favorite and most formidable instrument[] of tyranny.'

Id. at 705-06 (quoting The Federalist No. 84 at 444 (Alexander Hamilton)).

B. The District Court's Reliance on *U.S. v. Leach* Is Misplaced

The District Court relied primarily on *U.S. v. Leach,* 639 F.3d 769 (7th Cir. 2011) for its determination that the Residency Restrictions do not violate the Ex Post Facto Clause. Dkt. 43 at 10–11. Specifically, the Court concluded that the residency restrictions are not "retrospective" because they do not impose punishments for prior conduct but rather create "new, prospective legal obligations based on the person's prior history." *Id*. at 10 (citing *Leach*, 639 F.3d 773). The

District Court found this conclusion to be dispositive of Plaintiffs' Ex Post Facto claim and undertook no further analysis. *Id*.

The District Court's interpretation of *Leach* is seriously flawed. In *Leach*, this Court considered the constitutionality of the federal Sex Offender Registration and Notification Act (SORNA), which requires individuals deemed sex offenders to register their change of address with state authorities when they move across state lines. 639 F.3d at 771–72. This Court observed in *Leach* that an individual challenging a "civil regulatory scheme" such as SORNA could show the scheme violates the Ex Post Facto Clause in two ways: (1) by showing that the criminal penalties imposed under the scheme are retroactive; *or* (2) by showing that the regulations imposed under the scheme constitute punishment. *Id*. at 772. ("Logically there are only two conceivable ways in which one might argue that an ex post facto violation arises under SORNA: either Leach could contend that the criminal penalties under 18 U.S.C. §2250(a) are retroactive, or he could assert that the registration requirements under 42 U.S.C. §16913 constitute punishment.")

In applying *Leach* to the present case, the District Court erred because it stopped after the first method of establishing a violation of the Ex Post Facto Clause—*i.e*., the District Court ruled that because penalties for violation of the Residency Restrictions are not retroactive (that is, a person who lived within 500 feet of a home daycare before the enactment would not be punished for having done so), the statute cannot be said to violate the Ex Post Facto Clause. The District Court did not consider whether Plaintiffs have stated a claim under the second

method—*i.e.*, that the burdens imposed on Plaintiffs under the Residency Restrictions amount to punishment.

As set forth in the Complaint (and detailed in §I(C) below), Plaintiffs contend that the onerous, lifelong burdens that the Residency Restrictions impose on where they can live and whether they can establish stable homes amount to punishment. The District Court did not analyze whether Plaintiffs' Complaint alleged sufficient facts to support this claim and did not properly apply Supreme Court precedent. Accordingly, the District Court's decision to dismiss Plaintiffs' Ex Post Facto count based on *Leach* was in error and should be reversed.

C. The Residency Restrictions Impose Punishment

The Supreme Court has articulated several factors to assist courts in evaluating whether a statute imposes punishment—namely, whether the statute (1) imposes what has been regarded in our history and traditions as a punishment; (2) imposes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) has a rational connection to a nonpunitive purpose; or (5) is excessive with respect to that purpose. *Smith v. Doe*, 538 U.S. at 97; *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-69. These factors are "neither exhaustive nor dispositive but are "useful guideposts." *Smith* at 97 (internal citations omitted).

The District Court did not undertake any analysis of these factors or consider whether the Residency Restrictions should be considered retroactive punishment. As shown below, each of the *Mendoza-Martinez* factors, upon analysis, supports Plaintiffs' ex post facto claim.

1. The Statute Imposes What Traditionally Has Been Regarded as Punishment

As the Sixth Circuit observed in *Snyder*, a regulation that does not have "direct ancestors in our history and traditions" may still be regarded as an ex post facto enactment if its restrictions meet the "general definition of punishment." *Snyder*, 834 F.3d at 703. The Court noted:

> [SORA's restrictions] meet the general, and widely accepted, definition of punishment offered by legal philosopher H.L.A. Hart: (1) it involves pain or other consequences typically considered unpleasant; (2) it follows from an offense against legal rules; (3) it applies to the actual (or supposed) offender; (4) it is intentionally administered by people other than the offender; and (5) it is imposed and administered by an authority constituted by a legal system against which the offense was committed.

Id. at 701 (citing H.L.A. Hart, Punishment and Responsibility, 4-5 (1968)).

The Residency Restrictions at issue here meet all of these criteria. Being restricted in where one can live and never again being able to establish a secure and stable residence is a consequence that anyone would regard as "unpleasant." The Residency Restrictions apply to former offenders based solely on their history of having been convicted of certain crimes. Moreover, the Residency Restrictions are part of the criminal code and are enforced by police and states attorneys. Thus, they meet the "general definition of punishment." *Id.* at 703.

Likewise, the Residency Restrictions, like the restrictions considered in *Snyder*, "resemble in some respects at least, the ancient punishment of banishment." *Id*. That is, although the Residency Restrictions do not absolutely prohibit people classified as child sex offenders from living in the state, the

restrictions on where Plaintiffs can live are onerous, particularly because the restricted zones are constantly changing.[6] Thus, the first *Mendoza-Martinez* factor weighs in Plaintiffs' favor.

2. The Statute Imposes Affirmative Disabilities and Restraints

Courts have repeatedly found that restrictions on where an individual can reside constitute an affirmative restraint. For example, the Sixth Circuit, finding that Michigan's sex offender regulations imposed an affirmative disability and restraint, wrote that "regulation of where registrants may live, work, and loiter ... put significant restraints on how registrants may live their lives." *Snyder* at 703. Likewise, the Oklahoma Supreme Court found that a restriction prohibiting offenders from residing "within a two-thousand-foot radius" of schools, parks and daycare facilities "impose[d] substantial disabilities" and therefore had "a punitive effect." *Starkey v. Oklahoma Dept. of Corrections*, 305 P.3d 1004, 1023-25 (Okla. 2013). And in *Commonwealth v. Baker*, 295 S.W.3d 437, 445 (Ky. 2009), the Kentucky Supreme Court wrote: "We find it difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative

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[6] Plaintiffs have not been afforded an opportunity to bring forth evidence concerning the housing that is off limits to people classified as child sex offenders and the difficulties that the Residency Restrictions pose to those looking for housing. If permitted to go forward with discovery, Plaintiffs anticipate creating maps demonstrating how onerous the Residency Restrictions are. Moreover, Plaintiffs and others subject to the restrictions will testify to the difficulty of locating a compliant residence under the restrictions. See, *e.g.*, Dkt. 1, ¶29 (describing Vasquez's inability to find compliant housing).

disability or restraint." See also *In Re Taylor*, 60 Cal.4th 1019, 1038-39 (Cal. 2015).[7] Accordingly, the second *Mendoza-Martinez* factor also weighs in Plaintiffs' favor.

3. The Residency Restrictions Promote the Traditional Aims of Punishment

The Residency Restrictions were enacted to promote all of the traditional aims of punishment, including incapacitation, retribution and deterrence. In particular, the statute seeks to advance the goal of incapacitation by keeping people deemed child sex offenders away from locations where they would potentially encounter children. The statute advances the aim of retribution because the restrictions are imposed solely on the basis of a person's having been convicted of a particular crime (rather than any current assessment of whether the individual poses a danger). The statute also serves the purpose of deterrence in two ways. First, it seeks to keep former offenders away from opportunities to commit future crimes. And second, the burdensome, long-lasting restrictions imposed on people deemed sex offenders serve as a general deterrent against crime. See discussion in *Snyder*, 834 F. 3d at 704 (citing J.J. Prescott & Jonah E. Rockoff, Do Sex offender Registration and Notification Laws Affect Criminal Behavior?, 54 J.L. & Econ. 161 (2011)). This factor, too, weighs in favor of a determination that the Residency Restrictions impose punishment.

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[7] In *Smith v. Doe*, 538 U.S. 84 (2003), the Supreme Court found that an Alaska statute that required certain sex offenders to register with the state annually imposed only "minor and indirect" burdens on individuals subject to its requirements and thus did not constitute ex post facto punishment. *Id*. at 100. Important to the Court's determination that the Alaska statute did not impose "affirmative disabilities or restraints" was the fact that—unlike here—"offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens." *Id*. at 101.

4. The Residency Restrictions Are Excessive with Respect to their Non-Punitive Purpose

The Supreme Court has stated that whether the challenged statute has a "rational connection to a nonpunitive purpose is a most significant factor" in an assessment of whether it is punitive. *Smith*, 538 U.S. at 102. Here, the Residency Restrictions should be considered excessive in relation to any legitimate public safety goals for two reasons. First, the onerous restrictions on where Plaintiffs and others deemed child sex offenders can live are imposed without any individualized consideration of whether a particular person poses a present risk to the community. Second, the state has imposed these harsh restrictions in the absence of any evidence that they actually advance public safety or protect children.

Courts have repeatedly found that where, as here, a burdensome restriction is imposed based solely on a person's having been convicted of a particular crime and not on any assessment of whether the person poses a present danger to the public, the regulation should be regarded as excessive in relation to its legitimate goals and therefore punitive. See, e.g., *Snyder*, 834 F.3d at 705 ("A regulatory regime that severely restricts where people can live, work, and 'loiter,' [and] that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, ... imposes punishment."); *State v. Williams*, 952 N.E.2d 1108, 1112 (Ohio 2011) (finding that the burdens imposed under a sex offender registration scheme violated the ex post facto clause in the absence of an individualized finding of dangerousness); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (registration "without regard to ... particular future risk"

violates ex post facto); *Starkey*, 305 P.3d at 1030 (because the law's "many obligations impose a severe restraint on liberty without a determination of the threat a particular registrant poses to public safety," it was excessive in relation to non-punitive purpose); *State v. Pollard*, 908 N.E.2d 1145, 1153 (Ind. 2009) (statute exceeded its non-punitive purpose because it restricted residency "without considering whether particular offender is a danger"). Here, it is undisputed that by the very terms of the statute, the Residency Restrictions are imposed based solely on the fact that the individual had been convicted of a particular crime in the past without undertaking any assessment of present dangerousness. Thus, the Residency Restrictions should be viewed as excessive in relation to their public safety goals.

Moreover, the Residency Restrictions should be seen as excessive in relation to any non-punitive public safety goals because they are imposed in the absence of any evidence that such restrictions actually improve public safety. In *Snyder*, the Court noted numerous empirical studies calling into question the effectiveness and rationality of such laws and suggesting that restrictive laws regulating sex offenders may actually disserve public safety by "exacerbat[ing] risk factors for recidivism by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities." *Snyder*, at 704-05 (citing Lawrence A. Greenfield, Recidivism of Sex Offenders Released from Prison in 1994 (2003); J.J.

Prescott & Jonah E. Rockoff, *Do Sex offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161 (2011)).[8]

Accordingly, the fourth and fifth *Mendoza-Martinez* factors also weigh in Plaintiffs' favor. In sum, Plaintiffs have stated a claim that the Residency Restrictions violate the Ex Post Facto Clause and the District Court's decision to dismiss this claim should be reversed.

II. Plaintiffs Have Stated a Claim that the Statute Violates the Fifth Amendment Takings Clause

In Count II of their Complaint, Plaintiffs allege that the Residency Restrictions violate the Fifth Amendment prohibition against government takings without just compensation. As the Supreme Court recognized in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005), a government regulation that falls short of a "direct appropriation or ouster" may still violate the takings clause if it is "so

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[8] A great deal of recent scholarship and journalism has been devoted to debunking the often-repeated claim from *Smith v. Doe* that recidivism rates among sex offenders are "frightening and high" such that severe residency and presence restrictions are justified. See, *e.g.*, Adam Liptak, *Did the Supreme Court Base a Ruling on a Myth?*, N.Y. Times, March 6, 2017 ("there is vanishingly little evidence for the Supreme Court's assertion that convicted sex offenders commit new offenses at very high rates."); Melissa Hamilton, *Briefing The Supreme Court: Promoting Science Or Myth?*, Emory L.J., Forthcoming 2017 ("[P]olicies that target sex offenders which are not based on some empirical reality are unlikely to be effective. ... It is not clear if the states' legal representatives were merely naïve and uneducated .... The alternative that they are intentionally misleading the Supreme Court on the risks of sex offenders as a group would be regrettable for ethical and political reasons."); Radley Balko, *The Big Lie About Sex Offenders*, Washington Post, March 9, 2017 ("Much of the destructive, extra-punishment punishment we inflict on sex offenders is due to the widely held belief that they're more likely to re-offend than the perpetrators of other classes of crimes. ...The problem ... is that the claim just isn't true."); Jesse Singal, *There's Literally No Evidence That Restricting Where Sex Offenders Can Live Accomplishes Anything*, N.Y. Magazine, August 2014 ("laws designed to restrict where sex offenders can live are really and truly useless, except as a means of politicians scoring easy political points by ratcheting up hysteria.")

onerous" that its effect is to substantially impair the property's beneficial economic use, taking into account the "the character of the governmental action," the "economic impact on the landowner," and the extent to which the regulation "interferes with reasonable investment-backed expectations." *Id.* (citing *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978)). The District Court dismissed Plaintiffs' Fifth Amendment claim, finding that all three factors weighed in Defendants' favor. Appx. at 16–18. As set forth below, the District Court erred, and the decision should be reversed.

A. The Government Interference with Plaintiffs' Intended Use of their Property and the Economic Burdens Imposed on Plaintiffs Support a Finding that the Ouster of Plaintiffs from their Homes Is a Regulatory Taking

The first *Penn Central* factor considers the "nature and extent" of the governmental interference with the property owner's rights. *Penn Central*, 438 U.S. at 130–31. The District Court concluded that this factor favors Defendants because the Residency Restrictions do "not entail the government physically invading or permanently appropriating any of the Plaintiffs' property for its own use" and "while the residency statute interferes with offenders' ability to continue residing at a particular property, it does not otherwise interfere with their property interests," including their ability to sell their property. Appx. at 16 (internal citations omitted). Relatedly, the Court decided that the second factor in the *Penn Central* analysis—the economic impact of the regulation—also favored Defendants because "the residency statute prevents Plaintiffs from residing in their current homes, which lowers the value of their property interests somewhat from their perspective, but

the statute leaves much of the value of Plaintiffs' property interests untouched." *Id*. at 17.

In analyzing these first two factors, the District Court erred in placing excessive emphasis on the idea that Plaintiffs were not deprived of *all* potential uses of their property. Courts have explained that a government regulation that unreasonably impairs a property owners' intended use of his property can be considered a taking even if it does not foreclose all possible uses of the property. See, *Mann v. Georgia Dept. of Corrections*, 653 S.E. 2d 740, 744 (Ga. 2007) (the residency regulation, "by prohibiting appellant from residing at the Hibiscus Court house, thus utterly impairs appellant's use of his property as the home he shares with his wife.") (citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980) (holding that relevant inquiry is whether the owners' intended use of its property as a shopping center was unreasonably impaired, not whether the owner was deprived of all use of the property)).

In *Mann*, the Georgia Supreme Court struck down a regulatory scheme very similar to that at issue here. The *Mann* Court determined that a statute under which sex offenders could be forced to vacate their homes if a "child care facility, church, school or area where minors congregate" opened within 1,000 feet of the residence violated the Takings Clause. *Id*. at 741. The court concluded that forcing an individual to vacate a home that he had purchased solely for use as his primary residence is "functionally equivalent to the classic taking," notwithstanding the fact

that the ousted property owner could sell or lease the property. *Id*. at 744 (citing *Lingle*, 544 U.S. at 539).

The reasoning of *Mann* is persuasive here. Put simply, the mere fact that Plaintiffs would theoretically retain some economically beneficial use of their property does not mean that the Residency Restrictions do not affect a taking. The facts set forth in Plaintiffs' Complaint demonstrate that the District Court's conclusion that the Plaintiffs will retain useful property rights after being ousted from living in their homes is a fiction. With regard to Plaintiff Cardona, he cannot sell his home because it is where his elderly mother who has lung cancer currently lives and has resided for decades. If he is forced to leave his home, he will have to incur the cost of moving and paying for housing elsewhere while continuing to pay for a house at which he can no longer reside. With regard to Plaintiff Vasquez, who rents his apartment,[9] the District Court's assumption that he retains any economically beneficial use of his lease assumes that Vasquez can sublease his property or transfer his leasehold to someone else (facts that are not found anywhere in the record). It also ignores the fact that Vasquez and his family will incur costs related to early termination of their lease, will be forced to uproot their

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[9] The Supreme Court has long held that citizens have a protectable property interest in occupying leased property with which the government cannot unreasonably interfere without just compensation. See *Brown v. Legal Foundation of Wash*., 538 U.S. 216, 233 (2003) ("compensation is mandated when a leasehold is taken"); *United States v. Petty Motor Co*., 327 U.S. 372, 374 (1946) (the United States government could be held liable to tenants for its temporary "taking of their leaseholds"); *Ward v. Downtown Development Authority*, 786 F.2d 1526 (11th Cir. 1986) ("any tenancy, no matter the duration, is a property interest that can be the subject of a compensable taking.")

young daughter for the second time in five years, and will incur moving expenses that they are ill equipped to afford.

Moreover, the District Court erred in reaching the conclusion that forcing Plaintiffs to move out of their homes is a reasonable "adjust[ment] of economic burdens" to promote "the legitimate and important public interest of protecting children from convicted child sex offenders." Appx. at 16–17. As set forth above, there is a large body of evidence showing that restrictions on where people deemed sex offenders can live does not meaningfully advance public safety or prevent sex offenses against children, particularly where, as here, the people being forced out of their homes have lived in their communities without re-offending for more than ten years. See discussion in §I(C), *supra.*

In short, the District Court acted prematurely in deciding without the benefit of a factual record that the first two *Penn Central* factors favor Defendants.

B. The Residency Restrictions Deprive Plaintiffs of their Reasonable, Investment-Backed Expectations

The third *Penn Central* factor examines "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. The District Court concluded that this factor favored Defendants because "when Plaintiffs acquired the property interests in question, they were on notice that future events—the opening of a school or day care, for example—could

require them to move" and thus Plaintiffs cannot have a reasonable expectation that they will be able to use *any* residence as their residence. Appx. at 18.[10]

The District Court erred in analyzing this factor. Plaintiffs and others subject to the Residency Restrictions must live somewhere, and when the Plaintiffs established their current homes they relied on the Chicago Police Department's representation that the locations complied with the Residency Restrictions. Ousting Plaintiffs from their homes due to a subsequent opening of a prohibited facility interferes with Plaintiffs' reasonable expectations that they could use their property as their residence. In *Mann*, the Court analyzed this factor and concluded that a statute that operates to interference with an individual's intended use of his property as his residence amounts to a taking for which just compensation is required. The Court reasoned as follows:

> [The residency regulation] looms over every location appellant chooses to call home, with its on-going potential to force appellant from each new residence whenever, within that statutory 1,000-foot buffer zone, some third party chooses to establish any of the long list of places and facilities encompassed within the residency restriction. While this time it was a day care center, next time it could be a playground, a school bus stop, a skating rink or a church. [The regulation] does not merely interfere with, it positively precludes appellant from having any reasonable investment-backed expectation in any property purchased as his private residence.

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[10] It should not go unnoticed that the District Court's acknowledgment that the Residency Restrictions permanently deprive Plaintiffs of the ability to ever have a reasonable expectation that they will be able to maintain stable housing supports the claim that the Residency Restrictions are properly viewed as imposing ex post facto punishment.

Id. at 744. Here, as in *Mann*, enforcement of the residency regulation against Plaintiffs amounts to a taking of their property. The District Court erred in dismissing Plaintiffs' Fifth Amendment claim.

III. Plaintiffs Have Stated a Claim that the Statute Violates Plaintiffs' Right to Procedural Due Process

In their third count, Plaintiffs claim that the Residency Restrictions violate their right to procedural due process because the restrictions operate to deprive Plaintiffs of liberty and property interests without any hearing to determine whether they pose a current risk to the community. The Supreme Court explained in *Mathews v. Eldridge*, 424 U.S. 319 (1976) that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests ... This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Id*. at 333 (citing *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974); *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931) and *Dent v. West Virginia*, 129 U. S. 114, 124-125 (1889)). The Court went on to explain that "identification of the specific dictates of due process generally requires consideration of ... the private interest that will be affected by the official action; ... the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest ...." *Id*. at 335.

Here, both Plaintiffs have a protectable liberty interest in choosing where and with whom they live and a fundamental right to arrange their family affairs as

they see fit, including, in Plaintiff Vasquez's case, a fundamental right to maintain a custodial parental relationship with his daughter. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.") If the Plaintiffs are forced to move, they will be separated from their families, denied the right to live with family members of their choosing and deprived of their property without having received any hearing to determine whether there is a scintilla of evidence that their living within 500 feet of a daycare poses a risk to children in the community.

The District Court found the Supreme Court decision in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003) dispositive of Plaintiffs' procedural due process claim. Appx. at 8–9. In *Doe*, the Supreme Court found constitutional Connecticut's sex offender registry, which "enabled citizens to obtain the name, address, photograph, and description of any registered sex offender by entering a zip code or town name." *Id.* at 5. Connecticut's registration scheme, like the Residency Restrictions at issue here, applied to people deemed sex offenders based solely on their having been convicted of a specific crime in the past. *Id.* The Court concluded that individuals were not entitled to a hearing concerning whether they pose a current threat to the community before being required to register "because due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme." *Id.* at 4. In reaching that decision, the Court noted that "injury to reputation" does not constitute "deprivation of a liberty

interest" under established law. *Id.* at 6–7. Moreover, the Court observed that the Connecticut registration scheme merely served to make truthful information that was already a matter of public record "more easily available and accessible" to citizens and did not impose any other burdens on registrants. *Id.* at 7.

Plaintiffs acknowledge that Courts have extended the reasoning of *Doe* to due process challenges to other laws regulating the lives of people deemed sex offenders. See, *e.g.*, *Doe v. Miller,* 405 F.3d 700 (8th Cir. 2005) (residency restrictions); *Coleman v. Dretke*, 395 F.3d 216 (5th Cir. 2004) (requirement that offender undergo therapy). However, Plaintiffs contend that extending *Doe* to the present case cannot be squared with *Mathews v. Eldridge*, in which the Supreme Court unequivocally held that an individual cannot be deprived of property rights without first being afforded a hearing. The rights interfered with under the statute at issue are fundamentally different from those at issue in *Doe*. *Doe* concerned only a requirement that a person be listed on a searchable registry which contained true information and was accompanied by an explicit disclaimer that "officials have not determined that any registrant is currently dangerous." *Id.* at 4. Here, the statute interferes with core rights, including parental consortium and property rights. Dkt. 1 at ¶46–52. Given the fundamental nature of the rights at stake here, people should be entitled to a hearing before being deprived of those rights. Accordingly, Plaintiffs respectfully request that this Court reverse the decision of the District Court to dismiss their procedural due process claim.

IV. Plaintiffs Have Stated a Claim that the Statute Violates Plaintiffs' Right to Substantive Due Process

In their fourth count, Plaintiffs claim that the Residency Restrictions violate their right to substantive due process because the regulations are not rationally related to a legitimate government objective.

As set forth in Plaintiffs' Complaint and discussed in §I(C) above, there is scant evidence supporting the ostensible public safety rationales for the Residency Restrictions and many reasons to believe that the regulations actually run counter to their purported public safety purpose. See, *Snyder*, 834 F.3d at 705 ("Tellingly, nothing the parties have pointed to in the record suggests that the residential restrictions have any beneficial effect on recidivism rates.") At a minimum, the evidence suggests that the harsh burdens imposed on people classified as child sex offenders are highly disproportionate to any public safety benefit they provide, particularly where, as here, they are applied to individuals who have not reoffended for over a decade. See Complaint, Dkt. 1 at ¶¶55–63. The District Court acknowledged that there are many reasons to question the wisdom of the Residency Restrictions, writing as follows:

> Plaintiffs as well as the California Supreme Court [in *In Re Taylor*] and the Sixth Circuit [in *Snyder*] point out potentially persuasive reasons why the residency statute might be overly broad or not particularly effective. It has serious collateral effects on non-sex offenders (like Plaintiffs' family members). It makes it potentially difficult for a child sex offender to find a home, and it creates a risk that an offender who complies with the statute initially will be forced to later vacate his or her home due to the opening of a day care or other facility. This imposes potentially onerous costs on offenders and their families to break leases, sell homes, change schools, and periodically uproot their lives. The statute may contribute to increased

> homelessness, imposing a further strain on social services. It may undermine efforts of some offenders to reintegrate into the community as productive citizens. Finally, the residency statute may have all of these negative effects without providing much in terms of increased protection for children.

Appx at 14. Nonetheless, the District Court concluded that the regulations pass rational basis review because "it is at least conceivable that creating some distance between a child sex offender's home and places where children congregate could increase the protection for at least some children." *Id*. This decision was in error and should be reversed.

While lawmakers have broad latitude to legislate in the public interest, their discretion is not unlimited. Where, as here, a law disadvantages a politically unpopular group, it can only be upheld if it "is rationally related to a legitimate governmental interest." *USDA v. Moreno*, 413 U.S. 528, 533 (1973). The Supreme Court has held that a law fails rational basis review when the evidence supporting the government's purported interest is scant or contradicted by other evidence. See *Moreno*, 413 U.S. at 356-58 (Denial of food stamps to households comprised of non-relatives violated due process because evidence suggested a legislative animus toward "hippie communes" seeking food stamp benefits.); *Plyler v. Doe*, 457 U.S. 202, 228 (1982) (interest served by excluding undocumented children from schools was contradicted by other evidence and therefore irrational). The Supreme Court has also aggressively scrutinized the rationality of legislation where, as here, the burdens imposed on a disfavored class of persons are severe and disproportionate to their intended purpose. See *U.S. v. Windsor*, 133 S. Ct. 2675, 2693, 2696 (2013)

(without invoking heightened scrutiny, striking down federal Defense of Marriage Act on due process grounds notwithstanding "Congress['s] great authority to design laws to fit its own conception of sound national policy").

In this case, the risk of irrationally punitive legislation is great, and judicial review serves as an essential check on lawmakers' misuse of their discretion. People who have committed sex crimes, and particularly those who have offended against children, are condemned and reviled. From a political standpoint, there is no incentive for legislators to respect these individual's constitutional rights and much to be gained from passing increasingly harsh restrictions further excluding this population from public life. A mere veneer of "public safety" concerns cannot suffice to justify an irrational law that has a punitive effect on a despised population without delivering any corresponding benefit. See, *Windsor*, 133 S. Ct. at 2695–96 ("DOMA singles out a class of persons [and] imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. ... The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure...") Given the evidence that shows the ineffectiveness and irrationality of residency restrictions, Plaintiffs should be permitted to proceed with this claim. Accordingly, the District Court decision to dismiss Plaintiffs' substantive due process count on a Rule 12(b)(6) motion without any factual record was in error.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court reverse the decision dismissing all of Plaintiffs' claims with prejudice and remand the case to the District Court for discovery.

Respectfully submitted,

/s/ Adele D. Nicholas
/s/ Mark G. Weinberg
Counsel for Plaintiff-Appellant

Law Office of Mark G. Weinberg
3612 N. Tripp Ave.
Chicago, IL 60641
(773) 283-3913

Law Office of Adele D. Nicholas
5707 W. Goodman Street
Chicago, Illinois 60630
847-361-3869

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Fed. R. App. Pro. 34(a) Plaintiff-Appellant requests oral argument. The Court's consideration of the issues presented by this appeal would be advanced by the presence of the parties before the Court to comment upon the constitutionality of the challenged statute and respond to inquiries by the Court.

/s/ Adele D. Nicholas

CERTIFICATE OF SERVICE

I certify that on April 6, 2017, I electronically filed the foregoing **Plaintiffs-Appellants Brief** with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Adele D. Nicholas

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the foregoing Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,285 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac Version 2011 in 12 point Century Schoolbook font.

/s/ Adele D. Nicholas

CIRCUIT RULE 30(d) CERTIFICATE

Pursuant to Circuit Rule 30(d), the undersigned counsel certifies that all materials required by Circuit Rule 30(a) and (b) are included in the Appendix.

/s/ Adele D. Nicholas

No. 17-1061

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOSHUA VASQUEZ and MIGUEL CARDONA,	)	
Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Northern District of Illinois
v.	)	
	)	District Court No. 16 C 8854
CITY OF CHICAGO, et al.,	)	
	)	Hon. Amy J. St. Eve,
Defendants-Appellees.	)	Judge Presiding

PLAINTIFFS-APPELLANTS APPENDIX

IN THEUNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSHUA VASQUEZ and MIGUEL CARDONA,	)	
Plaintiffs,	)	No. 16-cv-8854
v.	)	Hon. Amy J. St. Eve
KIMBERLY M. FOXX, in her official capacity as the State's Attorney of Cook County, and the CITY OF CHICAGO, a municipal corporation,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

Defendants Kimberly M. Foxx,[1] in her official capacity as the State's Attorney of Cook County (the "State's Attorney"), and the City of Chicago (the "City") have moved to dismiss Plaintiffs Joshua Vasquez ("Vasquez") and Miguel Cardona's ("Cardona") complaint, (R. 23, 26), in which they allege violations of 42 U.S.C. § 1983, (R. 1). For the following reasons, the Court grants Defendants' motions.

BACKGROUND[2]

I. Facts

Plaintiffs challenge the constitutionality and enforcement procedures of 720 Ill. Comp.

[1] One of the original defendants in this case was Anita Alvarez. Kimberly Foxx replaced her as State's Attorney on December 1, 2016. (R. 41, State's Attorney Reply, at 1 n.1.) Under Federal Rule of Civil Procedure 25(d)(1), Kimberly Foxx has replaced Anita Alvarez as a defendant in this case.

[2] The facts presented in the Background are taken from the complaint and are presumed true for the purpose of resolving the pending motion to dismiss under Rule 12(b)(6). *See Teamsters Local Union No. 705 v. Burlington N. Santa Fe, LLC*, 741 F.3d 819, 823 (7th Cir. 2014); *Alam v. Miller Brewing Co.*, 709 F.3d 662, 665–66 (7th Cir. 2013); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Stat. 5/11-9.3(b-10) ("the residency statute"), an Illinois law that generally prohibits "child sex offender[s]" from "knowingly resid[ing] within 500 feet of a playground, child care institution, day care center, part day child care facility, day care home, group day care home, or a facility providing programs or services exclusively directed toward persons under 18 years of age." (R. 1.). Both Plaintiffs are Chicago residents and are subject to the residency statute because Vasquez was convicted of one count of possession of child pornography in 2001 and Cardona was convicted of indecent solicitation of a child in 2004. (*Id.* at ¶¶ 7–8, 22, 35.) Certain exceptions to the residency statute exist, but they do not apply in this case.[3]

For the last three years, Vasquez has resided in an apartment with his wife and their nine-year-old daughter. (*Id.* at ¶ 24.) They rent the apartment and have a one-year lease that ends on August 19, 2017. (*Id.*) When Vasquez and his family decided to move there, the Chicago Police Department ("CPD") confirmed that it complied with the residency statute. (*Id.* at ¶ 26.) Although there has been a home day care 550 feet from Vasquez's residence since he and his family began living there, "no problems" have arisen. (*Id.* at ¶ 31.)

On August 25, 2016, Vasquez went to CPD headquarters to complete an annual sex offender registration requirement. (*Id.* at ¶ 27.) Upon completing his registration, a CPD officer gave him a notification form indicating that a home daycare had opened 480 feet from his residence and that if he failed to move by September 24, 2016, he could be arrested and prosecuted. (*Id.* at ¶ 28.) Providing this notification was consistent with the CPD's policy of "giv[ing] people classified as child sex offenders 30 days to move from their residence" when

[3] One such exception is that that "[n]othing . . . prohibits a child sex offender from residing within 500 feet of a day care home or group day care home if the property is owned by the child sex offender and was purchased before August 14, 2008." 720 Ill. Comp. Stat. 5/11-9.3(b-10). It does not apply to Plaintiffs because Vasquez rents his home and Cardona did not own his home until 2010. (R. 1 at ¶¶ 24, 38; R. 4, Pls.' Mot. Emergency Injunctive Relief, at 6.)

they are notified that they are out of compliance with the residency statute. (*Id.* at ¶ 2.) This was the second time in the past five years that Vasquez has received such a notification. (*Id.* at ¶ 32.) In 2013, Vasquez and his family moved because someone obtained a daycare license within 500 feet of his apartment. (*Id.*)

Vasquez alleges that he has searched for suitable, affordable housing that complies with Illinois law, but has been unsuccessful. (*Id.* at ¶ 29.) He says that if he is "forced to vacate his home by September 24, he will be homeless and will be separated from his wife and daughter." (*Id.*) Vasquez and his wife, in selecting their current apartment, took care to remain in the same neighborhood in which they had previously resided so their daughter would not have to change elementary schools. (*Id.* at ¶ 33.) "If Vasquez's family has to move from their home, his daughter's schooling will be disrupted if they cannot find a compliant address within the same school district." (*Id.* at ¶ 34.)

Cardona lives with his mother in a home in Chicago that he has owned since 2010 and lived in for about twenty-five years. (*Id.* at ¶ 38.) "Cardona is the full-time caretaker for his mother, who has lung cancer and is currently undergoing chemotherapy." (*Id.* at ¶ 37.) According to Cardona's complaint, if he is forced to move, "his mother will be left without [his] assistance," which she relies upon. (*Id.* at ¶ 43.)

Each year between 2006 and 2015 when Cardona completed his annual sex offender registration, the CPD has confirmed that his address complied with the residency statute. (*Id.* at ¶ 39.) When Cardona completed his registration in August 2016, however, the CPD provided him a notice that his address did not comply with the residency statute because of a home daycare 475 feet away from his home. (*Id.* at ¶ 41.) Cardona thus was given thirty days to vacate his home. (*Id.* at ¶ 76.) "According to the website for the Illinois Department of Children

and Family Services," there had been a group daycare home at the location referenced by the CPD since 2014. (*Id.* at ¶ 45.) It is unclear why the CPD did not inform Cardona that his residence did not comply with the residency statute until 2016.

II. Procedural History

Plaintiffs' complaint alleges four counts of violations of 42 U.S.C. § 1983. First, Plaintiffs allege that "[t]he retroactive application of [the residency statute] violates the Ex Post Facto Clause of the U.S. Constitution, Art. I, § 10, cl. 1, because it makes more burdensome the punishment imposed for offenses committed prior to enactment of the law, and it applies retroactively," ("Count I"). (*Id.* at ¶ 81.) Second, Plaintiffs allege that "[t]he application of [the residency statute] to Plaintiffs . . . without any notice, hearing and/or determination of whether the individual affected poses a threat to the community violates the [Fourteenth] Amendment guarantee of procedural due process," ("Count II"). (*Id.* at ¶ 83.) Third, Plaintiffs allege that the residency statute deprives them of property without just compensation in violation of the Takings Clause of the Fifth Amendment ("Count III"). (*Id.* at ¶ 85.) Fourth, Plaintiffs allege that the residency statute is unconstitutional under the Fourteenth Amendment's Due Process Clause because its "prohibitions . . . are not rationally related to a legitimate state interest and thus fail rational basis review," ("Count IV"). (*Id.* at ¶ 87.) The Plaintiffs seek injunctive and declaratory relief, nominal and/or compensatory damages, and attorneys' fees and costs. (*Id.* at ¶¶ 81, 83, 85, 87.)

On September 13, 2016, Plaintiffs filed a motion for Emergency Injunctive Relief. Ultimately, the Court granted a temporary restraining order without objection, "enjoining the Defendants from forcing Plaintiffs to vacate their home and/or arresting them for violation of [the residency statute]." (R. 22.)

On September 29, 2016, Defendants filed the current motions to dismiss Plaintiffs' complaint, which the Court grants. (R. 23, 26.)

LEGAL STANDARD

"A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the viability of a complaint by arguing that it fails to state a claim upon which relief may be granted." *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736 (7th Cir. 2014). Under Rule 8(a)(2), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The short and plain statement under Rule 8(a)(2) must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* Put differently, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). In determining the sufficiency of a complaint under the plausibility standard, courts must "accept all well-pleaded facts as true and draw reasonable inferences in [a plaintiff's] favor." *Roberts v. City of Chicago*, 817 F.3d 561, 564 (7th Cir. 2016).

ANALYSIS

Defendants argue that Plaintiffs fail to state procedural due process, ex post facto, substantive due process claims, and Takings Clause claims. The Court considers the viability of those claims in turn. First, however, the Court evaluates the State's Attorney's argument that

consideration of the merits is unnecessary because the Court must abstain from hearing this case based on the *Younger* abstention doctrine.[4]

I. *Younger* Abstention

The State's Attorney argues that the Court must abstain from asserting jurisdiction over this case under the principles articulated in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. (R. 26, State's Attorney Mot. Dismiss, at 5.). "*Younger* holds that federal courts must abstain from taking jurisdiction over federal constitutional claims that may interfere with *ongoing* state proceedings." *Gakuba v. O'Brien*, 711 F.3d 751, 753 (7th Cir. 2013) (emphasis added); *see Younger*, 401 U.S. at 41 ("[W]e have concluded that the judgment of the District Court, enjoining appellant Younger from prosecuting under these California statutes, must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances."); *Sykes v. Cook Cty. Court Prob. Div.*, 837 F.3d 736, 740 (7th Cir. 2016). "It is well established that *Younger*'s concepts . . . are inapplicable 'when no state proceeding was pending . . . .'" *Vill. of DePue v. Exxon Mobil Corp.*, 537 F.3d 775, 783 (7th Cir. 2008); *see also Gakuba*, 711 F.3d at 753 (explaining that *Younger* abstention applies where there is an ongoing state proceeding); *Kurtz Invs. Ltd. v. Vill. of Hinsdale*, No. 15 C 1245, 2015 WL 4112879, at *2 (N.D. Ill. July 7, 2015) ("*Younger* abstention applies only when there is an action pending in state court against the federal plaintiff and the state is seeking to enforce the contested law in that proceeding."); *Bolton v. Bryant*, 71 F. Supp. 3d 802, 813 (N.D. Ill. 2014).

[4] The City argues that Plaintiffs fail to state a claim in Counts I–III under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978), because, according to the City, municipalities are not liable under § 1983 for "a policy of enforcing state law." (R. 24, City's Mem. Supp. Mot. Dismiss, at 4.) Because the Court concludes that Plaintiffs' claims fail on the merits, it need not consider whether Plaintiffs fail to state a *Monell* claim against the City.

The State's Attorney argues that "[t]he Seventh Circuit has recognized that when a criminal prosecution is 'imminent, then a federal court might well abstain on comity grounds—for the prosecution would offer [the defendant] an opportunity to present its legal arguments, and states are entitled to insist that their criminal courts resolve the entire dispute." (R. 26 at 5 (alteration in original) (quoting *520 S. Mich. Ave. Assocs. Ltd. v. Devine*, 433 F.3d 961, 963 (7th Cir. 2006)).) This argument is unavailing. As discussed above, the Seventh Circuit has said that *Younger* applies when there is an ongoing state proceeding, which there is not in the current case. *See also Sykes*, 837 F.3d at 740–41; *Pindak v. Dart*, No. 10 C 6237, 2011 WL 4337017, at *5 (N.D. Ill. Sept. 14, 2011) ("Because there is no ongoing state proceeding involving Plaintiff, *Younger* abstention is inapplicable here."). Moreover, the Seventh Circuit has explained that the language the State's Attorney cites from *Devine* is "dicta." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012). In *ACLU of Illinois*, the State's Attorney made an argument similar to one she makes here. *Id.* The Seventh Circuit rejected that argument, explaining that by the State's Attorney's logic, "*Younger* precludes all federal preenforcement challenges to state laws," which was "obviously not right." *Id.*[5]

Plaintiffs also have standing to bring a preenforcement challenge. "It is well established that 'preenforcement challenges . . . are within Article III." *Id.* at 590 (alteration in original) (quoting *Brandt v. Vill. of Winnetka*, 612 F.3d 647, 649 (7th Cir. 2010))). "To satisfy the injury-in-fact requirement in a preenforcement action, the plaintiff must show 'an intention to engage in

[5] The State's Attorney also argues that the Court should abstain because the Supreme Court "has long disfavored the concept of enjoining future State court criminal prosecutions." (R. 26 at 6.) The State's Attorney points to, among other cases, *Wooley v. Maynard*, 430 U.S. 705, 711–12 (1977), where the Supreme Court considered whether enjoining the enforcement of a state statute was appropriate or whether the district court was limited to granting declaratory relief. (*Id.* at 6–7.) Here, Plaintiffs seek declaratory as well as injunctive relief. Thus, even if the State's Attorney were correct that injunctive relief were not appropriate, abstaining at this stage of the litigation is not required. Indeed, in a case in which the ACLU brought a preenforcement challenge to an Illinois criminal law seeking injunctive and declaratory relief, the Seventh Circuit held that *Younger* did not apply and that the ACLU had standing. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 586, 590–94 (7th Cir. 2012).

a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder.'" *Id.* at 590–91 (alteration in original) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)); *see also Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 750 (N.D. Ill. 2015). Here, the CPD threatened enforcement against the Plaintiffs if they did not vacate their homes within a given time period. Plaintiffs seek to determine whether the state law requiring them to vacate their homes is constitutional before they either abandon their homes or risk serious criminal penalties. Plaintiffs therefore have standing to bring this preenforcement action.

Because Plaintiffs have standing to bring this preenforcement action and *Younger* abstention is not appropriate, the Court proceeds to the merits of Plaintiffs' claims.

II. Procedural Due Process

Plaintiffs allege that the residency statute violates their rights to procedural due process because "[p]rior to applying the residency restrictions . . . or forcing an individual to move from his home, neither the City nor the state provides any hearing or other procedure to determine whether the individual affected poses a threat to the community." (R. 1 at ¶ 50.) By failing to provide such a hearing, Plaintiffs contend, "the Defendants arbitrarily restrict Plaintiffs' and others' fundamental right to familial consortium and their right to choose where and with whom they reside." (*Id.*) Plaintiffs' claim does not succeed.

"[D]ue process does not entitle [an individual] to a hearing to establish a fact that is not material under the [relevant] statute." *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003); *see also, e.g.*, *Universal City Studios LLLP v. Peters*, 402 F.3d 1238, 1244 (D.C. Cir. 2005) (Roberts, J.); *People v. Leroy*, 828 N.E.2d 769, 778 (Ill. App. Ct. 2005) (considering a previous version of the residency statute). In *Connecticut Department of Public Safety v. Doe*, a convicted

sex offender challenged a law requiring a state agency to publicly disclose on the Internet a sex offender registry. 538 U.S. at 4–6. The Supreme Court rejected the offender's procedural due process argument that he was entitled to a hearing to determine if he was likely to be currently dangerous because a finding related to current dangerousness was not a relevant consideration under the relevant statute. *Id.* at 4, 7. In short, the Supreme Court explained, it would not matter "if [he] could prove that he is not likely to be currently dangerous" because "Connecticut has decided that the registry information of *all* sex offenders—currently dangerous or not—must be publicly disclosed." *Id.* (emphasis in original).

In the current case, the question of whether a person currently "poses a threat to the community" is irrelevant to the residency statute's applicability. Thus, Plaintiffs' procedural due process claim fails. The question remains, however, whether Plaintiffs have a viable substantive due process claim—an issue that the Court considers later. *See id.* at 8.

III. Ex Post Facto

Plaintiffs argue that the residency statute violates the Ex Post Facto Clause of the Constitution because it applies to them retroactively and "cross[es] the line from a regulatory scheme into the realm of punishment." (R. 32, Pls.' Response to State's Attorney Mot., at 8; R. 1 at ¶ 17). The Court rejects this argument.

The Ex Post Facto Clause "prohibits 'the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred.'" *United States v. Diggs*, 768 F.3d 643, 645 (7th Cir. 2014) (quoting *Weaver v. Graham*, 450 U.S. 24, 30 (1981)); *see* U.S. Const. art. I, § 9, cl. 3; *Peugh v. United States*, 133 S. Ct. 2072, 2081 (2013). "To violate the Ex Post Facto Clause, . . . a law must be both retrospective *and* penal." *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011). Here, Plaintiffs were convicted of their crimes before the Illinois

legislature amended the residency statute to include a prohibition on living 500 feet from a "day care home" or "group day care home." *See* Ill. Pub. Act 95-821, § 5 (2008); (R. 1 at ¶ 64 ("The residency restrictions . . . apply to people whose dates of conviction precede the effective date of the statute.")).[6] They argue that the residency statute therefore is an unconstitutional ex post facto law.

Plaintiffs are incorrect because, under Seventh Circuit precedent, the residency statute is not "retrospective." In *Leach*, the Seventh Circuit held that even though the Sex Offender Registration and Notification Act's ("SORNA") registration requirements applied to and "impose[d] significant burdens on sex offenders" convicted of a sex offense *before* SORNA's enactment, the registration requirements were not retrospective because "SORNA merely creates new, prospective legal obligations based on the person's prior history." 639 F.3d at 773. Thus, the court rejected the defendant's argument that the registration requirements retrospectively increased the punishment for his pre-SORNA conviction. *Id.* Here, it is impossible to meaningfully distinguish the residency statute, which similarly creates a "prospective legal obligation" regarding a person's residence "based on the person's prior history." *Id.* at 773; *see also, e.g.*, *Bhalerao v. Ill. Dep't of Fin. & Prof'l Regulations*, 11-CV-7558, 2012 WL 5560887, at *5 (N.D. Ill. Nov. 15, 2012) (citing *Leach* and explaining that a statute that revoked health care licenses of individuals convicted of certain offenses prior to the effective date of the statute was not retroactive); *Thompson v. State*, 603 S.E.2d 233, 235 (Ga. 2004) (explaining that a sex offender residency statute was not retrospective because it "d[id] not alter the consequences for the offense of child molestation; rather, it create[d] a new crime based in part on an offender's

[6] The residency statute was once codified in 720 Ill. Comp. Stat. 5/11-9.4(b-5) (2010), which was repealed in 2011, *see* Ill. Pub. Act 96-1551, art. 2, § 6 (2011), and moved to its current location in § 11-9.3, *id.* § 5.

status as a child molester"). *But see, e.g.*, *Commonwealth v. Baker*, 295 S.W.3d 437, 442 (Ky. 2009) (explaining that there "was no question" that a sex offender residency statute "applie[d] to conduct by Respondent that occurred well before the law's enactment").

IV. Substantive Due Process

Plaintiffs argue that the residency statute violates their right to substantive due process under the Fourteenth Amendment because the residency statute fails rational basis review. (R. 1 at ¶ 87; R. 17, Mot. Extend Emergency Injunctive Relief, at 10.) This argument does not succeed.

"Unless a government practice encroaches on a fundamental right, substantive due process requires only that the practice be rationally related to a legitimate government interest . . . ." *Charleston v. Bd. of Trs. of Univ. of Ill. at Chi.*, 741 F.3d 769, 774 (7th Cir. 2013); *see also Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 576 (7th Cir. 2014) ("Where a non-fundamental liberty . . . is at stake, the government need only demonstrate that the intrusion upon that liberty is rationally related to a legitimate government interest."). Because the Plaintiffs invoke rational basis review, Plaintiffs have effectively conceded that no more exacting level of scrutiny applies.

"Those attacking a statute on rational basis grounds have the burden to negate 'every conceivable basis which might support it.'" *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1071 (7th Cir. 2013) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)); *see also Hayden*, 743 F.3d at 576 ("So long as there is any conceivable state of facts that supports the [policy at issue], it passes muster under the due process clause . . . ."); *Int'l Aerobatics Club Chapter 1 v. City of Morris*, 76 F. Supp. 3d 767, 786 (N.D. Ill. 2014). It is not necessary that a rational justification also be the actual motivation for the law's enactment; "rather, the question

is whether some rational basis exists upon which the legislature could have based the challenged law." *Goodpaster*, 736 F.3d at 1071. Furthermore, the residency statute "is constitutional even if it is 'unwise, improvident, or out of harmony with a particular school of thought.'" *Id.* (quoting *Eby-Brown Co., LLC v. Wis. Dep't of Agric.*, 295 F.3d 749, 754 (7th Cir. 2002)).

The residency statute bears a rational relationship to a legitimate end: protecting children from convicted child sex offenders. A state "c[an] conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism." *Smith*, 538 U.S. at 103. The residency statute creates a buffer zone between a child sex offender's residence and certain locations in which children tend to congregate. It is at least "conceivable" that creating this buffer zone would further the goal of protecting children. *See Hayden*, 743 F.3d at 576. Thus, the residency statute survives scrutiny under the deferential rational basis standard. *See also, e.g.*, *Smith*, 538 U.S. at 102–03 (explaining the a sex offender registration law bore a rational relationship to the legitimate purpose of protecting the public); *Belleau v. Wall*, 811 F.3d 929, 943 (7th Cir. 2016) (Flaum, J., concurring) (explaining that a law requiring certain sex offenders to wear a GPS tracking device was rationally related to the purpose of protecting children); *Doe v. Miller*, 405 F.3d 700, 716 (8th Cir. 2005) (explaining that the Iowa legislature was "entitled to employ . . . 'common sense'" in implementing a similar residency statute); *Duarte v. City of Lewisville*, 136 F. Supp. 3d 752, 759–60 (E.D. Tex. 2015); *Doe v. Baker*, No. Civ.A. 1:05-CV-2265, 2006 WL 905368, at *5 (N.D. Ga. Apr. 5, 2006) ("Prohibiting a sex offender from living near a school or daycare is certainly an appropriate step in achieving the ultimate goal of protecting children."); *Leroy*, 828 N.E.2d at 781–82 (explaining that "it is reasonable to conclude that restricting child sex offenders from residing within 500 feet of a playground or a facility

providing programs or services exclusively directed toward persons under 18 years of age might also protect society").

The Court recognizes that some courts have questioned the rationality of similar laws. *See Does v. Snyder*, 834 F.3d 696 (6th Cir. 2016); *In re Taylor*, 343 P.3d 867 (Cal. 2015). In *Snyder*, the court examined in an ex post facto analysis whether a Michigan law that included a residency restriction similar to the one at issue here had "punitive" effects. 834 F.3d at 697–701. One consideration in the court's analysis was whether the law had a rational relation to a non-punitive purpose. *Id.* at 704. The court explained that the record provided "scant support" for the proposition that the law furthered the goal of "keep[ing] sex offenders away from" children. *Id.* It pointed to studies showing that sex offenders are *less* likely to reoffend than other types of criminals and that laws like the one in question "actually *increase* the risk of recidivism . . . by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities." *Id.* at 704–05.

Snyder is factually distinguishable because the statute at issue there included prohibitions on where a sex offender could work. *Id.* at 698. More importantly, the residency statute comports with the rational basis test—even if it may be "unwise, improvident, or out of harmony with a particular school of thought." *Goodpaster*, 736 F.3d at 1071 (quoting *Eby-Brown*, 295 F.3d at 754). As noted above, there need only be some conceivable set of facts that supports the statute's purpose. As Plaintiffs' complaint recognizes, it is conceivable that at least some child sex offenders present a recidivism risk, (R. 1 at ¶ 57 (noting that some sex offenders reoffend)), and that some child sex offenses are committed by individuals who are strangers to children or their "neighbor," (R. 1 at ¶ 61). Indeed, as the Supreme Court recognized in *Smith*, sex offender registry laws were enacted in response to the sexual assault and murder of a seven-year-old "by a

neighbor who, unknown to the victim's family, had prior convictions for sex offenses against children." 538 U.S. at 89. Moreover, as explained above, it is at least conceivable that creating some distance between a child sex offender's home and places where children congregate could increase the protection for at least some children. Consequently, Plaintiffs cannot plausibly allege that the residency statute fails the rational basis test.[7]

Plaintiffs as well as the California Supreme Court and the Sixth Circuit point out potentially persuasive reasons why the residency statute might be overly broad or not particularly effective. It has serious collateral effects on non-sex offenders (like Plaintiffs' family members). It makes it potentially difficult for a child sex offender to find a home, and it creates a risk that an offender who complies with the statute initially will be forced to later vacate his or her home due to the opening of a day care or other facility. This imposes potentially onerous costs on offenders and their families to break leases, sell homes, change schools, and periodically uproot their lives. The statute may contribute to increased homelessness, imposing a further strain on social services. It may undermine efforts of some offenders to reintegrate into the community as productive citizens. Finally, the residency statute may have all of these negative effects without providing much in terms of increased protection for children. These considerations, however, do not render the residency statute irrational under the rational basis test. As a result, the Court cannot rule it unconstitutional.

V. Unconstitutional Taking Without Just Compensation

The Takings Clause of the Fifth Amendment, which applies to the states through the Fourteenth Amendment, provides, "[N]or shall private property be taken for public use, without

[7] *Taylor* is similar to *Snyder*, as the California Supreme Court concluded that a residency statute (with a 2000-foot buffer requirement) had no rational relationship to protecting children because it "hamper[ed], rather than foster[ed], efforts to monitor, supervise, and rehabilitate" sex offenders on supervised parole in San Diego County. 343 P.3d at 879–82. The Court does not follow *Taylor* for reasons similar to why it declines to follow *Snyder*.

just compensation." *Bell v. City of Country Club Hills*, Nos. 16-1245, 16-1448, 2016 WL 6595965, at *2 (7th Cir. Nov. 8, 2016) (published opinion) (quoting U.S. Const. amend. V). "This provision 'does not proscribe the taking of property; it proscribes taking without just compensation.'" *Sorrentino v. Godinez*, 777 F.3d 410, 413 (7th Cir. 2015) (quoting *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985)). "Nor does the [Takings Clause] require a state to pay compensation prior to or at the same time as a taking." *Id.* Accordingly, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied compensation." *Id.* (quoting *Williamson*, 473 U.S. at 195). There is a "limited exception" to this exhaustion requirement "based on the futility of seeking state court relief." *Peters v. Vill. of Clifton*, 498 F.3d 727, 732 (7th Cir. 2007) (quoting *Daniels v. Area Plan Comm'n of Allen Cty.*, 306 F.3d 445, 456 (7th Cir. 2002)).

The Seventh Circuit recently accepted a concession from a litigant that, while Illinois provided a procedure in which individuals could seek compensation for physical takings, it does not have such a procedure for regulatory takings. *Callahan v. City of Chicago*, 813 F.3d 658, 660 (7th Cir. 2016). The Seventh Circuit also cited authority in support of that concession. *See id.* The Court therefore proceeds to the merits, assuming that Plaintiffs' regulatory takings claim satisfies the *Williamson* exhaustion requirement. *See Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 729 (2010) (explaining that the requirement that a plaintiff seek just compensation is not jurisdictional); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733–34 (1997) (describing the *Williamson* exhaustion requirement as "prudential").

A regulation can be so onerous that it violates the Takings Clause without requiring a physical invasion of land or destroying all economically beneficial use of property. *See Lingle v.*

Chevron U.S.A. Inc., 544 U.S. 528, 538–39 (2005); *see also Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015) (explaining that compensation is required for a "regulatory taking" that goes "too far" (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922))). To determine whether a regulation goes "too far," courts look to the factors articulated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978): "(1) the nature of the government action, (2) the economic impact of the regulation, and (3) the degree of interference with the owner's reasonable investment-based expectations." *Goodpaster*, 736 F.3d at 1074; *see also Lingle*, 544 U.S. at 539.[8]

With respect to the first factor, "[a] 'taking' may more readily be found where the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent.*, 438 U.S. at 124 (citation omitted). The residency statute, as discussed above, promotes the legitimate and important public interest of protecting children from convicted child sex offenders. It does not entail the government "physically invad[ing] or permanently appropriat[ing] any of the [Plaintiffs' property] for its own use." *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986). While the residency statute interferes with offenders' ability to continue residing at a particular property, it does not otherwise interfere with their property interests. Offenders may, for example, sell or otherwise transfer their property interest to another person. Because the residency statute does not involve a physical invasion or appropriation of property, and because it amounts to an adjustment of economic burdens to promote the common good, the Court concludes that the first factor weighs in Defendants' favor. *See Goodpaster*, 736 F.3d at 1074–75 (explaining that a smoking ban was

[8] Plaintiffs appear to agree that the test developed under *Penn Central* and its progeny is appropriate. (*See* R. 17 at 12–13; R. 32 at 15.)

"a prototypical" example of a regulation that adjusted economic burdens to promote the common good, and that "[s]uch a character weighs heavily against finding a taking").

The second factor—the economic impact of the regulation—does little for Plaintiffs. "[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979). Indeed, some regulations do not result in a "taking" even if they prevent a property owner from making "the most beneficial use of the property." *Penn Cent.*, 438 U.S. at 125. Here, as previously mentioned, the residency statute prevents Plaintiffs from residing in their current homes, which lowers the value of their property interests somewhat from their perspective, but the statute leaves much of the value of Plaintiffs' property interests untouched.

The final factor—the degree of interference with the owner's reasonable investment-based expectations—seals the fate of Plaintiffs' Takings Clause claim. When a party should reasonably expect a regulation to interfere with its investment, this factor will not favor the party's takings claim. *See Goodpaster*, 736 F.3d at 1074 (explaining that because smoking in public places had been regulated in a particular county since 2005, "[i]t should not have come as a surprise that the ordinance was later expanded to include appellants' business"); *see also Connolly*, 475 U.S. at 227 ("Prudent employers then had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations."); *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1091 (9th Cir. 2015) ("[T]hose who buy into a regulated field . . . cannot object when regulation is later imposed."); *Vesta Fire Ins. Corp. v. Florida*, 141 F.3d 1427, 1432 (11th Cir. 1998) (citing

Connolly for the proposition that "[i]nterference with investment-backed expectations occurs when an inadequate history of similar government regulation exists: where the earlier regulation does not provide companies with sufficient notice that they may be subject to the new or additional regulation"). Cardona became the owner of his home in 2010 and Vasquez began renting his in 2013. The residency statute has included a prohibition of living within 500 feet of "home day cares" since 2008. Consequently, when Plaintiffs acquired the property interests in question, they were on notice that future events—the opening of a school or day care, for example—could require them to move. The final *Penn Central* factor therefore weighs in Defendants' favor, and, when considered with the other factors, leads the Court to conclude that Plaintiffs' Takings Clause claim cannot succeed.

The purpose of the Takings Clause is to prevent the "Government from forcing some people alone to bear public burdens which, in fairness and justice, should be borne by the public as a whole . . . ." *See Goodpaster*, 736 F.3d at 1074 (quoting *Penn Cent.*, 438 U.S. at 123–24). The residency statute places restrictions on convicted child sex offenders to protect the community at large. It is not unjust to put the economic burden that accompanies these restrictions on the individuals whose prior conduct necessitated the regulations. Moreover, it is not illogical to place the economic burden on former offenders rather than the public because the former offenders have at least some ability to find housing that is likely to comply with the residency statute. For these reasons, Plaintiffs have failed to plausibly allege a violation of the Takings Clause.[9]

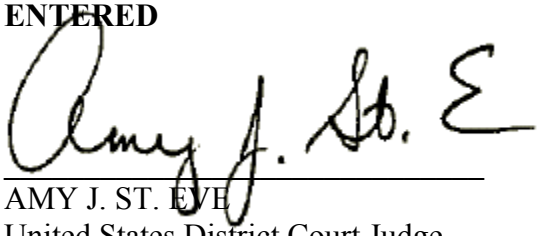
[9] Plaintiffs rely on *Mann v. Ga. Dep't of Corr.*, 653 S.E.2d 740 (Ga. 2007), where the Georgia Supreme Court concluded that a Georgia residency statute violated the Takings Clause. To the extent that *Mann*'s facts and analysis applies in this case, the Court respectfully parts ways with the reasoning of the Georgia Supreme Court for the reasons outlined above. The Court instead finds more persuasive an opinion from the Northern District of Georgia, which concluded that the Georgia residency statute did not violate the Takings Clause. *See Baker*, 2006 WL 905368, at *8–9.

CONCLUSION

For the foregoing reasons, the Court grants Defendants' motions to dismiss.

Dated: December 9, 2016

ENTERED



AMY J. ST. EVE
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

Joshua Vasquez and Miguel Cardona,

Plaintiff(s),

v.

Kimberly M. Foxx, in her official capacity as the State's Attorney of Cook County and the City of Chicago, a municipal corporation,

Defendant(s).

Case No. 16 C 8854
Judge Amy J. St. Eve

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

☒ other: Defendants' motions to dismiss are granted and this case is hereby dismissed.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Amy J. St. Eve on a motion to dismiss.

Date: 12/19/2016

Thomas G. Bruton, Clerk of Court

/s/Katie Franc, Deputy Clerk

RELEVANT STATUTORY PROVISIONS

(720 ILCS 5/11-9.3)

Sec. 11-9.3. Presence within school zone by child sex offenders prohibited; approaching, contacting, residing with, or communicating with a child within certain places by child sex offenders prohibited.

***

(b-5) It is unlawful for a child sex offender to knowingly reside within 500 feet of a school building or the real property comprising any school that persons under the age of 18 attend. Nothing in this subsection (b-5) prohibits a child sex offender from residing within 500 feet of a school building or the real property comprising any school that persons under 18 attend if the property is owned by the child sex offender and was purchased before July 7, 2000 (the effective date of Public Act 91-911).

(b-10) It is unlawful for a child sex offender to knowingly reside within 500 feet of a playground, child care institution, day care center, part day child care facility, day care home, group day care home, or a facility providing programs or services exclusively directed toward persons under 18 years of age. Nothing in this subsection (b-10) prohibits a child sex offender from residing within 500 feet of a playground or a facility providing programs or services exclusively directed toward persons under 18 years of age if the property is owned by the child sex offender and was purchased before July 7, 2000. Nothing in this subsection (b-10) prohibits a child sex offender from residing within 500 feet of a childcare institution, day care center, or part day child care facility if the property is owned by the child sex offender and was purchased before June 26, 2006. Nothing in this subsection (b-10) prohibits a child sex offender from residing within 500 feet of a day care home or group day care home if the property is owned by the child sex offender and was purchased before August 14, 2008 (the effective date of Public Act 95-821).

***

(d) Definitions. In this Section:

(2.5) For the purposes of subsections (b-5) and (b-10) only, a sex offense means:

(i) A violation of any of the following Sections of the Criminal Code of 1961 or the Criminal Code of 2012:

10-5(b)(10) (child luring), 10-7 (aiding or abetting child abduction under Section 10-5(b)(10)), 11-1.40

(predatory criminal sexual assault of a child), 11-6 (indecent solicitation of a child), 11-6.5 (indecent solicitation of an adult), 11-9.2 (custodial sexual misconduct), 11-9.5 (sexual misconduct with a person with a disability), 11-11 (sexual relations within families), 11-14.3(a)(1) (promoting prostitution by advancing prostitution), 11-14.3(a)(2)(A) (promoting prostitution by profiting from prostitution by compelling a person to be a prostitute), 11-14.3(a)(2)(C) (promoting prostitution by profiting from prostitution by means other than as described in subparagraphs (A) and (B) of paragraph (2) of subsection (a) of Section 11-14.3), 11-14.4 (promoting juvenile prostitution), 11-18.1 (patronizing a juvenile prostitute), 11-20.1 (child pornography), 11-20.1B (aggravated child pornography), 11-25 (grooming), 11-26 (traveling to meet a minor), or 12-33 (ritualized abuse of a child). An attempt to commit any of these offenses.

(ii) A violation of any of the following Sections of the Criminal Code of 1961 or the Criminal Code of 2012, when the victim is a person under 18 years of age: 11-1.20 (criminal sexual assault), 11-1.30 (aggravated criminal sexual assault), 11-1.60 (aggravated criminal sexual abuse), and subsection (a) of Section 11-1.50 (criminal sexual abuse). An attempt to commit any of these offenses.

(iii) A violation of any of the following Sections of the Criminal Code of 1961 or the Criminal Code of 2012, when the victim is a person under 18 years of age and the defendant is not a parent of the victim:

10-1 (kidnapping),
10-2 (aggravated kidnapping),
10-3 (unlawful restraint),
10-3.1 (aggravated unlawful restraint),
11-9.1(A) (permitting sexual abuse of a child).
An attempt to commit any of these offenses.

(iv) A violation of any former law of this State substantially equivalent to any offense listed in this paragraph (2.5) of this subsection.