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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS JOSHUA VASQUEZ AND MIGUEL CARDONA

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I. The Residency Restrictions Violate the Ex Post Facto Clause

A. The Challenged Statute Is Retroactive

Relying principally on *U.S. v. Leach,* 639 F.3d 769 (7th Cir. 2011), Defendants claim that the district court properly decided that the residency statute does not violate the ex post facto clause because its restrictions are not "retroactive." City Brief at 23–25; Foxx Brief at 11–13. Defendants' arguments and the district court's decision are contrary to established law.

This Court recently explained that "[a] law is retroactive if it 'changes the legal consequences of acts completed before its effective date.'" *Belleau v. Wall*, 811 F.3d 929, 942 (7th Cir. 2016) (citing *Weaver v. Graham*, 450 U.S. 24, 31 (1981). In *Belleau*, this Court found that a Wisconsin statute passed in 2006 that required "persons released from civil commitment for sexual offenses [to] wear a GPS monitoring device" was "unquestionably" retroactive as applied to a person who convicted of a sex offense in the 1990s because "the burden imposed by the law is attributable to [the plaintiff's] original convictions." *Id.* at 941–42.[1]

Here, there can be no question that the 2008 residency statute "changes the legal consequences" of Plaintiffs' previous convictions. Plaintiffs Vasquez and

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[1] This understanding of "retroactivity" is routinely used in cases challenging residency regulations. See, *e.g.*, *Doe v. Miami-Dade*, 846 F.3d 1180, 1185 (11th Cir. 2017) ("The County does not contest that its residency restriction applies to individuals convicted … before the passage of the Ordinance. … Therefore, we accept for purposes of this appeal that the residency restriction applies retroactively."); *Shaw v. Patton*, 823 F.3d 556, 560 (10th Cir. 2016) ("Mr. Shaw is subject to restrictions … only because Oklahoma changed its laws years after Mr. Shaw's criminal conduct. By definition, these restrictions are being retroactively applied to Mr. Shaw.")

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. In 2008, Illinois passed 720 ILCS 5/11-9.3(b-10), making it illegal for Plaintiffs to live within 500 feet of home daycares. They are subject to this restriction and the attendant burdens on their lives based solely on the fact of their previous offenses. Accordingly, under *Belleau* and *Weaver*, the Residency Restrictions should be regarded as retroactive.

B. The District Court and Defendants Have Ignored the Relevant Legal Standard

Because the Residency Restrictions apply retroactively to people whose offenses predate the enactment of the restrictions, the Court must "address whether the law imposes a punishment" by using the two-step framework set forth in *Smith v. Doe*, 538 U.S. 84, 92 (2003). *Belleau* at 942. First, the court considers whether "the legislature intended to impose a punishment." *Id.* If the legislature's intention was to impose punishment, that ends the inquiry. *Id.* If, however, "the intention was to enact a regulatory scheme that is civil and nonpunitive," the court "examine[s] whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Id.* In determining whether a statute has a punitive effect, the court takes into account the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)—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,* 538 U.S. at 97*; Mendoza-Martinez,* 372 U.S. at 168-69. See Plaintiffs' opening brief at 19–25.

Courts throughout the country have applied this framework to ex post facto challenges to residency restrictions. See, *e.g.*, *Does 1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016); *Doe v. Miami-Dade*, 846 F.3d 1180, 1185 (11th Cir. 2017); *Shaw v. Patton*, 823 F.3d 556, 560 (10th Cir. 2016); *State v. Pollard*, 908 N.E.2d 1145, 1153 (Ind. 2009); *Starkey v. Oklahoma Dept. of Corrections*, 305 P.3d 1004, 1023-25 (Okla. 2013); *Commonwealth v. Baker*, 295 S.W.3d 437, 445 (Ky. 2009).[2]

Because the district court wrongly concluded that the Residency Restrictions were not "retroactive," it did not analyze the *Mendoza-Martinez* factors to determine whether Plaintiffs stated a claim that the statute imposes punishment. The district court's failure to apply the proper legal standard was an error that warrants reversal.

C. The Statute Imposes Punishment

As set forth in Plaintiffs' opening brief (at 19–25), the Residency Restrictions have a harsh impact on Plaintiffs, severely limiting where they can reside and placing them in constant risk of being forced to move. Plaintiffs live in constant peril of being ousted from any home they establish as a result of someone obtaining a license to operate a home daycare nearby. Indeed, Vasquez and his family have already been forced to move once due to the location of a new home daycare and now

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[2] Nothing in *Leach* contradicts the propriety of applying the *Smith v. Doe* framework here. The *Leach* court concluded that the federal Sex Offender Registration and Notification Act does not violate the ex post facto clause because "a registration regime targeting only sex offenders" does not impose punishment. *Leach* at 773, citing *Smith v. Doe*, 538 U.S. 84.

face a second eviction. Dkt. 1 at ¶32. Cardona is being threatened with being uprooted from a home that he owns and where he has lived for over 25 years because someone nearby has decided to operate a home daycare. *Id.* at ¶¶38, 41.

Moreover, 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 Plaintiffs' Brief at 15. Combined with the restrictions on living within 500 feet of schools, playgrounds, and facilities providing services to minors, the restriction on living within 500 feet of daycares makes compliant housing extremely scarce. This Court has observed that "a pervasive problem in the criminal justice system" is that sex offenders throughout the country find it "difficult, if not impossible," to find a residence that complies with local laws. *Werner v. Wall*, 836 F.3d 751 (7th Cir. 2016) (Hamilton, J.) (dissenting).

Plaintiffs should be given the opportunity to establish that the burdens placed on their lives by the Residency Restrictions constitute punishment. Accordingly, the District Court's dismissal of this claim should be reversed.

D. The City Mischaracterizes Plaintiffs' Claims and the Law

The City does not cite *Smith v. Doe* or *Kennedy v. Mendoza-Martinez* in its brief. Nor does it undertake any analysis of whether the Residency Restrictions impose punishment on people who are subject to them. Rather, the City attempts to avoid addressing the harsh punitive effect of the Residency Restrictions by mischaracterizing Plaintiffs' claims and the relevant law.

First, the City's characterization of Plaintiffs' ex post facto claim is misleading. The *Leach* decision recognized that there are two ways in which a law can be retroactive: (1) when it "retrospectively targets conduct that was lawful before the statute was enacted"; or (2) when it imposes new obligations that "effectively increase[] the punishment" for a previous conviction. *Leach*, 639 F.3d 773. The City attempts to characterize Plaintiffs' claim as the former. See City Brief at 25 ("[the Residency Restrictions] do[] not criminalize conduct that occurred before the law was enacted. Plaintiffs' arguments to the contrary miss the mark.") But it has never been Plaintiffs' claim that the Residency Restrictions retroactively criminalized conduct that occurred before the enactment. Rather, Plaintiffs' claim is that being subject to the Residency Restrictions amounts to increased punishment for a previous crime. See, Dkt. 1, Complaint at ¶66.

Second, the City claims that "the law [is not] retroactive because plaintiffs can avoid committing the offense as long as they do not commit the prohibited conduct after the statute's effective date." City Brief at 24. But this is belied by the record. Both of the Plaintiffs have found themselves in violation of the statute and in peril of eviction and prosecution through no affirmative act of their own. Both Cardona and Vasquez were notified that they must move because third parties have opened home daycares near their homes. Contrary to the City's claim, it is impossible for Plaintiffs to "avoid" committing "prohibited conduct" because they can be found in violation of the statute based on the actions of third parties.

Finally, the City devotes a substantial part of its brief to arguing that *Leach* mandates a different framework for ex post facto challenges to criminal statutes as opposed to civil regulations. The City writes as follows:

> [Plaintiffs] spend six pages in an effort to demonstrate that the burdens and consequences flowing from restricting where they may reside constitute punishment. This is seriously misguided. *** *Leach* … does not authorize plaintiffs to prove solely that complying with the statute is burdensome enough to constitute punishment. Plaintiffs are not challenging a civil regulatory scheme such as SORNA's registration requirements …. *They are challenging a criminal statute, and for that challenge, the only question is whether it is retrospective, meaning plaintiffs must show the statute punishes conduct occurring before its effective date, which they cannot do*.

City Brief at 25, 27 (internal quotations omitted) (emphasis added).

In essence, the City claims that Plaintiffs could only prevail in their ex post facto challenge to 720 ILCS 5/11-9.3(b-10) if they could show that the statute retroactively made it a crime to have resided within 500 feet of a daycare prior to the statute's enactment. By the City's logic, a retroactive regulation that does not impose a criminal penalty can be challenged on ex post facto grounds, but an identical regulation that imposes a criminal penalty is immunized from ex post facto challenges. The City's argument would lead to absurd results.

One example should suffice: The City could pass a regulation prohibiting anyone who has been convicted of a felony from residing in the City. A citizen could mount a successful ex post facto challenge to this regulation if he shows that being prohibited from living in the City constitutes increased punishment for his prior felony. But if the City passes a law making it a *crime* for anyone who has been convicted of a felony to reside in the City, this law would be immunized from an ex

post facto challenge because the citizen could never make the required showing that the law "punishes conduct occurring before its effective date."

The City's position is obviously not right. Unsurprisingly, the argument finds no support in the case law. Courts apply the same standard to ex post facto challenges to retroactive civil regulations and retroactive criminal laws. The operative question in both cases is whether the burdens imposed by the law amount to punishment. See, *Snyder*, 834 F.3d 696 (finding Michigan sex offender registration and residency statute that imposed "heavy criminal penalties" violated the ex post facto clause); *Doe v. State*, 111 A.3d 1077, 1090 (N.H. 2015) (finding New Hampshire registration statute that made failure to register a crime violated the ex post facto clause); see also, *e.g.*, *Weaver*, 450 U.S. at 31 ("[I]t is the effect, not the form, of the law that determines whether it is ex post facto.")

The City's attempts to misdirect the Court from the substance of Plaintiffs' claims should be rejected.

E. State Court Decisions Upholding Residency Statutes Are Not Binding on this Court

Defendant Foxx relies primarily on two Illinois appellate court decisions—*People v. Leroy*, 357 Ill. App.3d 530 (5th Dist. 2005) and *People v. Morgan*, 377 Ill. App.3d 821 (3rd Dist. 2007)—for her claim that 720 ILCS 5/11-9.3(b-10) is not an ex post facto enactment. This Court should not follow these decisions for two reasons. First, decisions of Illinois appellate courts on matters of constitutional law are not binding on this Court. See *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1276 (7th Cir. 1997) ("Although state court precedent is binding upon us regarding issues of

state law, it is only persuasive authority on matters of federal law."); *Joseph v. Blair*, 482 F.2d 575, 580, n. 4 (4th Cir. 1973), ("[t]he decision of a state court of last resort is not binding on federal court on a federal constitutional question ...")

Second, *Leroy* and *Morgan* are inapposite because they concerned less onerous restrictions than the statute at issue here. In *Morgan*, the court upheld 720 ILCS 5/11-9.3(b-5), which restricts residence within 500 feet of a school. *Morgan*, 881 N.E.2d at 509. In *Leroy*, the court upheld a statute restricting residency within 500 feet of playgrounds and facilities providing services "exclusively directed toward" minors. *Leroy*, 828 N.E.2d at 775. Since *Leroy*, the state has amended its Residency Restrictions twice, adding prohibitions on living within 500 feet of daycare centers, part day child care facilities, daycare homes and group daycare homes. Thus, the Residency Restrictions at issue here are much more onerous than the statues at issue in *Leroy* and *Morgan*.

For all of the reasons set forth above and in Plaintiffs' opening brief, this Court should remand Plaintiffs' ex post facto claim to the district court.

II. Plaintiffs Have Stated a Procedural Due Process Claim

Defendants argue that Plaintiffs' procedural due process claim is foreclosed by *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003) and, in addition, that sister circuits have rejected the legal claim that Plaintiffs seek to pursue. City Brief at 35–37; Foxx Brief at 14–16. Plaintiffs acknowledge that the Eighth Circuit in *Doe v. Miller*, 405 F.3d 700, 709 (8th Cir. 2009) and the Fifth

Circuit in *Duarte v. City of Lewisville*, 858 F.3d 348 (5th Cir. 2017)[3] have found that the absence of a hearing allowing a sex offender to contest that he poses a danger to the community before being subjected to residency restrictions did not violate procedural due process and that once a person has been convicted of a "sex offense," *Connecticut Dept. of Public Safety v. Doe* dispenses with any constitutional necessity to balance the nature of the private interest against "the risk of an erroneous deprivation of such interest through the procedures used," as required by *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Despite this, Plaintiffs do not believe that their procedural due process claim has in fact been closed off.

First, there can be no dispute that fundamental liberty interests are at stake here. The right "to establish a home" has long been cherished as one of the fundamental liberties embraced by the Due Process Clause of the Fourteenth Amendment. As the Court explained in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (italics added):

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also *the right of the individual to . . . establish a home and bring up children* . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Second, Defendants are mistaken to dismiss Plaintiffs' efforts to distinguish *Conn. Dept. of Public Safety v. Doe* on the grounds that the rights at stake there

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[3] A petition for writ of certiorari was filed with the U.S. Supreme Court on August 24, 2017. See 2017 WL 3726069. The petition has been distributed for conference on October 27, 2017. Case No. 17-303.

were fundamentally different from those at stake here and to assert that the nature of Plaintiffs' liberty interests are not material to Plaintiffs' procedural due process challenge. City Brief at 38; Foxx Brief at 15–16. In so arguing, the Defendants ignore a long line of case law which has emphasized that the constitutionality of "civil commitment" schemes for "sexual predators," *after conviction for a sex offense*, depends on the existence of the "procedural safeguards" designed to prevent arbitrary deprivations of liberty.[4]

If, as the Defendants argue, a person's conviction for a sex offense "alone" renders the person's liberty interests "immaterial" for purposes of procedural due process analysis, a governmental entity, without any procedural safeguards whatever, could simply commit civilly *all* convicted sex offenders indefinitely, premised merely on an arbitrary legislative "finding of fact" that such offenders are dangerous. But see contra, *Specht v. Patterson*, 386 U.S. 605, 608–611 (1967) (invalidating on procedural due process grounds civil commitment, after conviction for sex offense, where offender's current dangerousness "was not an ingredient of the offense charged"); see also *Belleau v. Wall*, 132 F.Supp.3d 1085, 1094-1095 (E.D. Wis. 2015) (distinguishing *Conn. Dep't of Public Safety,* where truthful conviction information about sex offender conviction was required to be listed on a "publicly disseminated registry," from situation where convicted sex offender was forced to wear a GPS tracking device on his ankle and explaining that "[i]n order to restrain his liberty in this way, there must be some justification offered by the State and an

[4] *Specht v. Patterson*, 386 U.S. 605 (1967); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Kansas v. Hendricks*, 521 U.S. 326 (1997); *Kansas v. Crane*, 434 U.S. 407 (2002).

opportunity for Belleau to contest it.") (rev'd on ex post facto grounds, *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016)).[5]

Third, the lower court prematurely disposed of this case without affording Plaintiffs an opportunity to prove that the assumptions on which the residency restrictions were premised are factually inaccurate. It is true that government entities generally "are not barred by principles of procedural due process from drawing classifications" which may result in diminution of liberties held by one class as distinguished from another. *Conn. Dept. of Public Safety v. Doe*, *supra*, 538 U.S. at 8. However, when a governmental classification rests upon legislative findings, federal courts may not place "dispositive weight" on those findings in lieu of constitutional analysis. Rather, federal courts retain "an independent constitutional duty to review factual findings where constitutional rights are at stake." *Whole Woman's Health v. Hellerstedt*, ___ U.S. ___, 136 S.Ct. 2292, 2310 (2016).

Here, the district court found that the residency statute "promotes the legitimate and important public interest of protecting children from convicted child sex offenders," appx. at 16, but Plaintiffs will show that there is not a sound evidentiary basis to believe that residency restrictions advance public safety or that

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[5] The Supreme Court, in upholding sex offender registration laws, recognized that residency restrictions present a different case from publication on a registry. Unlike Plaintiffs and others subject to residency restrictions, the registrants in *Smith v. Doe* were "free to move where they wish and to live and work as other citizens, with no supervision," and "free to change ... residences." 538 U.S. 84, 100-01 (2003). There was "no evidence that the Act ha[d] led to substantial occupational or housing disadvantages[.]" *Id*. at 100.

all individuals subject to the residency restrictions are currently dangerous such that these restrictions are justified. See Plaintiffs' Opening Brief at 8–10.

Finally, the Supreme Court's recent decision in *Packingham v. North Carolina*, ___ U.S. ___, 137 S.Ct. 1730 (2017) has noted the "troubling fact" that sex offender laws often "impos[e] severe restrictions on persons [convicted of sex offenses] who already have served their sentence and are no longer subject to the supervision of the criminal justice system." *Id*. at 1337. Thus, the Court's decision in *Packingham* undermines the notion that a person, once convicted of a sex offense, may on that basis alone forever after be deprived of constitutional rights.

III. Plaintiffs Have Stated a Substantive Due Process Claim

There are two avenues to establishing a substantive due process claim. First, the substantive due process doctrine is rooted in the notion that some rights and liberty interests are so fundamental that no amount of process would justify government interference. *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998). Second, the substantive due process doctrine protects non-fundamental liberty interests from arbitrary, unjustified government action. *Belcher v. Norton*, 497 F.3d 742, 753 (7th Cir. 2007). Plaintiffs' argument in support of their substantive due process claim invokes both concepts.[6] In the analysis below, Plaintiffs make three points in support of their claim that the Residency Restrictions are "arbitrary"

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[6] Defendant Foxx argues that Plaintiffs have not pled that a fundamental right was at stake here. Foxx Brief at 22–23. But this is not the case, as even the City in its briefing acknowledges. See City' Brief at 35 ("Plaintiffs allege that the statute implicates certain of their liberty interests and fundamental rights, R. 1 ¶¶ 46-49."); See discussion in Plaintiffs' opening brief at 31–33.

and/or conscience-shocking in a manner that violates substantive due process of law. *Lewis*, 523 U.S. at 846.[7]

A. The Punishment Here Is Uniquely Harsh

There are many collateral consequences of a conviction for a sex offense in Illinois and elsewhere—and such consequences result in mild and great inconveniences. But the penalty imposed under Illinois law stands alone in its detrimental impact, impeding liberty and making it impossible for an offender to ever obtain a sense of stability in his home life, threatening much of what makes one's life precious. Moreover, individuals subject to these laws often have families, and these families are unnecessarily harmed when offenders have to pull children out of schools or force their spouses to find new employment or are themselves forced to be separated from them. Accordingly, the rights being interfered with here fit comfortably with the liberty interests that the Supreme Court has determined to be fundamental, which include the right of an individual to establish a home and bring up children and to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men.[8 and 9]

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[7] Plaintiffs adopt the arguments set forth in support of their procedural due process claim in support of their substantive due process claim as well. See, *Millard v. Rankin*, __ F.3d __, (D. Colo., August 31, 2017) (Matsch, J.) ("The Supreme Court has, at times, referred to [substantive due process] as constitutional protection against arbitrary governmental actions that are so contrary to the concept of individual autonomy, but has never clearly distinguished between procedural and substantive due process.")

[8] As noted previously, the right "to establish a home" has long been cherished as one of the fundamental liberties embraced by the Due Process Clause. *Meyer*, 262 U.S. at 399. See also *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (setting forth a litany of fundamental rights, including "the right[ ] to marry; to have children; to direct the education and upbringing of one's children; [and] to marital privacy.") (citations omitted).

B. Plaintiffs Deserve the Opportunity to Show that the Law Is Not Rationally Related to a Legitimate End

Plaintiffs should be accorded the opportunity to make a "factual record" to establish "the ineffectiveness and irrationality of residency restrictions." Plaintiffs' Brief at 36. See *Bearden v. Georgia*, 461 U.S. 660, 665-67 (1983) ("Whether analyzed in terms of equal protection or due process, the issue [of the constitutionality of a statute revoking an indigent defendant's probation for failure to pay a fine] ... requires a careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose'.") (quoting *Williams v. Illinois,* 399 U.S. 235, 260 (1970).

As for proving their due process claim, in addition to showing that the latest research subverts any claim that residency restrictions advance public safety and/or prevent crime, Plaintiffs will also show that the law's rationality is undercut by several other factors too:

1. Many municipalities throughout the country, even though they impose harsh local residency restrictions, do not impose a requirement that individuals be uprooted when a new daycare or park comes into their neighborhood. See, for example, §30-130(e)(3) of the Yorkville, Wisconsin Sex Offender Ordinance at http://townofyorkville.com/wp-content/uploads/2014/07/Ordinance-2017-01.pdf;

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[9] The harshness of the Residency Restrictions is aggravated by Illinois law's failure to provide a method for a person to petition for relief from the restrictions thereby imposing a lifelong disability. In *Millard v. Rankin*, the district court found Colorado's failure to provide a fair procedure by which a person could seek his removal from the sex offender registry showed that the registration scheme "enter[ed] the 'zone of arbitrariness' that violates the due process guarantee of the Fourteenth Amendment."

2. The law does not prohibit anyone subject to it from being in the prohibited residence during the day, which is, of course, the precise time that children are actually present at daycares; and

3. The law creates perverse incentives. There is no requirement that a licensed daycare even be operational to uproot someone from their home, and as a result individuals can obtain a license to operate a home daycare without any intent to operate one but merely as a means to force individuals to move.[10]

C. The State Attorney's Arguments Are Off Point

In arguing against Plaintiffs' substantive due process claim, Defendant Foxx first argues that monetary damages are not available to Defendants as a form of relief under the Eleventh Amendment. Foxx Brief at 21–22. Even if the State is correct about the matter, the question of monetary damages has nothing to do with the substantive issues under review by this Court.

Second, Defendant Foxx places great emphasis on *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004) (en banc). Foxx Brief at 22–24 (identifying it as "controlling"). In fact, Defendant's reliance on this case is badly misplaced. *Doe v. City of Lafayette* did involve a substantive due process claim against restrictions imposed on a convicted sex offender, but the case was quite narrow in its holding and is readily distinguishable from the issues at hand. The case involved the

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[10] See also Bruce Zucker, "Jessica's Law Residency Restrictions In California: The Current State of the Law," Golden Gate University Law Review, 44 Golden Gate U. L. Rev. 101, 108 (2014) (explaining that "[s]ome communities have actually gone as far as creating areas called 'pocket parks' in order to force sex offenders out of their neighborhoods. They are being built across the country. For example, the City of Los Angeles has plans underway to construct at least three 'pocket parks.' These locations will consist of small swaths of land less than one-fifth of an acre in size (about the size of a small backyard to a single-family residence) intended to uproot and displace sex offenders currently residing nearby.") (footnotes omitted).

restrictions imposed on a single individual from entering a specific high-risk location, *i.e.,* city parks. The individual was, by his own admission, a sexual addict with a proclivity toward children (*id*. at 762) who exhibited only a "marginal" ability to control his urges (*id*. at 762) and was identified by his own doctors as someone who "does not have control over his thoughts." (*Id*. at 761). The restrictions at issue were narrowly tailored to restricting this particular individual from entering parks. Based on this evidence, the Court held that the park restriction was rationally related to public safety (*id*. at 773), and was not an "arbitrary exercise of the powers of government." *Id*. at 768. The court took pains to emphasize that this was not a categorical ban but based on the facts of a particular individual. *Id*. at 773 ("The City has banned only one child sex offender, Mr. Doe, from the parks, and they have banned Mr. Doe only because of his near-relapse in January of 2000 when he went into the park to engage in psychiatric brinkmanship.")[11]

Thus, *City of Lafayette* does not lend support to the claim that the across-the-board, categorical, and severe restrictions imposed here on all convicted sex offenders under the law at issue satisfies due process.

IV. Plaintiffs State a Claim for Violation of the Takings Clause

Plaintiffs seek only to make two points regarding their takings claim. First, the City claims that Plaintiffs must first seek compensation in state court before

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[11] Here, it might be noted that a "one- size-fits-all" approach ignores "the heterogeneity of sexual offenders and overmanages some sexual offenders unnecessarily." See *Smith v. Doe*, 538 U.S. 84, 117 (2003) (Ginsburg, J., dissenting) ("However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.")

bringing their federal taking claim notwithstanding the district court's determination that such proceedings would be "futile" because Illinois does not provide a "procedure in which individuals could seek compensation for … regulatory takings." Appx. at 15 (citing *Callahan v. City of Chicago*, 813 F.3d 658, 660 (7th Cir. 2016)). In so arguing, the City admits that when a plaintiff brings a facial takings challenge, he need not first seek compensation in state court. City Brief at 31. But the City claims that "[it] is unclear whether plaintiffs mean to bring a facial challenge." *Id*. In fact, Plaintiffs' Complaint could not be clearer about this matter. See Plaintiffs' Complaint at ¶85 (identifying that Plaintiffs' takings claim is brought "both on its face and as applied to Plaintiffs").[12]

Second, Defendants make much of the fact that the Defendant Vasquez's lease in the apartment he rents with his wife and daughter ended on August 19, 2017, arguing that there is no right "to renew a lease and reside in a location prohibited by state law" and that therefore "Vasquez's takings claim fails because he lacks a constitutionally protected property interest." City at 33; Foxx at 16–17. Plaintiff Vasquez has, in fact, renewed his lease for another year, and given that there is an injunction in place allowing him to continue living in his apartment with

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[12] It might be added that this case is in many ways a classic facial challenge. It is not merely about individual circumstances or damages; it is about the law itself. Facial challenges are brought when, as here, a plaintiff wants to invalidate a law in its entirety and obtain declaratory and injunctive relief against further enforcement of that law. See *Bell v. Keating*, 697 F.3d 445, 452-53 (7th Cir. 2012) (observing that, if a facial challenge is successful, the remedy must be injunctive and declaratory); *Ezell v. City of Chicago*, 651 F.3d 684, 697-99 (7th Cir. 2011) (same).

his family (see dkts. 10, 22, 46), it was reasonable for him to do so, and none of his claims should be foreclosed because of it.

V. Defendants Are Liable for Enforcement of the Residency Restrictions

Both Defendants argue that the district court's decision should be affirmed because they cannot be held liable for enforcing state law. See, City Brief at 8 (the residency statute "is not the City's policy, and the City cannot be liable merely for enforcing state law"); Foxx Brief at 9 ("[t]he State Legislature enacted 720 ILCS 5/11-9.3(b-10), not the State's Attorney.")[13] As set forth below, there are at least four reasons that this argument is contrary to law and should be rejected.

A. The Supreme Court Has Held that Municipalities Are Strictly Liable Under §1983 for Constitutional Violations

In *Owen v. City of Independence*, 445 U.S. 622 (1980), the Supreme Court held that municipalities are strictly liable when their policies cause constitutional violations, even when the actions of municipal employees are in good faith and are taken without reason to believe they are unlawful. The *Owen* decision forecloses the City's arguments here.

The plaintiff in *Owen* was a police chief who was fired without notice or a hearing in circumstances that damaged his reputation. 445 U.S. at 625–30. Shortly after the termination, the Supreme Court ruled that public employees were entitled

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[13] The district court declined to rule on this argument when it decided the Defendants' motions to dismiss. Appx. at 6 ("[A]ccording to the City, municipalities are not liable under § 1983 for 'a policy of enforcing state law.' 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.")

to hearings in such circumstances. Given this sequence of events, the Eighth Circuit ruled that the municipality could not be held liable under *Monell* because its actions were lawful under the law in place at the time of the termination. *Owen v. City of Independence*, 589 F.2d 335, 338 (8th Cir. 1978) (internal citations omitted).

The Supreme Court reversed. After reviewing the legislative history of §1983, the Court rejected "a construction of §1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations." *Id.* at 650. The Court cited a host of policy reasons to hold municipalities strictly liable for constitutional violations, regardless of the good faith with which they might have acted. As an initial matter, the Court noted that, through the creation of §1983 as a remedy for constitutional violations, "Congress sought to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Id.* at 650–51 (internal quotations omitted).

In light of this and the qualified-immunity available to individual defendants, the Court observed that the only fair and appropriate rule was one in which municipalities were responsible for all constitutional violations:

> How uniquely amiss it would be, therefore, if the government itself — the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, … — were permitted to disavow liability for the injury it has begotten. A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. Yet owing to the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be

> left remediless if the city were also allowed to assert a good-faith defense.

Id. at 651 (internal quotations and citations omitted).

In so concluding, the Court explained that providing good-faith immunity to municipalities would undermine §1983's goal of deterring unlawful conduct: "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id*. at 651-52.

B. Municipalities Are Liable Under *Monell* When They Exercise Discretion in the Implementation of State Laws

In light of *Owen*'s instruction that municipalities are liable for constitutional violations that result from their policies regardless of whether they act in good faith, this Court and other circuit courts of appeal have held that a municipality can be held liable under *Monell* when it enforces an unconstitutional state statute if it exercises discretion in its implementation of the law. See *Bethesda Lutheran Homes and Services, Inc. v. Leean*, 154 F. 3d 716, 718–19 (7th Cir. 1998) (municipal liability will not attach where "local officials could not act otherwise without violating state or federal law" ... but "municipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives.") (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986).

Applying these principles in *McKusick v. City of Melbourne*, 96 F.3d 478, 484 (11th Cir. 1996), the Eleventh Circuit held that a city was liable under *Monell* for its enforcement of a state court order prohibiting protesting in a buffer zone around an abortion clinic. *Id*. at 480. The Court reasoned that the city's development and implementation of an administrative enforcement procedure that went beyond the explicit terms of the injunction amounted to cognizable policy choice for which the City could be held liable when it led to a wrongful arrest of a protestor. *Id*. Similarly, in *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993) (cert. denied, 510 U.S. 1177 (1994)), the Sixth Circuit rejected a municipality's argument that it could not be held liable for authorizing its police officers to use deadly force to apprehend fleeing felons because state law authorized such tactics. The Sixth Circuit observed that the state statute authorized, but did not mandate the use of deadly force to apprehend fleeing felons. Therefore, the Court held "[d]efendants' decision to authorize use of deadly force to apprehend nondangerous fleeing burglary suspects was ... a deliberate choice from among various alternatives," such that *Monell* liability was proper. *Id*. at 364.

The City is correct that this Court has declined to impose *Monell* liability where a municipal defendant lacks discretion in enforcement of state law. See, *e.g*., *Surplus Store and Exchange, Inc. v. City of Delphi*, 928 F.2d 788, 791–92 (7th Cir. 1991) However, in *Bethesda Lutheran*, 154 F.3d at 718, decided seven years after *Surplus Store*, this Court distinguished municipal action *mandated* by state law from municipal action *authorized* by state law. The Court wrote as follows:

> *Garner* [*v. Memphis Police Dept.*] ... distinguishes between the state's command (which insulates the local government from liability) and the state's authorization (which does not). That is entirely consistent with *Quinones* and *Surplus Store*.

Id. 154 F.3d at 718. Thus, under *Bethesda Lutheran*, where, as here, the actions of the municipal Defendant are not mandated by state law, a municipality can be held liable for its actions in enforcement of an unconstitutional state statute.

Here, the City has not merely taken actions mandated by 720 ILCS 5/11-9.3(b-10). Rather, the City has affirmatively adopted and implemented enforcement procedures that do not have their source in state law. Specifically, the City has created an official notice that instructs an individual subject to the statute that he or she must vacate his residence within 30 days of a prohibited location opening within 500 feet of his residence or be subject to "arrest, prosecution and imprisonment." Dkt. 33-1. The statute itself does not set forth a time within which a person must vacate a residence that becomes non-compliant due to a new daycare. Nor does the statute command that the City issue notices or force individuals to move if their residence becomes non-compliant during their registration period.

The City's attorney stated in open court that the City exercises discretion about how and whether to enforce 720 ILCS 5/11-9.3(b-10). See, Dkt. 31, Sept. 14, 2016, Transcript at 7 (stating that the City's practice to only make arrests for violation of 720 ILCS 5/11-9.3(b-10) "if there's some sort of complaint against them that initiates police action" and that "there's no standard follow-up after the 30 days.") Indeed, the City here does not even suggest that its enforcement policies were commanded by the state.

The City's affirmative adoption of these enforcement procedures is the type of municipal policymaking that this court has observed can give rise to *Monell* liability—*i.e.*, the City has made a "conscious choice" to enforce the state statute in a certain way. Accordingly, for the reasons set forth above, the City's claims that it cannot be held liable for enforcing 720 ILCS 5/11-9.3(b-10) should be rejected.

C. The City Is a Necessary Defendant

The City argues that it cannot be held liable in this action because it simply follows the mandates of 720 ILCS 5/11-9.3(b-10). However, both Plaintiffs received notices from the City ordering them to vacate their homes within 30 days or face arrest, prosecution and imprisonment. See Dkt. 33-1. It is enforcement of these orders that Plaintiffs seek to enjoin. Accordingly, the City—*e.g.*, the entity threatening to enforce the statute against Plaintiffs—is a necessary Defendant to this action.

D. The State's Attorney Is a Proper Defendant

Claiming to "adopt and incorporate" all of the City's arguments concerning the proper scope of *Monell* liability, the state's attorney also claims that she cannot be held liable here because "[t]he State Legislature enacted 720 ILCS 5/11-9.3(b-10), not the State's Attorney." Foxx Brief at 9. However, it is well established that a state's attorney is a proper defendant in a case seeking to enjoin prosecutions for violation of a state statute that is alleged to violate the constitution. *Parker v. Lyons*, 757 F.3d 701, 707 (7th Cir. 2014) (citing *Ex parte Young*, 209 U.S. 123 (1908)); see also *American Civil Liberties Union v. Florida Bar*, 999 F.2d 1486, 1490

(11th Cir. 1993) (an official charged with enforcing a state law is a proper defendant to an action challenging its constitutionality). Foxx's office has been directly involved in enforcement of the Residency Restrictions and has defended their constitutionality in state and federal courts.

Likewise, Foxx's claim that the suit is barred by Eleventh Amendment immunity lacks merit. Plaintiffs have sought injunctive relief—not damages—and it is well established that "under *Ex parte Young*, a plaintiff may file suit against state officials seeking prospective equitable relief for ongoing violations of federal law … *Ex parte Young* applies to suits to enforce federal statutes as well as the federal Constitution." *Ind. Prot. and Adv. Servs. v. Ind. Family and Social Servs. Admin*, 603 F.3d 365 (7th Cir. 2010) (internal quotations omitted).

Finally, it bears noting that Defendant Foxx's arguments are inherently contradictory—on one had Foxx claims that she is a "state official" entitled to Eleventh Amendment immunity, and on the other hand she claims that she cannot be held liable for her role in enforcing state laws or policies.

CONCLUSION

Plaintiffs respectfully request that this Court reverse the dismissal of Plaintiffs' claims and remand the case to the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 6, 2017, I electronically filed the foregoing **Plaintiffs-Appellants Reply 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 6,957 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 2017 in 12-point Century Schoolbook font.

/s/ Adele D. Nicholas