

No. 18-308

In the Supreme Court of the United States

ANTHONY RAYSHON BETHEA,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE NORTH CAROLINA SUPREME COURT*

**BRIEF OF THE RODERICK AND SOLANGE
MACARTHUR JUSTICE CENTER AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONER'S REQUEST
FOR CERTIORARI**

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INTEREST OF THE *AMICUS CURIAE*¹

The Roderick and Solange MacArthur Justice Center (“RSMJC”) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

SUMMARY OF ARGUMENT

It is well-settled, under the Ex Post Facto Clause in the U.S. Constitution, that the government cannot retroactively create punishments for acts that were not punishable when they were committed. The government also cannot increase punishments for acts that had lesser punishments when they were committed.

However, it is common practice today for states to apply residency restrictions to sex offenders retroactively—that is, to place restrictions on sex offenders specifying where they cannot live, even though those restrictions did not exist when the sex offense was

¹ No counsel for a party authored this brief in whole or part, nor did any person or entity, other than the *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have received timely notice of the intent to file this brief, and have consented to this filing.

committed. These restrictions have the effect of prohibiting sex offenders from living in entire cities and towns, removing them from support and treatment systems, and often forcing them into homelessness. If these were “criminal” punishments, there is no question that they would violate the Ex Post Facto Clause. However, because they have been adopted through civil regulatory schemes (despite having the same onerous, punitive effects), state and local governments nationwide have been able to create, expand, and apply them retroactively to sex offenders for over two decades.

This practice shows no sign of stopping. Indeed, these regulations are quite popular with voters and politicians, signaling that the restrictions will only increase in the future because legislatures have no incentive to curtail them (and, in fact, are pressured by constituents to expand them). The Ex Post Facto clause was written to prevent this exact result—retroactively piling punishments onto unpopular members of society because of the popular opinion. The problems with these restrictions will not be solved without this Court’s intervention. For these reasons, we respectfully request that this Court grant Petitioner’s petition for certiorari.

ARGUMENT

The Ex Post Facto Clause, U.S. Const. art I, § 10, provides: “No State shall ... pass any ... ex post facto Law.” This Court has explained that an ex post facto law is one “which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.” *Weaver v. Graham*, 450 U.S. 24, 28

(1981) (quoting *Cummings v. Missouri*, 71 U.S. 277, 325-26 (1866)).

The Ex Post Facto Clause applies to both criminal punishments and civil regulatory measures that are “punitive” in their intent or effect. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

I. The Effect Of Modern Sex Offender Residency Restrictions Is Punitive.

Modern sex offender residency restrictions are civil regulations. These regulations have been adopted by over 30 states,² hundreds of local governments,³ and even private individuals and establishments (e.g., landlords, housing developments, and homeless shelters).⁴ Typically, these restrictions prohibit sex offenders from living within 1,000 to 2,500 feet⁵ from

² Taurean J. Shattuck, *Pushing the Limits: Reining in Ohio’s Residency Restrictions for Sex Offenders*, 65 CLEV. ST. L. REV. 591, 597 (2017).

³ Songman Kang, *The Consequences of Sex Offender Residency Restriction: Evidence from North Carolina*, 49 INT’L REV. L. & ECON 10, 11 (2016).

⁴ Jill S. Levenson & Andrea L. Hern, *Sex Offender Residence Restrictions: Unintended Consequences and Community Reentry*, 9 JUST. RES. & POL. 59, 65 (2007) (“About 30% [of surveyed sex offenders] reported that a landlord refused to rent to them or to renew their existing lease due to their being a registered sex offender.”); Cassie Dallas, *Not in My Backyard: The Implications of Sex Offender Residency Ordinances in Texas and Beyond*, 41 TEX. TECH L. REV. 1235, 1269 (2009) (private housing development); Kari White, *Where Will They Go? Sex Offender Residency Restrictions as Modern-Day Banishment*, 59 CASE W. RES. L. REV. 161, 165 (2008) (noting that only one homeless shelter in the state of Georgia is willing to accept sex offenders).

⁵ White, *supra* note 4, at 163.

places where children gather such as schools, parks, daycares, playgrounds, and bus stops.⁶ Some of these restrictions are even more expansive, increasing the prohibited distance to four miles,⁷ and including public places such as churches, movie theaters, arcades, amusement parks, youth centers, and pools.⁸

Because the sex offender residency restrictions are civil regulations, they must be “punitive” in effect to violate the Ex Post Facto Clause. Many courts and scholars agree that these regulations are punitive, and are thus unconstitutional.

A. Several Courts Have Found That Sex Offender Residency Restrictions Are Punitive.

Most recently, in 2016, the Sixth Circuit in *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), found that Michigan’s sex offender regulations violated the

⁶ See, e.g., H.B. 91, 108th Leg., Reg. Sess. (Fla. 2006) (prohibiting sex offenders from living within 2,500 feet of schools, day-care facilities, parks, playgrounds, public school bus stops, or “other places where children regularly congregate”); Paul A. Zandbergen & Timothy C. Hart, *Reducing Housing Options for Convicted Sex Offenders: Investigating the Impact of Residency Restriction Laws Using GIS*, 8 JUST. RES. & POL. 1, 18 (2006) (finding that “[p]ublic school bus stops are by far the most restrictive category, followed by daycares, schools, parks, and attractions”).

⁷ Mark Loudon-Brown, “*They Set Him on a Path Where He’s Bound to Get Ill*”: *Why Sex Offender Residency Restrictions Should Be Abandoned*, 62 N.Y.U. ANN. SURV. AM. L. 765, 837-38 (2007).

⁸ John Kip Cornwell, *Sex Offender Residency Restrictions: Government Regulation of Public Health, Safety, and Morality*, 24 WM. & MARY BILL RTS. J. 1, 7 (2015).

Ex Post Facto Clause of the U.S. Constitution. These regulations, which were applied retroactively, prohibited sex offenders “from living, working, or ‘loitering’ within 1,000 feet of a school.” *Id.* at 698 (citing Mich. Pub. Acts 121, 127 (2005)). Referring to these regulations as “a byzantine code governing in minute detail the lives of the state’s sex offenders,” the Court found that the regulations:

ha[ve] a significant impact on each of [the registrants] that reach[] far beyond the stigma of simply being identified as a sex offender on a public registry. As a result of the school zone restrictions, for example, many of the Plaintiffs have had trouble finding a home in which they can legally live or a job where they can legally work.

Id. at 698. Noting that these “geographical restrictions are . . . very burdensome, especially in densely populated areas,” the Court reproduced a map of Grand Rapids, Michigan as a visual representation of how much of the city was off-limits to the Plaintiffs. *Id.* at 701-02; *see* Appendix A.

The *Snyder* Court distinguished *Smith v. Doe*, 538 U.S. 84 (2003), which rejected an Ex Post Facto challenge to the retroactive application of a sex offender registration statute, stating that the “restraints [in the Michigan regulations] are greater than those imposed by the [state statute considered in *Smith*] by an order of magnitude” and that the effects of the Michigan regulations were not “minor and indirect.” *Id.* at 703 (citing *Smith*, 538 U.S. at 100). Moreover, the Court cautioned that *Smith* did not

simply write “blank checks to states to do whatever they please in this arena.” *Id.* at 705.

In *State v. Pollard*, 908 N.E.2d 1145 (Ind. 2009), the Indiana Supreme Court found that Indiana’s sex offender residency restrictions were unconstitutional ex post facto laws. Pollard was convicted of a sex crime in 1997, and the regulations at issue (Ind. Code § 35-42-4-11) were applied to him retroactively. *Id.* at 1147. These regulations included a residency restriction that prohibited Pollard from living “within 1,000 feet of school property, a youth program center, or a public park.” *Id.* Because of this regulation, Pollard was no longer allowed to live in a house that he owned and in which he had resided for 20 years. *Id.* at 1150. The Court found that the “disability or restraint imposed by the residency restriction statute is neither minor or indirect” (referring to the language in *Smith*, 538 U.S. at 100) and therefore held that it violated the Ex Post Facto Clause in the Indiana Constitution. *Id.*

Similarly, in *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011), the Ohio Supreme Court found that Ohio’s sex offender residency restrictions were unconstitutional “retroactive laws” (ex post facto laws) under the Ohio Constitution. *Id.* at 1113. The challenged regulation (R.C. Chapter 2950) “prohibit[ed] all classified sex offenders, not just those convicted of sex offenses against children, from residing within 1,000 feet of any school premises.” *Id.* at 1112. Due to the expansion of various aspects of the regulation over time, the Court found that “all doubt has been removed: R.C. Chapter 2950 is punitive.” *Id.*

Likewise, in *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009), the Kentucky Supreme Court found that Kentucky’s sex offender residency restrictions were unconstitutional ex post facto laws. Baker entered a guilty plea for a sex offense in 1995 and subsequently moved into his family’s home in Ohio. *Id.* at 441. Kentucky amended its sex offender regulations in 2006, applying them retroactively to Baker. *Id.* These regulations included a residency restriction that prohibited sex offenders from “resid[ing] within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility.” *Id.* (citing KRS 17.545). Because of the strict sex offender residency restrictions where he was living in Ohio, Baker had to move back to Kentucky, where he was subsequently arrested and charged with violating KRS 17.545 for living too close to a public playground. *Id.* at 441. The Court held that the Kentucky residency restrictions violated the U.S. Constitution and Kentucky Constitution’s Ex Post Facto Clauses, reasoning that they were akin to banishment because they “prevent[ed] the registrant from residing in large areas of the community” and because they “also expel[] registrants from their own homes. *Id.* at 444.

B. The Effects Of Sex Offender Residency Restrictions Are Neither “Minor” Nor “Indirect.”

Many scholars have analyzed the sex offender residency restrictions used nationwide, and their findings show that these regulations effectively “ban-

ish” sex offenders from entire cities and towns.⁹ The examples abound:

- New York, NY: sex offenders are banned from living in “almost all parts of Manhattan . . . as well as other large areas of the other boroughs of New York City.”¹⁰
- Atlanta, GA: “most of downtown . . . [is] totally off-limits for sex offenders [to live].”¹¹
- Oklahoma City, OK: “less than 16% of the city [is] legally inhabitable by sex offenders, and most of that land [is] industrial and lack[s] residential housing.”¹²
- Des Moines, IA: “the few areas . . . which are not restricted, include only industrial areas or some of the city’s newest and most expensive neighborhoods.”¹³
- Richardson, TX: 98% of the city is prohibited.¹⁴

⁹ Dallas, *supra* note 4, at 1268; White, *supra* note 4, at 176.

¹⁰ Leslie Anne Mendoza, “Where Can I Go?: Excessiveness of the Geographical Restraints Imposed by the Sexual Assault Reform Act in Urban Neighborhoods, 33 *TOURO L. REV.* 569, 576-77 (2017) (citing *Williams v. Department of Corrections and Community Supervision*, 24 N.Y.S.3d 18, 32 (N.Y. App. Div. 2016) (Kapnick, J., dissenting)).

¹¹ Dwight H. Merriam, *Residency Restrictions for Sex Offenders: A Failure of Public Policy*, 60 *PLAN. & ENVTL. L.* 3, 11 (2008).

¹² Michelle Olson, *Putting the Brakes on the Preventative State: Challenging Residency Restrictions on Child Sex Offenders in Illinois Under the Ex Post Facto Clause*, 5 *NW J. L. & SOC. POL’Y* 403, 423-24 (2010).

¹³ White, *supra* note 4, at 164.

¹⁴ Dallas, *supra* note 4, at 1269.

- Jersey City, NJ: even when only proximity to schools is counted “the only areas of the city that remain available are railroad tracks, a cemetery, and a mall” and “[o]nce the remainder of the restrictions are accounted for, even those minimal options disappear.”¹⁵
- Tulsa, OK: “most of downtown . . . [is] totally off-limits for sex offenders [to live].”¹⁶

Indeed, even some counties are largely off limits to sex offenders. For example:

- Miami-Dade County, FL: residency restrictions prevent sex offenders from living “in almost every neighborhood in the county,” causing over 70 sex offenders to live together in a homeless encampment under a bridge (approved as a “residence” by the sex offenders’ probation officers).¹⁷
- Carroll County, IA: “only 139 total residential units, out of a total of 9,019 in the county, were available to sex offenders who wanted to live in an incorporated area in which educational services were available.”¹⁸
- Orange County, FL: 95.2% of potentially available properties fall within 1,000 feet of one or

¹⁵ White, *supra* note 4, at 170.

¹⁶ Merriam, *supra* note 11, at 11.

¹⁷ Gina Puls, *No Place to Call Home: Rethinking Residency Restrictions for Sex Offenders*, 36 B.C. J.L. & SOC. JUST. 319, 319-20 (2016).

¹⁸ Loudon-Brown, *supra* note 7, at 809-10.

more restricted areas and 99.7% fall within 2,500 feet.¹⁹

Maps are perhaps the most compelling demonstration of just how much of a city is off-limits to sex offenders. For example, in the *Snyder* published opinion, the Court reprinted a map made by one of the Plaintiff's experts to show how much of Grand Rapids, Michigan was covered by the regulation. *Snyder*, 834 F.3d at 702; Appendix A. Several other similar maps have been made by researchers. For example, one researcher created such a map of two major cities in Petitioner's home state (North Carolina).²⁰ Another researcher created an analogous map of an entire county (Orange County, Florida) from which he concluded that 95.2% of potentially available properties fall within 1,000 feet of one or more restricted areas and 99.7% fall within 2,500 feet.²¹ Still another researcher relied on a map of Minneapolis, provided by the Minnesota Department of Corrections, in coming to the conclusion that "[w]ith minor exceptions, all of the areas left available [for sex offenders to live] are non-residential areas of the city, meaning there would be little to no housing options for offenders in those areas."²²

¹⁹ Zandbergen & Hart, *supra* note 6, at 15.

²⁰ Kang, *supra* note 3, at 13-14; Appendix B.

²¹ Zandbergen & Hart, *supra* note 6, at 19 Fig. 4; Appendix C.

²² White, *supra* note 4, at 165-69; Appendix D.

Due to the lack of available housing, many sex offenders become homeless.²³ A 2011 report from the California Sex Offender Management Board found that “nearly 32 percent of sex offenders on parole are homeless due to Jessica’s Law [a California law prohibiting sex offenders from living within 2,000 feet of a school or park].”²⁴ Some sex offenders are not even given the option of homelessness if they cannot find legally compliant housing, and are forced to remain in prison. For example, in 2015 there were 1,000 sex offenders in Illinois that were currently eligible for parole, but the state refused to release them from prison until they could secure suitable housing.²⁵

For those who are able to find houses that meet the regulations’ standards, these residences are often

²³ Mendoza, *supra* note 10, at 586; Kang, *supra* note 3, at 11; Puls, *supra* note 17, at 343; Olson, *supra* note 12, at 424; Amanda Moghaddam, *Popular Politics and Unintended Consequences: The Punitive Effect of Sex Offender Residency Statutes from an Empirical Perspective*, 40 Sw. L. Rev. 223, 238-39 (2010).

²⁴ Lorelei Laird, *A Place to Call Home: Courts Are Reconsidering Residency Restrictions for Sex Offenders*, 101-JUL A.B.A. J. 15, 16 (2015).

Homeless sex offenders are a major problem for law enforcement because they are very difficult to monitor. For example, in the six months after Iowa passed a sex offender registry restriction prohibiting them from living within 2,000 feet of any school or childcare center, “the number of registered sex offenders in the state who could not be located more than doubled.” Puls, *supra* note 17, at 343. Unstable living arrangements are the “strongest predictor of absconding.” Jill Levenson et al., *Sex Offender Residence Restrictions: Sensible Crime Policy or Flawed Logic?*, 71-DEC FED. PROBATION 2, 3 (2007).

²⁵ Olson, *supra* note 12, at 404.

not affordable,²⁶ or conversely, are in disadvantaged high-crime neighborhoods²⁷ “that are poorly suited for anyone trying to turn around a life.”²⁸ In either case, the available residences are often quite rural,²⁹ far from employment opportunities, social services, familial and other support networks, and medical and mental treatment services.³⁰

By pushing sex offenders to the outskirts of society, these residency restrictions “brand[] registrants as moral lepers” and “consign[] them to years, if not a

²⁶ One study found that over half of sex offenders on parole reported that it was difficult to find affordable housing. Levenson & Hern, *supra* note 4, at 63.

²⁷ Kang, *supra* note 3, at 10.

²⁸ Merriam, *supra* note 11, at 9.

²⁹ White, *supra* note 4, at 164 (citing *Doe v. Miller*, 298 F. Supp. 2d 844, 869 (S.D. Iowa 2004)) (“Unincorporated areas and towns too small to have a school or child care facility remain available [for sex offenders to live], as does the country, but available housing in these areas is not necessarily readily available. . . . [A]lthough entirely unrestricted areas do exist within the state [of Iowa], these areas are exclusively limited to very small towns without any schools, or to farmland.”); Kang, *supra* note 3, at 11 (finding that the “adverse effect” of residency restrictions on sex offenders “can be particularly severe for sex offenders in metropolitan areas, where child-related facilities are densely located”).

³⁰ A 2007 study surveyed sex offenders about their experiences with these restrictions. Levenson & Hern, *supra* note 4. The surveyed sex offenders “reported that they were forced to live farther away from employment opportunities (37%), social services and mental health clinics (25%), and supportive family and friends (45%). The majority (64%) expressed anxiety that they would be unable to find a place to live at some point in the future.” *Id.* at 66. Other, more recent studies also support these findings. See *e.g.*, Shattuck, *supra* note 2, at 601.

lifetime, of existence on the margins, not only of society, but often . . . from their own families, with whom, due to school zone restrictions, they may not even live.” *Snyder*, 834 F.3d at 705.

II. The Retroactive Punitive Effects Of Sex Offender Residency Restrictions Cannot Be Fixed Without This Court’s Intervention.

Since they were first created in 1995,³¹ sex offender residency restrictions have greatly expanded in number and scope. Now, more than half the states and hundreds of local governments have implemented these laws. This trend shows no sign of stopping. Indeed, voters and politicians are very supportive of these regulations. For example, in 2006 over 70% of California voters voted to pass “Jessica’s Law,” which prohibits sex offenders from living within 2,000 feet of any school, daycare facility, park, or other place where children gather.³² And, in 2000, a similar law in Illinois passed in the state Senate by a vote of 53 ayes, 5 present, and 0 nays.³³

Legislators have no incentive to lessen the restrictions on sex offenders—if they did ease the regu-

³¹ Florida was the first state to create such a law. Puls, *supra* note 17, at 325.

³² *Id.* at 335; *Jessica's Law, California Proposition 83 (2006)*, BALLOTPEDIA, [https://ballotpedia.org/Jessica%27s_Law,_California_Proposition_83_\(2006\)](https://ballotpedia.org/Jessica%27s_Law,_California_Proposition_83_(2006)).

³³ Senate Vote (H.B. 4045), 91st Gen. Assem. (Ill. Apr. 7, 2000), http://www.ilga.gov/legislation/votehistory/srollcalls91/pdf/910HB4045_04072000_019000T.PDF.

lations they would likely become “an open target the next election”³⁴ and “the attack ads [would] practically write themselves.”³⁵ Instead, legislators have every incentive to *increase* regulations on sex offenders, and some are quite open about their intent to do so. For example:

When the first draft of the Georgia restriction was unveiled, the Georgia House Majority Leader stated that it was his intent to make it “so onerous, costly, [and] inconvenient (for sex offenders) that they leave Georgia. I don't care where [they live] as long as it's not here.”³⁶

This presents a situation exactly like the Framers of the Constitution feared when they wrote the Ex Post Facto Clause. As the Court in *Snyder* noted, “as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under the guise of civil regulation to punish people without prior notice.” *Snyder*, 834 F.3d at 706. When governments retroactively change punishments that were already assigned, it creates an unfair “moving target” for offenders, who cannot not anticipate how their punishments might change in the future when they are deciding how to respond to their charges (e.g., pleading guilty). This in turn undermines public confidence in the finality of these laws. Indeed, the idea of curtailing these laws has found unlikely

³⁴ Olson, *supra* note 12, at 416.

³⁵ *America's Unjust Sex Laws*, THE ECONOMIST (Aug. 8, 2009), <https://www.economist.com/leaders/2009/08/06/americas-unjust-sex-laws>.

³⁶ White, *supra* note 4, at 175.

support from sexual violence victims' advocacy groups and prosecutors.³⁷

As Judge Keith cautioned in his dissent in *Doe v. Bredesen*, 521 F.3d 680, 681 (6th Cir. 2008), “We must be careful, in our rush to condemn [sex offenders], not to undermine the freedom and constitutional rights that make our nation great.”

CONCLUSION

Without this Court's intervention, sex offender residency restrictions will continue to expand in number and scope, applying to sex offenders retroactively in a way that effectively banishes them from society. The modern residency restrictions, though they are civil regulations, are so excessively punitive in effect that they violate the Ex Post Facto Clause of the U.S. Constitution. The Court should issue a writ of certiorari to address these issues, which will not be resolved by legislatures.

³⁷ Levenson & Hern, *supra* note 4, at 68 (“Interestingly, victims' advocates have also taken a stand against residence restriction laws, noting their potential to jeopardize public safety by creating transience and thereby making sex offenders more difficult to track and monitor.”); Levenson et al., *supra* note 24, at 4 (“Iowa prosecutors and victim advocates took proactive steps and publicly denounced residence restrictions, asserting that they create more problems than they solve.”).

Respectfully submitted,

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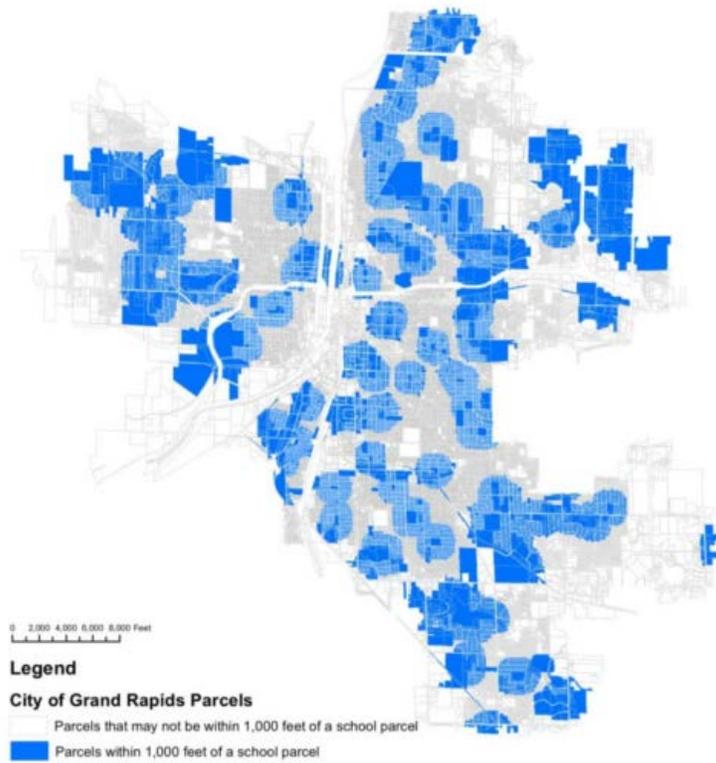
OCTOBER 11, 2018

App. A

APPENDIX A

Map of Grand Rapids, Michigan showing where sex offenders can live.¹

"School safety zones" in the city of Grand Rapids



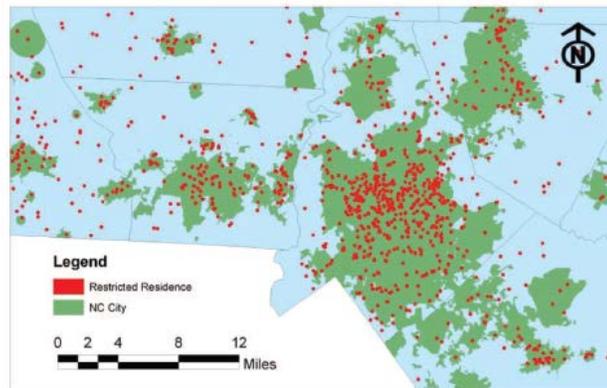
¹ *Does #1-5 v. Snyder*, 834 F.3d 696, 702 (6th Cir. 2016).

App. B

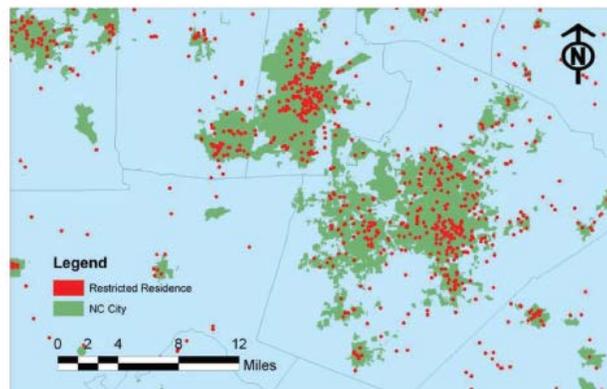
APPENDIX B

Maps of Charlotte and Raleigh, North Carolina showing where sex offenders can live.²

(a) Charlotte



(b) Raleigh



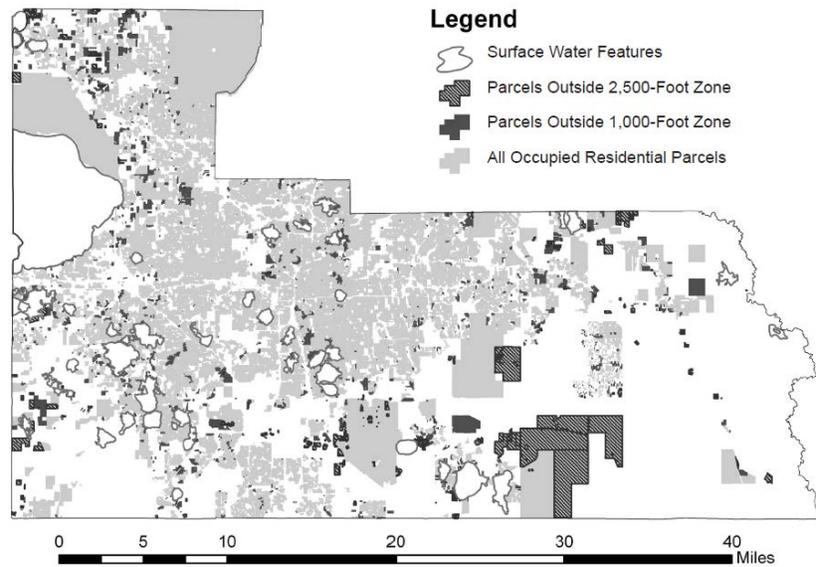
² Songman Kang, *The Consequences of Sex Offender Residency Restriction: Evidence from North Carolina*, 49 INT'L REV. L. & ECON 10, 13 (2016).

App. C

APPENDIX C

Map of Orange County, Florida showing where sex offenders can live.³

Occupied Residential Parcels in Orange County, Florida

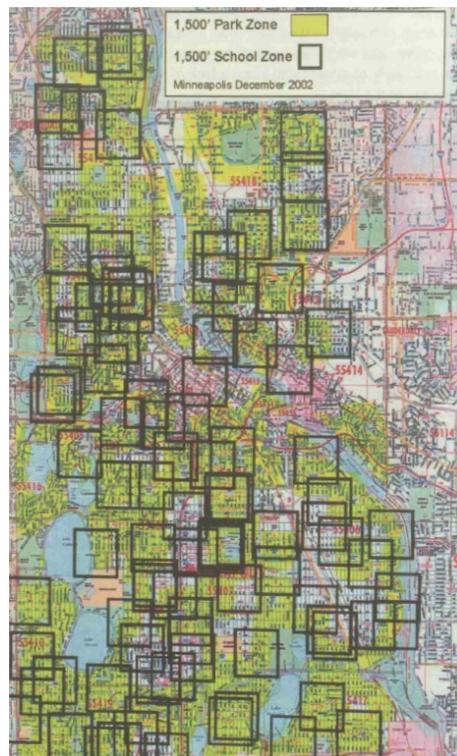


³ Paul A. Zandbergen & Timothy C. Hart, *Reducing Housing Options for Convicted Sex Offenders: Investigating the Impact of Residency Restriction Laws Using GIS*, 8 JUST. RES. & POL. 1, 19 Fig. 4 (2006).

App. D

APPENDIX D

Map of Minneapolis, Minnesota showing where sex offenders can live.⁴



⁴ Kari White, *Where Will They Go? Sex Offender Residency Restrictions as Modern-Day Banishment*, 59 CASE W. RES. L. REV. 161, 165-69 (2008).