**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ROME DIVISION**

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| WENDY WHITAKER, et. al. | ) | |
| Plaintiffs, | ) | |
| | ) | CIVIL ACTION |
| v. | ) | |
| | ) | No. 4:06-cv-140-CC |
| SONNY PERDUE, et. al., | ) | |
| Defendants. | ) | |

**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF "EX POST FACTO" SUBCLASS**

This case presents the issue of whether the State may retroactively force persons on the sex offender registry from their homes and forbid them from working in most urban areas of the State pursuant to O.C.G.A. § 42-1-15(b) ("the Statute"). The facts are not in dispute. The Statute retroactively forbids all sex offenders from living within 1,000 feet of school bus stops, churches, and swimming pools and from working within 1,000 feet of schools, child care centers, and churches. It cannot be disputed that 90% of persons on the registry were convicted before the Statute's July 1, 2006 effective date, yet must comply

with its terms.[1] There is further no dispute that since July 1, 2006, at least **1,069 people have been forced from their homes due to the church and swimming pool provisions of § 42-1-15(b)**.[2] The following facts are also beyond dispute: First, at least 774 people have been retroactively expelled from homes due to the church provision of § 42-1-15(b), and at least 203 people have been evicted due to the Statute's swimming pool provision.[3] Second, once rendered homeless by the Statute, many of these people have nowhere to go. Shelters that might otherwise provide a temporary bed cannot house indigent homeless plaintiffs because of the Statute; there are no shelters in Georgia at which such persons can reside.[4] The State's response has been to "direct[] homeless offenders into the woods" where persons on the registry have set up tent camps.[5]

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[1] See Mica Doctoroff Decl. (Ex. 1, ¶ 17).

[2] See id. (Ex. 1, Attachment A).

[3] See id. At least 92 others were required to move due to *either* the church or pool provision; sheriffs' discovery responses did not specify whether the prohibited location was the former or latter. Id. at ¶ 11(b).

[4] See Decl. of Mica Doctoroff (Ex. 1 ¶ 20-23).

[5] See Greg Bluestein, *Homeless Georgia Sex Offenders Directed to Woods*, ASSOCIATED PRESS, Sept. 28, 2009 (reporting that "[a state probation official] said state probation officers have directed homeless offenders into the woods" and noting that "[t]he muddy camp on the outskirts of prosperous Cobb County is an unintended consequence of Georgia's sex offender law, which bans the state's

Third, at least 240 people were forced to resign from their jobs due to § 42-1-15(c) and thousands more are severely limited in their employment opportunities under the Statute.[6] Fourth, elderly and disabled persons in nursing homes will be expelled from their facilities unless this Court acts.[7]

The only question presented in this motion is a legal one – whether the Statute violates the *ex post facto* clause. Plaintiffs in the "ex post facto" subclass ask this Court to grant them summary judgment and to enjoin enforcement of the 2006 residence and employment restrictions of O.C.G.A. § 42-1-15(b).[8]

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16,000 sex offenders from living, working or loitering within 1,000 feet of schools, churches, parks and other spots where children gather) (Ex. 14).

[6] See Doctoroff Decl. (Ex. 1, Attachment B).

[7] See Consent Order, Oct. 19, 2006 [Doc. No. 105] (agreeing to permit Cherokee County plaintiff to remain in nursing home within 1,000 feet of a church pending resolution of this action); Consent Order, Oct. 17, 2006 [Doc. No. 104] (agreeing to permit three Candler County plaintiffs to remain in nursing facility within 1,000 feet of a church pending resolution of this case); Resp. of Sheriff Whittle to Pls' Mot. for Prelim. Inj., Oct. 13, 2006 [Doc. No. 102] (agreeing to temporarily stay nursing home evictions).

[8] This Court certified a class of all persons who: "are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-12 and who: (1) were convicted before July 1, 2006; (2) are prohibited from residing within 1,000 feet of a church, swimming pool, or school bus stop or working within 1,000 feet of a church, school, or child care center; and (3) do not qualify for the homeowner exemption or employment exemption set forth in O.C.G.A. § 42-1-15(f), (g) as determined by the sheriff in the county where the person is registered." Order of Mar. 30, 2009 at 14 [Doc. No. 223].

## STATEMENT OF FACTS

Per L.R. 56.1(B), the facts are set forth in *Plaintiffs' Statement of Material Facts in Support of Motion for Summary Judgment on Behalf of Ex Post Facto Subclass.*

## STANDARD OF REVIEW

Summary judgment may be granted if there are no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law.[9]

## LEGAL ARGUMENT

### I. THE SCHOOL BUS STOP, CHURCH AND SWIMMING POOL PROVISIONS OF O.C.G.A. § 42-1-15, ALONE AND IN COMBINATION, VIOLATE THE *EX POST FACTO* CLAUSE.

Plaintiffs argued their *ex post facto* claim in Doc. No. 261 and hereby incorporate that argument herein. The onerous and punitive nature of the Statute is already apparent when solely the school bus stop provision is considered. The constitutional infirmity becomes even more glaring when added to the equation are hundreds people who have been evicted from homes because they live too close to a church or pool. Plaintiffs particularly note the profound impact of the church provision: at least 774 people have been forced from their homes due to this provision alone.[10]

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[9] See Fed. R. Civ. P. 56(c).

[10] See Mica Doctoroff Decl. (Ex. 1 ¶ 11; Attachment A).

### A. *Ex post facto* standard.

A state statute violates the *ex post facto* clause if its intent is to impose retroactive punishment, or if it is so punitive in effect as to negate the state's attempt to deem it a civil regulation. See Smith v. Doe, 538 U.S. 84, 92 (2003).

### B. The Intent of the Church, Swimming Pool, and School Bus Stop Provisions Was Punitive.

The intent of the 2006 residence restrictions was clearly punitive for the reasons set forth in *Plaintiffs' Brief in Support of Motion for Summary Judgment to Enjoin Enforcement of the "School Bus Stop" Provision* at 5-7.

### C. The Effect of the Church, Swimming Pool, and School Bus Stop Restrictions Is Punitive.

The *effect* of the church, swimming pool and school bus stop restrictions ("the 2006 residence restrictions") is to sentence plaintiffs to a life of transience, forcing them to move from place to place. These restrictions are "punitive" when analyzed pursuant to the factors in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963) and Smith v. Doe, 538 U.S. 84, 97 (2003): (1) whether the statute "has been regarded in our history and traditions as punishment;" (2) whether it "imposes an affirmative disability or restraint;" (3) whether it "promotes the traditional aims of punishment;" (4) whether it "has a rational connection to a nonpunitive purpose;" and (5) whether it "is excessive with

respect to this purpose." Id. Since this action was filed, several courts have found that sex offender residence laws violated the *ex post facto* clause.[11]

1. **The 2006 Residence Restrictions Are Analogous to Sanctions That Have Been Historically Considered Punishment: Banishment and the Residence Restrictions Typical to Probation and Parole.** This Court stated that it could conclude, when presented with evidence regarding the areas impacted by the Statute, that the Statute "sufficiently resembles

[11] See Elwell v. Township of Lower, 2006 WL 3797974 at *17 (N.J. Super. Ct. Law Div. Dec. 22, 2006) (ordinance prohibiting sex offenders from residing within 25 feet of school bus stop violated *ex post facto* clause). See also State v. Pollard, 908 N.E.2d 1145, 1150, 1154 (Ind. 2009) (Indiana statute prohibiting sex offenders from living within 1,000 feet of a school, youth center, or park violated *ex post facto* clause since it rendered persons "subject to constant eviction"); Commonwealth v. Cory, 911 N.E.2d 187 (Mass. 2009) (retroactive application of statute requiring probationers convicted of sex offenses to be placed on global positioning system device violated *ex post facto* clause); *Order Granting Permanent Inj.*, Oct. 7, 2008 [Doc. No. 77], ACLU of Nevada, Does 1-8, v. Masto, Case No. 2:08-cv-922 (D. Nev. 2008) (statute that re-categorized sex offenders and made them retroactively subject to residence law, including school bus stop provision, N.R.S. § 213.1243, violated *ex post facto* clause) (cited in U.S. v. Burkey, 2009 WL 1616564 at *8 (D. Nev. June 8, 2009); Mikaloff v. Walsh, 2007 WL 2572268 at *3 (N.D. Ohio Sept. 4, 2007) (Ohio law prohibiting sex offenders from residing within 1,000 feet of a school violated the *ex post facto* clause because it "restricts where offenders can live in a manner similar to probation and parole, prototypical punishments"); R.L. v. Mo. Dep't of Corr., 245 S.W.3d 236 (Mo. 2008) (a 1,000-foot sex offender residence statute was a retroactive law in violation of state constitution). See also Doe v. Schwartzenegger, 476 F. Supp.2d 1178, 1181 (E.D. Cal. 2007) (applying sex offender residency law retroactively "would raise serious ex post facto concerns.").

banishment to make this factor weigh towards finding the law punitive."[12] Plaintiffs have now presented this Court with such evidence; the Statute is so expansive that nearly 400 people will be immediately evicted from "bus stop counties" absent a ruling in plaintiffs' favor.[13] Plaintiffs have further shown that at least 1,069 people have been evicted from their homes since July 1, 2006 due to the church and pool provisions.[14]

**2. The 2006 residence restrictions impose an affirmative disability.**

O.C.G.A. § 42-1-15, unlike the sex offender registration law in Smith, 538 U.S. at 100, "imposes a physical restraint on the available residences of registered sex offenders."[15] Unlike in Smith, moreover, "[t]he record in this case" **does** "contain[] . . . evidence that the Act has led to substantial

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12 See Order, Mar. 20, 2007 at 19 [Doc. No. 109].

13 See *Statement of Material Facts* ¶ 22.

14 See Mica Doctoroff Decl. (Ex. 1, ¶ 11; Attachment A); Mikaloff, 2007 WL 2572268 at *9-10 (residence law was akin to restrictions imposed by parole officers); Pollard, 908 N.E.2d at 1151 ("restrictions on living in certain areas is not an uncommon condition of probation or parole" and determining that residence restrictions were analogous to traditional forms of punishment).

15 See Order, Mar. 30, 2007 [Doc. No. 109] at 19-20. See also Doe v. Miller, 405 F.3d 700, 721 (8th Cir. 2005) (statute imposed affirmative disability); Mikaloff, 2007 WL 2572268 at *8 (residence restriction "imposes an onerous affirmative disability and restraint"); Pollard, 908 N.E.2d at 1150 (residence restriction subjected persons to "constant eviction," thus imposing affirmative disability).

occupational or housing disadvantages . . . ."[16] The Statute: "significantly limit[s] the permanency of residences that can be established by registered sex offenders and impair[s] their ability to form relationships in their chosen communities."[17] It has caused and will continue to cause enormous upheaval and stress to plaintiffs and their families.[18]

**3. The 2006 residence restrictions promote the traditional aims of punishment.** "The parties do not dispute that one of the purposes of the

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[16] See Ex. 1 and 2; Maps [Ex. 1-2 to Doc. No. 261].

[17] Order, Mar. 30, 2007 [Doc. No. 109] at 20.

[18] See John Colley Decl., Nov. 12, 2008 (Ex. 4) (describing being arrested for residing within 1,000 feet of a pool in 2006; being evicted from his trailer in 2008 while on dialysis due to church provision; facing homelessness while on dialysis); Glynda Gowen Decl., June 20, 2008 [Doc. No. 187, Ex. 1] (stating that she has congestive heart failure and was forced from her home, after hospitalization, due to church provision); Kelly Piercy Decl., Jan. 30, 2008 [Doc. No. 169, Ex. C] (legally blind man forced to move from residence in 2006 because residence was within 1,000 feet of church); Andrew Norton Decl., June 12 [Doc. No. 187, Ex. 4] (describing repeated evictions and separation from wife and children); Tyrone Mitchell Decl., Sept. 14, 2007, [Doc. No. 169, Ex. B] (forced to leave two apartments within 1,000 feet of pool; describing resulting difficulty of paying for HIV medications); Rebecca Danner Decl., Dec. 19, 2007 (Ex. 3) (stating that she and her late husband, who died of cancer, were forced to move three times due to the Statute; further stating that they were ordered to move a fourth time while her husband was under hospice care); Thomas Early Decl., July 27, 2006 [Ex. 1 to Doc. No. 63] (bus stop provision would separate him from his wife who has multiple sclerosis); Jeffrey Jones Decl., Jan. 29, 2008 [Ex. C to Doc. No. 169] (stating that the bank foreclosed on his home and that he lost $25,000 after he was ordered him to move due to school bus stop provision).

Act is deterrence, a traditional aim of punishment."[19] As this Court held, this factor weighs in plaintiffs' favor. Id.

**4. The 2006 residence restrictions are irrational and excessive for the reasons in *Plaintiffs' Brief in Support of Motion for Summary Judgment to Enjoin Enforcement of School Bus Stop Provision* at 13-19.** The Statute fails to differentiate between people on the sex offender registry regardless of whether the person engaged in teenage consensual sex or a violent offense.[20] In addition, prohibiting plaintiffs from residing within 1,000 feet of churches and pools will not prevent sex offenses.[21] The contrary is true: sex offenders with stable housing are less likely to commit new sex

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19 Order, Mar. 30, 2007 [Doc. No. 109] at 20.

20 See Order, Mar. 30, 2007 [Doc. No 109] at 21. See also Pollard, 908 N.E.2d at 1153 (statute was excessive where it "applie[d] equally to persons convicted for example of vicarious sexual gratification as a class D felony . . . as to persons convicted of rape as a class A felony. . . ."); Cory, 911 N.E.2d at 197 (statute retroactively requiring sex offenders to wear GPS devices was excessive "to the extent that it applies without exception . . . regardless of any individualized determination of their dangerousness or risk of reoffense.").

21 See COLO. DEP'T OF PUB. SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 4 (2004) ("Placing restrictions on the location of . . . supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism"); MINN. DEP'T OF CORR., LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES: 2003 REPORT TO THE LEGISLATURE 9 (2003) ("Enhanced safety due to proximity restrictions may be a comfort factor for the general public, but it does not have any basis in fact.").

offenses than those who lack stability.[22]

In short, the Statute – so broad that it has evicted more than 1,069 people, rendered many homeless, and left probation officers with no option but to order plaintiffs to camp in the woods – is excessive, irrational, and unconstitutional.

## II. THE EMPLOYMENT PROVISION OF O.C.G.A § 42-1-15(c) IS PUNITIVE IN EFFECT IN VIOLATION OF THE *EX POST FACTO* CLAUSE.[23]

O.C.G.A § 42-1-15(c), signed into law as part of HB 1059, retroactively bars plaintiffs from employment within 1,000 feet of churches, schools, and child care centers in violation of the *ex post facto* clause. The employment provision violates the *ex post facto* clause for the following reasons: First, forcing plaintiffs to abandon their employment and forego their source of income while vastly limiting their job prospects is analogous to traditional punishments.[24]

Second, the employment restrictions impose an affirmative disability.

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22 See id.

23 Plaintiffs incorporate herein the *ex post facto* argument set forth in Doc. 261.

24 See Nixon v. Adm'r of Gen. Serv., 433 U.S. 425, 473-74 (1977) ("[A] legislative enactment barring designated individuals or groups from participation in specified employments or vocations" was "a mode of punishment commonly employed against those legislatively branded as disloyal."); U.S. v. Du, 476 F.3d 1168 (10th Cir. 2007) (occupational restrictions may be imposed as part of criminal sentence to "prevent a probationer from taking a certain type of employment").

Registered sex offenders are not "free to . . . live and work as other citizens." Smith, 538 U.S. at 101. Rather, as demonstrated by Exhibits 9-11, their employment opportunities are extremely limited.[25] Declarations submitted by plaintiffs additionally testify to the hardship imposed by the employment provision.[26] Barring plaintiffs from working in most urban areas is not a "minor and indirect effect of a conviction for a sexual offense."[27]

Third, the employment provision promotes the traditional aims of punishment. One of the purposes of the Statute is deterrence, a traditional aim of punishment. Smith v. Doe, 538 U.S. at 102.

Finally, the Statute is both irrational and excessive.[28] It fails to differentiate between people on the sex offender registry – it treats everyone the same, regardless of whether the person engaged in teenage consensual sex or a violent offense.[29] More significantly, the employment provision will not prevent sex

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[25] See Doctoroff Decl. (Ex. 1 ¶ 13; Attach. B) (stating 240 plaintiffs were required to leave their employment); Maps (Ex. 9-11); Wagner Decl. (Ex. 2).

[26] See *Statement of Material Facts* ¶ 12.

[27] Order, Mar. 30, 2007 [Doc. No. 109] at 20.

[28] See Order, March 30, 2007 [Doc. 109] at 21.

[29] See Depo. of David Rush at 30 [Ex. 19 to Doc. No. 261] ("[I] think Ms. Whitaker shouldn't be on the registry"); Pollard, 908 N.E.2d at 1153 (statute was

offenses.[30] Sex offenders with stable employment are less likely to commit new sex offenses than those who lack such stability.[31] An analysis of Georgia's parolees found that employment has a serious impact on recidivism, quantifiable as a 30% decrease in recidivism for each month of employment: [32]

> The analysis of Georgia paroles indicates that the pay-off for each day of employment during parole is a 1% reduction in the likelihood of arrest. That translates into a 30% decrease in the likelihood of arrest for only one month (30 days) of employment. A parolee employed for a year is 3.5 times less likely to be arrested than a similarly situated parolee who is unemployed for the year.[33]

Further, training materials disseminated by the Board of Pardons and Parole list "lifestyle instability," including instability in employment, as "one of the most

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excessive where it "applie[d] equally to persons convicted for example of vicarious sexual gratification as a class D felony . . . as to persons convicted of rape as a class A felony. . . .").

[30] See Jill Levenson, Sex Offender Residence Restrictions: Sensible Crime Policy or Flawed Logic? 71 Fed. Probation 2 at 5 (Dec. 2007) ("sex offenders who maintained social bonds to communities through stable employment and family relationships had lower recidivism rates than those without jobs or significant others").

[31] See id.

[32] See Applied Research Serv., Enhancing Parole Decision-making Through the Automation of Risk Assessment 15 (Apr. 2003) [Ex. 23 to Doc. No. 261].

[33] See id.

powerful triggers to committing a sex offense."[34] The Office of the Child Advocate, moreover, publicly opposed the employment provision.[35] Finally, in examining whether the employment provision is punitive "in effect," this Court may consider the consequences of violating the Statute and the fact that the employment provision applies to plaintiffs for the remainder of their lives. The employment provision impermissibly increases the punishment for previously-committed crimes and must be held unconstitutional.

CONCLUSION

Plaintiffs request that the Court grant their motion and enjoin defendants from enforcing the school bus stop, church, and swimming pool provisions of § 42-1-15(b) and the employment provision of § 42-1-15(c).

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[34] See Ga. Bd. of Pardons and Parole, *Basic Parole Officer Training, Sex Offender Supervision,* Oct. 8, 2008 at 5 [Ex. 20 to Doc. No. 261]. The training materials further state: "Financial, employment, and residence stability lower stress levels and increase a person's self worth. Lowering or losing any of these increases stress, which in turn increases risk." (emphasis added).

[35] See Letter to the Office of the Governor from the Child Advocate, Apr. 29, 2008 (Ex. 3 to Pls' Mt. for Leave to Amend, Doc. No. 176) ([d]isrupting offenders' stability through exclusionary housing and employment provisions is likely to exacerbate the psychosocial stressors that can increase the likelihood of recidivism . . . .") (emphasis added).

Respectfully submitted this 28th day of September, 2009.

SOUTHERN CENTER
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CERTIFICATION OF COMPLIANCE WITH L.R. 5.1B

Pursuant to L.R. 7.1, I, Sarah Geraghty, hereby certify that this document has been prepared in compliance with Local Rule 5.1B.

Dated this 28th day of September, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing *Motion for Summary Judgment* upon Defendants by causing a true and correct copy thereof to be delivered by the Court's ECF filing system to Defendants' counsel of record at the following addresses:

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This 28th day of September, 2009.


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