

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

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

**DEFENDANTS PERDUE, BAKER AND DEAN’S  
RESPONSE TO PLAINTIFFS’ MOTIONS FOR SUMMARY JUDGMENT**

Come now Defendants Sonny Perdue, Governor of Georgia; Thurbert E. Baker, Attorney General of Georgia; and Scot Dean, Probation Officer with the Georgia Department of Corrections; by counsel, the Attorney General of the State of Georgia, and pursuant to LR 56.1, file this Response to Plaintiffs’ Motion for Summary Judgment.

**A.**

**PLAINTIFFS ‘TAKINGS’ CLAIM**

Plaintiffs motion in regard to the “takings claim” (doc-260) is premised upon information that is outdated and inaccurate. It appears to ignore entirely the

binding effect of the Georgia Supreme Court's ruling in *Mann v. Georgia Department of Corrections*, 282 GA. 754 (2007). Plaintiffs instead concentrate on factual events that took place prior to the *Mann* ruling and on shortcomings they perceive in statutory changes that were made in O.C.G.A. § 42-1-15 after the ruling.

Plaintiffs also ignore their own admissions that the *Mann* decision already protects those who have leases from any potential "taking" of their property. Plaintiffs admitted "that a valid lease does constitute a property interest under Georgia law" and that such "property interests are protected from regulatory taking under Georgia law pursuant to the case of *Mann v. Georgia Department of Corrections*, 282 Ga. 754 (2007) and other authority." (doc-267-13).

Plaintiffs also appear to premise the validity of the *Mann* decision on a stipulation from the Defendants. Inasmuch as *Mann* is the law in Georgia and Defendants have consistently asserted that it is the law, a stipulation by the State Defendants was, and is, unnecessary. Plaintiffs apparently felt that a stipulation with the Defendant sheriffs was necessary as is evidenced by Plaintiffs responses to three of the five Defendants' Requests for Admissions.(doc-267-13, pp. 3-5). While conceding that *Mann* is the law in Georgia, Plaintiffs declined to admit that it protected Ms. Collins or Ms. Allison, because Plaintiffs suggested that sheriffs

might not honor the decision and would ignore it in favor of the literal language of O.C.G.A. § 42-1-15. To satisfy Plaintiffs' concern, Plaintiffs and the sheriffs entered into a stipulation. (doc-254). Even with the stipulation, which should have satisfied Plaintiffs concerns, they decline to concede that Georgia law already fully protects the property interests of both Ms. Allison and Ms. Collins (and any other registered sex offender with a valid lease).

Plaintiffs also claim that those with valid leases are protected now only because of Defendants' "act of unfettered discretion" in following the mandate of the Georgia Supreme Court. They suggest that Defendants can "change their minds" and apparently disregard the law as mandated by Georgia's highest court. Defendants have no such option. Defendants have not "read in" an exception to a Georgia statute. The Georgia Supreme Court did. Officials of the State of Georgia are presumed to properly discharge their duties. *National Archives and Record Administration v. Favish*, 541 U.S. 157, 174; 124 S. Ct. 1570, 1582 (2004), citing *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15; 47 S. Ct. 1 (1926); *Carson v. State*, 241 Ga. 622, 625 (1978). Decisions of the Georgia Supreme Court are binding; in addition, if Plaintiffs reasoning is correct, then no ruling from any court would provide them the guarantee they seek.

Plaintiffs claim to the contrary, this is not a case in which there is “voluntary cessation of a challenged practice.” *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 (2001). This is a case in which the highest court in Georgia has ruled. It is a case in which all parties, including the Plaintiffs, agree that the ruling protects Plaintiffs property interests. The law already fully protects Plaintiffs Collins and Allison.

**B.**

**PLAINTIFFS ‘SCHOOL BUS STOP’ CLAIMS**

The portion of Plaintiffs’ Motion for Summary Judgment in regard to the “school bus stop” provision relies on exaggeration of both the facts and the law. (doc-262). It also depends on facts that have changed materially since the Georgia Supreme Court’s ruling in *Mann*.

Defendants have previously addressed *ex post facto* and substantive due process issues in Defendants’ Motion for Summary Judgment which Defendants adopt and incorporate as a response. (doc-267, pp. 28-46). Defendants will supplement that response here.

Plaintiffs argue that thousands of people will be “forcibly evicted from their homes” if school bus stops are designated again in Bulloch, Chatham and Columbia counties, the only counties that have ever designated school bus stops.

There is no evidence of forcible evictions and there is certainly no evidence of plans for mass evictions by the sheriffs of Georgia; many offenders have simply received notices that they may be residing in locations that violate the law.

Plaintiffs also disregard completely the data which they themselves gathered from registered sex offenders in these three counties. Plaintiffs obtained declarations from sex offenders in Bulloch, Columbia and Chatham counties. These declarations show a substantial portion of sex offenders in these counties either own their homes or rent them and are thus exempted from having to move. In Columbia County, for example, twenty-four registered sex offenders returned Plaintiffs' declarations and nine of the twenty-four owned their own homes and another four rented. (doc-267-5, ¶¶ 50-55). Thus, their own declarations show that thirteen of the twenty-four who responded with declarations would be exempted from moving under the *Mann* decision. Thirty-seven out of the eighty-two from Chatham County who responded may also be exempt from having to move (doc-267-5, ¶¶ 59-61) and ten out of the eighteen who responded in Bulloch County (doc-267-5, ¶¶ 61-66).

Plaintiffs' bleak assessment is supported only by maps produced by Peter Wagner. Wagner, who works for an organization called Prison Policy Initiative and who has not been designated as an expert under Rule 26(a)(2) nor qualified as

an expert, admitted that his Columbia County map is his own creation and may not be what the sheriff is using. He also was unsure whether school bus stops were actually those designated by the Board of Education. (doc-256, pp. 2, 14-16).

Wagner previously had testified, in 2006, that he was using 6-year-old census data and that even with all the school bus stops shown, there were still places where sex offenders could live. (doc-42, pp. 285-288). Wagner admitted during testimony in 2008 that his maps were “essentially the same” as that he displayed in 2006. (doc-256, p. 15). Some of Wagner’s newest maps, previously unseen by Defendants and subject to these flaws, have been attached to Plaintiffs’ Motion.

Wagner’s testimony also conflicts with the deposition testimony of David Rush, the Columbia County sheriff’s deputy who enforces the sex offender law for Columbia County. Rush testified that only 12 of 42 registered sex offenders were required to move when school bus stops were designated in 2006 in Columbia County. (doc-262-22, p. 52). Rush was also not aware that there have been any designations of school bus stops in Columbia County since the 2006- 2007 school year. (doc-262-22, pp. 58-59). In addition, Wagner’s maps do not account for the property interests of owners or lessees of property that would exempt them from having to move under the case of *Mann v. Georgia Department of Corrections*,

282 Ga. 754 (2007); (doc-261-6; doc-256, pp. 2-16). Wagner's maps simply ignore such property interests.

It is further worth noting that most sex offenders in Columbia County who have been required to move have found other places to live within Columbia County.(doc-262-22, Rush deposition, pp. 59,60). Even if sex offenders could not find other places to live in Columbia County, the surrounding counties, none of which have designated school bus stops, are available as places to live.(doc-262-22, Rush deposition, pp. 60-62). Both Bulloch and Chatham County, like Columbia County, adjoin multiple other counties that have not designated school bus stops.(doc-267-5, Dolby affidavit, ¶ 67). For a registered sex offender in any of the three counties that have designated school bus stops, there are places to live in surrounding counties. There are sex offenders presently residing in all the counties that surround Bulloch, Columbia and Chatham Counties.(doc-267-8, Tate affidavit, ¶ 10, Exhibit B).

Plaintiffs also make reference to evidence of hypothetical school bus stops in counties that have never designated school bus stops in the more than three years since the "school bus stop" provision went into effect. Plaintiffs suggest that 900 out of Fulton County's more than 1,235 sex offenders *might* have had to move *if* school bus stops had been designated by Fulton County (and all the municipalities

in Fulton County) at a time prior to the ruling in *Mann*. Plaintiffs make this argument despite the undisputed fact that neither Fulton County nor any of the municipalities in Fulton County has designated school bus stops. And the decision in *Mann* would exempt a large percentage of sex offenders even if a designation were made. In addition, school bus stops have never been designated in any of the counties in regard to which evidence was presented at the preliminary injunction hearing in July of 2006.

Plaintiffs also claim some law enforcement officials have concerns about the school bus stop provision. The law enforcement officials listed are quoted, often in news reports, as having made the statements about fears that offenders will abscond and will be forced “underground.” The statements do not necessarily call for “change in Georgia’s sex offender law” and express concerns that have not been borne out by statistics now showing that the rate of absconders has remained constant since 2005 and sex offenders have not been driven underground. The evidence clearly shows to the contrary, as the percentage of absconders has not increased. (See Tate affidavit, doc-267-8, ¶¶ 6, 7). Plaintiffs offer nothing to support a contrary conclusion.

Plaintiffs also cite to expert opinions. The opinions, including the opinion of Plaintiffs’ own expert, while showing that stability for sex offenders is desirable,

nonetheless concede that decreasing access to children is something that would decrease the likelihood of re-offending. (doc-43, p. 224). Dr. Mario Dennis, called as an expert by Defendants, testified that in dealing with sex offenders one talks not in terms of cure but in terms of “risk reduction and self management.” (doc-43, p.323). Dr. Dennis pointed out that access to potential victims is among high risk situations for sex offenders and that it is appropriate to restrict access to children or other potential victims. (doc-43, p.324-325). Dr. Dennis opined that residence restrictions fall in the category of external controls to prevent offenders from having such access. (doc-43, p.326-327, 331-332). Yet Plaintiffs question whether the statute furthers a legitimate state interest. As noted in Defendants’ Motion for Summary Judgment, the protection of children from sex offenders, who have a high rate of recidivism, is most certainly a legitimate state interest. *See Conn. Dep’t of Public Safety v. Doe*, 538 U.S. 1, 4 (2003); *McKune v. Lile*, 536 U.S. 24, 32 (2002).

Plaintiffs suggest that “numerous courts” have found residence restrictions violate the *ex post facto* clause. Neither the United States Supreme Court nor the court of any United States circuit has so held. The few district court cases and state cases on the subject are clearly distinguishable. A district court in Ohio relied on facts far different from those here. *Mikaloff v. Walsh*, 5:06-CV-96 (N.D. Ohio,

2007). As Plaintiffs concede, in footnote 15 of their brief, the Ohio statute in question was not even identified as civil or regulatory and was actually part of Ohio's criminal code, giving suggestion that the statute was punitive in nature. The statute in *Mikaloff* also had not been narrowed in any way to protect property interests as the *Mann* case did in Georgia. The statute here has been designated as regulatory in the Act itself and does not appear in the criminal code. 2006 Ga. Laws 379, 381 (HB 1059, Section 1). Although Plaintiffs attempt to turn Title 42 of the Georgia Code into a criminal code, it is not. Georgia's criminal code is located in Title 16. Title 42 of the Georgia code relates to Penal Institutions and its chapters include: Chapter 1 (General provisions), Chapter 2 (Board and Department of Corrections), Chapter 3 (Georgia Building Authority [Penal]), Chapter 4 (Jails), Chapter 5 (Correctional Institutions of State and Counties), Chapter 6 (Detainers), Chapter 7 (Treatment of Youthful Offenders), Chapter 8 (Probations), Chapter 9 (Pardons and Paroles), Chapter 10 (Correctional Industries), Chapter 11 (Interstate Corrections Compact) and Chapter 12 (Prison Litigation Reform). Official Code of Georgia Annotated, Volume 29A, p. 67.

Another case cited by Plaintiffs is *State v. Pollard*, 908 N.E. 2d 1145 (2009). There, the Supreme Court of Indiana found an *ex post facto* violation on a statute very different from Georgia's. The Indiana law simply added a new crime within

its criminal code. There was no purpose statement indicating any regulatory or civil purpose, no regulatory scheme, no civil or regulatory component and no exception in the law for property interests like that established in *Mann*. In another of Plaintiffs' cited cases, *Commonwealth v. Cory*, 454 Mass. 559; 911 N.E. 2d 187 (2009) a statute that actually changed the *sentence* of a sex offender retroactively was, not surprisingly, found to be an *ex post facto* violation. This bears no resemblance to the factual situation in the instant case. Another of Plaintiffs' cases, *United States v. Burkey*, 2:08-CR-00145-RCJ-PAL (D. Nevada, 2008), certainly does not support Plaintiffs' claims. The Court in that case found there was no *ex post facto* violation in prosecuting a sex offender for failing to register under federal law. *Doe v. Schwarzenegger*, 476 F. Supp. 2d 1178 (E. D. California, 2007) is equally unresponsive for Plaintiffs. Doe's Motion for Preliminary Injunction was denied and the Court never even addressed the *ex post facto* claim. And *R.L. v. Missouri Department of Corrections*, 245 S.W. 3d 236 (2008) is based entirely on the unique Missouri constitutional provision that is "broader than the *ex post facto* bars in other states." *R.L. v. Missouri Department of Corrections*, 245 S.W. 3d at 237. Under the same constitutional provision even basic registration of sex offenders is unconstitutional. See *Doe v. Phillips*, 194 S.W. 3d 833, 850 (Mo. 2006).

Plaintiffs also suggest that legislative intent is established here by the statements of one of the sponsors of the original 2006 enactment. The comments of legislators are inadmissible under Georgia law to establish the intent of the legislature. *Jackson v. Delk*, 257 Ga. 541 (2)(1987). Also, as noted by the Court in *United States v. O'Brien*, 391 U.S. 367, 384 (1968), “what motivates one legislator to make a speech about a statute is not necessarily what motives scores of others to enact it.”

Plaintiffs persist in their attempts to fabricate a fundamental right that would invoke protection under a substantive due process claim. No such right has yet been identified by Plaintiffs. Plaintiffs cite a variety of cases but none support their position. Plaintiffs attempt to liken this case to the situation in *Lawrence v. Texas*, 539 U.S. 538, 123 S. Ct. 2472 (2003). *Lawrence* was a case in which the sexual conduct of consenting adults in the privacy of their home was prohibited by a Texas statute. The conduct did not involve minors, did not involve potential injury to anyone and did not involve any public conduct. The Supreme Court found that there was no legitimate state interest in making the conduct a crime. No conduct of this kind is involved in the statute here.

Another case cited by Plaintiffs is *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 97 S. Ct. 1932 (1977). In *Moore*, a homeowner was convicted of

violating a housing ordinance, the effect of which made it a crime for a grandmother to live with her grandson. The Court noted that interference with the family was not a “mere incidental result of the ordinance.” The situation here is far different. Nothing in the residency statute prohibits anything related to the family. Any inconvenience caused to family members is incidental to the statute.

*Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244 (1984) is also cited by Plaintiffs. That case involved a Minnesota statute that prohibited the Jaycees from discriminating against women by refusing to admit them to their organization. The Court found that this interference by the State of Minnesota was justified even though it interfered with the male members associational freedoms. Again, the case cited fails to shed light on any fundamental right impacted by the statute here. Likewise, the situation in *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174 (2003) fails to bolster Plaintiffs’ argument. *Sell* involved the forced administration of antipsychotic drugs to a criminal defendant; the case here involves no intrusion on bodily integrity. *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000) is equally inapplicable. A Washington state statute was “breathtakingly broad” and permitted “any third party seeking visitation to subject any decision by a parent concerning visitation of the parent’s children to state-

court review.” *Troxel*, 530 U.S. at 67. Plaintiffs cases simply fail to show the existence of any fundamental right being impacted by the statute.

Plaintiffs’ examples cited in footnote 63 of their brief attempt to show interference with the family. In the situations cited, as can be seen in the footnote, declarants refer to “possibilities” and “fears” of separation and the inconvenience of moving multiple times. It also appears that most of the declarations quoted are for counties other than those with designated school bus stops. In this case, there is no direct interference with the family and nothing in the statute requires or even suggests that a family can not continue to live together.

### C.

#### PLAINTIFFS ‘EX POST FACTO’ SUBCLASS CLAIM

Plaintiffs’ “ex post facto” Brief (doc-264-2) repeats much of what Plaintiffs have already argued in Plaintiffs’ brief in regard to school bus stops. (doc-262-2). The legal issues on behalf of Defendants have been set forth in Defendants’ Motion of Summary Judgment which Defendants adopt and incorporate as a response. (doc-267, pp. 28-41). Some issues remain and will be addressed here.

First, Defendants take issue with factual inaccuracies set forth by Plaintiffs. Plaintiffs state that 90% of those on the registry were convicted prior to July 1, 2006. Yet, only 12,844 sex offenders were on the registry in 2006 and there are now more than 17,400 on the registry.(doc-267-8, p. 5, Exhibit A). Plaintiffs’

percentages are mathematically inaccurate. In addition, Plaintiffs presume, without factual support, that the sex offender law renders people homeless. It is unclear how many sex offenders are homeless and whether or not they would be homeless with or without the changes in the sex offender law at issue in this case. The Plaintiffs suggest that “the State’s response” to homelessness is to “direct homeless offenders into the woods.” This is based entirely on a news story in regard to 9 apparently homeless sex offenders out of the 290 living in Cobb County. Again, Plaintiffs claims are exaggerated. The article sheds no light on how these people became homeless. Plaintiffs imply, without support, that the homelessness was caused by the statute. It is incumbent to show causation, which they have not even attempted to do.

Plaintiffs also cite to numbers of persons who have been required to move as evidence in support of their claim. Such evidence, however, tends to show that a relatively small percentage of sex offenders have had to move or change employment in the three years since 2006. The evidence also tends to show that after an initial adjustment period in the year immediately following the 2006 statutory changes, the numbers and percentage of sex offenders being required to move or change places of employment has dropped significantly. Additionally, evidence from experience by the Department of Corrections shows that most

people who actually moved found housing relatively close to where they were originally located. Plaintiffs have thus failed to show that they are being banished from the community.

Of the 144 sheriffs responding to Plaintiffs' First Interrogatories (for the period from 2006 to 2007) slightly more than 1% of the more than 10,000 sex offenders in the reporting counties had to change their employment for any reason as a result of proximity to a church, child care center, school or place where minors congregate.(doc-267-5, ¶¶ 22-30). The majority who had to change employment did so because of proximity to a church, totaling 98 out of the 137 total who had to change employment during that period. (doc-267-5, ¶ 22). For the subsequent period, from 2007 through 2009, a smaller percentage of registered sex offenders were required to change employment. Based on the 126 sheriffs' responses to Plaintiffs' Second Interrogatories, only 57 persons out of 9,976 in those reporting counties, were required to change employment for any reason during the period from 2007 to 2009.(doc-267-5, ¶ 37). This is a percentage of slightly less than six-tenths of one percent (.6%) who had to change employment over the two year period. (doc-267-5, ¶ 37).

Similar results were reported by sheriffs in regard to registered sex offenders who were required to move. Of the 144 sheriffs responding to Plaintiffs' First

Interrogatories (for the period from 2006 to 2007), 12.4 %, or a total of 1,272 sex offenders, out of 10,267 were required to move because of proximity to all prohibited areas (school bus stop, school, public or private park, skating rink, recreation facility, public swimming pool, child care facility, neighborhood center, church, playground, or gymnasium). (doc-267-5, ¶ 16). 550 of those moved because of proximity to a church. (doc-267-5, ¶ 17). For the subsequent period, from 2007 through 2009, a much smaller percentage of registered sex offenders were required to move. Based on the 126 sheriffs' responses to Plaintiffs' Second Interrogatories, only 396 persons, or 4% of the 9,976 sex offenders in the reporting counties were required to move *for any reason* during the two-year period from 2007 to 2009. (doc-267-5, ¶ 35).

These figures do not take into consideration that many of these people would not have to move or change employment since the decision in *Mann v. Georgia Department of Corrections*, 282 Ga. 754 (2007) and the subsequent change in O.C.G.A. § 42-1-15. The *Mann* decision and the statutory change protected sex offenders from any regulatory taking of their property.

Statistics on the total number of arrests statewide for violation of the residence, employment and loitering restrictions also indicate that few sex offenders have been impacted in any disruptive way. For the period where

statistics were available in 2007 (May 1, 2007 through the end of December, 2007) there were a total of 58 arrests for violation of any of the residence, employment or loitering provisions. (doc-267-11, Marsha O'Neal affidavit, ¶ 5). For the entire year 2008 there were a total of only 90 arrests statewide for violation of any of the residence, employment or loitering provisions. (doc-267-11, ¶ 6). For the first five months of 2009 there were a total of just 52 arrests statewide for violation of any of the residence, employment or loitering provision. (doc-267-11, ¶ 7).

Despite Plaintiffs' claims that the residence statute would lead to high rates of absconders and would drive sex offenders "underground," the percentage of absconders has remained relatively constant over the years from 2005 through 2009. (doc-267-8, Laura Tate affidavit, ¶ 6). Since 2004, the rate has actually fallen from 4% of registered sex offenders to 3% in subsequent years and so far in 2009 the rate is only 2.5%. (doc-267-8, ¶ 7). There are registered sex offenders living in every county in the State of Georgia. (doc-267-8, ¶ 10, Exhibit B). They have not been driven from urban or suburban areas as Plaintiffs have suggested.

Plaintiffs also suggest that sex offenders are banished from their communities. The experience of the Department of Corrections shows otherwise. During the two year period, from 2007 to 2009, 401 registered sex offenders on probation moved because they were out of compliance with the sex offender law.

(doc-267-7, ¶ 5). Out of the 401, 77% (309) found another residence either in their own county or in the same judicial circuit. (doc-267-7, ¶ 6). Of the other 92 that moved beyond their county or circuit, 68 were able to find places to live in neighboring counties or circuits and none had to move more than 50 miles from their original residence. (doc-267-7, ¶ 7). Of the remaining 24 who moved, 22 found other places to live within the state and 2 relocated out of state. (doc-267-7, ¶ 8).

Since 2004 only fifteen (15) sex offenders have been sentenced to the Georgia Department of Corrections for residing within 1,000 feet of any prohibited location. (doc-267-10, ¶ 7). During the same period, only two (2) people have been sentenced to the Georgia Department of Corrections for being employed within 1,000 feet of a prohibited area and only four (4) people have been sentenced for loitering. (doc-267-10, ¶¶ 6, 8).

Using the Plaintiffs' figures, as reported by local law enforcement, produces similar results. For example, Plaintiffs state that "since July 1, 2006, at least 1,069 people" were required to move "due to the church and swimming pool provisions of O.C.G.A. § 42-1-15(b)." That number amounts to a percentage of only 7% over a period of three years (assuming there are approximately 15,000 registered sex offenders). Assuming one third of the total moved during each of those three

years since 2006, there would be about 356 persons per year who were required to move, or a percentage of only 2.3% per year. For the church provision, Plaintiffs say 774 persons were required to move or slightly more than 5% of sex offenders over three years. Again, presuming one third of those persons moved each year, only 256 persons moved each year out of approximately 15,000 sex offenders for a percentage of 1.7% per year. In regard to the employment provisions, Plaintiffs state that “240 people were forced to resign from their jobs.” Defendants do not concede that people have to “resign from their jobs” since they are only required to cease employment near restricted locations and may certainly work for the same employer at another location or they may relocate where they work. But assuming this number of people who had to change job locations was 240, as stated by Plaintiffs, that amounts to only a total of 1.6% of sex offenders who have been affected in three years. Assuming one third were required to move in each of the three years since 2006, that would amount to 80 persons per year, or a percentage of one-half of one percent. For the vast majority of registered sex offenders, their lives have not been disrupted by requirements to move change employment.

**D.**

PLAINTIFFS' VAGUENESS AND OVERBREADTH CLAIM

Many of the issues raised in Plaintiffs' Motion for Summary Judgment in regard to the "vagueness and overbreadth" claim (doc-263-2) are addressed in Defendants Motion for Summary Judgment which Defendants adopt and incorporate as a response. (doc-267-2, pp. 46-54). Some issues remain and will be addressed here.

The term "designated by local school boards of education" is not vague. For any action to be approved by a local board of education there are clear procedures, many set forth in Georgia's Open Meetings law, O.C.G.A. § 50-14-1 *et seq.* Matters should appear on a posted agenda and be voted upon in public. Any matter being considered before any public body would normally contemplate specific action and require a vote of a majority of a quorum of members in attendance at that public meeting. The minutes of a meeting would normally reflect the action taken. There is nothing vague about the process.

Plaintiffs claim it is unclear what is included under the term "areas where minors congregate." The term is specifically defined to "include all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, public libraries, and public and community

swimming pools.” O.C.G.A. § 42-1-12(a)(3). There is nothing vague about this and only the school bus stops, swimming pools and libraries are new to the definition since 2005. Plaintiffs appear to be suggesting that this subsection might be applied to other “unspecified areas” that could constitute “areas where minors congregate.” Defendants are unaware of any attempts by anyone to apply this law to other “unspecified areas” in light of the clear list provided by the statute. Plaintiffs also fail to cite a single situation in which any registered sex offender has been required to move because of proximity to any “unspecified area” not clearly listed in the statute.

Plaintiffs claim that the law is unconstitutionally vague “because the moment a plaintiff becomes aware of a school bus stop, the crime is complete.” Plaintiffs suggest that no intent is required and one could be convicted without even having an opportunity to move. Plaintiffs fail to cite a single situation in which this has taken place. Plaintiffs claim has nothing to do with vagueness; it has more to do with whether a criminal prosecution could be sustained in a factual situation in which a person has had no opportunity to make a willful decision to move or not to move. For any action to be a crime in Georgia there must be “a joint operation of an act or omission and intention or criminal negligence.” O.C.G.A. § 16-2-1(a). Intent is clearly required (and criminal negligence is not

relevant since it involves “willful, wanton or reckless disregard for the safety of others who might reasonably be expected to be injured thereby”). Georgia law does not presume intent. O.C.G.A. § 16-2-6. Georgia law *does* presume innocence and each element, including intent, must be proven beyond a reasonable doubt. O.C.G.A. § 16-1-5. As the United States Supreme Court noted in reversing an Eleventh Circuit case, the Eleventh Circuit’s “basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague. That is not so. Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.” *United States v. Williams*, 553 U.S. \_\_\_, 128 S. Ct. 1830, 1845 (2008).

Plaintiffs complain that the term “address” is unconstitutional because “homeless” can not be used as an address. Plaintiffs concede that the Georgia Supreme Court has already addressed this issue in *Santos v. State*, 284 Ga. 514 (2008). Although there is no issue remaining, Plaintiffs persist in asking this Court to rule that this now-corrected term is vague.

Finally, citing *United States v. Williams*, 444 F. 3d 1286, 1296 (11<sup>th</sup> Cir. 2006), Plaintiffs claim that O.C.G.A. § 42-1-12 and O.C.G.A. § 42-1-15 are overly broad. That case, however, was reversed by the United States Supreme Court and

no longer provides the basis claimed by Plaintiffs. *United States v Williams*, 553 U.S.\_\_\_\_, 128 S. Ct. 1830 (2008). None of the factors cited by Plaintiffs establish overbreadth.

**E.**

**PLAINTIFFS ‘VOLUNTEER’ SUBCLASS CLAIM**

The issues raised in Plaintiffs’ Motion for Summary Judgment “to stop the State of Georgia from criminalizing protected religious activity” (doc-265-2) have been addressed in Defendants Motion for Summary Judgment (doc-267-2) as well as in previous documents (doc-190) which Defendants adopt and incorporate as a response. Some issues remain and will be addressed here.

Plaintiffs’ assert that at least one hundred probationers have been ordered, advised, or encouraged not to volunteer at church. This does not appear to be supported by the record. This may be explained by the fact that Plaintiffs continue to confuse enforcement of special conditions of probation for sex offenders with enforcement of O.C.G.A. § 42-1-15. Sex offenders serving a probationary period often have sentences that include special conditions that may be more strict than O.C.G.A. § 42-1-15. (doc-267-3, ¶ 45). Plaintiffs’ confusion is apparent when they quote, out of context, from the deposition of Ahmed Holt, Manager of the Sex Offender Administration Unit for the Georgia Department of Corrections. Mr.

Holt stated that his office “instructed officers to contact their judge” in the event of confusion regarding the volunteer provision (doc-262-7, p.28). Holt was clear in stating that:

“ A person is allowed to worship, is allowed to participate in church activities of that nature. What we are concerned about is that an offender, and *separate of the law*, isn't in contact with a minor or his particular victim class. So probation has a unique responsibility to actually abide by *probation conditions* as well as whatever the state law is at the particular time. So our officers have been notified to allow volunteer / worship. But if an offender is in direct violation of his *probation conditions* such as direct contact with a minor, Sunday school teaching minors, or day care instructors, if it is prohibited by their probation conditions, then a person would not be allowed to do that.” (doc-262-7, p.28, and Exhibit 2, email from Ahmed Holt)(*emphasis added*).

Probation officers come in contact with judges for “guidance” in those instances where the offender has violated the special conditions of probation set by the judge. The probation officer would seek guidance from the judge with respect

to any violations and whether or not Plaintiff's probation should be revoked. This has absolutely nothing to do with O.C.G.A. §42-1-15.

As previously noted, the Sex Offender Administration Unit of the Georgia Department of Corrections does not prohibit activities at a church that constitute worship service, or any part of the religious life of a church. (Doc. 206-3, ¶¶ 9, 10). Sex offenders on probation are permitted to participate in worship services (including singing in the choir or playing a musical instrument at a service), teach adult Sunday school, cut the grass at the church, rake leaves or help clean church buildings. (Doc.206-3, ¶ 11). Sex offenders are not permitted to engage in activities that bring them in direct contact with children. (Doc. 206-3 ¶ 12).

Plaintiffs suggest that many sex offenders are subject to prosecution if they volunteer at churches. Evidence from Sheriffs suggests otherwise. Evidence produced by the 126 sheriffs who responded to Plaintiffs' Second Interrogatories indicates only one-fifth of 1% of registered sex offenders have been restricted in any way from volunteering or being employed at a church. (doc-267-5, ¶ 47). Moreover, of the 9,976 registered sex offenders in the 126 counties responding to Plaintiff's Second Interrogatories, only two (2) individuals have been arrested for volunteering or being employed at a church. (doc-267-5, ¶ 48).

In addition, as previously noted, the Department of Corrections and the Board of Pardons and Paroles have adopted and carried out policies to make sure that no one is prevented from exercising religious rights and worshiping as they choose. (doc-206-2, ¶¶ 9-22; doc-206-3, ¶¶ 9-24).

### **Conclusion**

For all of the above and foregoing reasons, Defendants request that the Court enter summary judgment in their favor and against the Plaintiffs on all claims asserted in this action.

Respectfully submitted this 30<sup>th</sup> day of October, 2009.

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## **CERTIFICATION AS TO FONT**

Pursuant to N.D. Ga. Local Rule 7.1 D, I hereby certify that this document is submitted in Times New Roman 14 point type as required by N.D. Ga. Local Rule 5.1(b).

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## CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed this RESPONSE TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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