

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

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

**PLAINTIFFS' RESPONSE TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT [DOC. 286]**

A criminal statute with the potential to force persons from their homes upon penalty of 10-30 years in prison must give clear notice of the conduct it prohibits. The term "school bus stop" in § 42-1-12(a)(19) is so unclear that nearly every sheriff's department in Georgia misinterpreted its meaning. The phrase produced such confusion that Georgia sheriffs mistakenly ordered hundreds of people to leave their homes, actually evicted numerous people, and came within 48 hours of mistakenly evicting thousands more. An ordinary citizen cannot be expected to understand the statute's commands when government officials have not been able agree on its meaning. The school bus stop provision is unconstitutionally vague. In addition, the school bus stop provision violates the

substantive component of the Due Process Clause, particularly when applied to force children out of their parents' homes. The record in this case shows that the school bus stop provision is both ambiguous and unworkable, and that Georgia remains the only state in the country to have passed such a law. Plaintiffs' motion should be granted, and Defendants' motion denied.

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE SCHOOL BUS STOP PROVISION BECAUSE THEY RESIDE WITHIN 1,000 FEET OF SCHOOL BUS STOPS AND DO NOT QUALIFY FOR AN EXEMPTION TO THE PROVISION.

In their summary judgment brief, Defendants once again contend that Plaintiffs lack standing because they have not yet suffered the "actual injury" of being forced from their homes. The Court has rejected this exact argument on three prior occasions, finding, in accordance with clear precedent, that Plaintiffs need not wait to suffer an injury before filing suit:¹

- In 2007, this Court rejected Defendants' argument that Plaintiffs' injuries were "hypothetical" and stated "prior Orders in this case have effectively halted the enforcement of the school bus stop provision." (Order, Mar. 30, 2007 at 14);
- In 2008, this Court held that Defendants' claim that lessees lacked standing "does not have legal support." (Order, Sept. 30, 2008 at 8);

¹ See *Pennell v. City of San Jose*, 485 U.S. 1, 7-8 (1988) (landlord had standing to challenge city rent control ordinance even though ordinance had not yet been enforced, where it was not speculation to conclude that the ordinance would be enforced against plaintiff).

- In 2009, this Court held that: “[O]n numerous occasions throughout this lawsuit, Defendants Perdue, Baker and Dean have taken the position that the named Plaintiffs lack standing because their residences currently comply with the statutory restrictions and because they have not been arrested, threatened with arrest, or asked to move. The Court has previously addressed this contention that the named Plaintiffs lack standing and will not do so again here.” (Order, Mar. 30, 2009 at 13, n. 2).

This Court’s prior standing orders were correctly decided. The same analysis applies to Ruben Luna, Walter Smiley, and G.W., with the same result.

A. Ruben Luna: Mr. Luna has standing to challenge the school bus stop provision for four reasons: First, although Mr. Luna rents his home, a lease does not automatically exempt a person from the residence restrictions. *See* O.C.G.A. § 42-1-15(e)(1). To qualify for a leasehold exemption, a person must reside on his property and form his leasehold interest *before* a school bus stop or other prohibited location is designated within 1,000 feet of the residence.² Mr. Luna, however, moved to his residence in November 2009, *after* a school bus stop had been designated within 1,000 feet of it.³

² *See* O.C.G.A. § 42-1-15(e)(1) (“If an individual . . . leases real property and . . . a [school bus stop] *thereafter* located itself within 1,000 feet of such property . . . such individual shall not be guilty of a violation . . .”) (emphasis added).

³ *See* Supp. Luna Decl. ¶ 4-5 (stating “[t]his school bus stop was here before we moved into our home.”) (Ex. 1).

Second, even if Mr. Luna did qualify for a leasehold exemption to the residence restrictions, that exemption offers only a temporary respite from the school bus stop provision. “[L]easehold exemptions shall only be for the duration of the executed lease,”⁴ meaning that a person must move at the end of his lease if a school bus stop is designated within 1,000 feet of the residence during the lease’s term. Thus, even if Mr. Luna qualified for a leasehold exemption, that exemption expires when his lease concludes at the end of 2010.

Third, contrary to Defendants’ claim, Mr. Luna is not eligible to petition for release from the residence restrictions pursuant to O.C.G.A. § 42-1-19. Mr. Luna is precluded from petitioning for release from the registration or residence restrictions while he is on probation.⁵

Fourth, Mr. Luna resides within 1,000 feet of a school bus stop designated by the school board in Columbia County.⁶ The State has offered no evidence to

⁴ See O.C.G.A. §§ 42-1-15(f)(3), 42-1-16(f)(3).

⁵ See O.C.G.A. § 42-1-19(a)(4) (permitting removal petition only if the petitioner has completed probation); Supp. Luna Decl. ¶ 3 (stating he is on probation and does not qualify for an exemption under § 42-1-19) (Ex. 1).

⁶ See Decl. of Vivianne Guevara ¶ 4 (Ex. 2) (stating that examination of school bus stops in Columbia County showed a bus stop within 1,000 feet of Mr. Luna’s residence and providing an illustration thereof); Resolution of Columbia County Bd. of Educ., July 25, 2006 (Ex. 5 to Doc. 287); Supp. Luna Decl. ¶ 5.

contradict this assertion. Mr. Luna has standing.

B. Walter Smiley: Mr. Smiley also has standing. Contrary to Defendants' claim, Mr. Smiley is not eligible to petition for release from the residence restrictions under § 42-1-19. Mr. Smiley is on probation and thus does not qualify for a "disability" exemption.⁷ Defendants also suggest, without any evidence in support, that Mr. Smiley might not live within 1,000 feet of a school bus stop. (Defs' Br. at 12). Mr. Smiley's home is within 1,000 feet of at least two school bus stops designated by the Chatham County school board in 2010.⁸

C. G.W.: G.W. has standing because he is a minor and his parents' home is within 1,000 feet of a school bus stop.⁹ While G.W. is currently in the Chatham County Jail, he has not been convicted of any new crime; nor has his probation been revoked. G.W. has a pending bail application, but if granted bail, he will not be able to return home if the bus stop provision is enforced.¹⁰ G.W.

⁷ See O.C.G.A. § 42-1-19(a)(1) (permitting petitions for removal only if the petitioner has completed probation); Smiley Decl. ¶ 5 (stating he is on probation) (Ex. 18 to Doc. 287).

⁸ See Guevara Decl. ¶ 5(d-f) (stating there are two school bus stops within 1,000 feet of Mr. Smiley's residence and providing evidence in support).

⁹ See Guevara Decl. ¶ 6; Pls' Statement of Facts ¶ 48(c).

¹⁰ See G.W. Decl. (Ex. 14 to Doc. 287); Pls' Statement of Facts ¶ 48(c).

has standing. In the alternative, Plaintiffs ask the Court for permission to add another child as a named plaintiff since G.W. is one of four children in Chatham County subject to immediate eviction if the bus stop provision is enforced.¹¹

Defendants argue that Plaintiffs lack standing because they have not yet been required to move. (Defs' Br. at 12). But Plaintiffs are not required to wait until the moment they are expelled from their homes to seek relief from this Court. *See 31 Foster Children v. Bush*, 329 F.3d 1255, 1265 (11th Cir. 2003) (plaintiffs may file preemptive suit to prevent injury). In *Cutshall v. Sundquist*, 193 F.3d 466, 472 (6th Cir. 1999), for example, a plaintiff challenged a statute permitting law enforcement officials to place him on the state's sex offender registry. The state argued that plaintiff lacked standing since his name had not yet been placed on the registry. The Sixth Circuit Court of Appeals held the plaintiff demonstrated an "injury" since the registration requirement could be imposed upon him any time by a third party:

¹¹ *See Lynch v. Baxley*, 651 F.2d 387, 388 (5th Cir. Unit B 1981) (district court erred in dismissing class action challenging the constitutionality of a state statute, where it failed to give members of the class an opportunity to amend the complaint to add named plaintiffs); *see also* R.W. Decl., Sept. 11, 2009 and B.W. Decl., Sept. 11, 2009 (stating that 15-year-old R.W. is her minor grandson and discussing the family hardship that will occur if he is forced to move) (Ex. 13 to Doc. 287); J.M. Decl. (Ex. 22 to Doc. 287) (declaration from 17-year-old stating that he is subject to school bus stop provision); Guevara Decl. ¶ 6-9.

The statute is written in such a manner that the release of registry information can take place at any time law enforcement officials have determined that release is necessary to protect the public. . . . Were it otherwise, a convicted sex offender would be required to wait until after his registry information is released before challenging the Act. [Plaintiff's] status as a convicted sex offender registered in accordance with the Act arguably results in an injury because *he faces a specific threat of being subject to the release of registry information every day*. *Id.* at 472.

Finally, Plaintiffs Luna, Smiley and G.W. are just a few of many class members who have an interest in resolving the constitutional questions raised in this case. Statewide, there are about 2,400 class members whose convictions occurred after July 1, 2006, making them potentially subject to the bus stop provision.¹² Although only three counties have designated bus stops to date, this Court has recognized that the cessation of designations was due to the injunctions entered in this case. *See* Order, Mar. 30, 2007 at 14. It took less than 72 hours after this Court's July 25, 2006 order for the first county to designate its bus stops. More counties stand poised to designate school bus stops depending on the Court's ruling in this case. Plaintiffs satisfy the standing prerequisite.

¹² *See* GBI Sex Offender Registry (October 5, 2010) available at: http://gbi.georgia.gov/00/channel_modifieddate/0,2096,67862954_87983024,00.html.

II. WHILE THE NUMEROSITY INQUIRY IS NOT RELEVANT TO SUMMARY JUDGMENT, PLAINTIFFS SATISFY IT.

The numerosity inquiry pertains to class certification and is not material to Defendants' summary judgment motion. Plaintiffs nevertheless address Defendants' numerosity argument as follows:

The numerosity element of Rule 23(a) requires that class members should be so numerous that joinder is "impracticable." Fed. R. Civ. P. 23(a)(1). The practicability of joinder "depends on many factors, including . . . size of the class, [and] ease of identifying its numbers and determining their addresses . . ." *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (approving certification of class where "[p]laintiffs have identified thirty-two individual class members and the class includes future and deterred job applicants which of necessity cannot be identified"); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) (stating that "more than forty" members generally satisfies the numerosity requirement).

While the size of the school bus stop subclass has slimmed since the passage of House Bill 571, the undisputed evidence shows there are still more than enough current and future class members to make joinder highly impracticable. The parties are more or less in agreement on the number of

people currently subject to the school bus stop provision in the school bus stop counties.¹³ Defendants put that number at a maximum of 62.¹⁴ Plaintiffs contend that it is approximately 66 as of September 2010.¹⁵ Both parties' raw numbers show that the numerosity element is still satisfied.¹⁶

Joinder is made even more impracticable by the unknown number of future class members.¹⁷ The number of people subject to the bus stop provision is growing all the time.¹⁸ In a similar situation, when considering whether 33 class members satisfied numerosity, the Fifth Circuit Court of Appeals held:

¹³ See *Stipulation Regarding Numbers of Sex Offenders in Counties That Have Designated School Bus Stops* (Doc. 284) (stating there are 5 people on the registry whose offenses occurred after July 1, 2006 in Bulloch County; there are 16 such people in Columbia County; and there 49 people convicted after July 1, 2006 in Chatham County).

¹⁴ See Defs' Br., Doc. 286, at 14.

¹⁵ See Pls' Statement of Facts ¶ 29, 31; *Stipulation* (Doc. 284).

¹⁶ See *Cox*, 784 F.2d at 1553; see also *Evans v. U.S. Pipe & Foundry*, 696 F.2d 925, 930 (11th Cir. 1983) (finding plaintiffs "need not show the precise number of members in the class.").

¹⁷ See *Kilgo*, 789 F.2d at 878.

¹⁸ See Russell Hinton, State Auditor, Ga. Dep't of Audits and Accounts, *Georgia's Sexual Offender Registry*, July 2010 at 8, available at <http://www.audits.ga.gov/rsaAudits/viewMain.aud> (stating the number of sex offenders statewide is expected to nearly double over the next ten years).

The problem before the district court, and now before us, is not simply to say whether 33 class members are enough or too few to satisfy Rule 23(a)(1) The proper focus is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors. . . . Moreover, the alleged class includes future and deterred applicants, necessarily unidentifiable. In such a case the requirement of Rule 23(a)(1) is clearly met, for joinder of unknown individuals is certainly impracticable. *Phillips v. Joint Legislative Comm. on Performance and Expenditure Review of the State of Miss.*, 637 F.2d 1014, 1022 (5th Cir. 1981) (internal citations and quotations omitted).

Finally, Defendants challenge numerosity on the ground that “previous experience” showed “50% or more” people subject to the school bus stop provision “may be . . . exempted” from residence restrictions. (Defs’ Br. at 14). This figure is inaccurate. It simply does not comport with the parties’ recent *Stipulation* or with sheriffs’ discovery responses, all of which show significantly lower exemption rates.¹⁹ The numerosity standard is satisfied.

¹⁹ According to the sheriffs’ discovery responses, only 134 of more than 17,000 plaintiffs – or **less than one percent** – are exempt under the homeowner exemption. See Doctoroff Decl. (Ex. 9 to Doc. 287 at ¶ 14) (compiling sheriffs’ 2009 discovery responses). As of August 2010, *none* of the sex offenders subject to the school bus stop provision in Bulloch County was exempt under the homeowner or leaseholder exemption. See *Stipulation*, Doc. 284, at ¶ I. In Chatham County, as of July 2009, the sheriff reported that *none* of the 294 non-incarcerated sex offenders was exempted by the homeownership provision. See Resp. of Chatham County Sheriff to Pls’ Second Interrogs. at 2 (Ex. 11 to Doc. 287). In Columbia County, as of August 2010, only 4 of 16 persons subject to the bus stop provision were exempted by homeownership. See *Stipulation* ¶ III.

III. THE SCHOOL BUS STOP PROVISION IS UNCONSTITUTIONALLY VAGUE BECAUSE IT FAILS TO PROVIDE CLEAR NOTICE OF THE CONDUCT IT CRIMINALIZES AND HAS LED TO ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

Defendants contend that Plaintiffs' vagueness claim is the product of a "fertile legal imagination" envisioning "hypothetical" scenarios and "close cases." (Defs' Br. at 22-23). Defendants fail to acknowledge the "overwhelming evidence" that the ambiguity of the school bus stop provision actually led reasonable law enforcement officers across Georgia to interpret the statute's meaning in different ways.²⁰ For example:

- Sheriffs' officials from ten different counties testified that "designated" school bus stops are the locations where buses regularly pick up students, regardless of whether the school board officially designated the stops or delegated that responsibility to others.²¹ These officials were so confident in their understanding of a "designated" school bus stop that they ordered nearly all sex offenders in their jurisdictions to move.
- Some school district officials were convinced that the term "school bus stop" has yet another definition. The Director of Transportation for the Seminole County School Board testified that although the District's buses are scheduled to pick up students at numerous, specified locations each morning, these stops are not "designated" school bus stops because the

²⁰ See Order, July 25, 2006, at 5 (stating that the Court was "deeply troubled" by the "overwhelming evidence" that local law enforcement authorities prepared to evict plaintiffs pursuant to a mistaken interpretation of the law).

²¹ See Pls' Statement of Facts ¶ 9-12.

stops are at each student's own driveway.²² According to this interpretation, a "designated" school bus stop is only a stop located at a place other than the child's home.

- Richard Oleson of the State Board of Pardons and Paroles, testified that he counted as a bus stop any home at which a bus regularly stops to pick up even a single child.²³
- The Attorney General has offered yet another interpretation – that school bus stops must be designated by school boards in conformance with Georgia's Open Meetings law. (Defs' Br. at 21).

In *Konikov v. Orange County, Fla.*, 410 F.3d 1317, 1331-32 (11th Cir. 2005),

the Eleventh Circuit Court of Appeals held that a plaintiff demonstrated arbitrary enforcement of a vague ordinance where just *two* officers had varying interpretations of what constituted a violation of the ordinance. Here, it was not just a few officers who had differing interpretations of the law. The ambiguity of the statute led numerous, reasonable law enforcement officers across the state to mistakenly order plaintiffs from homes. For example:

- Janet Allison stated that on June 15, 2006, a **Lumpkin County** sheriff's deputy came to her home and ordered her to move because her home was within 1,000 feet of a school bus stop. (Allison Decl., June 17, 2006, Ex. 3 to Doc. 8).

²² See Tr. of Hearing, July 11-12 (Doc. No. 42, 43) at 94-99.

²³ See Tr. of Hearing, July 11-12 (Doc. No. 42, 43) at 312 ("Q: [I]f the bus stopped in front of Junior's house every morning, that's going to count? A: We would consider that a bus stop, yes, sir.").

- Lori Collins stated that she was forced from her home in **Rockdale County** in 2006 due to the school bus stop provision. (Collins Decl., June 19, 2008, Doc. 187-10).
- Kathleen Corbin stated that in June 2006, a sheriff's deputy informed her husband that he would have to move because of the school bus stop provision. (Corbin Decl., June 25, 2006, Ex. 4 to Doc. 12).
- Jeffrey Jones stated that the bank foreclosed on his **Cobb County** home and that he lost \$25,000 after a sheriff's deputy ordered him to move from his home because it was within 1,000 feet of a school bus stop. (Jones Decl., Jan. 29, 2008, Ex. C to Doc. 169).
- Joseph Linaweaver stated that on June 1, 2006, a **Columbia County** sheriff's deputy ordered him to move by June 30, 2006 due to his home's proximity to a school bus stop. (Linaweaver Decl., June 17, 2006, Ex. 2 to Doc. 8).
- Al Reginald Marks stated that the **Cobb County** sheriff's office sent him a letter in May 2006 ordering him to move due to his home's proximity to a school bus stop. (Marks Decl., June 18, 2006, Ex. 6 to Doc. 8).
- Joshua Murphy stated that a **Clayton County** sheriff's deputy came to his home and ordered him to move because his home was within 1,000 feet of two school bus stops. (Murphy Decl., June 25, 2006, Ex. 3 to Doc. 12).
- Andrew Norton stated that in July 2006, he was forced to move from his home in **Cobb County** because his home was within 1,000 feet of a school bus stop. (Norton Decl., June 12, 2008, Ex. 5 to Doc. 186).
- Amy Whitaker stated that her probation officer ordered her to move from her **Hall County** home on June 26, 2006 due to the school bus stop provision. (A. Whitaker Decl., June 28, 2006, Ex. 5 to Doc. 19).
- Jeffery York stated that in June 2006, his probation officer ordered him to move from a **Polk County** residence that was within 1,000 feet of a school bus stop because of H.B. 1059. (York Decl., June 18, 2006, Ex. 5 to Doc. 8).

These people were all ordered to move due to interpretations of the law that diverged with the Attorney General's interpretation.

The school bus stop provision neither defines the term "designated," nor specifies what a school board must do before a bus stop is "designated" for purposes of the law. Is a school bus stop designated if a school board posts changes to its bus route on its website, as in Columbia County?²⁴ Is a school bus stop still designated if the school board does not re-affirm its designation resolution from year to year? Is a school bus stop designated if a school board specifically authorizes its transportation director to designate school bus stops for purposes of the sex offender law? The statute leaves these questions to be resolved by individual law enforcement officers.²⁵ An ordinary citizen cannot be

²⁴ See Guevara Decl. ¶ 4(e).

²⁵ See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) ("[T]he hallmark of a vague criminal statute is one that furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."); *U.S. v. Loy*, 237 F.3d 251, 266 (3rd Cir. 2001) (probation condition prohibiting possession of "pornography" was vague because it delegated interpretation of the term "pornography" to "policemen . . . for resolution on an ad hoc and subjective basis."); *LoFranco v. U.S. Parole Comm'n*, 986 F. Supp. 796, 810 (S.D.N.Y. 1997) (holding a parole condition was unconstitutionally vague because it delegated interpretive power to parole officer).

expected to understand the provision when government officials cannot agree on its meaning. The school bus stop provision is unconstitutionally vague.

IV. THE SCHOOL BUS STOP PROVISION VIOLATES THE SUBSTANTIVE COMPONENT OF THE DUE PROCESS CLAUSE.

A. The School Bus Stop Provision Will Significantly Interfere With Family Living Arrangements and Will Summarily Evict Children from their Parents' Homes.

Plaintiffs do not claim a due process "right to live wherever they want." (Defs' Br. at 17). Instead, Plaintiffs show that the scope of the bus stop provision is so vast that it will interfere with protected family living arrangements.²⁶

In four years of litigation, the State has presented no evidence – no maps, no statistics, no expert testimony, no lay witness testimony – to refute the massive scope of the restriction.²⁷ Plaintiffs, however, have shown that nearly all sex offenders in the school bus stop counties live within 1,000 feet of a school bus

²⁶ See *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) ("[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.").

²⁷ Defendants' only effort to dispute Plaintiffs' evidence of the impact of the school bus stop provision is their argument that only "12 of 42" sex offenders in Columbia County were affected by the bus stop provision in 2006. See Defs' Br. at 8 (quoting Columbia County Investigator David Rush). David Rush actually stated that 12 people were required to move in the 72 hours "prior to the injunction . . . which basically prohibited us from enforcing it." Rush Depo. June 22, 2009 at 56-57 (Ex. 19 to Doc. No. 262).

stop.²⁸ Plaintiffs' maps further show that persons subject to the bus stop provision in Chatham and Columbia counties will be banished from these counties if the bus stop provision is enforced.²⁹ Plaintiffs' maps are in keeping with the findings of numerous law enforcement officials who mapped the scope of the provision in 2006.³⁰ Plaintiffs' maps are also consistent with the testimony of sheriffs' deputies from Bibb, Cherokee, Cobb, DeKalb, Forsyth, Gwinnett, Paulding, and Rockdale counties, all of whom stated they had imminent plans to remove nearly all sex offenders from their homes due to the bus stop provision.³¹

²⁸ See Pls' Statement of Facts ¶ 29(b).

²⁹ See Ex. 1-2 to Doc. 287.

³⁰ See Ex. 1-4 to Doc. 274 (showing that the provision would render nearly all of Bibb, Cobb, DeKalb, and Richmond counties off limits).

³¹ See Pls' Statement of Facts, Doc. 287, at ¶ 9-12. Sheriff Ted Paxton testified that all 60 people on the registry in Forsyth County would have to move due to the bus stop provision. See Tr. of Hearing, July 11-12 (Doc. No. 42, 43) at 23. Investigator Russell Finley testified that in Cobb County, all but 4 of the approximately 200 sex offenders would have to move from the county's bus stops. See *id.* at 37-38. Captain David Davis testified that 222 of 230 sex offenders in Bibb County would have to move. See *id.* at 49-50. A DeKalb County official testified that all 490 sex offenders in that county would have to move. See *id.* at 62. Corporal Karen Pirkel testified that 277 of 278 sex offenders in Gwinnett County would have to move, all due to bus stops. See *id.* at 85, 87. Sergeant Jay Baker testified that 88 of 95 sex offenders in Cherokee County would have to move. See *id.* at 88. Investigator Gene Higdon of Rockdale County testified that 51 of 52 sex offenders would have to move due to the bus stop provision. See *id.*

In short, if the school bus stop provision goes into effect, persons subject to it – including Ruben Luna – will be forced to abandon their family members and will be unable to relocate in counties with designated school bus stops. If this Court does not act and Mr. Luna is forced to move, he will have to relocate instantly to avoid the 10-30 year prison sentence that accompanies a violation of the statute. Families – especially those with young children, like Mr. Luna’s family – cannot vacate a home in an instant. The school bus stop provision will necessarily force at least a period of separation on the Lunas at a time when such a separation is especially burdensome given that the couple is expecting another child.³² See *Elwell v. Township of Lower*, 2006 WL 3797974 at *15 (N.J. Super. Ct. Law Div. Dec. 22, 2006) (ordinance prohibiting sex offenders from residing near bus stops “substantially intrude[d] upon significant family matters,” including “how to raise and care for children.”). Any suggestion by the State that families

at 159-60. See also Decl. of Detective Jodie Askea, June 27, 2006 (Doc. No. 19-4) (stating that 90 of 100 offenders in Paulding County would have to move, most due to school bus stop provision).

³² See Supp. Luna Decl. ¶ 6.

can simply “move together” is willfully blind to economic reality.³³

The bus stop provision will be particularly detrimental to children. There are 18 children on the sex offender registry, four of whom live in Chatham County.³⁴ By definition, children do not qualify for the homeowner or leasehold exemptions since they cannot own or lease property. R.W., age 15, G.W., age 17, J.M., age 17, and K.M., age 16 are all subject to the school bus stop provision.³⁵ All reside within 1,000 feet of a school bus stop,³⁶ and all will be evicted if the bus stop provision is enforced. There is simply no question that a fundamental right is at stake when the State seeks to force a child from his parents’ home.³⁷

³³ See *Mann v. Dep’t of Corr.*, 282 Ga. 754, 758-59 (2007) (acknowledging the economic deprivations that accompany ouster of a person from his home).

³⁴ See Pls’ Statement of Facts ¶ 31.

³⁵ See *id.*

³⁶ See Guevara Decl. ¶ 6-9.

³⁷ See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (noting that a parent’s interest in care, custody and control of their children is perhaps the oldest of the fundamental liberty interests); *Doe v. Heck*, 327 F.3d 492, 524 (7th Cir. 2003) (“The interest . . . is not only that of the parent in the companionship, care and custody of the children, [but also] of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily association with the parent.”); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (the “most essential and basic aspect of familial privacy [is] the right of the family to remain together without the coercive interference of the awesome power of the state.”).

B. The School Bus Stop Provision Will Subject People With Disabilities to Summary Eviction.

Forcing people with disabilities out of their homes whenever a school board designates a bus stop also “shocks the conscience.” *Carr v. Tatangelo*, 338 F.3d 1259, 1271 (11th Cir. 2003). If the bus stop provision goes into effect, Walter Smiley, who is blind and lives alone, must immediately leave home or face prison. Yet Mr. Smiley’s disability prevents him from vacating his home in an instant. And, due to the sex offender residence restrictions, there are no homeless shelters in Chatham County or anywhere else in Georgia at which Mr. Smiley can reside.³⁸ As applied to Mr. Smiley and others with disabilities, “the relationship between the classification and the goal” of protecting children from sex offenses is “so attenuated as to render the distinction arbitrary or irrational.”³⁹ A civilized society does not turn persons with disabilities into

³⁸ In Savannah, “100%” of homeless shelters are within 1,000 feet of a prohibited location. See Email from G. McConnell, Asst. Dist. Atty. to J. Alexander, Savannah Probation Office, Aug. 21, 2008 (Ex. 13 to Doc. 262). See also Doctoroff Decl. (Ex. 9 to Doc. 287 at ¶ 20-23).

³⁹ *Mikaloff v. Walsh*, 2007 WL 2572268 at *11 (N.D. Ohio 2007) (finding sex offender residence law excessive where “[a] feeble, aging paraplegic must leave his home just as a younger one.”); *Open Homes Fellowship, Inc. v. Orange County, Fla.*, 325 F. Supp. 2d 1349 (M.D. Fla. 2004) (finding zoning restrictions on ministry for “substance-addicted” persons, including sex offenders, was unconstitutional under rational basis review because of insufficient showing of “threat to safety”).

nomads, requiring them to be “repeatedly uprooted and forced to abandon homes.” *Mann*, 282 Ga. at 756.

C. The School Bus Stop Provision Cannot Survive Strict Scrutiny and Fails Even the Rational Basis Test.

Given its massive intrusion into family living arrangements and its effect on disabled persons like Mr. Smiley, the reach of the school bus stop provision must be narrowly tailored to meet its goal. The school bus stop provision is not narrowly tailored, but vastly over-inclusive.

The State does not address how the statute survives strict scrutiny. While the State argues that there is no due process right at issue, its argument (should such a right exist) is simply that the statute is a matter of “legislative choice” and that the State has an “interest in protecting children.” (Defs’ Br. at 18). Thus, the State neither presents evidence nor argument on the strict scrutiny test. For three reasons, the bus stop provision’s scope and reach are so excessive that the provision fails both the strict scrutiny test and rational basis review.

First, the statute fails to differentiate between people on the sex offender registry and instead treats everyone the same, regardless of whether the person committed a minor offense or a serious one.⁴⁰ Even after House Bill 571, the school bus stop provision applies to everyone on the registry whose offense occurred after July 1, 2006.

Second, the provision does not call for any individualized assessment of dangerousness before a person is banished from his home and county. *See Elwell*, 2006 WL 3797974 at *14-15, 17 (ordinance prohibiting sex offenders from residing within 25 feet of school bus stop violated substantive due process clause where it did not differentiate between tiers of sex offenders or attempt to assess the actual risk posed by a particular person).

⁴⁰ This Court held that “the Act’s failure to distinguish among sex offenders and failure to identify those registered sex offenders who are most likely to reoffend, when coupled with the fact that the instability created by the Act may be harmful to the public, could support a finding that the Act is excessive.” Order, Mar. 30, 2007 at 21. *See also State v. Pollard*, 908 N.E.2d 1145, 1153 (Ind. 2009) (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. . . .”); *Commonwealth v. Cory*, 911 N.E.2d 187, 197 (Mass. 2009) (statute 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.”).

Third, there is no evidence in the record to suggest that the school bus stop provision will prevent sex offenses.⁴¹ On the contrary, sex offenders with stable housing are *less* likely to commit new sex offenses than those who lack such stability.⁴² An analysis of Georgia’s parolees verified the importance of stable housing.⁴³ This 2003 study found that among Georgia parolees, residential instability has a serious impact on recidivism, quantifiable as a 25% increase in the likelihood of arrest *each time* a parolee changes addresses.⁴⁴ Further, training

⁴¹ See Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet from Danger or One Step from Absurd?*, 49 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 168 (2005) (suggesting that residence restrictions disrupt stability and lead to an increase in risk factors associated with sex offense recidivism); 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.”).

⁴² See *id.* See also Wendy Koch, *Sex-Offender Residency Laws Get Second Look: States Consider Easing Restrictions that Critics Say Provide a False Sense of Security and Often Make Felons Tougher to Monitor*, USA TODAY, Feb. 26, 2007, at 1A (describing a “backlash” against sex offender residence restriction laws).

⁴³ See Applied Research Serv., *Enhancing Parole Decision-making Through the Automation of Risk Assessment* 15 (Apr. 2003) (Ex. 17 to Doc. 287).

⁴⁴ See *id.*

materials disseminated by the Board of Pardons and Paroles in 2008 list “lifestyle instability” as “one of the most powerful triggers to committing a sex offense.”⁴⁵ For this reason and others, many law enforcement officials opposed the school bus stop provision.⁴⁶

Experts in the prevention of sexual abuse, including Dr. Kevin Baldwin, share concerns about the provision.⁴⁷ At the July 12, 2006 hearing in this case, Dr. Baldwin testified that rather than furthering public safety, the school bus stop provision “will in fact have the opposite effect of increasing potential harm to children,” and that § 42-1-15 runs directly contrary to accepted strategies to reduce recidivism.⁴⁸ Under questioning from this Court, *the State’s expert witness*

⁴⁵ See Ga. Bd. of Pardons and Paroles, *Basic Parole Officer Training, Sex Offender Supervision*, Oct. 8, 2008 at 5 (Ex. 16 to Doc. 287). 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).

⁴⁶ See, e.g., Rush Depo., June 22, 2009 at 51 (Ex. 15 to Doc. 287) (stating “[i]t’s my opinion that the school bus stop [provision] should not be a part of a sex offender law” because it would “almost be impossible . . . to enforce” and because of “fears” that “offenders go underground”). See also Pls’ Statement of Facts ¶ 37 (quoting Georgia law enforcement officers opposed to the provision).

⁴⁷ See Tr. of Hearing, July 11-12, 2006 (Doc. No. 42, 43) at 203-211.

⁴⁸ *Id.* at 216.

agreed that the school bus stop provision had the “potential to raise risk for recidivism.”⁴⁹ Georgia’s former Child Advocate, moreover, stated in a letter to the Office of the Governor that “[t]here is no evidence that sex offender residence restrictions prevent sex crimes or increase public safety” and concluded that:

[d]isrupting offenders’ stability through exclusionary housing and employment provisions is likely to exacerbate the psychosocial stressors that can increase the likelihood of recidivism, thereby impeding the public safety goal that is at the very heart of [the statute].⁵⁰

Lacking a procedure to determine which individuals could legitimately be subject to the 1,000 foot buffer, the school bus stop provision “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

Banishing plaintiffs from their counties and evicting children from their parents’ homes advances no legitimate state interest and is so irrational that it runs afoul of the Due Process Clause.

⁴⁹ See Testimony of Dr. Mario Dennis, Tr. of Hearing, July 12, 2006 at 338.

⁵⁰ See Letter to the Office of the Governor from Georgia’s former Child Advocate, Apr. 29, 2008 (Ex. 3 to Doc. 176).

CONCLUSION

For the foregoing reasons and those set forth in Plaintiffs' initial summary judgment brief, Plaintiffs ask this Court to grant their motion for summary judgment and to deny Defendants' motion for summary judgment.

Respectfully submitted this 5th day of October, 2010.⁵¹

s/ Sarah Geraghty

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⁵¹ Pursuant to L.R. 7.1, the undersigned counsel hereby certifies that this document has been prepared in compliance with Local Rule 5.1B.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document 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 5th day of October, 2010.

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