IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WENDY WHITAKER, et al., Plaintiffs, vs. SONNY PERDUE, et al., Defendants.	:	CIVIL ACTION NO. 4:06-CV-0140-CC

ORDER

This matter is presently before the Court on Defendants' Motion to Dismiss in Lieu of Answer [Doc. No. 34], Defendants' Motion to Dismiss Amended Complaint [Doc. No. 55], and Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint [Doc. No. 78]. The Court **DENIES** Defendants' Motion to Dismiss in Lieu of Answer and Defendants' Motion to Dismiss Amended Complaint **as moot**, insofar as Plaintiffs amended their complaint after the filing of those motions.[1] The Court will consider only Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint in this Order.

I. BACKGROUND[2]

On June 20, 2006, Plaintiffs Wendy Whitaker, Joseph Linaweaver, Janet Jenkins Allison, James Victor Wilson, Jeffery York, Dewayne Owens, Al Reginald Marks, Lori Sue Collins, and Reverend Joel Jones filed the instant class action

---

[1] The Court notes, however, that Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint incorporates by reference all material contained in the previous motions to dismiss. The Court will accordingly refer to the previous motions to dismiss in this Order, as appropriate.

[2] Insofar as this matter is before the Court on Defendants' motion to dismiss, the Court has accepted the factual allegations in Plaintiffs' Second Amended Complaint as true for the purposes of this Order.

complaint challenging certain provisions of Act No. 571 (HB 1059), Ga. Laws 2006, codified at O.C.G.A. § 42-1-15 (hereinafter the "Act"). The Act provides, in pertinent part, that no individual required to register as a sex offender "shall reside or loiter within 1,000 feet of any child care facility, church, school, or area where minors congregate." § 42-1-15(a). The Act defines "areas where minors congregate" as including "school bus stops," § 42-1-12(a)(3), and "school bus stops" are defined as school bus stops "as designated by local school boards of education or by a private school." § 42-1-12(a)(19). In addition, the Act provides that no individual required to register as a sex offender "shall be employed by any child care facility, school, church, or by any business entity that is located within 1,000 feet of a child care facility, a school, or a church." § 42-1-15(b)(1).

The Act was scheduled to take effect on July 1, 2006. On June 22, 2006, Plaintiffs filed a Motion for Temporary Restraining Order, which this Court granted in part by oral ruling on June 26, 2006, and by written Order entered on June 27, 2006 [Doc. No. 16]. By this Order, the Court temporarily restrained Defendants[3] from taking any action to enforce the provision of the Act that prohibits registered sex offenders from living within 1,000 feet of a school bus stop (hereinafter the "school bus stop provision"). The Court scheduled a hearing on Plaintiffs' Motion for Preliminary Injunction and instructed Plaintiffs to produce information regarding the number and location of school bus stops

[3] The original Defendants in this case were Sonny Perdue, in his official capacity as Governor of the State of Georgia; Thurbert Baker, in his official capacity as Attorney General of the State of Georgia; Scot Dean, in his official capacity as Chief of Probation, Cedartown, Polk County, Georgia; and Robert Sparks, in his official capacity as Sheriff of Polk County. Defendants Perdue and Baker have been the only Defendants to address the substantive constitutional challenges to the Act. Subsequent references to "Defendants" and "parties" in this Order include only Defendants Perdue and Baker, unless otherwise noted.

before the hearing. On June 29, 2006, the Court provisionally certified, for the duration of the temporary restraining order, a class of Plaintiffs consisting of all persons who registered as sex offenders on or before July 1, 2006, and who reside within 1,000 feet of a currently-designated school bus stop or a school bus stop so designated in the future.

On July 11, 2006, the Court held an evidentiary hearing on Plaintiffs' Motion for Preliminary Injunction. That same day, the Court entered an Order extending the temporary restraining order for an additional ten days or until the Court ruled on the Motion for Preliminary Injunction [Doc. No. 38]. After hearing evidence and oral argument at the hearing, the Court ordered the parties to submit briefing on the proper interpretation of the phrase "school bus stop," as used in the Act. The parties complied with the Court's request, and on July 25, 2006, the Court entered an Order denying without prejudice Plaintiffs' Motion for Preliminary Injunction on the grounds that the motion was premature, insofar as the evidence failed to establish that any school bus stop had been designated by local school boards of education, as provided in the Act. The next day, on July 26, 2006, Plaintiffs filed a Motion for Temporary Restraining Order [Doc. No. 58], alleging that the District Attorney of the Augusta Judicial Circuit, which encompasses Burke, Columbia, and Richmond counties, had announced an intention to enforce the school bus stop provision and that the Columbia County local school board of education had officially designated school bus stops. That same day, Plaintiffs filed a motion to amend their complaint to assert claims against the Sheriffs of Burke, Columbia, and Richmond counties [Doc. No. 59], which the Court granted on July 27, 2006. On July 28, 2006, the Court held a hearing to consider Plaintiffs' Motion for Temporary Restraining Order and also heard argument on Plaintiffs' Motion for Class Certification [Doc. No. 46]. At

that hearing, the Columbia County Sheriff, Clay Whittle, indicated his willingness to consent to an injunction regarding the enforcement of the school bus stop provision while the Court considered the constitutionality of that provision. On July 28, 2006, the Court entered an Order denying Plaintiffs' Motion for Temporary Restraining Order as to the Sheriffs of Burke and Richmond counties, insofar as it appeared that the local school boards of education in those counties had not designated school bus stops, and directing Plaintiffs and the Sheriff of Columbia County to file a consent order reflecting the agreement reached at the hearing. That same day, the Court entered an Order certifying, for the duration of this litigation, a Plaintiff class consisting of all persons who are registered, who are required to register, or who in the future will be required to register as sex offenders under Georgia law. On August 24, 2006, this Court entered an Order certifying, for the duration of this litigation, a Defendant class consisting of all Sheriffs in the State of Georgia and naming the Sheriff of Columbia County as the class representative.

Plaintiffs estimate that there are approximately 11,000 registered sex offenders in Georgia, 9,000 of whom live in the community. (Second Am. Compl. [Doc. No. 75], ¶ 2.) Plaintiffs Wendy Whitaker, Joseph Linaweaver, Janet Jenkins Allison, James Victor Wilson, Jeffery York, Dewayne Owens, Al Reginald Marks, and Lori Sue Collins are registered sex offenders. When Ms. Whitaker was 17, she engaged in a single consensual act of oral sex with a 15-year-old male while on school property; she pled guilty to charges of sodomy and received a sentence of 5 years probation. (Id. at ¶ 10.) Plaintiff Joseph Linaweaver is on the sex offender registry because, when he was 16, he participated in single consensual act of oral sex with a 14-year-old girl; he pled guilty to sodomy and received a sentence of 5 years probation. (Id. at ¶ 15.) Plaintiff Janet Allison was convicted

of being party to a crime of statutory rape and party to a crime of child molestation after her 15-year-old daughter became pregnant and Ms. Allison allowed her daughter's boyfriend (and future husband) to move into their household; she received a sentence of 15 years probation. (Id. at ¶ 18.) Plaintiff James Wilson pled guilty to sexual abuse in the first degree for inappropriately touching an adult female college friend while highly intoxicated at a freshman party; he was sentenced to 5 years probation. (Id. at ¶ 22.) Plaintiff Jeffery York pled guilty to one count of sodomy for engaging in a consensual act of oral sex with a 15-year-old male when he was 17 years old; he was sentenced to 5 years probation. (Id. at ¶ 26.) Plaintiff Dewayne Owens was convicted of incest when he was 13 years old, for allegedly having sex with his sister; he was found to have violated the terms of his probation in 2004 and was incarcerated with a tentative parole date of December 2006, assuming that he provided a home plan to the Board of Pardons and Paroles. (Id. at ¶¶ 29-30.)[4] Plaintiff Al Marks pled guilty to child molestation after being charged with hand-to-genital and mouth-to-genital sexual contact with a 7-year-old male son of a family friend when he was 14 years old; he was sentenced to probation. (Id. at ¶ 32.) Plaintiff Lori Collins was convicted of statutory rape for having consensual sex with a 15-year-old male when she was 39 years old; she served three years in prison and since her release has been living in a faith-based halfway home. (Id. at ¶¶ 37-38.)

Plaintiff alleges that the Act will force thousands of registered sex offenders from their homes, jobs, and churches. (Id. at ¶ 1.) Ms. Whitaker, whose current residence is within 1,000 feet of where a school bus stops to pick up a child, has not been able to find another affordable residence in the Augusta

[4] The Court has no information regarding whether Mr. Owens was in fact paroled in December 2006.

area (which is where her husband works) that is not within 1,000 feet of a school bus stop. (Id. at ¶¶ 12-13.) Mr. Linaweaver was notified of the Act by the Columbia County Sheriff on June 1, 2006; he has been unable to find anywhere in the Augusta area to meet the Act's requirements and has not found employment that complies with the Act's restrictions. (Id. at ¶ 16.) Ms. Allison was informed by an officer with the Lumpkin County Sheriff's Office that her residence is within 1,000 feet of a school bus stop and that she must leave her home. (Id. at ¶ 19.) Ms. Allison and her family searched for a new home in White, Pickens, Dawson, Lumpkin, and Gilmer counties without success. (Id.) Mr. Wilson is the co-owner of a home that is within 1,000 feet of a school bus stop, and his place of employment is within 1,000 feet of a church. (Id. at ¶ 22.) Mr. Wilson searched the metro-Atlanta area for a residence that complies with the Act's provisions; Mr. Wilson found only a motel in an industrial area that may meet the Act's requirements. (Id. at ¶ 24.) Mr. York received two letters from the Polk County Sheriff's Office stating that his home may be within 1,000 feet of a school bus stop. (Id. at ¶ 27.) Mr. Owens, who is incarcerated, may be unable to qualify for parole because he cannot afford accommodations himself and the residences of his family members and the accommodations available in halfway houses do not comply with the Act's requirements. (Id. at ¶ 30.) Mr. Marks was informed by the Cobb County Sheriff's Office that his home is within 1,000 feet of a school bus stop and that he must leave the residence. (Id. at ¶ 34.) Mr. Marks and his family have searched for a residence that complies with the Act for six weeks, but have unable to find housing. (Id. at ¶ 35.) Ms. Collins was notified by the Rockdale County Sheriff's Office that she would need to leave Door of Hope in Rockdale County because a school bus stop was located within 1,000 feet of the residence. (Id. at ¶ 39.) Ms. Collins searched for a new home for three weeks without

success before moving to the Door of Hope in Polk County. (Id. at ¶¶ 39-42.) Because the Door of Hope in Polk County conducts religious programs and services, however, the residence may not be suitable under the Act. (Id. at ¶ 43.)

Plaintiff Reverend Joel Jones, who is not a member of the Plaintiff class in this case, is a minister and serves on the Board of Directors of the Door of Hope Ministry in Rockdale County, which is a faith-based halfway house that ministers to women who have been released from prison, including Plaintiff Collins. (Id. at ¶ 45.) Plaintiff Jones alleges that his spiritual beliefs compel him to provide assistance and spiritual leadership to people released from prison and jail. (Id.) The Second Amended Complaint alleges that the Door of Hope in Rockdale County "will no longer be able to house women on the registry because residents engage in religious worship and because the ministry's . . . location is within 1,000 feet of a school bus stop." (Id.)

Plaintiffs contend that the Act is unconstitutional because it violates (1) U.S. Const. art. I, § 10, prohibiting *ex post facto* laws, Bills of Attainder, and laws that impair the obligation of contracts; (2) the procedural component of the Due Process Clause; (3) the substantive component of the Due Process Clause and the right to family privacy; (4) the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2006) ("RLUIPA"); (5) the Free Exercise Clause and the right to freedom of association; (6) the Takings Clause; (7) the right to interstate and intrastate travel; and (8) the Eight Amendment's prohibition on cruel and unusual punishment.[5] Plaintiffs request that the Court declare certain portions of the Act unconstitutional and permanently enjoin the enforcement of those provisions. Defendants Perdue and Baker have moved to dismiss Plaintiffs'

[5] Plaintiffs also seek a declaration that the Act is vague and overbroad.

Second Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. STANDARD OF REVIEW

Pursuant to Rule 12(b)(6), a defendant may seek to dismiss a complaint for failure to state a claim upon which relief can be granted. "A motion to dismiss should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief. 75 Acres, L.L.C. v. Miami-Dade County, 338 F.3d 1288, 1293 (11th Cir. 2003) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). "In evaluating such a motion, [the court] accept[s] the factual allegations in the complaint as true and . . . construe[s] them in the light most favorable to the plaintiff." 75 Acres, 338 F.3d at 1293 (citing Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003)). A court evaluating a Rule 12(b)(6) motion may not consider matters outside the pleadings unless the court treats the motion to dismiss as a motion for summary judgment under Federal Rule of Civil Procedure 56 and gives all parties "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b); see also Moss v. W & A Cleaners, 111 F. Supp.2d 1181, 1185 (M.D. Ala. 2000).

Federal Rule of Civil Procedure 12(b)(1) provides that a defendant may move for dismissal on the grounds that a court lacks subject matter jurisdiction. Rule 12(b)(1) motions may involve facial or factual attacks on a court's subject matter jurisdiction. The Eleventh Circuit recently summarized the court's inquiry when, as here, a standing challenge is raised in a motion to dismiss:

> When standing is questioned at the pleading stage . . . general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. We accept as true all material allegations contained in the complaint and construe the complaint in a light most favorable to the complaining

> party. Moreover, in the context of a Rule 12(b)(1) challenge to standing, we are obligated to consider not only the pleadings, but to examine the record as a whole to determine whether we are empowered to adjudicate the matter at hand.

Elend v. Basham, 471 F.3d 1199, 1208 (11th Cir. 2006) (citation and internal marks omitted). With this standard in mind, the Court will proceed to consider the merits of Defendants' arguments.

III. LEGAL ANALYSIS

A. Standing

Defendants first assert that Plaintiffs lack standing in the instant case because they cannot show actual injury. (Brief in Support of Defs.' Motion to Dismiss in Lieu of Answer [Doc. No. 34-2] (hereinafter "Defs.' Brief"), p. 6.) Defendants argue that Plaintiffs lack standing to challenge that portion of the Act that prohibits registered sex offenders from residing or loitering within 1,000 feet of a church, § 42-1-15(a), because Plaintiffs are not prohibited from attending church and no Plaintiff is currently in violation of the residency requirement pertaining to churches. Defendants further contend that Plaintiffs cannot challenge that portion of the Act that prohibits sexually dangerous predators from being employed within 1,000 feet of an area where minors congregate, § 42-1-15(b)(2), because no Plaintiff is a sexually dangerous predator. Defendants finally argue that certain Plaintiffs lack standing to challenge the school bus stop provision.

The standard that this Court uses to evaluate whether Plaintiffs have standing is well-settled. As stated by the Eleventh Circuit,

> First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the

injury will be "redressed by a favorable decision." Doe v. Pryor, 344 F.3d 1282, 1285 (11th Cir. 2003) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 550, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (citations, footnote, and some internal marks omitted)). Importantly, as previously noted, insofar as the instant case is before the Court on a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct may suffice," and the Court "presume[s] that general allegations embrace those specific facts that are necessary to support the claim." Id. (citation and internal marks omitted). The Court "may consider affidavits and other factual materials in the record." Nat'l Ass'n of State Utility Consumer Advocates v. Federal Communications, 457 F.3d 1238, 1251 (11th Cir. 2006). In addition, the Court does not consider Plaintiffs' likelihood of success on the merits when evaluating standing. Warth v. Seldon, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

The Court notes that "[i]n order to bring a claim on behalf of other similarly situated persons, the named plaintiff must have standing to bring the claim." Cummings v. Baker, 130 Fed. Appx. 446, 449 (11th Cir. 2005) (citation omitted); see also Jackson v. Okaloosa County, 21 F.3d 1531, 1536 (11th Cir. 1994) ("In order for this court to have jurisdiction over the claims before us, at least one named plaintiff must have standing for each of the claims."). In the instant case, the Second Amended Complaint does not indicate that any of the named Plaintiffs are classified as sexually dangerous predators, and the Court has not uncovered any such evidence elsewhere in the record. Plaintiffs do not dispute that they lack standing to challenge the enforcement of residency restrictions applicable only to sexually dangerous predators and state that those restrictions are not challenged in this case.

As to Plaintiffs' claims regarding the portion of the Act that prohibits

registered sex offenders from living or working within 1,000 feet of a church, the Court finds that Plaintiffs Victor Wilson and Lori Collins have standing to challenge the constitutionality of that portion of the Act. According to the allegations of the Complaint, Mr. Wilson has received an offer of full-time employment from an accounting firm at which he previously worked while pursuing a college degree. (Second Am. Compl. ¶ 21.) The accounting firm is located within 1,000 feet of a church. (Id. at ¶ 23.) Therefore, if the Act is enforced, Mr. Wilson will have to resign his current position and will be unable to accept the firm's full-time employment offer. Mr. Wilson satisfies the requirements of imminent injury-in-fact caused by the operation of the Act, for which the instant action seeking injunctive relief provides a remedy. Ms. Collins lived at the Door of Hope residential ministry in Rockdale County until June 2006, when she moved to the Door of Hope residential ministry in Polk County after being informed that her former residence was within 1,000 feet of a school bus stop. (Id. at ¶¶ 37, 42.) The Door of Hope in Polk County conducts religious programs and services and hosts religious events, prayer, and worship. (Id. at ¶ 43.) As previously noted, the Act prohibits anyone registered as a sex offender from living within 1,000 feet of a church. § 42-1-15(a). "Church" is defined as "a place of public religious worship." § 42-1-12(a)(7). If the Act is enforced, Ms. Collins likely will have to abandon her current residence.[6] She satisfies the requirements of imminent injury-in-fact caused by the operation of the Act, for which the instant action seeking injunctive relief provides a remedy.

Defendants do not challenge the standing of Plaintiff Jones to bring a claim under RLUIPA. However, Plaintiffs address this issue in their response brief and

[6] Whether the Door of Hope would be considered to be a place of public religious worship is not a proper determination at this stage of the proceedings.

the Court finds it appropriate to consider Mr. Jones' standing here. Mr. Jones is a minister and serves on the Board of Directors of the Door of Hope residential ministry in Rockdale County. (Second Am. Compl. ¶ 45.) Door of Hope operates a halfway house that ministers to women who have been released from prison. (Id.) As previously noted, Door of Hope in Rockdale County is located within 1,000 feet of a school bus stop and its residents engage in religious worship. (Id.) Plaintiff argues that, because of the Act, Mr. Jones cannot provide a residence for registered sex offenders. Standing to assert a claim under RLUIPA is determined "by the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000cc-2(a). RLUIPA prevents governments from imposing a "substantial burden" on the religious exercise of a person or a religious assembly by imposing a land use regulation, unless that land use regulation is necessary to further a compelling state interest. 42 U.S.C. § 2000cc(a)(1). In addition, governments may not impose land use regulations that treat religious institutions on less than equal terms with secular institutions. 42 U.S.C. § 2000cc(b)(1). A land use regulation is defined as a zoning or landmarking law "that limits or restricts a claimant's use or development of land . . . if the claimant has an ownership, leasehold, easement, servitude or other property interest in the regulated land." 42 U.S.C. § 2000cc-5(5). The term "claimant" is in turn defined to mean "a person raising a claim or defense under this Act." 42 U.S.C. § 2000cc-5(1). Plaintiffs do not allege that Mr. Jones has an ownership interest in the Door of Hope in Rockdale County. The Court has been unable to locate any authority holding that a minister or church board member has standing to assert claims under RLUIPA where that minister does not own a property interest in the property at issue. The Court therefore cannot determine whether Mr. Jones has standing to pursue a claim under RLUIPA, and the Court would ordinarily permit Plaintiffs an opportunity to

amend their complaint to sufficiently allege standing. However, in the instant case, the Court finds that even if Mr. Jones had standing to pursue claims under RLUIPA, Plaintiffs fail to state a RLUIPA claim, see infra, and any such amendment accordingly would be futile.

As to Plaintiffs' standing to challenge that portion of the Act that prohibits anyone on the sex offender registry from residing within 1,000 feet of a school bus stop, Defendants argue that Plaintiff Whitaker has a suitable housing option that complies with the Act; that Plaintiff Linaweaver found suitable housing but his rental application was rejected because of his status as a convicted felon; that Plaintiff Allison has "failed to negate the fact that there is available housing;" that Plaintiff Wilson has found suitable housing; that Plaintiff York has not been threatened with prosecution if he fails to move; that Plaintiff Owens is currently incarcerated and has not been denied parole based on the Act; that Plaintiff Marks' allegation that he has not found housing for himself and his parents is insufficient; and that Plaintiff Collins has found suitable housing.[7] Defendants argue that Plaintiffs do not have the right to live where they want. This argument, however, plainly reaches into the merits of this case and is not an appropriate consideration when evaluating standing.

As an initial matter, the Court disagrees with Defendants' position that all named Plaintiffs who have located housing that complies with the Act's requirements (according to Defendants, Plaintiffs Whitaker, Linaweaver, Wilson and Collins fall within this category) have not suffered an injury-in-fact sufficient to satisfy standing requirements. Defendants do not explain why the forced

[7] Defendants also argue that Mr. Jones does not have standing to challenge the school bus stop provision because he is not a registered sex offender. The Court agrees with this position.

relocation of those individuals pursuant to a potentially unconstitutional legislative enactment would not constitute an injury-in-fact. The mere fact that Plaintiffs are able to comply with the Act's residency restrictions does not remove the injury associated with that compliance. In addition, the Court is unpersuaded by Defendants' argument that Plaintiffs Allison and Marks lack standing to bring this challenge because their allegations that they have not found housing are insufficient or because they have failed to "negate" that housing is available. Defendants cite no authority for this position and have cited nothing to indicate that Plaintiffs are obligated to come forward with any evidence regarding the nature and extent of housing options in order to support standing in this case.

Finally, Defendants contend that Plaintiff York lacks standing because he has not been threatened with prosecution if he fails to move. Defendants more generally take the position that, "[u]ntil each Plaintiff has shown they have been actually injured by the imposition of the [Act] as to each individual Plaintiff, their 'fear' of prosecution is speculative at best." (Defs.' Brief, p. 9.) Defendants are essentially arguing that the injury is hypothetical. The Court does not find this position persuasive. As an initial matter, the Court agrees with Plaintiffs' conclusion that the prior Orders in this case have effectively halted the enforcement of the school bus stop provision. It is undisputed that Plaintiffs, with the exception of Mr. Jones, are registered sex offenders who are subject to the Act. Before this lawsuit was filed, Plaintiffs Linaweaver, Allison, York, Marks, and Collins were notified by local Sheriffs' offices that they will need to relocate to comply with the school bus stop provision. Plaintiff Collins has already relocated to a residence to comply with the school bus stop provision, but that residence may not comply with the requirement that registered sex offenders not reside within 1,000 feet of a church. Plaintiffs Whitaker and Wilson have become aware

that their current residences are within 1,000 feet of where a school bus stops to pick up a child and have been searching for other residences. Plaintiff Owens cannot afford to pay for a residence and all available residences of family members and all halfway houses are within 1,000 feet of where a school bus stops to pick up a child. Mr. Owens therefore cannot submit an acceptable home plan to the parole board. These Plaintiffs have suffered or are in imminent danger of suffering an actual injury occasioned by the enforcement of the school bus stop provision. These injuries are caused by the operation of the Act, and an injunction barring the enforcement of the Act would provide a remedy to Plaintiffs. Defendants' standing challenge speaks more directly to the merits of Plaintiffs' constitutional claims than to this Court's subject matter jurisdiction.

B. *Ex Post Facto* Prohibition

Article I, § 10 of the United States Constitution provides that states may not pass *ex post facto* laws. *Ex post facto* laws impose retroactive punishment; in other words, they increase the punishment for criminal acts after they have been committed. Defendants argue that the Act is regulatory rather than punitive, precluding a finding that the Act is an unconstitutional *ex post facto* law. This Court disagrees. While the Court recognizes that residency restrictions have been upheld in other cases, the Act at issue in the instant case imposes more severe residency restrictions than those evaluated in those opinions.

The Supreme Court reviewed the framework used to evaluate an *ex post facto* challenge in Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). Pursuant to that framework, this Court first considers whether the Act was intended to establish civil or criminal proceedings. Smith, 538 U.S. at 92. "If the intention of the legislature was to impose punishment, that ends the inquiry." Id. If the legislature intended to enact a civil, nonpunitive regulatory scheme,

however, the Court further examines whether the Act is "so punitive either in purpose or in effect as to negate [the State's] intention to deem it civil." Id. (citation and internal marks omitted).

The Court "considers the statute's text and its structure to determine the legislative objective." Id. (citation omitted). The Court must give "considerable deference" to the legislature's stated intent. Id. at 93. In this case, as in Smith, the legislature stated its intention with regard to the registration requirement: "The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes." HB 1059, § 1. In the instant case, however, the legislature did not include any statement specifically addressing its intention as to the residency restrictions. Indeed, the residency restrictions are not included in the list of strategies purportedly implemented by the legislature in Section 1 of HB 1059. The Court's inquiry into legislative intent, therefore, is not aided by the stated intention of the legislature in the instant case.[8]

As to the prior residency restrictions, the Georgia Supreme Court stated:

> The Statute is designed to safeguard against encounters between minors and a convicted sex offender by requiring at least a 1,000 foot distance between places where the former congregate and the latter resides. While not every convicted sex offender will be a recidivist, the statute aims to lessen the potential for those offenders inclined toward recidivism to have contact with, and possibly victimize, the youngest members of society.

Mann v. State, 278 Ga. 442, 443-444, 603 S.E.2d 283, 286 (2004). Defendants interpret the above statement as a finding of legislative intent. Even if the Court

---

[8] Plaintiffs argue that the Court must accept, as true, their allegations that the intent of the Act was to punish registered sex offenders by removing them from Georgia. (Pls.' Resp. to Defs.' Motion to Dismiss [Doc. No. 88], p. 10.) The Court considers Plaintiffs' allegation as to this issue to be conclusory and does not find that it is bound by this conclusion in addressing Defendants' motion to dismiss.

were to agree with Defendants' interpretation of this language,[9] the Court does not find this statement controlling in the instant case, which challenges subsequent revisions to the residency requirements.[10]

"Other formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent." Smith, 538 U.S. at 94 (citation omitted). The Act is codified in Title 42 of the Georgia Code, which is entitled "Penal Institutions." It appears in Chapter 1, "General Provisions," at Article 2, "Sexual Offender Registration Review Board." Other matters addressed in Title 42 include correctional institutions, conditions of detention, probation, pardons and paroles, and transfer of prisoners. The provisions in Title 42 appear to relate exclusively to criminal administration, but they do not appear punitive. See Smith, 538 U.S. at 95. As for enforcement procedures, the Act does not appear to provide any specific enforcement procedures; it merely provides that registered sex offenders who fail to comply with the Act "shall be guilty of a felony and shall be punished by imprisonment for not less than ten nor more than 30 years." O.C.G.A. § 42-1-15(d). With the exception of the harsh penalty imposed for those offenders who fail to comply with the Act, the Court agrees with Defendants' position that "[n]othing on the face of the Act as a whole or the specific statute in question suggests that it is anything but a regulatory scheme designed to protect the

---

[9] This statement appears in the Georgia Supreme Court's analysis of the state interest underlying the residency restrictions, in connection with evaluating a takings challenge to the former statute. Accordingly, legislative intent was not directly at issue in that case.

[10] As Defendants note, the residency restrictions in effect prior to the 2006 amendment have been found not to constitute an *ex post facto* law, and this Court will not consider these restrictions here. See Doe v. Baker, No. 1:05-CV-2265-TWT (N.D. Ga. 2006).

public." (Defs.' Brief, p. 11.)

The Court next determines whether, assuming that the legislature's intent was to establish civil, nonpunitive residency restrictions, the effect of the Act is nonetheless so punitive in effect as to negate the legislative intent. The Court recognizes that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." Smith, 538 U.S. at 92. In undertaking this inquiry, the Court considers the "guideposts" described in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). Smith, 538 U.S. at 97 (noting that the factors are "neither exhaustive nor dispositive"). The following factors are evaluated to determine if a statute is punitive: (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.

The Court first evaluates whether the Act has been regarded in our history and traditions as punishment. "[A] State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." Id. Banishment has been regarded historically as a punishment, id. at 98, and Plaintiffs argue that the Act sufficiently resembles banishment to support a finding that this factor weighs in their favor. Defendants argue that the Act does not effectively banish registered sex offenders because the Act does not mandate that those individuals be "permanently expelled from their community and prevented from returning," which is the historic definition of banishment. (Defs.' Brief, p. 13.) Because the Act addresses only residency and loitering and does not impact any other activities in "restricted" areas, Defendants

contend that the Act cannot be considered banishment.

While the Court acknowledges that the Eighth Circuit found this position persuasive in Doe v. Miller, 405 F.3d 700 (8th Cir. 2005), the Court disagrees with its application in the instant case.[11] In particular, the Court finds that it could reasonably conclude, when presented with evidence regarding the availability of housing and the areas impacted by the Act, that the Act "sufficiently resembles banishment to make this factor weigh towards finding the law punitive." Miller, 405 F.3d at 724 (Melloy, J., dissenting). The Court agrees with Judge Melloy's opinion that a statute found to be substantially similar to banishment could support a finding of punitive effect. In this case, Plaintiffs may be able to establish that they are effectively excluded from many communities in Georgia by operation of the Act. If the Court required Plaintiffs to prove banishment as historically defined in order to pursue an *ex post facto* challenge, the Georgia legislature could prohibit sex offenders from living anywhere in the State of Georgia without raising a question of punitive effect relevant to an *ex post facto* determination. This position goes too far. The Act may be found to sufficiently resemble banishment so as to support a finding that it is punitive in effect.

The Court next considers whether the law imposes an affirmative disability or restraint. "Here, we inquire how the effects of the Act are felt by those subject to it." Smith, 538 U.S. at 99-100. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." Id. at 100. In the instance case,

---

[11] The Miller decision considered several constitutional challenges to an Iowa statute prohibiting certain registered sex offenders from living within 2,000 feet of a school or a registered child care facility. The statute considered in Miller included a grandfather clause that permitted registered sex offenders to retain residences established prior to the effective date of the statute, even if those residences did not comply with the new statutory requirements. See Miller, 405 F.3d at 719. The Act at issue in this case, however, does not include a grandfather provision.

unlike Smith, the Act imposes a physical restraint on the available residences of registered sex offenders. See also Miller, 405 F.3d at 721 (statute imposed affirmative disability or restraint). The Act at issue in this case does not leave registered sex offenders "free to change jobs or residences." Smith, 538 U.S. at 100. Registered sex offenders are not "free to move where they wish and to live and work as other citizens, with no supervision." Id. at 101. Moreover, school bus stops are inherently transient and may be designated by local school boards of education at any time under the Act, significantly limiting the permanency of residences that can be established by registered sex offenders and impairing their ability to form relationships in their chosen communities. On its face, the Act does not require that any notice be provided to a sex offender who is in violation of the Act's requirements and does not provide any specified time period within which that person can locate a new residence that complies with the Act. The Court cannot agree with Defendants' argument that the residency restriction "is a minor and indirect effect of a conviction for a sexual offense." (Defs.' Brief, p. 16.)

Thirdly, the Court evaluates whether the Act promotes the traditional aims of punishment. The parties do not dispute that one of the purposes of the Act is deterrence, a traditional aim of punishment. Consistent with Smith, the Court recognizes that "[a]ny number of governmental programs might deter crime without imposing punishment." Smith, 538 U.S. at 102. While the Court does not rely on this factor alone to conclude that Plaintiffs state an *ex post facto* claim, the Court does consider this factor to weigh in favor of finding the law punitive in effect.

Finally, the Court considers whether the Act has a rational connection to a nonpunitive purpose and whether it is excessive as to that purpose. "The Act's rational connection to a nonpunitive purpose is a 'most significant' factor in our

determination that the statute's effects are not punitive." Smith, 538 U.S. at 102 (citation omitted). Plaintiffs admit that the Act has a rational connection to a nonpunitive purpose but contend that the Act is excessive. The Act is rationally connected to the nonpunitive purpose of protecting the public, particularly children, from the risk that a registered sex offender will reoffend by limiting the ability of registered sex offenders to reside and work near (and thereby presumably to reduce their opportunity to access) children.

Plaintiffs argue that the Act is excessive because it fails to differentiate between people on the sex offender registry – it treats everyone the same, regardless of whether the person engaged in a consensual act or a violent offense. Plaintiffs additionally allege that the Act may actually foster recidivism by creating instability in housing and employment. Defendants disagree, noting that a perfect or close fit between the Act and its goals is not required and arguing that the legislature acted properly in this case. The Court acknowledges that a close or perfect fit is not required; however, the Court nonetheless finds 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.

In addition to the factors set forth in Smith, the Court additionally finds it appropriate to consider the consequences of violating the Act. The sanction of residing within 1,000 feet of a school bus stop is particularly severe. The Act provides that any registered sex offender who "knowingly" violates the Act's provisions "shall be guilty of a felony and shall be punished by imprisonment for not less than ten nor more than 30 years." O.C.G.A. § 42-1-15(d). This harsh sanction supports a finding that the Act is punitive in effect.

In short, the Court finds that, when taken in the light most favorable to Plaintiffs, the allegations in the Second Amended Complaint are sufficient to raise a question regarding whether the Act impermissibly increases the punishment for previously-committed crimes. The Court acknowledges the obvious fact that some individuals required to register as sex offenders have committed serious, violent offenses. However, to the extent that the Act is ultimately found to be punitive in effect, it is the function of the criminal laws of the state, and not residency restrictions imposed after the sentence has been determined and fulfilled, to punish those individuals for this conduct.

Plaintiffs state a claim that the Act violates the *ex post facto* prohibition. Defendants' motion to dismiss this portion of Count 1 of Plaintiffs' Second Amended Complaint is **DENIED**. See Gibbs v. Buck, 307 U.S. 66, 76, 59 S. Ct. 725, 83 L. Ed. 1111 (1939) ("Where the [case] makes an attack upon the constitutionality of a state statute, supported by factual allegations sufficiently strong, as here, to raise 'grave doubts of the constitutionality of the Act' in the mind of the trial court, the motion to dismiss for failure to state a cause of action should be denied.").

C. Eighth Amendment

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. Defendants argue that the Act does not violate the Eighth Amendment because it is not punitive, and, even if the Act is punitive, the punishment imposed by the Act is not severe enough to constitute cruel and unusual punishment. Plaintiffs do not address the Eighth Amendment in their response brief, and the Court deems the Eighth Amendment claim to be abandoned. See Local Rule 7.1B; Roberts v. City of Hapeville, No. 1:05-CV-1614-

WSD, 2007 U.S. Dist. LEXIS 10508 (N.D. Ga. Feb. 15, 2007); City of Lawrenceville v. Ricoh Electronics, Inc., 370 F. Supp. 2d 1328, 1333 (N.D. Ga. 2005).

Even if Plaintiffs had not abandoned this claim, the Court finds that the Act does not impose cruel and unusual punishment within the meaning of the Eighth Amendment. A punishment will be found to be cruel and unusual if it is barbaric or excessive. Coker v. Georgia, 433 U.S. 584, 591-92, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) (plurality). "[A] punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." Id. The Court finds no support for the position that the Act's residency restrictions or the requirement that Plaintiffs register as sex offenders satisfies this standard. Count 8 of Plaintiffs' Second Amended Complaint is **DISMISSED**.

D. Procedural Due Process

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. Defendants argue that the Act does not violate the procedural requirements of due process because the triggering event for the imposition of the Act's residency restrictions is the conviction of a sexual offense or crime against a child and no individualized determination of dangerous is required. According to Defendants, because the Act does not provide for an exemption from its requirements, additional procedures are unnecessary, insofar as any fact other than the requirement that an individual register as a sex offender is irrelevant under the statute. Plaintiffs argue that they have a constitutionally protected interest in life, liberty, and property, which encompasses their homes and professions, and that in order to deprive them of

these interests, adequate procedures must be employed.

The Court finds Connecticut Department of Public Safety v. Doe, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003) to be instructive here. In Connecticut, the Supreme Court considered a due process challenge to Connecticut's sex offender registry statute. The plaintiff in that action, a convicted sex offender subject to the state's registration statute, argued that the registration requirement deprived him of a liberty interest, in the form of his reputation, without notice or an opportunity to be heard. Connecticut, 538 U.S. at 6. The Supreme Court assumed that the plaintiff had been deprived of a liberty interest but found that "due process does not entitle him to a hearing to establish a fact that is not material under the Connecticut statute." Id. at 7. The residency requirements "turn on an offender's conviction alone – a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." Id. (citation omitted).

The Supreme Court stated,

> In short, even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of all sex offenders – currently dangerous or not – must be publicly disclosed. Unless respondent can show that that substantive rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise. . . . States are not barred by principles of "procedural due process" from drawing . . . classifications.

Id. at 7-8 (emphasis removed and citation omitted); see also Doe v. Miller, 405 F.3d 700, 709 (8th Cir. 2005) ("Thus, the absence of an individualized hearing in connection with a statute that offers no exemptions does not offend principles of procedural due process.").

Similarly, in this case, Plaintiffs argue that prior to being forced to leave their residences, they should have an opportunity to challenge the "appropriateness of such an eviction." (Pls.' Resp. to Defs.' Motion to Dismiss, p. 21.) Plaintiffs argue that the Act is defective because it fails to provide for

"individualized consideration of dangerousness." (Id.) For the reasons stated in Connecticut, Plaintiffs' procedural due process challenge cannot succeed.[12] Count 2 of Plaintiffs' Second Amended Complaint is **DISMISSED**.

E. Substantive Due Process

The substantive component of the due process clause protects certain fundamental rights from infringement, regardless of the procedures provided, unless the infringement satisfies the strict scrutiny analysis. U.S. CONST. amend. XIV; see Doe v. Moore, 410 F.3d 1337 (11th Cir. 2005). Defendants contend that Plaintiffs do not have a legitimate liberty interest that can be described as a fundamental right. Plaintiffs disagree, arguing that the Act impermissibly burdens their fundamental right to live with their families.

Fundamental rights protected by substantive due process are those rights "that are so 'implicit in the concept of ordered liberty' that 'neither liberty nor justice would exist if they were sacrificed.'" Moore, 410 F.3d at 1342 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 152, 82 L. Ed. 288 (1937); McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc)). "When a state enacts legislation that infringes fundamental rights, courts will review the law under a strict scrutiny test and uphold it only when it is 'narrowly tailored to serve a compelling state interest.'" Id. at 1343 (quoting Reno v. Flores, 507 U.S.

---

[12] Plaintiffs do not address Connecticut in their response brief. Instead, Plaintiffs rely on Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) to support their position. The Matthews decision addressed the issue of whether procedural due process required that the recipient of Social Security disability benefits payments be afforded an opportunity for an evidentiary hearing prior to the payments' termination; the Court found that it did not. Plainly the existence of a continuing disability would be relevant to a determination of whether the disability benefits payments should continue. In contrast, in this case, the dangerousness of the registered sex offender is not a statutory prerequisite for the application of the residency restrictions.

292, 302, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993)). A substantive due process claim is analyzed by "first crafting a 'careful description of the asserted right.'" Id. (quoting Flores, 507 U.S. at 302, 113 S. Ct. at 1447). "Second, we must determine whether the asserted right is one of those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Id. (citations and internal marks omitted).

The Court begins with a careful description of the fundamental right at issue. In the instant case, as noted, Plaintiffs allege that the Act interferes with their fundamental right to live with their families. Fundamental rights that have received protection under substantive due process include "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." Washington v. Glucksberg, 521 U.S. 702, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); see also Roberts v. United States Jaycees, 468 U.S. 609, 617-618, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) ("[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."). The Supreme Court has expressed a reluctance to "expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Glucksberg, 521 U.S. at 720. The Eleventh Circuit has additionally noted that the Supreme Court "has not created a broad category where any alleged infringement on privacy and liberty will be subject to substantive due process protection." Moore, 410 F.3d at 1344. Consistent with the Moore decision, the Court begins by defining the scope of the claimed fundamental right in this case by referencing the

Act itself. Id.

Under this formulation, the right at issue in this case could be described as the right of a person registered as a sex offender under Georgia law to reside with his or her family in a location within 1,000 feet of a school bus stop and/or a church. Such a narrowly-defined right plainly would not be fundamental within the meaning of substantive due process jurisprudence. The Court is not satisfied, however, that the right as stated above is the only appropriate description of the right at issue in this case. As this case proceeds and the factual background is more fully developed, the contours of the right at issue may emerge in sharper focus. The Act may reach deeper into intimate family relationships and choices regarding child rearing and marriage than is immediately apparent. While the Court does not disagree with Defendants' assertion that there is no right to live where you want, the Court suspects that a different right ultimately may be at issue in this case. At this stage of the litigation, the Court cannot find that there are no circumstances under which Plaintiffs' substantive due process claim might succeed. The Court acknowledges, however, that this claim presents a close question.

Because the Court has not defined the claimed fundamental right in this case, the Court cannot proceed to determine if that right is indeed fundamental by evaluating whether the right is deeply rooted in the history and tradition of this Nation such that it is implicit in the concept of ordered liberty. The Court finds that Plaintiffs state a claim for a substantive due process violation, and Defendants' motion to dismiss Count 3 of Plaintiffs' Second Amended Complaint is hereby **DENIED**.

F. Takings Clause

The Fifth Amendment provides that private property may not be taken for public use without just compensation. U.S. CONST. amend. V, XIV. Defendants argue that the Act does not take Plaintiff Wilson's property,[13] it merely limits his ability to live there. Defendants contend that the Act does not restrict Mr. Wilson from owning, visiting, conducting business upon, leasing, selling, or otherwise using or enjoying the property. Plaintiffs argue that the Act is a partial regulatory taking because it prevents them "from living in their homes and forc[es] many to sell their property." (Pls.' Resp. to Defs.' Motion to Dismiss, p. 35.)[14]

The Supreme Court recognized that a regulatory taking could violate the Fifth Amendment in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922) (noting that "if regulation goes too far, it will be recognized as a taking"). The Court has not provided specific guidance for determining when a regulation "goes too far," instead relying on "essentially ad hoc, factual inquiries." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (quoting Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631(1978)). Certainly, where a regulation "denies all economically beneficial or productive use of land," a categorical finding that the land has been taken is

---

[13] Defendants correctly note that Mr. Wilson is the only named Plaintiff who is alleged to own real property. Accordingly, Mr. Wilson is the only named Plaintiff who would have standing to assert a takings challenge to the Act, and the only named Plaintiff who can establish the possession of a property interest. See Givens v. Alabama Dep't of Corrections, 381 F.3d 1064 (11th Cir. 2004). For purposes of consistency, however, the Court will continue to use the term "Plaintiffs" in this section.

[14] The Court notes that the instant case plainly does not involve a physical taking, or a direct appropriation of property, as to which little analysis is required. Lucas, 505 U.S. at 1014.

appropriate. Lucas, 505 U.S. at 1015. Where, as here, no per se rule applies, the Court must engage in a factual inquiry, as described in Penn Central. The Court examines "[t]he economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." Penn Central, 438 U.S. at 124. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Id.

Plaintiffs contend that the Act has forced many property owners from their homes and that it "significantly diminishes the value of [P]laintiffs' homes and disrupts their investment-backed expectations." (Pls.' Resp. to Defs.' Motion to Dismiss, p. 36.) Specifically, Plaintiffs argue that, because they are barred from living in their residences, the economic value of the residence is reduced. Plaintiffs contend that, even though they may be able to sell or lease their property, they will be unable to obtain a fair value for the property because they will be required to vacate quickly. Defendants argue that the economic impact of the Act is minimal because Plaintiffs may continue to own the property or they may sell the property; in either case, the economic value of the land is not reduced. This Court agrees with Defendants' position and finds that the economic impact of the Act is fairly minimal. Plaintiffs are not forced to sell their homes and are not otherwise deprived of the homes' value because of the Act. The Act limits their ability to use the property as a residence.

The Court next considers the extent to which the Act interferes with Plaintiffs' reasonable investment-backed expectations regarding the property. Defendant argues that Plaintiffs' investment in their homes is not diminished in

that the economic value of the home is not reduced. Plaintiffs contend that they invested in their property in accordance with the expectation that the property could be used as a residence. At the time Plaintiffs purchased their homes, Plaintiffs doubtlessly expected that the properties could be used as residences and likely invested in the property for the purpose of establishing a residence. Because the Act prohibits Plaintiffs from using the property for this purpose, it interferes with their reasonable expectations. The Court notes, however, that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." Andrus v. Allard, 444 U.S. 51, 65-66, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979). Accordingly, although the Act interferes with Plaintiffs' reasonable investment-backed expectations, this factor does not weigh strongly in their favor.

Finally, Plaintiffs do not seriously dispute that the State has a strong interest in preventing sexual abuse and that the purpose of the Act is to limit contact between registered sex offenders and children, thereby reducing the potential for recidivism among sex offenders. While Plaintiffs urge the Court to determine how much of an interest the State has in requiring Plaintiffs to move from their homes, the Court finds that such a determination is not supported by law. The nature of the state's interest is "critical in determining whether a taking has occurred." Vesta Fire Ins. Corp. v. State of Florida, 141 F.3d 1427, 1433 (11th Cir. 1998). This factor weighs in favor of Defendants.

After weighing these factors, the Court concludes that Plaintiffs' takings claim cannot succeed. "The standard for whether regulation effects a taking is whether the landowner has been denied all or substantially all economically viable use of his land." Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1072 (11th Cir. 1996) (noting that "[t]he standard is not whether the landowner has been

denied those uses to which he wants to put his land"). Plaintiffs have not been denied all or substantially all economically viable use of their properties. Accordingly, the Court finds that Plaintiffs have failed to state a claim pursuant to the Takings Clause. Count 6 of Plaintiffs' Second Amended Complaint is **DISMISSED**.

G. RLUIPA

As previously noted, RLUIPA prevents governments from imposing a "substantial burden" on the religious exercise of a person or a religious assembly by imposing a land use regulation, unless that land use regulation is necessary to further a compelling state interest. 42 U.S.C. § 2000cc(a)(1). In addition, governments may not impose land use regulations that treat religious institutions on less than equal terms with secular institutions. 42 U.S.C. § 2000cc(b)(1). Defendants argue that Plaintiffs' RLUIPA claims cannot succeed because the Act does not regulate land use; rather, it limits the residences of registered sex offenders. Defendants contend that land belonging to religious institutions is not substantially burdened in the exercise of religion because a sex offender cannot live there.

Although Plaintiffs correctly fault Defendants for failure to comply with the Local Rules of this Court by not citing any authority to support their position that Plaintiffs' RLUIPA claims must be dismissed, the Court nonetheless finds that Plaintiffs' RLUIPA claims cannot succeed because the Act is not a land use regulation, as defined in RLUIPA. A land use regulation is defined as a zoning or landmarking law "that limits or restricts a claimant's use or development of land . . . if the claimant has an ownership, leasehold, easement, servitude or other property interest in the regulated land." 42 U.S.C. § 2000cc-5(5). "[A] government agency implements a 'land use regulation' only when it acts pursuant to a 'zoning

or landmarking law' that limits the manner in which a claimant may develop or use property in which the claimant has an interest." Prater v. City of Burnside, 289 F. 3d 417, 434 (6th Cir. 2002). Zoning laws may be generally defined as those rules that regulate "uses and development by means of zones or districts." Artistic Entertainment, Inc. v. City of Warner Robins, 331 F.3d 1196, 1205 (11th Cir. 2003) (citations and internal marks omitted) (discussing the definition of a zoning ordinance under Georgia law). The Act cannot be considered a zoning law, in accordance with the plain meaning of that term. Moreover, the Court notes that zoning is traditionally a local government function, rather than a state-wide exercise.

The Court has found only one interpretation of the term "landmarking law" in its research of published federal cases. In that case, the Western District of New York concluded that "[l]andmarking laws generally involve the 'regulation and restriction [of] certain areas as national historic landmarks, special historic sites, places and buildings for the purposes of conservation, protection, enhancement and perpetuation of those places of natural heritage.'" Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 254 (W.D. N.Y. 2005) (quoting N.Y. Village L. § 7-700.) Plainly, the Act does not fall within this definition. Even if the Court were inclined to define the term "landmarking law" more broadly than the New York district court, the Act could not be fairly described as a landmarking law.[15]

---

[15] Plaintiffs, citing Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004), argue that the "equal terms" provision of RLUIPA does not require a showing that the law regulates land use. The Court does not read Midrash to support Plaintiff's argument. While the "substantial burden" provision of RLUIPA describes the scope of its application in terms that do not appear in the "equal terms" provision, both provisions prohibit only the imposition or implemental of a "land use regulation." Plainly if no land use regulation has been imposed by the government, RLUIPA simply does not afford relief. Such is the case here.

The Court notes that Plaintiffs have not taken the position that the Act should be considered a landmarking law. Accordingly, insofar as RLUIPA applies only to zoning or landmarking laws, Plaintiffs' RLUIPA claims cannot succeed. Count 4 of Plaintiffs' Second Amended Complaint is hereby **DISMISSED**.

H. Free Exercise Clause[16]

States may not pass laws that prohibit the free exercise of religion. U.S. CONST. amends. I, XIV. Defendants argue that Plaintiffs are not prohibited from participating in religious activities on church property but are merely prohibited from living within 1,000 feet of a church. Defendants contend that the Act does not restrict Plaintiffs' ability to exercise their religious beliefs. Plaintiffs argue that the Act's prohibition on living or working within 1,000 feet of a church imposes an unequal burden on secular and religious organizations, in violation of the Free Exercise Clause. Plaintiffs urge the application of strict scrutiny and submit that there is no justification to support treating secular halfway houses differently from religious halfway houses.

The Free Exercise Clause protects both religious beliefs and religious practices. Generally, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (citation omitted). As to the neutrality requirement, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." Lukumi, 508 U.S. at 532. "Although a law

[16] The Court notes that Defendants have not moved to dismiss Plaintiffs' claim that the Act violates the right to freedom of association, U.S. CONST. amend. I.

targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." Id. at 533. To determine the object of a law, the Court begins by considering the text itself. Id. In the instant case, the Act prohibits registered sex offenders from living or working within 1,000 feet of a church. According to Lukumi, "a law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." Id. The Act does not refer to a religious practice without a secular meaning – indeed, it does not refer to a religious practice at all.

As to the second requirement of the Free Exercise Clause, the Supreme Court has stated that "laws burdening religious practice must be of general applicability." Lukumi, 508 U.S. at 542 (citing Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 879-881, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)). Where a law has "the incidental effect of burdening religious practice," "categories of selection are of paramount concern." Id. The Free Exercise Clause guarantees "that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." Id. at 543. To establish a Free Exercise Clause violation, a plaintiff must demonstrate "a substantial burden on the observation of a central religious belief or practice." Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989). The Court finds that the Act's provision prohibiting registered sex offenders from residing within 1,000 feet of a church does not impose a substantial burden on religious practices. Plaintiffs' argument that the law treats faith-based halfway houses differently from secular halfway houses is unpersuasive. The Act does not preclude sex offenders from residing in faith-based halfway houses, it only provides that those

halfway houses cannot be located on church grounds or within 1,000 feet of a church. Plaintiffs do not allege any particular religious belief that would mandate the location of a halfway house on church property. The Act similarly does not preclude Mr. Jones from providing spiritual leadership and assistance to people released from prison. It does not limit registered sex offenders from attending church or worship services and does not limit Mr. Jones' activities in counseling and ministering to recently-released registered sex offenders. It only provides that Mr. Jones may not house these individuals on church grounds or within 1,000 feet of a church. The Court does not find this restriction to impose a substantial burden on religious practices such that strict scrutiny would be required.

In contrast to the residency provision, however, the Court finds that Plaintiffs potentially state a claim for violation of the Free Exercise Clause as to that portion of the Act that prohibits Plaintiffs from working within 1,000 feet of a church. This provision would effectively exclude all registered sex offenders from serving as clergy or ministers in religious organizations. This provision may operate as a substantial burden on religious practice that does not survive scrutiny; however, the Court does not read Plaintiffs' Second Amended Complaint as alleging that any named Plaintiff seeks employment in a religious organization such that a named Plaintiff would have standing to assert this claim. The Court will nonetheless provide Plaintiffs an opportunity to amend their complaint to adequately allege standing as to this claim.

Plaintiffs additionally contend that the Act violates "the ministerial exception of the Free Exercise Clause" because it interferes with employment decisions of churches. (Plfs.' Resp. to Defs.' Motion to Dismiss, p. 33.) The ministerial exception has been described as "a rule adopted by several circuits that civil rights laws cannot govern church employment relationships with ministers

without violating the free exercise clause because they substantially burden religious freedom." Hankins v. Lyght, 441 F.3d 96, 100 (2d Cir. 2006). It has been applied almost exclusively as a bar to discrimination suits against churches and religious organizations – it is an exception to employment discrimination claims. See Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000) (finding that the Free Exercise Clause prohibits "a church from being sued under Title VII by its clergy"). The Court's research has failed to reveal any authority for applying the ministerial exception to invalidate a state statute. Plaintiffs' Free Exercise claim that is based on the portion of the Act that prohibits registered sex offenders from living within 1,000 feet of a church is **DISMISSED**. The Court will, however, permit Plaintiffs an opportunity to amend their complaint to state a claim that the portion of the Act that prohibits registered sex offenders from working within 1,000 feet of a church violates the Free Exercise Clause.

I. Right to Interstate or Intrastate Travel

Defendants argue that, because the Act does not restrict Plaintiffs from traveling to other states or moving around in any local community for socializing, shopping, or working, the Act does not violate the right to interstate or intrastate travel. (Defs.' Brief, p. 31.) Plaintiffs have failed to respond to Defendants' argument as to this claim, and, accordingly, have abandoned it. See Local Rule 7.1B; Roberts v. City of Hapeville, No. 1:05-CV-1614-WSD, 2007 U.S. Dist. LEXIS 10508 (N.D. Ga. Feb. 15, 2007); City of Lawrenceville v. Ricoh Electronics, Inc., 370 F. Supp. 2d 1328, 1333 (N.D. Ga. 2005). Even if Plaintiffs had not abandoned this claim, the Court finds that it is without merit. See Saenz v. Roe, 526 U.S. 489, 499, 119 S. Ct. 1518, 1524, 143 L. Ed. 2d 689 (1999); Doe v. Moore, 410 F.3d 1337, 1348-49 (11th Cir. 2005); Doe v. Miller, 405 F.3d 700, 711-12 (8th Cir. 2005). Count 8 of

Plaintiffs' Second Amended Complaint is **DISMISSED**.

J. Bill of Attainder

Article I, § 10 of the United States Constitution provides that states may not pass bills of attainder. Pursuant to this clause, legislatures may not pass "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." United States v. Brown, 381 U.S. 437, 448-48, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965). Defendants argue that because the Act does not inflict punishment, it cannot be an unconstitutional bill of attainder.

Three requirements must be met before a legislative act will be considered an unconstitutional bill of attainder: "specification of the affected persons, punishment, and lack of a judicial trial." Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 847, 104 S. Ct. 3348, 82 L. Ed. 2d 632 (1984). In this case, the first requirement is met, insofar as the Act specifically affects only registered sex offenders. See § 42-1-15(e) (noting that the residency restrictions apply only to individuals required to register as sex offenders under Georgia law).

The definition of punishment in the Bill of Attainder context is set forth in Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 277, 53 L. Ed. 2d 867 (1977). The Court first considers whether the Act "falls within the historical meaning of legislative punishment," in the context of the history of bills of attainder Nixon, 433 U.S. at 475. Such historical punishments include death, imprisonment, banishment, confiscation of property, and employment or vocational restrictions. Id. at 473-74. The Court next looks beyond historical experience to consider whether the law "reasonably can be said to further

nonpunitive legislative purposes." Id. at 475-76 (citations omitted). The Court finally considers whether "the legislative record evinces a congressional intent to punish." Id. at 478. The Court ultimately applies the same analysis here as it applied in connection with Plaintiffs' *ex post facto* challenge. See United States v. O'Neal, 180 F.3d 115, 122 n.7 (4th Cir. 1999) (noting that "it is apparent that the Court applies the same test for 'punishment' for at least the Ex Post Facto, Double Jeopardy, and Bill of Attainder Clauses, and for substantive due process"); see also Flemming v. Nestor, 363 U.S. 603, 612, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960) (applying the same analysis of punishment to *ex post facto* and bill of attainder challenges). For the reasons stated in connection with this Court's analysis of Plaintiffs' *ex post facto* challenge to the Act, the Court finds that, when the allegations in the Second Amended Complaint are viewed in the light most favorable to Plaintiffs, the Act could be found to inflict punishment.

The Court finally must consider whether the Act inflicts punishment without a judicial trial. In the instant case, the Act imposes residency restrictions based on an individual's status as a registered sex offender. The triggering event for the operation of the Act is the requirement of registration. Prior to imposing the registration requirement, each Plaintiff was afforded a judicial trial (or was provided the opportunity to challenge the charges that ultimately required registration as part of a judicial proceeding). The Court accordingly cannot find that the Act constitutes punishment that is imposed without the protections of a judicial trial. Plaintiffs do not specify what would be shown at trial that would be relevant to the application of the Act. For this reason, Plaintiffs' bill of attainder challenge must fail, and the Court **DISMISSES** this claim, which is contained in Count 1 of Plaintiffs Second Amended Complaint.

K. Impairment of Contractual Obligations

Article I, § 10 of the United States Constitution provides that states may not pass any law that impairs the obligations of contracts. Defendants argue that Plaintiffs' claim that the Act impairs the obligation of contracts by forcing them to break leases cannot succeed because Plaintiffs cannot show a substantial impairment. Plaintiffs have not responded to this argument, and the Court accordingly finds that Plaintiffs have abandoned this claim. See Local Rule 7.1B; Roberts v. City of Hapeville, No. 1:05-CV-1614-WSD, 2007 U.S. Dist. LEXIS 10508 (N.D. Ga. Feb. 15, 2007); City of Lawrenceville v. Ricoh Electronics, Inc., 370 F. Supp. 2d 1328, 1333 (N.D. Ga. 2005).[17]

Even assuming that Plaintiffs did not abandon this claim, the Court finds that it is due to be dismissed. To determine whether a change in the law improperly impairs contractual obligations, the Court considers whether that change "has operated as a substantial impairment of a contractual relationship." General Motors Corp. v. Romein, 503 U.S. 181, 186, 112 S. Ct. 1105, 1109, 117 L. Ed. 2d 328 (1992) (internal marks and citations omitted). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." Romein, 503 U.S. at 186. As the Supreme Court has explained, "it is well settled that the prohibition against impairing the obligation of contracts is not to be read

[17] In addition, Plaintiffs do not clearly state a claim based on the impairment of contracts in their complaint. Although the phrase is mentioned in the heading associated with Count 1 of Plaintiffs' Second Amended Complaint, it is not referenced in any paragraphs in the text of that Count. The Court does not consider the inclusion of a phrase in a heading sufficient to state a claim as to that issue. Furthermore, Plaintiffs have not included any specific factual allegations addressing the contracts they are alleging to have been impaired by the Act, although Count 1 asserts that Plaintiffs will be forced to break their leases.

literally." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 502, 107 S. Ct. 1232, 1251, 94 L. Ed. 2d 472 (1987) (citation omitted).

The Court finds that, to the extent that Plaintiffs allege they are parties to lease agreements, Plaintiffs could establish the existence of a contractual relationship. To the extent the Act operates to restrict Plaintiffs' ability to reside in premises leased for that purpose, the contracts are impaired. The Act "alter[s] contractual rights or obligations," National R. Passenger Corp. v. Atchison, T. & S.F.R. Co., 470 U.S. 451, 472, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985), because Plaintiffs may no longer reside at the leased premises, even though the lease presumably would include the right to reside at the property. The Court accordingly must consider whether the impairment is substantial.

"The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." Energy Reserves Group v. Kansas Power & Light Co., 459 U.S. 400, 411, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983) (citation omitted). If contractual obligations are only minimally altered, the claim must fail, and no additional analysis is required. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978). "Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." Id. In the instant case, the Act's alteration of Plaintiffs' contractual right to use leased premises as residences is a substantial impairment requiring an examination of the nature and purpose of the legislation.

"If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem." Energy Reserves, 495 U.S. at 411-12. "[I]t is to be accepted as a

commonplace that the Contract Clause does not operate to obliterate the police power of the States;" "[t]he police power [] is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." Flanigan's Enterprises, Inc. v. Fulton County, Georgia, 242 F.3d 976 (11th Cir. 2001) (citations and internal marks omitted) (Fulton County Code provision prohibiting the sale and consumption of alcoholic beverages in adult entertainment establishments did not unconstitutionally impair the obligations of contracts where the defendants' leases provided that the premises be used for topless nudity bar and required the maintenance of a liquor license). In the instant case, the Act has a legitimate public purpose – to lessen the potential for registered sex offenders who are inclined towards recidivism to have contact with children. The Court must next "satisfy itself that the legislature's adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." Keystone, 480 U.S. at 505 (citations and internal marks omitted). "[W]e have repeatedly held that unless the State is itself a contracting party, courts should properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." Id. (internal marks and citations omitted). The Act survives scrutiny under this standard, and the Court will **DISMISS** this claim from Count 1 of Plaintiffs' Second Amended Complaint.

L. Overbreadth/Vagueness

The Due Process Clause of the Fourteenth Amendment requires that state legislative enactments be neither impermissibly vague nor overbroad. A statute is unconstitutionally vague if it either "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or "authorize[s]

and even encourage[s] arbitrary and discriminatory enforcement." City of Chicago v. Morales, 527 U.S. 41, 56, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999).[18] A law must provide "fair warning" of proscribed conduct so that citizens (or, in this case, registered sex offenders) can conform their conduct to the law. Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 503, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1983); Morales, 527 U.S. at 58. A statute is unconstitutionally vague "only if the enactment is impermissibly vague in all of its applications." Hoffman Estates, 455 U.S. at 495. A statute that is overbroad similarly will not survive against a constitutional challenge. "Under the overbreadth doctrine, a statute that prohibits a substantial amount of constitutionally protected [conduct] is invalid on its face." United States v. Williams, 444 F.3d 1286, 1296 (11th Cir. 2006); see also Houston v. Hill, 482 U.S. 104, 114, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

Although Defendants contest Plaintiffs' ability to assert claims that the Act is vague and/or overbroad, the Court notes that the only mention of these claims in Plaintiffs' Second Amended Complaint is in Plaintiffs' prayer for relief. The claims are not addressed in the listed Counts of Plaintiffs' Second Amended Complaint. As such, to the extent that Plaintiffs assert claims based on these theories, Plaintiffs have failed to adequately allege these claims. Plaintiffs have not set forth their basis for alleging that Act is vague and overbroad. In particular, Plaintiffs failed to allege the particular portions of the Act that Plaintiffs contend are vague and to identify the constitutionally protected conduct that forms the grounds for their overbreadth challenge. The Court will permit Plaintiffs to

[18] The Court notes that the Morales court considered a vagueness challenge to a criminal law; however, the Court finds nothing to indicate that the same analysis would not apply in this case, where a violation of the Act's residency restrictions is punishable as a felony with a minimum sentence of ten years.

amend their complaint to correct these pleading deficiencies and **DENIES**, at this time, Defendants' motion to dismiss these claims.

IV. CONCLUSION

Defendants' Motion to Dismiss in Lieu of Answer [Doc. No. 34] and Defendants' Motion to Dismiss Amended Complaint [Doc. No. 55] are **DENIED** as moot. Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint [Doc. No. 78] is **GRANTED in part and DENIED in part**, as stated herein. The Court will permit Plaintiffs to amend their complaint within twenty (20) days of the date of this Order to assert a claim that the provision of the Act that prohibits registered sex offenders from working within 1,000 feet of churches violates the Free Exercise Clause and to assert vagueness and overbreadth claims, as provided in this Order.

SO ORDERED this 30th day of March, 2007.

s/ CLARENCE COOPER

CLARENCE COOPER
UNITED STATES DISTRICT JUDGE