Appendix

Table of Contents

JOSHUA VASQUEZ and MIGUEL CARDONA,
Plaintiffs-Appellants,
v.
KIMBERLY M. FOXX, in her official capacity as the State's Attorney of Cook County, and CITY OF CHICAGO, Defendants-Appellees.

No. 17-1061
United States Court of Appeals, Seventh Circuit.

Argued November 28, 2017.
Decided July 11, 2018.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 16-cv-8854, Amy J. St. Eve, Judge.

Before BAUER, ROVNER, and SYKES, Circuit Judges.

SYKES, Circuit Judge.

Joshua Vasquez and Miguel Cardona are convicted child sex offenders who live in Chicago and are required to register as sex offenders and comply with state restrictions on where they may live. For example, a child sex offender may not knowingly live within 500 feet of a school, playground, or child-care center. 720 ILL. COMP. STAT. 5/11-9.3(b-5), (b-10). A few years after Vasquez and Cardona were convicted, Illinois added child day-care homes and group day-care homes to the list of places included in the 500-foot residential buffer zone. § 5/11-9.3(b-10). When Vasquez and Cardona updated their sex-offender registrations in August 2016, the Chicago Police Department told them they had to move because child day-care homes

had opened up within 500 feet of their residences. The Department gave them 30 days to come into compliance with the statute.

Vasquez and Cardona sued the City of Chicago and Kimberly M. Foxx, the Cook County State's Attorney,[1] seeking relief under 42 U.S.C. § 1983 based on four alleged constitutional violations. First, they claimed that the amendment to the residency statute imposes retroactive punishment in violation of the Ex Post Facto Clause. Next, they alleged that applying the amended statute to them amounted to an unconstitutional taking of their property in violation of the Fifth Amendment's Takings Clause. Finally, they asserted two due-process claims, one procedural and one substantive: they complained that the statute is enforced without a hearing for an individualized risk assessment and is not rationally related to a legitimate state interest.

The district judge rejected each claim at the pleadings stage and we affirm. Under Supreme Court and circuit precedent, the amended statute is neither impermissibly retroactive nor punitive, so it raises no ex post facto concerns. The plaintiffs' claim under the Takings Clause fails for two independent reasons: it is unexhausted and the amendment was adopted before they acquired their homes, so it did not alter their property-rights expectations. The procedural due-process claim is a nonstarter for the straightforward reason that there is no right to a hearing to establish a fact

---

1 Anita Alvarez was the Cook County State's Attorney when the suit was filed. Foxx replaced her in that office on December 1, 2016, and was substituted as a defendant. See FED. R. CIV. P. 25(d).

not material to the statute. And the law is not unconstitutional in substance: it easily satisfies rational-basis review.

I. Background.

Illinois first adopted residency restrictions for child sex offenders in 2000. Act of July 7, 2000, Pub. Act No. 91-911, 2000 Ill. Laws 2051. As originally enacted the law prohibited child sex offenders from knowingly residing within 500 feet of a "playground or a facility providing programs or services exclusively directed toward persons under 18 years of age." *Id*. In subsequent years the Illinois legislature amended the statute to add other places to the list. At issue here is a 2008 amendment prohibiting child sex offenders from knowingly residing within 500 feet of a "day care home" or "group day care home." Act of Aug. 14, 2008, Pub. Act No. 95-821, 2008 Ill. Laws 1383. Noncompliance is a Class 4 felony punishable by up to three years in prison. 720 ILL. COMP. STAT. 5/11-9.3(f); 730 ILL. COMP. STAT. 5/5-4.5-45(a).

Plaintiff Joshua Vasquez was convicted of child pornography possession in 2001 and must register as a sex offender for the rest of his life. His conviction also makes him a child sex offender within the meaning of the residency statute. 720 ILL. COMP. STAT. § 5/11-9.3(d)(1). On August 25, 2016, Vasquez visited the Chicago Police Department headquarters to complete his annual sex-offender registration. As of that date, he had lived in his Chicago apartment for three years with his wife and daughter, and his lease continued through August 19, 2017. The Department notified him that a child day-care home had opened 480 feet from his apartment and told him he had to move

within 30 days. Vasquez alleges that he has been unable to find suitable and affordable housing that complies with the residency requirements. He also alleges that his daughter's schooling will be disrupted if the family has to move outside the school district.

Plaintiff Miguel Cardona was convicted of indecent solicitation of a child in 2004.[2] Like Vasquez, Cardona's conviction makes him a child sex offender subject to the requirements of the residency statute. Id. Cardona has lived in his Chicago home for roughly 25 years, but he did not purchase it until 2010 so he cannot claim an exemption for offenders who owned their homes prior to the enactment of the 2008 amendment. § 5/11-9.3(b-10). When Cardona completed his annual sex-offender registration on August 17, 2016, the Chicago Police Department notified him that a child day-care home had opened 475 feet from his residence. Like Vasquez, he was given 30 days to move. Cardona alleges that he cannot afford to move into compliant housing. He also alleges that the day-care home in question has been open since 2014 and his proximity to it has caused no problems.

Vasquez and Cardona challenge the 2008 amendment facially and as applied to them. They sued the City of Chicago and State's Attorney Foxx seeking declaratory and injunctive relief under § 1983 for violation of the Ex Post Facto Clause, the Fifth Amendment's Takings Cause, and the Fourteenth Amendment's Due Process Clause. The judge entered an order

---

2 The complaint alleges that Cardona's conviction requires him to register as a sex offender through 2017. Although his registration duty has expired, he remains subject to the residency restrictions.

enjoining the defendants from forcing the plaintiffs to vacate their homes or otherwise enforcing the amended statute against them while the case was pending.

The defendants moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and the judge granted the motion. She held that the 2008 amendment created only prospective legal obligations and thus raised no concerns under the Ex Post Facto Clause. On the takings claim she concluded that the plaintiffs had not suffered an unconstitutional taking of their property under the test announced in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Finally, the judge ruled that the complaint failed to state a procedural or substantive due-process claim because there is no right to a hearing to establish a fact not material under the statute and the challenged residency restriction is a rational means of protecting children from convicted child sex offenders.

Vasquez and Cardona appealed, and the judge granted their motion to extend her order maintaining the status quo through the pendency of the appeal. In the meantime Vasquez renewed his lease, and Cardona lives in the same home.

II. Discussion.

We review the judge's dismissal order de novo. *Roberts v. City of Chicago*, 817 F.3d 561, 564 (7th Cir. 2016). Before taking up the merits of the plaintiffs' constitutional claims, we note that the City is not a proper defendant on any of them, at least not as the claims were pleaded. A municipality is subject to § 1983 liability only if one of its policies caused the constitutional

injury. *Swanigan v. City of Chicago*, 881 F.3d 577, 582 (7th Cir. 2018) (citing *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978)). The "official policy" analysis isolates ultimate responsibility for a claimed constitutional violation, distinguishing the acts of a municipality from the acts of its employees. *Estate of Sims ex rel. Sims v. County of Bureau*, 506 F.3d 509, 515 (7th Cir. 2007). A municipality's enforcement of a state law does not constitute an actionable official policy. See *Surplus Store & Exchange, Inc. v. City of Delphi*, 928 F.2d 788, 791 (7th Cir. 1991) ("It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the `policy' of enforcing state law.").

The City's police department did not enforce a Chicago ordinance or other municipal policy; rather, this suit challenges a state law. The City can be held liable only if it has "as a matter [of] policy or custom, enforce[d] the law in a manner or method that caused the constitutional violation." *Id*. Vasquez and Cardona contend that the City exercises discretion in enforcing the residency statute—for example, by checking for compliance annually when sex offenders register and by giving sex offenders 30 days' notice to move. But the complaint does not allege a causal connection between the City's compliance monitoring and the plaintiffs' constitutional injury. *Id*. at 790. The plaintiffs do face a continuing threat of prosecution if they fail to comply with the 2008 amendment, but the State's Attorney is the proper defendant to sue for redress of that injury. For this independent reason, which the City preserved below but the judge did not need to address, the plaintiffs failed to state a claim against the City.

A. Ex Post Facto Clause

The Ex Post Facto Clause[3] forbids retroactive punishment—that is, "the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." *Weaver v. Graham*, 450 U.S. 24, 30 (1981). So a statute is not an impermissible ex post facto law unless it is both retroactive and penal. *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011).

Our decision in *Leach* is conclusive on the retroactivity question. There we considered an ex post facto challenge to the federal Sex Offender Registration and Notification Act ("SORNA"). *Id.* at 770-71. Enacted in 2006, SORNA requires all convicted sex offenders—including those who were convicted before the Act was adopted—to register in each jurisdiction where they live, work, or attend school; the Act also imposes criminal penalties for failure to register or update a registration following interstate travel. *Id.* at 771 (citing 42 U.S.C. § 16913(a) and 18 U.S.C. § 2250(a)). Donald Leach was convicted of child molestation in 1990, long before SORNA came into being, and he was charged with failing to update his registration when he moved to another state. He argued that SORNA could not be applied to him because it retroactively increased his punishment in violation of the Ex Post Facto Clause.

We rejected that argument and affirmed *Leach*'s conviction. We began by noting that SORNA's registration duty and the criminal penalty for failure to comply are plainly prospective in operation. In other

---

[3] "No . . . ex post facto Law shall be passed." U.S. CONST. art. I, § 9, cl. 3.

words, the new regulatory scheme applies only to conduct occurring after the law's enactment—that is, a sex offender's failure to register or update his registration following interstate travel. Accordingly, we held that SORNA "merely creates new, prospective legal obligations based on the person's prior history." *Id.* at 773.

So too here. Although the 2008 amendment to the Illinois residency statute applies to Vasquez, Cardona, and others like them who were convicted of child sex offenses before the amendment was adopted, its requirements and any criminal penalty apply only to conduct occurring after its enactment—*i.e.*, knowingly maintaining a residence within 500 feet of a child day-care home or group day-care home.

We also held in *Leach* that under *Smith v. Doe*, 538 U.S. 84 (2003), SORNA's registration regime for sex offenders is not penal in nature. *Id. Smith* upheld Alaska's sex-offender registration statute against an ex post facto challenge. The Court found that the Alaska registration regime was a nonpunitive civil regulatory scheme and thus raised no ex post facto concerns. 538 U.S. at 105-06. Because SORNA is indistinguishable from the Alaska statute upheld in *Smith*, we concluded in *Leach* that the federal law is likewise a civil regulatory scheme and not a penal statute. 639 F.3d at 773.

Again, the same is true here. The Illinois residency statute is similar enough to the sex-offender registration statutes at issue in *Smith* and *Leach* that it's safe to apply those holdings and reject the plaintiffs' challenge without further ado. If more is needed, we briefly address the two-step framework the Court

used in Smith and explain why the Illinois residency statute is not punitive under that test.

The Court's framework asks if the legislature intended to impose punishment, and if not, whether the civil regulatory scheme is "so punitive either in purpose or effect as to negate" the legislature's nonpunitive intent. *Smith*, 538 U.S. at 92 (quotation marks omitted). Vasquez and Cardona do not argue that the Illinois legislature intended to impose additional punishment, so we skip directly to the second step. To determine if Alaska's registration law was punitive in effect, the Court examined several factors: whether the regulatory regime "in its necessary operation . . . [would be] regarded in our history and traditions as a punishment[,] imposes an affirmative disability or restraint[,] promotes the traditional aims of punishment[,] has a rational connection to a nonpunitive purpose[,] or is excessive with respect to this purpose." *Id*. at 97. The Court assigned no particular priority or weight to any of these factors: they are "neither exhaustive nor dispositive" but merely "relevant." *Id*.

As for the first factor, Vasquez and Cardona compare the Illinois residency restrictions to the historical punishments of shaming and banishment. As the Court noted in Smith, however, early shaming punishments "inflict[ed] public disgrace," and "[t]he aim was to make these offenders suffer permanent stigmas, which in effect cast the person out of the community." *Id*. at 97-98 (internal quotation marks omitted). The Alaska registration requirement did not shame child sex offenders in this way, id., and neither do the Illinois residency restrictions. Nor do the residency restrictions resemble banishment. Under that early form of punishment, "[t]he most serious offenders . . .

could neither return to their original community nor, reputation tarnished, be admitted easily into a new one." Id. (citing THOMAS G. BLOMBERG & KAROL LUCKEN, AMERICAN PENOLOGY: A HISTORY OF CONTROL 30-31 (2000)). The Illinois residency statute merely keeps child sex offenders from living in very close proximity to places where children are likely to congregate; it does not force them to leave their communities.

Vasquez and Cardona also compare the residency restrictions to criminal punishments such as probation and supervised release. The comparison is inapt; the Court rejected it in *Smith*, noting that "offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens[] with no supervision." Id. at 101. Although the Illinois residency restrictions limit where sex offenders may live, the statute does not control any other aspect of their lives and thus does not resemble the comprehensive control of probation and supervised release.

The Court also examined the extent to which the Alaska law imposed an affirmative disability or restraint on sex offenders, observing that "[i]f the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id*. at 100. We accept for present purposes that Vasquez and Cardona have had difficulty finding suitable compliant housing in their neighborhoods. We also recognize that including child day-care homes within the 500-foot buffer zone creates some unpredictability: schools and playgrounds are typically known and fixed, but a private residential property can become a day-care home without anyone in the neighborhood noticing. However, like the registration scheme at issue in *Smith*, the residency

law "imposes no physical restraint[] and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *Id*.

Another relevant factor in the *Smith* framework is whether the statute promotes the traditional aims of punishment, but the Court strictly limited the scope of this inquiry, asking only whether the law is retributive. 538 U.S. at 102. Vasquez and Cardona do not develop an argument on this point, perhaps because the residency restrictions are so clearly not retributive. As in *Smith*, the obvious aim of the statute is to protect children from the danger of recidivism by convicted child sex offenders. Id.

The last two factors in the *Smith* framework are related: the Court asked whether the Alaska statute was rationally connected to a nonpunitive purpose and whether its requirements were excessive with respect to that purpose. Id. at 103. At this step of the analysis, the challenger is required to show that the statute's "nonpunitive purpose is a sham or mere pretext." *Id*. (internal quotation marks omitted). Vasquez and Cardona maintain that sex offenders do not reoffend more than other criminals. Even if we accept that assertion, similar recidivism rates across different categories of crime would not establish that the nonpunitive aim of this statute—protecting children—is a sham. Indeed, *Smith* holds that states may make "reasonable categorical judgments . . . without any corresponding risk assessment." *Id*. at 103-04.

In short, under *Smith* and *Leach*, the 2008 amendment to the sex-offender residency statute is neither retroactive nor punitive and thus raises no ex post

facto concerns.[4] The judge was right to dismiss this claim.

B. Takings Clause

Next, Vasquez and Cardona argue that the judge wrongly dismissed their claim that the 2008 amendment effectively "takes" their property without just compensation in violation of the Fifth Amendment's Takings Clause. But neither plaintiff pursued state remedies prior to filing this suit, and current law requires exhaustion of state mechanisms for obtaining compensation before a takings claim can be brought in federal court. *Williamson Cnty. Reg'l Planning*

---

4 Vasquez and Cardona rely heavily on the Sixth Circuit's decision in *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), but that case is easily distinguishable. The plaintiffs there challenged a series of amendments to the Michigan sex-offender registration law, which the court characterized as imposing "a byzantine code governing in minute detail the lives of the state's sex offenders." *Id*. at 697. The challenged provisions included a residency restriction prohibiting sex offenders from "living, working, or 'loitering' within 1,000 feet of a school." *Id*. at 698. The plaintiffs also challenged a provision publicly classifying registrants "into three tiers, which ostensibly correlate to current dangerousness, but which are based[] not on individual assessments, but solely on the crime of conviction." *Id*. Finally, the plaintiffs challenged a provision requiring registrants to "appear in person `immediately' to update information such as new vehicles or `internet identifiers.'" *Id*. The court considered these provisions collectively and concluded that this package of civil regulatory restrictions were punitive in effect. *Id*. at 702-06. The single 2008 amendment at issue in this case does not remotely compare.

Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985).[5]

To exhaust a takings claim, the plaintiff must seek relief in state court unless doing so would be "futile." *Peters v. Village of Clifton*, 498 F.3d 727, 732 (7th Cir. 2007). Relying on *Callahan v. City of Chicago*, 813 F.3d 658 (7th Cir. 2016), the judge assumed that the Illinois state courts could not provide relief for this claim. In *Callahan*, however, we accepted Chicago's concession that a suit for relief on a takings claim in an Illinois state court would be futile. *Id.* at 660. Foxx has not made a similar concession here. And as we explained in *Sorrentino v. Godinez*, 777 F.3d 410, 413 (7th Cir. 2015), the Illinois Court of Claims can provide damages for a regulatory taking. By failing to seek damages in state court, the plaintiffs have not exhausted their challenge to the residency requirements.[6]

Even if we looked past this procedural barrier, the takings claim would fail on the merits. Under the

---

[5] *Williamson County* has been criticized, and the Supreme Court may revisit and overrule it next term. *Knick v. Township of Scott*, 862 F.3d 310.

[6] Vasquez and Cardona argue that if they cannot proceed on an as-applied takings claim, they should be permitted to raise a facial takings claim. This argument is based on a line of caselaw holding that a facial takings challenge need not meet the *Williamson County* exhaustion requirement. *Peters v. Village of Clifton*, 498 F.3d 727, 732 (7th Cir. 2007). But Vasquez and Cardona did not develop an argument that the 2008 amendment is facially unconstitutional under the Takings Clause. The issue is therefore waived. See *Judge v. Quinn*, 612 F.3d 537, 557 (7th Cir. 2010).

Supreme Court's *Penn Central* test, we're instructed to examine "(1) the nature of the government action, (2) the severity of [its] economic impact on the [property] owner, and (3) the degree of interference with the owner's reasonable investment-backed expectations." *Bettendorf v. St. Croix County*, 631 F.3d 421, 430 (7th Cir. 2011) (internal quotation marks omitted). On the first of these factors, a taking "may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124 (citation omitted). Although the Illinois law restricts a child sex offender's use of his property, it cannot be characterized as a physical invasion. The law merely adjusts the benefits and burdens of economic life.

Moving on to the economic impact of the 2008 amendment, we keep in mind that a regulation does not amount to a taking simply because the property owner can no longer make the "most beneficial use of the property." *Id*. at 125. Even the denial of a traditional property right does not necessarily amount to a taking. For example, in *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979), the Supreme Court held that a law preventing the sale of certain artifacts did not amount to a taking of property within the meaning of the Fifth Amendment. The Court emphasized that the regulation did not compel the surrender of the artifacts and that the owners could still derive some economic benefit by "exhibit[ing] the artifacts for an admissions charge." *Id*. at 66. The economic impact of the 2008 amendment to the Illinois residency statute is minimal in comparison to *Andrus*. Although Vasquez and

Cardona cannot reside within the 500-foot buffer zone, there is no question that many others can, leaving open a broad market to sell or sublease their residences at full market value.

The third factor in the analysis seals the fate of the plaintiffs' takings claims. We're instructed to look at their "expectation concerning the use of the parcel" and whether they can obtain a "reasonable return" on their investment. *Penn Central*, 438 U.S. at 136. Vasquez and Cardona assert that they had no reasonable expectation they would have to move. They rely on *Mann v. Georgia Department of Corrections*, 653 S.E.2d 740 (Ga. 2007), which held that a sex-offender residency statute "positively precludes appellant from having any reasonable investment-backed expectation in any property purchased as his private residence." *Id*. at 744. But *Penn Central* simply does not support this expansive understanding of a property owner's investment-backed expectations.

A properly focused inquiry looks to the effect of the 2008 amendment on the plaintiffs' property-rights expectations. And because the amendment was on the books when Cardona purchased his home and Vasquez leased his apartment, its terms were necessarily part of any property-rights expectations they could have held. That's enough to doom this takings claim on the merits. See, e.g., *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1074 (7th Cir. 2013) (holding that the bar owners' reasonable expectations included the expansion of the smoking ban); *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1091 (9th Cir. 2015) ("[T]hose who buy into a regulated field . . . cannot object when regulation is later imposed.").

C. Procedural Due Process

The procedural aspect of the due-process claim rests on the plaintiffs' allegation that the 2008 amendment is unconstitutionally enforced against them without a hearing or other procedure to determine whether they actually pose a continued threat to children. This claim is squarely foreclosed by *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003). There the Supreme Court considered whether a sex-offender registration statute required a determination that the offender was currently dangerous. *Id*. at 4. The answer was "no." The Court reasoned that "due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme." *Id*.; see also id. at 8 (Scalia, J., concurring) ("[A] validly enacted statute suffices to provide all the process that is 'due. . . .'"); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) ("General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard."). The Illinois statute places residency restrictions on all child sex offenders regardless of their individual risk of recidivism. Vasquez and Cardona are not entitled to a hearing for an individualized risk assessment.

D. Substantive Due Process

Finally, Vasquez and Cardona argue that the 2008 amendment to the residency statute is substantively unconstitutional. They urge us to apply heightened scrutiny, claiming that the residency requirements were enacted out of pure animus toward child sex offenders, a politically unpopular group. See, e.g., *United States v. Windsor*, 570 U.S. 744, 770 (2013);

U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 556-58 (1973). Heightened scrutiny does not apply. The residency statute is facially neutral and advances a compelling governmental interest: protecting children from recidivism by child sex offenders. The plaintiffs also press for heightened scrutiny because the statute infringes their fundamental right to "establish a home." See *Washington v. Glucksberg*, 521 U.S. 702, 761 (1997). This argument is meritless. A law limiting where sex offenders may live does not prevent them from establishing a home; it just constrains where they can do so.

This law triggers only rational-basis review, so we ask whether its intrusion upon liberty is rationally related to a legitimate governmental interest. *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 576 (7th Cir. 2014). No one questions that protecting children from child sex offenders is a legitimate governmental interest; indeed, it is a compelling interest. See *Doe v. City of Lafayette*, 377 F.3d 757, 773 (7th Cir. 2004) (holding that the City's interest in protecting minors from child sex offenders is "not merely legitimate, it is compelling"). The plaintiffs thus "have the burden to negate every conceivable basis [that] might support [the statute]." *Goodpaster*, 736 F.3d at 1071 (internal quotation marks omitted).

It's self-evident that creating a buffer between a child day-care home and the home of a child sex offender may protect at least some children from harm. Indeed, as the Supreme Court explained in *Smith*, a state legislature "could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism." 538 U.S. at 103. Vasquez and Cardona insist that "scant evidence" supports the public-safety

rationale of this statute; they also argue that the harsh burdens placed on sex offenders are highly disproportionate to any benefit. But our role is not to second guess the legislative policy judgment by parsing the latest academic studies on sex-offender recidivism. See *Goodpaster*, 736 F.3d at 1071 ("Under rational basis review, a state law is constitutional even if it is unwise, improvident, or out of harmony with a particular school of thought.") (internal quotation marks omitted). This residency restriction on child sex offenders cannot be called irrational.

AFFIRMED.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
No. 17-1061
August 14, 2018

Before WILLIAM J. BAUER, Circuit Judge,
ILANA DIAMOND ROVNER, Circuit Judge
DIANE S. SYKES, Circuit Judge

JOSHUA VASQUEZ and MIGUEL CARDONA,
Plaintiffs-Appellants,

vs.

KIMBERLY M. FOXX, in her official capacity as the State's Attorney of Cook County, and CITY OF CHICAGO,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 16-cv-8854

Amy J. St. Eve, *Judge*.

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc,[1] and all of the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

---

[1] Circuit Judge Amy J. St. Eve took no part in the consideration of the petition for rehearing en banc.

JOSHUA VASQUEZ and MIGUEL CARDONA, Plaintiffs,
v.
KIMBERLY M. FOXX, in her official capacity as the State's Attorney of Cook County, and the CITY OF CHICAGO, a municipal corporation, Defendants.

No. 16-cv-8854.
United States District Court, N.D. Illinois, Eastern Division.

December 9, 2016.

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Judge.

Defendants Kimberly M. Foxx,[1] in her official capacity as the State's Attorney of Cook County (the "State's Attorney"), and the City of Chicago (the "City") have moved to dismiss Plaintiffs Joshua Vasquez ("Vasquez") and Miguel Cardona's ("Cardona") complaint, (R. 23, 26), in which they allege violations of 42 U.S.C. § 1983, (R. 1). For the following reasons, the Court grants Defendants' motions.

BACKGROUND[2]

---

1 One of the original defendants in this case was Anita Alvarez. Kimberly Foxx replaced her as State's Attorney on December 1, 2016. (R. 41, State's Attorney Reply, at 1 n.1.) Under Federal Rule of Civil Procedure 25(d)(1), Kimberly Foxx has replaced Anita Alvarez as a defendant in this case.

2 The facts presented in the Background are taken from the complaint and are presumed true for the purpose of resolving the pending motion to dismiss under Rule 12(b)(6). See

I. Facts

Plaintiffs challenge the constitutionality and enforcement procedures of 720 Ill. Comp. Stat. 5/11-9.3(b-10) ("the residency statute"), an Illinois law that generally prohibits "child sex offender[s]" from "knowingly resid[ing] within 500 feet of a playground, child care institution, day care center, part day child care facility, day care home, group day care home, or a facility providing programs or services exclusively directed toward persons under 18 years of age." (R. 1.). Both Plaintiffs are Chicago residents and are subject to the residency statute because Vasquez was convicted of one count of possession of child pornography in 2001 and Cardona was convicted of indecent solicitation of a child in 2004. (*Id*. at ¶¶ 7-8, 22, 35.) Certain exceptions to the residency statute exist, but they do not apply in this case.[3]

For the last three years, Vasquez has resided in an apartment with his wife and their nine-year-old daughter. (*Id*. at ¶ 24.) They rent the apartment and have a one-year lease that ends on August 19, 2017.

Teamsters Local Union No. 705 v. Burlington N. Santa Fe, LLC, 741 F.3d 819, 823 (7th Cir. 2014); *Alam v. Miller Brewing Co*., 709 F.3d 662, 665-66 (7th Cir. 2013); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

[3] One such exception is that that "[n]othing . . . prohibits a child sex offender from residing within 500 feet of a day care home or group day care home if the property is owned by the child sex offender and was purchased before August 14, 2008." 720 Ill. Comp. Stat. 5/11-9.3(b-10). It does not apply to Plaintiffs because Vasquez rents his home and Cardona did not own his home until 2010. (R. 1 at ¶¶ 24, 38; R. 4, Pls.' Mot. Emergency Injunctive Relief, at 6.)

(*Id*.) When Vasquez and his family decided to move there, the Chicago Police Department ("CPD") confirmed that it complied with the residency statute. (*Id*. at ¶ 26.) Although there has been a home day care 550 feet from Vasquez's residence since he and his family began living there, "no problems" have arisen. (*Id*. at ¶ 31.)

On August 25, 2016, Vasquez went to CPD headquarters to complete an annual sex offender registration requirement. (Id. at ¶ 27.) Upon completing his registration, a CPD officer gave him a notification form indicating that a home daycare had opened 480 feet from his residence and that if he failed to move by September 24, 2016, he could be arrested and prosecuted. (*Id*. at ¶ 28.) Providing this notification was consistent with the CPD's policy of "giv[ing] people classified as child sex offenders 30 days to move from their residence" when they are notified that they are out of compliance with the residency statute. (*Id*. at ¶ 2.) This was the second time in the past five years that Vasquez has received such a notification. (*Id*. at ¶ 32.) In 2013, Vasquez and his family moved because someone obtained a daycare license within 500 feet of his apartment. (*Id*.)

Vasquez alleges that he has searched for suitable, affordable housing that complies with Illinois law, but has been unsuccessful. (*Id*. at ¶ 29.) He says that if he is "forced to vacate his home by September 24, he will be homeless and will be separated from his wife and daughter." (*Id*.) Vasquez and his wife, in selecting their current apartment, took care to remain in the same neighborhood in which they had previously resided so their daughter would not have to change elementary schools. (*Id*. at ¶ 33.) "If Vasquez's family has

to move from their home, his daughter's schooling will be disrupted if they cannot find a compliant address within the same school district." (*Id*. at ¶ 34.)

Cardona lives with his mother in a home in Chicago that he has owned since 2010 and lived in for about twenty-five years. (*Id*. at ¶ 38.) "Cardona is the full-time caretaker for his mother, who has lung cancer and is currently undergoing chemotherapy." (*Id*. at ¶ 37.) According to Cardona's complaint, if he is forced to move, "his mother will be left without [his] assistance," which she relies upon. (*Id*. at ¶ 43.)

Each year between 2006 and 2015 when Cardona completed his annual sex offender registration, the CPD has confirmed that his address complied with the residency statute. (*Id*. at ¶ 39.) When Cardona completed his registration in August 2016, however, the CPD provided him a notice that his address did not comply with the residency statute because of a home daycare 475 feet away from his home. (*Id*. at ¶ 41.) Cardona thus was given thirty days to vacate his home. (*Id*. at ¶ 76.) "According to the website for the Illinois Department of Children and Family Services," there had been a group daycare home at the location referenced by the CPD since 2014. (*Id*. at ¶ 45.) It is unclear why the CPD did not inform Cardona that his residence did not comply with the residency statute until 2016.

II. Procedural History

Plaintiffs' complaint alleges four counts of violations of 42 U.S.C. § 1983. First, Plaintiffs allege that "[t]he retroactive application of [the residency statute] violates the Ex Post Facto Clause of the U.S. Constitution, Art. I, § 10, cl. 1, because it makes more burdensome

the punishment imposed for offenses committed prior to enactment of the law, and it applies retroactively," ("Count I"). (*Id*. at ¶ 81.) Second, Plaintiffs allege that "[t]he application of [the residency statute] to Plaintiffs . . . without any notice, hearing and/or determination of whether the individual affected poses a threat to the community violates the [Fourteenth] Amendment guarantee of procedural due process," ("Count II"). (*Id*. at ¶ 83.) Third, Plaintiffs allege that the residency statute deprives them of property without just compensation in violation of the Takings Clause of the Fifth Amendment ("Count III"). (*Id*. at ¶ 85.) Fourth, Plaintiffs allege that the residency statute is unconstitutional under the Fourteenth Amendment's Due Process Clause because its "prohibitions . . . are not rationally related to a legitimate state interest and thus fail rational basis review," ("Count IV"). (*Id*. at ¶ 87.) The Plaintiffs seek injunctive and declaratory relief, nominal and/or compensatory damages, and attorneys' fees and costs. (*Id*. at ¶¶ 81, 83, 85, 87.)

On September 13, 2016, Plaintiffs filed a motion for Emergency Injunctive Relief. Ultimately, the Court granted a temporary restraining order without objection, "enjoining the Defendants from forcing Plaintiffs to vacate their home and/or arresting them for violation of [the residency statute]." (R. 22.)

On September 29, 2016, Defendants filed the current motions to dismiss Plaintiffs' complaint, which the Court grants. (R. 23, 26.)

LEGAL STANDARD

"A motion to dismiss pursuant to Federal Rule of Civil

Procedure 12(b)(6) challenges the viability of a complaint by arguing that it fails to state a claim upon which relief may be granted." *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736 (7th Cir. 2014). Under Rule 8(a)(2), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The short and plain statement under Rule 8(a)(2) must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id*. Put differently, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). In determining the sufficiency of a complaint under the plausibility standard, courts must "accept all well-pleaded facts as true and draw reasonable inferences in [a plaintiff's] favor." *Roberts v. City of Chicago*, 817 F.3d 561, 564 (7th Cir. 2016).

ANALYSIS

Defendants argue that Plaintiffs fail to state procedural due process, ex post facto, substantive due process claims, and Takings Clause claims. The Court considers the viability of those claims in turn. First, however, the Court evaluates the State's Attorney's argument that consideration of the merits is unnecessary because the Court must abstain from hearing

this case based on the Younger abstention doctrine.[4]

I. Younger Abstention

The State's Attorney argues that the Court must abstain from asserting jurisdiction over this case under the principles articulated in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. (R. 26, State's Attorney Mot. Dismiss, at 5.). "*Younger* holds that federal courts must abstain from taking jurisdiction over federal constitutional claims that may interfere with ongoing state proceedings." *Gakuba v. O'Brien*, 711 F.3d 751, 753 (7th Cir. 2013) (emphasis added); see *Younger*, 401 U.S. at 41 ("[W]e have concluded that the judgment of the District Court, enjoining appellant Younger from prosecuting under these California statutes, must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances."); *Sykes v. Cook Cty. Court Prob. Div.*, 837 F.3d 736, 740 (7th Cir. 2016). "It is well established that *Younger*'s concepts . . . are inapplicable 'when no state proceeding was pending. . . .'" *Vill. of DePue v. Exxon Mobil Corp.*, 537 F.3d 775, 783 (7th Cir. 2008); see also *Gakuba*, 711 F.3d at 753 (explaining that *Younger* abstention applies where there is an ongoing state proceeding); *Kurtz Invs. Ltd. v. Vill. of Hinsdale*, No. 15 C 1245, 2015 WL 4112879, at *2 (N.D.

---

4 The City argues that Plaintiffs fail to state a claim in Counts I-III under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978), because, according to the City, municipalities are not liable under § 1983 for "a policy of enforcing state law." (R. 24, City's Mem. Supp. Mot. Dismiss, at 4.) Because the Court concludes that Plaintiffs' claims fail on the merits, it need not consider whether Plaintiffs fail to state a *Monell* claim against the City.

Ill. July 7, 2015) ("*Younger* abstention applies only when there is an action pending in state court against the federal plaintiff and the state is seeking to enforce the contested law in that proceeding."); *Bolton v. Bryant*, 71 F. Supp. 3d 802, 813 (N.D. Ill. 2014).

The State's Attorney argues that "[t]he Seventh Circuit has recognized that when a criminal prosecution is 'imminent, then a federal court might well abstain on comity grounds—for the prosecution would offer [the defendant] an opportunity to present its legal arguments, and states are entitled to insist that their criminal courts resolve the entire dispute." (R. 26 at 5 (alteration in original) (quoting *520 S. Mich. Ave. Assocs. Ltd. v. Devine*, 433 F.3d 961, 963 (7th Cir. 2006)).) This argument is unavailing. As discussed above, the Seventh Circuit has said that *Younger* applies when there is an ongoing state proceeding, which there is not in the current case. See also *Sykes*, 837 F.3d at 740-41; *Pindak v. Dart*, No. 10 C 6237, 2011 WL 4337017, at *5 (N.D. Ill. Sept. 14, 2011) ("Because there is no ongoing state proceeding involving Plaintiff, *Younger* abstention is inapplicable here."). Moreover, the Seventh Circuit has explained that the language the State's Attorney cites from Devine is "dicta." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012). In *ACLU of Illinois*, the State's Attorney made an argument similar to one she makes here. *Id.* The Seventh Circuit rejected that argument, explaining that by the State's Attorney's logic, "*Younger* precludes all federal preenforcement challenges to state laws," which was "obviously not right." *Id.*[5]

---

[5] The State's Attorney also argues that the Court should abstain because the Supreme Court "has long disfavored the concept of enjoining future State court criminal prosecutions." (R. 26

Plaintiffs also have standing to bring a preenforcement challenge. "It is well established that 'preenforcement challenges . . . are within Article III." *Id*. at 590 (alteration in original) (quoting *Brandt v. Vill. of Winnetka*, 612 F.3d 647, 649 (7th Cir. 2010))). "To satisfy the injury-in-fact requirement in a preenforcement action, the plaintiff must show 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder.'" *Id*. at 590-91 (alteration in original) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)); see also *Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 750 (N.D. Ill. 2015). Here, the CPD threatened enforcement against the Plaintiffs if they did not vacate their homes within a given time period. Plaintiffs seek to determine whether the state law requiring them to vacate their homes is constitutional before they either abandon their homes or risk serious criminal penalties. Plaintiffs therefore have standing to bring this preenforcement action.

---

at 6.) The State's Attorney points to, among other cases, *Wooley v. Maynard*, 430 U.S. 705, 711-12 (1977), where the Supreme Court considered whether enjoining the enforcement of a state statute was appropriate or whether the district court was limited to granting declaratory relief. (*Id.* at 6-7.) Here, Plaintiffs seek declaratory as well as injunctive relief. Thus, even if the State's Attorney were correct that injunctive relief were not appropriate, abstaining at this stage of the litigation is not required. Indeed, in a case in which the ACLU brought a preenforcement challenge to an Illinois criminal law seeking injunctive and declaratory relief, the Seventh Circuit held that Younger did not apply and that the ACLU had standing. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 586, 590-94 (7th Cir. 2012).

Because Plaintiffs have standing to bring this preenforcement action and Younger abstention is not appropriate, the Court proceeds to the merits of Plaintiffs' claims.

II. Procedural Due Process

Plaintiffs allege that the residency statute violates their rights to procedural due process because "[p]rior to applying the residency restrictions . . . or forcing an individual to move from his home, neither the City nor the state provides any hearing or other procedure to determine whether the individual affected poses a threat to the community." (R. 1 at ¶ 50.) By failing to provide such a hearing, Plaintiffs contend, "the Defendants arbitrarily restrict Plaintiffs' and others' fundamental right to familial consortium and their right to choose where and with whom they reside." (*Id*.) Plaintiffs' claim does not succeed.

"[D]ue process does not entitle [an individual] to a hearing to establish a fact that is not material under the [relevant] statute." *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003); see also, e.g., *Universal City Studios LLLP v. Peters*, 402 F.3d 1238, 1244 (D.C. Cir. 2005) (Roberts, J.); *People v. Leroy*, 828 N.E.2d 769, 778 (Ill. App. Ct. 2005) (considering a previous version of the residency statute). In *Connecticut Department of Public Safety v. Doe*, a convicted sex offender challenged a law requiring a state agency to publicly disclose on the Internet a sex offender registry. 538 U.S. at 4-6. The Supreme Court rejected the offender's procedural due process argument that he was entitled to a hearing to determine if he was likely to be currently dangerous because a finding related to current dangerousness was not a relevant consideration under the

relevant statute. *Id*. at 4, 7. In short, the Supreme Court explained, it would not matter "if [he] could prove that he is not likely to be currently dangerous" because "Connecticut has decided that the registry information of all sex offenders—currently dangerous or not—must be publicly disclosed." *Id*. (emphasis in original).

In the current case, the question of whether a person currently "poses a threat to the community" is irrelevant to the residency statute's applicability. Thus, Plaintiffs' procedural due process claim fails. The question remains, however, whether Plaintiffs have a viable substantive due process claim—an issue that the Court considers later. See id. at 8.

III. Ex Post Facto

Plaintiffs argue that the residency statute violates the Ex Post Facto Clause of the Constitution because it applies to them retroactively and "cross[es] the line from a regulatory scheme into the realm of punishment." (R. 32, Pls.' Response to State's Attorney Mot., at 8; R. 1 at ¶ 17). The Court rejects this argument.

The Ex Post Facto Clause "prohibits 'the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred.'" *United States v. Diggs*, 768 F.3d 643, 645 (7th Cir. 2014) (quoting *Weaver v. Graham*, 450 U.S. 24, 30 (1981)); see U.S. Const. art. I, § 9, cl. 3; *Peugh v. United States*, 133 S. Ct. 2072, 2081 (2013). "To violate the Ex Post Facto Clause, . . . a law must be both retrospective and penal." *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011). Here, Plaintiffs were convicted of their crimes before the Illinois legislature

amended the residency statute to include a prohibition on living 500 feet from a "day care home" or "group day care home." See Ill. Pub. Act 95-821, § 5 (2008); (R. 1 at ¶ 64 ("The residency restrictions . . . apply to people whose dates of conviction precede the effective date of the statute.")).[6] They argue that the residency statute therefore is an unconstitutional ex post facto law.

Plaintiffs are incorrect because, under Seventh Circuit precedent, the residency statute is not "retrospective." In Leach, the Seventh Circuit held that even though the Sex Offender Registration and Notification Act's ("SORNA") registration requirements applied to and "impose[d] significant burdens on sex offenders" convicted of a sex offense before SORNA's enactment, the registration requirements were not retrospective because "SORNA merely creates new, prospective legal obligations based on the person's prior history." 639 F.3d at 773. Thus, the court rejected the defendant's argument that the registration requirements retrospectively increased the punishment for his pre-SORNA conviction. *Id*. Here, it is impossible to meaningfully distinguish the residency statute, which similarly creates a "prospective legal obligation" regarding a person's residence "based on the person's prior history." Id. at 773; see also, e.g., *Bhalerao v. Ill. Dep't of Fin. & Prof'l Regulations*, 11-CV-7558, 2012 WL 5560887, at *5 (N.D. Ill. Nov. 15, 2012) (citing *Leach* and explaining that a statute that revoked health care licenses of individuals convicted of certain offenses

---

6 The residency statute was once codified in 720 Ill. Comp. Stat. 5/11-9.4(b-5) (2010), which was repealed in 2011, see Ill. Pub. Act 96-1551, art. 2, § 6 (2011), and moved to its current location in § 11-9.3, id. § 5.

prior to the effective date of the statute was not retroactive); *Thompson v. State*, 603 S.E.2d 233, 235 (Ga. 2004) (explaining that a sex offender residency statute was not retrospective because it "d[id] not alter the consequences for the offense of child molestation; rather, it create[d] a new crime based in part on an offender's status as a child molester"). But see, *e.g.*, *Commonwealth v. Baker*, 295 S.W.3d 437, 442 (Ky. 2009) (explaining that there "was no question" that a sex offender residency statute "applie[d] to conduct by Respondent that occurred well before the law's enactment").

IV. Substantive Due Process

Plaintiffs argue that the residency statute violates their right to substantive due process under the Fourteenth Amendment because the residency statute fails rational basis review. (R. 1 at ¶ 87; R. 17, Mot. Extend Emergency Injunctive Relief, at 10.) This argument does not succeed.

"Unless a government practice encroaches on a fundamental right, substantive due process requires only that the practice be rationally related to a legitimate government interest. . . ." *Charleston v. Bd. of Trs. of Univ. of Ill. at Chi.*, 741 F.3d 769, 774 (7th Cir. 2013); see also *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 576 (7th Cir. 2014) ("Where a non-fundamental liberty . . . is at stake, the government need only demonstrate that the intrusion upon that liberty is rationally related to a legitimate government interest."). Because the Plaintiffs invoke rational basis review, Plaintiffs have effectively conceded that no more exacting level of scrutiny applies.

"Those attacking a statute on rational basis grounds have the burden to negate 'every conceivable basis which might support it.'" *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1071 (7th Cir. 2013) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)); see also Hayden, 743 F.3d at 576 ("So long as there is any conceivable state of facts that supports the [policy at issue], it passes muster under the due process clause. . . ."); *Int'l Aerobatics Club Chapter 1 v. City of Morris*, 76 F.Supp. 3d 767, 786 (N.D. Ill. 2014). It is not necessary that a rational justification also be the actual motivation for the law's enactment; "rather, the question is whether some rational basis exists upon which the legislature could have based the challenged law." *Goodpaster*, 736 F.3d at 1071. Furthermore, the residency statute "is constitutional even if it is 'unwise, improvident, or out of harmony with a particular school of thought.'" *Id*. (quoting *Eby-Brown Co., LLC v. Wis. Dep't of Agric.*, 295 F.3d 749, 754 (7th Cir. 2002)).

The residency statute bears a rational relationship to a legitimate end: protecting children from convicted child sex offenders. A state "c[an] conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism." *Smith*, 538 U.S. at 103. The residency statute creates a buffer zone between a child sex offender's residence and certain locations in which children tend to congregate. It is at least "conceivable" that creating this buffer zone would further the goal of protecting children. See *Hayden*, 743 F.3d at 576. Thus, the residency statute survives scrutiny under the deferential rational basis standard. See also, e.g., *Smith*, 538 U.S. at 102-03 (explaining the a sex offender registration law bore a rational relationship to the legitimate purpose of protecting the public);

Belleau v. Wall, 811 F.3d 929, 943 (7th Cir. 2016) (Flaum, J., concurring) (explaining that a law requiring certain sex offenders to wear a GPS tracking device was rationally related to the purpose of protecting children); *Doe v. Miller*, 405 F.3d 700, 716 (8th Cir. 2005) (explaining that the Iowa legislature was "entitled to employ . . . 'common sense'" in implementing a similar residency statute); *Duarte v. City of Lewisville*, 136 F. Supp. 3d 752, 759-60 (E.D. Tex. 2015); *Doe v. Baker*, No. Civ.A. 1:05-CV-2265, 2006 WL 905368, at *5 (N.D. Ga. Apr. 5, 2006) ("Prohibiting a sex offender from living near a school or daycare is certainly an appropriate step in achieving the ultimate goal of protecting children."); *Leroy*, 828 N.E.2d at 781-82 (explaining that "it is reasonable to conclude that restricting child sex offenders from residing within 500 feet of a playground or a facility providing programs or services exclusively directed toward persons under 18 years of age might also protect society").

The Court recognizes that some courts have questioned the rationality of similar laws. See *Does v. Snyder*, 834 F.3d 696 (6th Cir. 2016); *In re Taylor*, 343 P.3d 867 (Cal. 2015). In *Snyder*, the court examined in an ex post facto analysis whether a Michigan law that included a residency restriction similar to the one at issue here had "punitive" effects. 834 F.3d at 697-701. One consideration in the court's analysis was whether the law had a rational relation to a non-punitive purpose. *Id*. at 704. The court explained that the record provided "scant support" for the proposition that the law furthered the goal of "keep[ing] sex offenders away from" children. *Id*. It pointed to studies showing that sex offenders are less likely to reoffend than other types of criminals and that laws like the one in question "actually increase the risk of recidivism . . . by

making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities." *Id*. at 704-05.

Snyder is factually distinguishable because the statute at issue there included prohibitions on where a sex offender could work. *Id*. at 698. More importantly, the residency statute comports with the rational basis test—even if it may be "unwise, improvident, or out of harmony with a particular school of thought." *Goodpaster*, 736 F.3d at 1071 (quoting Eby-Brown, 295 F.3d at 754). As noted above, there need only be some conceivable set of facts that supports the statute's purpose. As Plaintiffs' complaint recognizes, it is conceivable that at least some child sex offenders present a recidivism risk, (R. 1 at ¶ 57 (noting that some sex offenders reoffend)), and that some child sex offenses are committed by individuals who are strangers to children or their "neighbor," (R. 1 at ¶ 61). Indeed, as the Supreme Court recognized in Smith, sex offender registry laws were enacted in response to the sexual assault and murder of a seven-year-old "by a neighbor who, unknown to the victim's family, had prior convictions for sex offenses against children." 538 U.S. at 89. Moreover, as explained above, it is at least conceivable that creating some distance between a child sex offender's home and places where children congregate could increase the protection for at least some children. Consequently, Plaintiffs cannot plausibly allege that the residency statute fails the rational basis test.[7]

---

[7] *Taylor* is similar to *Snyder*, as the California Supreme Court concluded that a residency statute (with a 2000-foot buffer requirement) had no rational relationship to protecting children because it "hamper[ed], rather than foster[ed], efforts to monitor, supervise, and rehabilitate" sex offenders on supervised parole in San Diego County. 343 P.3d at 879-82. The Court does

Plaintiffs as well as the California Supreme Court and the Sixth Circuit point out potentially persuasive reasons why the residency statute might be overly broad or not particularly effective. It has serious collateral effects on non-sex offenders (like Plaintiffs' family members). It makes it potentially difficult for a child sex offender to find a home, and it creates a risk that an offender who complies with the statute initially will be forced to later vacate his or her home due to the opening of a day care or other facility. This imposes potentially onerous costs on offenders and their families to break leases, sell homes, change schools, and periodically uproot their lives. The statute may contribute to increased homelessness, imposing a further strain on social services. It may undermine efforts of some offenders to reintegrate into the community as productive citizens. Finally, the residency statute may have all of these negative effects without providing much in terms of increased protection for children. These considerations, however, do not render the residency statute irrational under the rational basis test. As a result, the Court cannot rule it unconstitutional.

V. Unconstitutional Taking Without Just Compensation

The Takings Clause of the Fifth Amendment, which applies to the states through the Fourteenth Amendment, provides, "[N]or shall private property be taken for public use, without just compensation." *Bell v. City of Country Club Hills*, Nos. 16-1245, 16-1448, 2016

---

not follow *Taylor* for reasons similar to why it declines to follow *Snyder*.

WL 6595965, at *2 (7th Cir. Nov. 8, 2016) (published opinion) (quoting U.S. Const. amend. V). "This provision 'does not proscribe the taking of property; it proscribes taking without just compensation.'" *Sorrentino v. Godinez*, 777 F.3d 410, 413 (7th Cir. 2015) (quoting *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985)). "Nor does the [Takings Clause] require a state to pay compensation prior to or at the same time as a taking." *Id.* Accordingly, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied compensation." *Id.* (quoting *Williamson*, 473 U.S. at 195). There is a "limited exception" to this exhaustion requirement "based on the futility of seeking state court relief." *Peters v. Vill. of Clifton*, 498 F.3d 727, 732 (7th Cir. 2007) (quoting *Daniels v. Area Plan Comm'n of Allen Cty.*, 306 F.3d 445, 456 (7th Cir. 2002)).

The Seventh Circuit recently accepted a concession from a litigant that, while Illinois provided a procedure in which individuals could seek compensation for physical takings, it does not have such a procedure for regulatory takings. *Callahan v. City of Chicago*, 813 F.3d 658, 660 (7th Cir. 2016). The Seventh Circuit also cited authority in support of that concession. See *id.* The Court therefore proceeds to the merits, assuming that Plaintiffs' regulatory takings claim satisfies the *Williamson* exhaustion requirement. See *Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 729 (2010) (explaining that the requirement that a plaintiff seek just compensation is not jurisdictional); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997) (describing the *Williamson*

exhaustion requirement as "prudential").

A regulation can be so onerous that it violates the Takings Clause without requiring a physical invasion of land or destroying all economically beneficial use of property. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005); see also *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015) (explaining that compensation is required for a "regulatory taking" that goes "too far" (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922))). To determine whether a regulation goes "too far," courts look to the factors articulated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978): "(1) the nature of the government action, (2) the economic impact of the regulation, and (3) the degree of interference with the owner's reasonable investment-based expectations." *Goodpaster*, 736 F.3d at 1074; see also *Lingle*, 544 U.S. at 539.[8]

With respect to the first factor, "[a] 'taking' may more readily be found where the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent.*, 438 U.S. at 124 (citation omitted). The residency statute, as discussed above, promotes the legitimate and important public interest of protecting children from convicted child sex offenders. It does not entail the government "physically invad[ing] or permanently appropriat[ing] any of the [Plaintiffs' property] for its own use." See *Connolly v. Pension Benefit Guar. Corp.*,

---

[8] Plaintiffs appear to agree that the test developed under *Penn Central* and its progeny is appropriate. (See R. 17 at 12-13; R. 32 at 15.)

475 U.S. 211, 225 (1986). While the residency statute interferes with offenders' ability to continue residing at a particular property, it does not otherwise interfere with their property interests. Offenders may, for example, sell or otherwise transfer their property interest to another person. Because the residency statute does not involve a physical invasion or appropriation of property, and because it amounts to an adjustment of economic burdens to promote the common good, the Court concludes that the first factor weighs in Defendants' favor. See *Goodpaster*, 736 F.3d at 1074-75 (explaining that a smoking ban was "a prototypical" example of a regulation that adjusted economic burdens to promote the common good, and that "[s]uch a character weighs heavily against finding a taking").

The second factor—the economic impact of the regulation—does little for Plaintiffs. "[T]he denial of one traditional property right does not always amount to a taking. At least 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 (1979). Indeed, some regulations do not result in a "taking" even if they prevent a property owner from making "the most beneficial use of the property." *Penn Cent.*, 438 U.S. at 125. Here, as previously mentioned, the residency statute prevents Plaintiffs from residing in their current homes, which lowers the value of their property interests somewhat from their perspective, but the statute leaves much of the value of Plaintiffs' property interests untouched.

The final factor—the degree of interference with the owner's reasonable investment-based expectations—

seals the fate of Plaintiffs' Takings Clause claim. When a party should reasonably expect a regulation to interfere with its investment, this factor will not favor the party's takings claim. See *Goodpaster*, 736 F.3d at 1074 (explaining that because smoking in public places had been regulated in a particular county since 2005, "[i]t should not have come as a surprise that the ordinance was later expanded to include appellants' business"); see also *Connolly*, 475 U.S. at 227 ("Prudent employers then had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations."); *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1091 (9th Cir. 2015) ("[T]hose who buy into a regulated field . . . cannot object when regulation is later imposed."); *Vesta Fire Ins. Corp. v. Florida*, 141 F.3d 1427, 1432 (11th Cir. 1998) (citing *Connolly* for the proposition that "[i]nterference with investment-backed expectations occurs when an inadequate history of similar government regulation exists: where the earlier regulation does not provide companies with sufficient notice that they may be subject to the new or additional regulation"). Cardona became the owner of his home in 2010 and Vasquez began renting his in 2013. The residency statute has included a prohibition of living within 500 feet of "home day cares" since 2008. Consequently, when Plaintiffs acquired the property interests in question, they were on notice that future events—the opening of a school or day care, for example—could require them to move. The final *Penn Central* factor therefore weighs in Defendants' favor, and, when considered with the other factors, leads the Court to conclude that Plaintiffs' Takings Clause claim cannot succeed.

The purpose of the Takings Clause is to prevent the "Government from forcing some people alone to bear public burdens which, in fairness and justice, should be borne by the public as a whole. . . ." See *Goodpaster*, 736 F.3d at 1074 (quoting *Penn Cent.*, 438 U.S. at 123-24). The residency statute places restrictions on convicted child sex offenders to protect the community at large. It is not unjust to put the economic burden that accompanies these restrictions on the individuals whose prior conduct necessitated the regulations. Moreover, it is not illogical to place the economic burden on former offenders rather than the public because the former offenders have at least some ability to find housing that is likely to comply with the residency statute. For these reasons, Plaintiffs have failed to plausibly allege a violation of the Takings Clause.[9]

CONCLUSION

For the foregoing reasons, the Court grants Defendants' motions to dismiss.

---

9 Plaintiffs rely on *Mann v. Ga. Dep't of Corr.*, 653 S.E.2d 740 (Ga. 2007), where the Georgia Supreme Court concluded that a Georgia residency statute violated the Takings Clause. To the extent that *Mann*'s facts and analysis applies in this case, the Court respectfully parts ways with the reasoning of the Georgia Supreme Court for the reasons outlined above. The Court instead finds more persuasive an opinion from the Northern District of Georgia, which concluded that the Georgia residency statute did not violate the Takings Clause. See *Baker*, 2006 WL 905368, at *8-9.

720 ILL. COMP. STAT. 5/11-9.3(b-5), (b-10)

(b-5) It is unlawful for a child sex offender to knowingly reside within 500 feet of a school building or the real property comprising any school that persons under the age of 18 attend. Nothing in this subsection (b-5) prohibits a child sex offender from residing within 500 feet of a school building or the real property comprising any school that persons under 18 attend if the property is owned by the child sex offender and was purchased before July 7, 2000 (the effective date of Public Act 91-911).

(b-10) It is unlawful for a child sex offender to knowingly reside within 500 feet of a playground, child care institution, day care center, part day child care facility, day care home, group day care home, or a facility providing programs or services exclusively directed toward persons under 18 years of age. Nothing in this subsection (b-10) prohibits a child sex offender from residing within 500 feet of a playground or a facility providing programs or services exclusively directed toward persons under 18 years of age if the property is owned by the child sex offender and was purchased before July 7, 2000. Nothing in this subsection (b-10) prohibits a child sex offender from residing within 500 feet of a child care institution, day care center, or part day child care facility if the property is owned by the child sex offender and was purchased before June 26, 2006. Nothing in this subsection (b-10) prohibits a child sex offender from residing within 500 feet of a day care home or group day care home if the property is owned by the child sex offender and was purchased before August 14, 2008 (the effective date of Public Act 95-821).