No. 18-386

IN THE

Supreme Court of the United States

JOSHUA VASQUEZ AND MIGUEL CARDONA,

Petitioners,

v.

KIMBERLY M. FOXX, STATE'S ATTORNEY OF COOK COUNTY, IN HER OFFICIAL CAPACITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

KIMBERLY M. FOXX
COOK COUNTY STATE'S ATTORNEY
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-2350

Counsel for Respondent

CATHY MCNEIL STEIN
ASSISTANT STATE'S ATTORNEY
CHIEF, CIVIL ACTIONS BUREAU

PAUL A. CASTIGLIONE*
ASSISTANT STATE'S ATTORNEY
paul.castiglione@cookcountyil.gov

of Counsel

*Counsel of Record

284722

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the dismissal of Petitioners' *ex post facto*, takings, procedural due process, and substantive due process claims created a circuit split or other conflict that warrants the granting of certiorari under the considerations set forth in Supreme Court Rule 10?

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

STATUTES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

I. Background.

Petitioners Joshua Vasquez ("Vasquez") and Miguel Cardona ("Cardona") (collectively "Petitioners") state that they are convicted child sex offenders, as defined in 720 ILCS 5/11-9.3(d)(1). (R. 1, ¶¶22, 35.)[1] As child sex offenders, Petitioners are subject to the prohibitions of 720 ILCS 5/11-9.3.

720 ILCS 5/11-9.3(b-10) states:

> 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.

1. The district court granted the Rule 12(b)(6) motion that respondent Kimberly M. Foxx, State's Attorney of Cook County ("Respondent" or the "State's Attorney") and the City of Chicago (the "City") filed. (Pet. App. 20a-41a.) The Seventh Circuit affirmed. (Pet. App. 1a-18a.) Petitioners did not attach a copy of their complaint to the appendix to their petition for a writ of certiorari (the "Petition"). As a result, Respondent will cite to the complaint in the electronic district court record.

> 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).

720 ILCS 5/11-9.3(b-10) (2018). (Pet. App. 42.) As the Seventh Circuit stated, "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.'" *Vasquez v. Foxx*, 895 F.3d 515, 518 (7th Cir. 2018).

The statute contains exceptions allowing the child sex offender to reside at property within 500 feet of protected facilities if he purchased the property before the effective dates of the statute or a relevant amendment -- July 7, 2000, June 26, 2006, and August 14, 2008 -- depending on the type of facility at issue. (R. 1, ¶ 17.) Because Vasquez rents his residence and Cardona purchased his home in 2010, R. 1 at ¶¶ 24, 38, these exceptions do not apply to Petitioners. The statute contains no exception allowing the offender to reside at property that was not located within 500 feet of a protected facility when the child sex offender moved in but became a prohibited location when a protected facility later opened up within 500 feet. (R. 1 at ¶¶ 17-19.) The date that the child sex offender was convicted of his qualifying child sex offense

is irrelevant under the statute. (R. 1 at ¶ 17.) Whether the child sex offender is required to register with the State also is irrelevant under the statute. (R. 1 at ¶ 20.) A violation of the statute is a class four felony. *See* 720 ILCS 5/11-9.3(f) (2018). Petitioners allege that 720 ILCS 5/11-9.3(b-10) violates the United States Constitution's *Ex Post Facto*, Fifth Amendment's Takings and Fourteenth Amendment's Due Process Clauses. (R. 1.)

A. Joshua Vasquez.

Vasquez resides in Chicago, Illinois, and "is subject to the residency restrictions contained in 720 ILCS 5/11-9.3(b-10)." (R.1 at ¶7.) Vasquez was convicted of one count of possession of child pornography in 2001. (R. 1 at ¶22.) Vasquez is a child sex offender as defined in 720 ILCS 5/11-9.3(d)(1) and is required to register with the State of Illinois as a sex offender. (*Id.*)

Vasquez currently leases an apartment at 4834 W. George Street in Chicago, Illinois. (R. 1 at ¶24.) When Vasquez and his family decided to move there, the Chicago Police Department ("CPD") confirmed that it complied with the residency statute. (R. 1 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" had arisen. (R. 1 at ¶ 31.)

On August 25, 2016, Vasquez went to Chicago police headquarters to complete his annual registration requirements. (R. 1 at ¶27.) After Vasquez completed his registration, a Chicago police officer handed him a form stating that his address is in violation of 720 ILCS 5/11-9.3(b-10) because of a home day care facility opened

at 4918 W. George Street, approximately 480 feet from Vasquez's residence. (R. 1 at ¶28.) The form stated that Vasquez must move by no later than September 24, 2016, and that if he failed to do so, he could be subject to arrest and prosecution for violating 720 ILCS 5/11-9.3(b-10). (*Id.*)

B. Miguel Cardona.

Cardona resides in Chicago, Illinois, and "is subject to the residency restrictions contained in 720 ILCS 5/11-9.3(b-10)." (R. 1 at ¶8.) Cardona was convicted of indecent solicitation of a child in 2004, making him a child sex offender as defined in 720 ILCS 5/11-9.3(d)(1). (R. 1 at ¶35.) Cardona is required to register with the State of Illinois as a sex offender until 2017. (*Id.*)

Cardona resided with his mother at 3152 S. Karlov Street in Chicago, Illinois. (R. 1 at ¶38.) Cardona has lived at this address for approximately 25 years. (*Id.*) He has been the owner of the building since 2010. (*Id.*) Cardona alleged that due to his mother's illness, if he left the home on Karlov Street, he would be unable to care for his mother. (*Id.* at ¶¶37, 43.) In 2017, during the pendency of this litigation, Cardona's mother passed away. (Pet. 6.)

Each year between 2006 and 2015 when Cardona completed his annual sex offender registration, the CPD confirmed that his address complied with the residency statute. (R. 1 at ¶ 39.) On August 17, 2016, Cardona went to Chicago police headquarters to complete his annual registration requirements. (R. 1 at ¶40.) After Cardona completed his registration, a Chicago police officer handed him a form stating that his address is in violation of 720 ILCS 5/11-9.3(b-10) because of a home daycare at 3123 S.

Keeler Street, Chicago, Illinois, which is approximately 475 feet from Cardona's residence. (R. 1 at ¶41.)

To date, neither Vasquez nor Cardona have been arrested or charged with violating 720 ILCS 5/11-9.3(b-10).

II. Proceedings Below.

On September 12, 2016, Petitioners filed a complaint under 42 U.S.C. §1983 challenging the constitutionality of the statute and the City's enforcement procedures. (R. 1.) Count I alleged that the application of the statute violates the *Ex Post Facto* Clause of the U.S. Constitution. (R. 1 at ¶81.) Count II alleged that the application of the statute to plaintiffs, without notice or hearing to determine whether either poses a threat to the community, violates the Fourteenth Amendment's procedural due process guarantee. (R. 1 at ¶83.) Count III alleges a violation of the Fifth Amendment's Takings Clause because plaintiffs allegedly are deprived "of the use and enjoyment of their property without just compensation." (R. 1 at ¶85.) Count IV, directed solely against the State's Attorney, alleges that the statute violates the Fourteenth Amendment's substantive due process guarantee because it is not rationally related to a legitimate state interest. (R. 1 at ¶¶86, 87.)

The City and the State's Attorney each moved to dismiss the complaint. (R. 23-24, 26.) On December 9, 2016, the district court granted the motions to dismiss that the State's Attorney and the City filed. (Pet. App. 20-41.) The district court entered final judgment dismissing the case on December 19, 2016. (R. 47.) On January 9, 2017, Plaintiffs filed their notice of appeal. (R. 48.)

On July 11, 2018, the Seventh Circuit affirmed the decision of the district court. (Pet. App. 1a-18a.) On August 13, 2018, the Seventh Circuit denied Petitioners' petition for rehearing or rehearing *en banc*. (Pet. App. 19a.)

REASONS FOR DENYING THE PETITION

Petitioners contend that "[t]he decision of the Seventh Circuit warrants review because it is based on a misunderstanding of this Court's precedents and conflicts with decisions of this Court and . . . [other] courts." (Pet. 8.) Petitioners could not be more wrong.

In affirming the district court, the Seventh Circuit followed decisions from: (1) this Court in *Smith v. Doe*, 538 U.S. 84 (2003); *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), *Andrus v. Allard*, 444 U.S. 51 (1979); *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 644-646 (1993); and *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); (2) the Seventh Circuit in *United States v. Leach*, 639 F.3d 769 (7th Cir. 2011); *Peters v. Village of Clifton*, 498 F.3d 727 (7th Cir. 2007); *Sorrentino v. Godinez*, 777 F.3d 410 (7th Cir. 2015); *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1074 (7th Cir. 2013); and *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004) (*en banc*); and (3) the Ninth Circuit in *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1091 (9th Cir. 2015). These cases all show that existing federal law from this Court and the circuit courts compelled the dismissal of Petitioners' *Ex Post Facto* Clause, Taking Clause, Procedural Due Process and Substantive Due Process claims. Petitioners' true complaint with the Seventh Circuit is not that it

deviated from controlling federal law but rather that it faithfully followed such law.

Supreme Court Rule 10 sets forth several considerations for the granting of certiorari:

> (a) United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

United States Supreme Court Rule 10.

The decision below does not conflict with any decision of this Court or other federal courts. Accordingly, in light

of the considerations in Supreme Court Rule 10 and for the reasons set forth below, this Court should deny the Petition.

I. The Dismissal Of Petitioners' *Ex Post Facto* Claims Does Not Create A Conflict That Warrants Review Under Supreme Court Rule 10.

(Response to Plaintiffs' Petition at 15-20.)

In affirming the district court's denial of Petitioners' *ex post facto* claims, the Seventh Circuit followed applicable precedent and did not create a conflict with any decision of this Court of other federal circuit courts. Nonetheless, both in this Court and below, Petitioners have relied on a Sixth Circuit case, *Does#1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), in support of their argument that 720 ILCS 5/11-9.3(b-10) is an *ex post facto* law. (Pet. 18-19.) *Vasquez*, 895 F.3d at 522, n. 4. *Snyder* does not conflict with the decision below because, as the Seventh Circuit observed, *Snyder* is "easily distinguishable." *Id.*

In *Snyder*, the plaintiffs 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." *Snyder*, 834 F.3d 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 Sixth Circuit considered these provisions collectively and concluded that this package of civil regulatory restrictions were punitive in effect. *Id*. at 702-706.

In contrast, the Seventh Circuit recognized that "[t]he single 2008 amendment at issue in this case does not remotely compare" to the array of restrictions in *Snyder*. *Vasquez*, 895 F.3d at 522, n. 4. *Snyder* is distinguishable and does not conflict with *Vasquez*.

Petitioners also claim that the Eleventh Circuit opinion in *Doe v. Miami-Dade County*, 838 F.3d 1050, 1052 (11th Cir. 2016) creates a conflict with *Vasquez*. It does not. As an initial matter, the opinion that Petitioners cited in *Miami-Dade County* was withdrawn and replaced with another decision. *See Doe v. Miami-Dade County*, 846 F.3d 1180 (11th Cir. 2017). In *Miami-Dade County*, the Eleventh Circuit considered a residency restriction of 2,500 feet that applied "even if there is no viable route to reach the school within 2500 feet." *Id*., 846 F.3d at 1186. The Eleventh Circuit reversed the granting of a Rule 12(b)(6) motion to dismiss with respect to two of the plaintiffs. The restrictions at issue are factually distinguishable from the challenged provision here: the 2008 amendment to 720 ILCS 5/11-9.3(b-10) which added a prohibition for child sex offenders from knowingly residing within 500 feet of a "day care home" or "group day care home" to a previous statutory prohibition of child sex offenders from knowingly residing within 500 feet of a playground, child care institution, day care center, part day child care facility, or a facility providing programs or services exclusively directed toward persons under 18 years of

age. (Pet. App. 42.) *Miami-Dade County* is factually distinguishable and does not conflict with *Vasquez*.

Beyond their reliance on *Snyder* and *Miami-Dade County*, Petitioners also contend that the Seventh Circuit made an "overly expansive interpretation" of *Smith v. Doe*, 538 U.S. 84 (2003). (Pet. 15.) That contention is erroneous.

In determining that 720 ILCS 5/11-9.3(b-10) is not an *ex post facto* law, the decision below relied on *Smith* and *United States v. Leach*, 639 F.3d 769 (7th Cir. 2011). *Leach* held that the Sex Offender Registration and Notification Act ("SORNA") did not violate the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3. *Leach*, 639 F.3d at 773-774. *Leach* recognized that a law that violates the Ex Post Facto Clause "must be both retrospective *and* penal." *Id.* at 773 (emphasis in the original). *Leach* then recognized that under *Smith*, "whether a comprehensive registration regime targeting only sex offenders is penal, as [defendant] concedes, is not an open question." *Id.* And under *Smith*, it is not an open question.

As *Leach* observed, in *Smith*, this Court "held that an Alaska sex offender registration and notification statute posed no *ex post facto* violation because it was a civil, rather than penal, statute" *Id.* The Alaska statutory regime in *Smith* imposed registration and notification requirements and a sex offender who did not comply with requirements could face criminal prosecution. *Smith*, 538 U.S. at 90. *Leach* noted that under SORNA, the defendant Leach was required to notify Indiana authorities when he moved to South Carolina and to register as a sex offender in South Carolina. The Seventh Circuit stated that Leach "has not identified any aspects of SORNA's

registration provisions that distinguish this case from *Smith*. This is unsurprising, since we too are unable to find any meaningful distinctions." *Leach*, 639 F.3d at 773. The Seventh Circuit then "join[ed] our sister circuits in concluding that SORNA is not an *ex post facto* law." *Id.*[2]

In the decision below, the Seventh Circuit noted that in *Leach*, "we held that SORNA `merely creates new, prospective legal obligations based on the person's prior history.'" *Vasquez*, 895 F.3d at 520, *citing Leach*, 639 F.3d at 773. The Seventh Circuit then stated:

> 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.

Vasquez, 895 F.3d at 520.

---

2. In *Leach*, the Seventh Circuit joined the First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits in holding that SORNA is not an *ex post facto* law. *Leach*, 639 F.3d at 773. Petitioners cite *Commonwealth v. Muniz*, 164 A.3d 1189, 1218, 1222 (Pa. 2017) for the proposition that Pennsylvania's version of SORNA violates the Ex Post Facto Clause. It is significant to note that the Pennsylvania Supreme Court concluded that Pennsylvania's SORNA was significantly different that the offender registration statute and the statutes upheld in *Smith. See Muniz,* 164 A.3d at 1218.

Petitioners, however, argue that with respect to the *Ex Post Facto* Clause, the residency restrictions in 720 ILCS 5/11-9.3(b-10) are distinguishable from the registration and notification requirements in *Leach* and *Smith*. (Pet. 15-18.) The Seventh Circuit correctly disagreed, noting that "like the registration scheme at issue in *Smith*, the [Illinois] residency law `imposes no physical restraint[] and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint' and that `the residency restrictions are so clearly *not* retributive.'" *Id*., citing *Smith*, 538 U.S. at 100, 102. The Seventh Circuit also found that Illinois' residency law was connected to a non-punitive purpose and its requirements were not excessive with respect to that purpose:

> 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 non-punitive aim of this statute—protecting children—is a sham. Indeed, *Smith* holds that states may make "reasonable categorical judgments ... without any corresponding risk assessment."

Vasquez, 895 F.3d at 522, *citing Smith*, 538 U.S. at 103-104.

With respect to *ex post facto* concerns, any differences between the residency restriction in *Vasquez* and the notice and registration requirements in *Smith* and *Leach* are distinctions without a difference. The decision below found that "the 2008 amendment to [Illinois'] sex-offender

residency statute is neither retroactive nor punitive and thus raises no *ex post facto* concerns." *Id.* at 522. As the Seventh Circuit adopted and followed the *ex post facto* analysis in *Smith* and *Leach*, the decision below does not conflict with the *ex post facto* jurisprudence from this Court or other federal circuit courts.

II. The Dismissal Of Petitioners' Takings Clause Claims Does Not Create A Conflict That Warrants Review Under Supreme Court Rule 10.

(Response to Plaintiffs' Petition at 14-15, 18-20.)

With respect to Petitioners' Takings Clause claims, the Seventh Circuit followed applicable precedent and did not create a conflict with any decision of this Court of other federal circuit courts. Petitioners, however, argue that they have stated a claim for declaratory and injunctive relief under the Takings Clause on the grounds that Illinois law prohibits them from "establish[ing] a permanent home, because their right to remain in any home they establish is always contingent on the actions of third parties." (Pet. 14.) This argument is specious.

Illinois' sex-offender residency statute does not prevent Petitioners from purchasing property or establishing a home. It simply prohibits child sex offenders 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." 720 ILCS 5/11-9.3(b-10) (2018). That residency restriction does not violate the Takings Clause of the Fifth Amendment. In this regard, Petitioners' Takings Clause claims fail procedurally and on the merits.

It is undisputed that neither Petitioner "pursued state remedies prior to filing this suit." *Vasquez*, 895 F.3d at 522-523. This Court has recognized that the exhaustion of state mechanisms for obtaining compensation is a prerequisite "before a takings claim can be brought in federal court." *Id.* at 523, *citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

Under Illinois law, the State's Attorney is a State official and a claim for damages against the State's Attorney in her official capacity is really a damages claim against Illinois. *Garcia v. City of Chicago,* 24 F.3d 966, 969 (7th Cir. 1994) (holding that a claim for damages against a State's Attorney is claim against the State). While the Eleventh Amendment prohibits a damage claim against the State's Attorney in her official capacity, *Hernandez v. Joliet Police Dep't*, 197 F.3d 256 (7th Cir. 1999), Petitioners could have sought damages for a regulatory taking in an Illinois court.[3] *Sorrentino*, 777 F.3d at 414 (recognizing that a regulatory takings claim could be brought against Illinois in the Illinois Court of Claims); *Patzner v. Baise*, 133 Ill. 2d 540, 545 (1990) (same). In addition, Petitioners could have also sought a declaration in state court that 720 ILCS 5/11-9.3(b-10) operated as a taking of Petitioners' property in violation of the Fifth Amendment. *See Sorrentino*, 777 F.3d at 413-414 (stating

3. In their claim under the Takings Clause, Petitioners did not seek money damages, R. 1, ¶85, even though the normal remedy for an alleged taking is monetary relief. *See Sorrentino v. Godinez*, 777 F.3d 410, 414 (7th Cir. 2015), *citing Peters v. Village of Clifton*, 498 F.3d 727, 732 (7th Cir. 2007) (noting the "strong presumption that damages, not injunctive relief, is the appropriate remedy in a Takings Clause action").

that a property owner can ask an Illinois court to issue a writ of *mandamus* directing the initiation of eminent domain proceedings for property that has been taken in violation of the Takings Clause); *Patzner*, 133 Ill. 2d at 546 (same). But Petitioners did not pursue any remedies regarding an alleged taking of their property in state court. As a result, the decision below properly followed *Williamson County* when it held that "by failing to seek damages in state court, [Petitioners] have not exhausted their challenge to the residency requirements." *Vasquez*, 895 F.3d at 523.

Putting aside this procedural barrier, the dismissal of Petitioners' Takings Clause on the merits is also consistent with precedent from this Court. Under the *Penn Central* test, federal courts determining whether a governmental action violates the Takings Clause must consider: "(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), *citing Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), and *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 644-646 (1993).

With respect to the first factor, the Seventh Circuit noted that 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." *Vasquez*, 895 F.3d at 523, citing *Penn Central*, 438 U.S. at 124. Against that legal backdrop, the Seventh Circuit

stated that "[a]lthough 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."

The decision below then turned to the second factor and considered the economic impact of the 2008 amendment, noting a regulation does not amount to a taking simply because the property owner can no longer make the "most beneficial use of the property." *Vasquez*, 895 F.3d at 523, citing *Penn Central*, 438 U.S. at 124. The court observed that in *Andrus v. Allard*, 444 U.S. 51 (1979), this 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." *Vasquez*, 895 F.3d at 523. In *Andrus*, this Court emphasized that the regulation at issue 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*., *citing Andrus*, 444 U.S. at 66. The Seventh Circuit then stated that:

> 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.

Vasquez, 895 F.3d at 524.

In contravention of *Penn Central* and *Andrus*, Petitioners urge this Court to follow *Mann v. Georgia Dep't of Corrections*, 653 S.E. 2d 740, 744 (Ga. 2007) where the Georgia Supreme Court found that Georgia's residency requirement for sex offenders violated the Takings Clause. (Pet. 20, n. 13.) *Mann* held that the Georgia 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. However, as the Seventh Circuit found, "*Penn Central* simply does not support [*Mann*'s] expansive understanding of a property owner's investment-backed expectations." *Vasquez*, 895 F.3d at 524. *Mann* is an outlier that did not properly follow *Penn Central.* In marked contrast, the decision below properly followed *Penn Central* and *Andrus.*

The decision below then considered the third *Penn Central* factor and concluded that this factor "seals the fate of the [Petitioners'] takings claims." *Id.* Vasquez and Cardona argued that "they had no reasonable expectation they would have to move." *Id.* The Seventh Circuit rejected this argument, noting that "*Penn Central* simply does not support this expansive understanding of a property owner's investment-backed expectations." *Id.* The court further stated:

> 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.

Id., citing *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) and *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").

Petitioners described the decision below as "anathema" to this Court's Takings Clause jurisprudence. (Pet. 15.) As the decision below closely followed and applied this Court's three-part test from *Penn Central,* this Court's decisions in *Williamson County* and *Andrus* and the decisions in *Goodpaster* and *Rancho de Calistoga*, that description is baseless and legally groundless.

III. The Dismissal Of Petitioners' Procedural Due Process Claims Does Not Create A Conflict That Warrants Review Under Supreme Court Rule 10. (Response to Plaintiffs' Petition at 9-12)

In affirming the district court's denial of Petitioners' procedural and substantive due process claims, the Seventh Circuit followed applicable precedent interpreting the Due Process Clause of the Fourteenth Amendment and did not create a conflict with any decision of this Court or other federal circuit courts.

In a nutshell, Petitioners contend that 720 ILCS 5/11-9.3(b-10) violates the Fourteenth Amendment's guarantee of procedural due process because the 2008

amendment is "enforced against them without a hearing or other procedure to determine whether they actually pose a continued threat to children." *Vasquez*, 895 F.3d at 524. The Seventh Circuit concluded that this Court's decision in *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003) squarely foreclosed such a claim. As the decision below observed:

> [This] Court considered whether a sex-offender registration statute required a determination that the offender was currently dangerous. [*Doe*, 538 U.S. at] 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 Board 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").

Like the six other circuits that have considered the issue,[4] the Seventh Circuit followed this Court's clear holding in

4. See, e.g., *Doe v. Cuomo*, 755 F.3d 105, 113 (2nd Cir. 2014) (following *Conn. Dep't of Pub. Safety*); *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 759-760 (4th Cir. 2013) (same); *Duarte v. City of Lewisville*, 858 F.3d 348, 352 (5th Cir. 2017) (same); *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 502 (6th Cir. 2007) (same); *ACLU v. Masto*, 670 F.3d 1046, 1058-1059 (9th Cir. 2012) (same); and *United States v. Ambert*, 561 F.3d 1202, 1208 (11th Cir. 2009) (same).

Conn. Dep't of Pub. Safety: a sex-offender registration statute does not require a determination that the offender is currently dangerous.

Petitioners, however, argue that a "one size fits all" approach to imposing a residency restriction on child sex offenders constitutes a "categorical deprivation of rights." (Pet. 14, n. 9.) Petitioners further argue that "[t]he Seventh Circuit's reading of *Conn. Dep't of Pub. Safety* untethers the Court's decision from its context and ignores bedrock procedural due process principles." (Pet. 10.) These arguments reveal the true nature of Petitioners' position regarding this Court's decision in *Conn. Dep't of Pub. Safety*: Petitioners' actual complaint is not that the decision below strayed from *Conn. Dep't of Pub. Safety* but rather that it accurately followed the holding of that case. Like its sister circuits, the Seventh Circuit in *Vasquez* adhered to this Court's holding in *Conn. Dep't of Pub. Safety* that procedural due process does not require an additional hearing to determine whether the offender is currently dangerous.

IV. The Dismissal Of Petitioners' Substantive Due Process Claims Does Not Create A Conflict That Warrants Review Under Supreme Court Rule 10.
(Response to Plaintiffs' Petition at 13-14)
(Response to *Amici* Brief of Eighteen Scholars at 14-26.)

Petitioners argue that the residency restriction in 720 ILCS 5/11-9.3(b-10) "severely burdens constitutionally protected property and liberty rights," Pet. 14, and that a heightened level of scrutiny should apply to their substantive due process claims. *Vasquez*, 895 F.3d at 524.

In accordance with applicable case law from this Court and other circuit courts, the Seventh Circuit rejected these arguments and stated:

> 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." (citation omitted) 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.

Id. The Seventh Circuit then concluded that 720 ILCS 5/11-9.3(b-10) satisfies a rational basis review:

> 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." *Smith*, 538 U.S. at 103. . . This residency restriction on child sex offenders cannot be called irrational.

Vasquez, 895 F.3d at 525.

Petitioners and *amici* criticize the fact the Seventh Circuit gave deference to the conclusion of the Illinois

Legislature that placing geographic barriers between children and convicted child sex offenders would, in fact, protect children. As Circuit Judge Sykes observed in *Vasquez*:

> 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).

Id. The Petition and the *amici* brief criticize this very point -- they wanted the Seventh Circuit and they want this Court to parse the latest academic studies on sex-offender recidivism and decide whether Illinois made a proper policy choice. But as this Court has recognized, federal courts "do not sit as a `super-legislature' to second-guess . . . policy choices." *Ewing v. California*, 538 U.S. 11, 28 (2003) (holding that it would not second guess California' policy determination that dramatically enhanced sentences for habitual felons advances the goals of [its] criminal justice system).

Moreover, as the Seventh Circuit itself observed just a few days ago, "the separation of powers principle . . . inherent in the federal Constitution, requires us to

accept the final output of the legislature without sitting in judgment about how it was produced." *McCann v. Brady*, ___ F.3d ___, 2018 U.S. App. LEXIS 33105, *13 (7th Cir. November 26, 2018), *citing Fletcher v. Peck*, 10 U.S. 87, 131 (1810).

When it adopted the 2008 Amendment, the Illinois Legislature made a rational decision: to protect children, it prohibited child sex offenders from knowingly residing within 500 feet of a "day care home" or "group day care home." The validity of such a law does not hinge on whether it completely solves a public problem. The relevant question is whether the law is a rational attempt to help ameliorate a public problem. As the District of Columbia Circuit has recognized, in reviewing legislation, courts should not employ "a rigid approach . . . that would make the perfect the enemy of the good." *AFL & CIO v. Marshall*, 570 F.2d 1030, 1037 (D.C. Cir. 1978).

Here, the Illinois Legislature enacted a residency restriction that attempts to keep a distance between children and child sex offenders. In finding that this decision is rational and does not violate substantive due process, the Seventh Circuit followed applicable federal law and did not create any conflict with precedent from this Court or other federal circuit courts.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

KIMBERLY M. FOXX
COOK COUNTY STATE'S ATTORNEY
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-2350

Counsel for Respondent

CATHY MCNEIL STEIN
ASSISTANT STATE'S ATTORNEY
CHIEF, CIVIL ACTIONS BUREAU

PAUL A. CASTIGLIONE*
ASSISTANT STATE'S ATTORNEY
paul.castiglione@cookcountyil.gov

of Counsel

*Counsel of Record