UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Case No. 1:14-cv-23933-PCH

JOHN DOE #1, JOHN DOE #2,
JOHN DOE #3, and
FLORIDA ACTION COMMITTEE, INC.,

Plaintiffs,

v.

MIAMI-DADE COUNTY; FLORIDA DEPARTMENT OF CORRECTIONS
SUNNY UKENYE, Circuit Administrator
For the Miami Circuit Office, FLORIDA DEPARTMENT OF CORRECTIONS, in his official capacity,

Defendants.
_____/

CLOSED CIVIL CASE

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE is before the Court on the motions to dismiss Plaintiffs' Amended Complaint filed by Defendants Miami-Dade County (the County), Sunny Ukenye, and the Florida Department of Corrections (FDOC) [D.E. 29 & 39]. The Court held oral argument on the motions on March 31, 2015. The Court has considered the motions, Plaintiffs' responses [D.E. 40 & 46-1], and Defendants' replies [D.E. 51 & 52], as well as the parties' oral arguments. For the following reasons, the motions to dismiss are GRANTED and Plaintiffs' Amended Complaint is DISMISSED.

BACKGROUND

Plaintiffs John Does numbers 1 through 3 and the Florida Action Committee filed suit against the County, Ukenye, and the FDOC for alleged violations of the United States Constitution and the Florida Constitution arising from Miami-Dade County's Lauren Book Child Safety Ordinance, MIAMI-DADE COUNTY CODE § 21-279 *et seq*. The Miami-Dade Board of

County Commissioners enacted the Book Ordinance in 2010 to "strike a proper balance between protecting children around the crucial and vulnerable areas of schools while still leaving available residential units in which sexual offenders can find housing." *Id.* § 21-279. According to the Amended Complaint, the 2010 ordinance repealed a patchwork of municipal regulations that had resulted in a "notorious encampment under the Julia Tuttle Causeway of more than one hundred" convicted sex offenders, and replaced it with a uniform county-wide regulatory scheme. The Book Ordinance, in pertinent part, prohibits sex offenders convicted of certain enumerated sexual crimes involving a victim under the age of 16 from establishing a new residence within 2,500 feet of a school. *Id.* § 21-281. The ordinance, however, contains a "grandfather clause" granting exceptions to sex offenders who established a residence before either the Book Ordinance's effective date or the date that the school opened. *Id.* § 21-282(1)(a) & (c). The ordinance defines a "school" as "a public or private kindergarten, elementary, middle or secondary school." *Id.*, § 21-280(9).

The facts of the case are taken from Plaintiffs' Amended Complaint, as the Court is bound to accept Plaintiffs' well-pleaded factual allegations as true on a motion to dismiss. *See St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 954 (11th Cir. 1986). Following the ordinance's enactment, the Miami-Dade County Police Department's Sex Crimes Bureau approved the River Park Mobile Home Park at 2260 NW 27th Avenue as compliant with the residency restriction. However, in 2013, administrators in Miami-Dade County schools and the Miami-Dade County Homeless Trust informed the County Police Department and the FDOC that they considered the Miami Bridge—an emergency youth shelter—to be a "school" under the meaning of the Book Ordinance. Though the Miami Bridge is separated from the River Park by the Miami River and is not within 2,500 feet in driving or walking distance of the River Park, the

Miami Bridge is within 2,500 feet of the River Park as the crow flies, which is the standard of measurement imposed by the Book Ordinance. *See* MIAMI-DADE COUNTY CODE § 21-281(b). The County IT Department subsequently added the Miami Bridge to a list of facilities that the County considers to be schools for the purposes of enforcing the Book Ordinance.

In July 2013, the FDOC and the County Police Department informed approximately 100 convicted sex offenders living at the River Park that their residences were not in compliance with the Book Ordinance. Then, for reasons not elaborated on in the Amended Complaint, the two entities' approaches to the Book Ordinance diverged. The FDOC proceeded to evict the approximately 50 convicted sex offenders who remained under its supervision. The County, however, eventually opted not to enforce the Miami Bridge as a school, and permitted the remaining convicted sex offenders to stay in the River Park. Plaintiffs allege that many of the River Park residents evicted by the FDOC moved to an encampment next to railroad tracks and warehouses in unincorporated Miami-Dade County, near the border of the City of Hialeah. Plaintiffs further allege that some FDOC parole officers have directed convicted sex offenders to this location as one that is in compliance with the Book Ordinance.

Plaintiffs concede that, following the County's removal of the Miami Bridge from its list of schools, the FDOC has permitted some convicted sex offenders to return to the River Park. However, the parties agreed at oral argument that no convicted sex offenders are being permitted to establish new residences at the River Park, due to a more-recent school opening in the area. Offenders who established their River Park residences before the school's opening have remained pursuant to the Book Ordinance's "grandfather clause."

None of the three John Doe Plaintiffs in this action were among those that the FDOC evicted from the River Park. John Doe #1 was convicted in 1992 of lewd and lascivious conduct

on a 14-year-old. According to the Amended Complaint, John Doe #1 was in jail at the time of the FDOC's eviction, and moved to the railroad track encampment upon his release in January 2014. John Doe #2 was convicted in 2006 of lewd and lascivious conduct on a 14-year-old. John Doe #2 moved to the River Park in 2010, but was subsequently evicted for failing to pay rent. Following his eviction, John Doe #2 was incarcerated until January 2014 and was homeless until September 2014, when he moved back to the River Park, where he currently resides. John Doe #3 was convicted in 1999 of lewd and lascivious conduct with a 15-year-old and unlawful sexual activity with a 16/17-year-old. John Doe #3 never lived in the River Park neighborhood; rather, in March 2014, he was evicted from his Shorecrest apartment for failure to pay rent, and has been homeless since that time.

ANALYSIS

Plaintiffs' Amended Complaint asserts facial and as-applied constitutional challenges to the Book Ordinance, under the United States Constitution and the Florida Constitution. Plaintiffs contend that, on its face, the Book Ordinance's definition of "school" is unconstitutionally vague, and that the Book Ordinance's residency restriction is an unconstitutional *ex post facto* law. Plaintiffs further contend that, as applied to them by the County and Ukenye,[1] the Book Ordinance violates Plaintiffs' allegedly fundamental rights to housing and safety. The Defendants have separately moved to dismiss for failure to state a claim under Rule 12(b)(6).

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), all well-pleaded factual allegations in the complaint are considered true and are construed in the light most favorable to the plaintiff. *See Speaker v. U.S. Dep't of Health & Human Servs. Ctrs.*

[1] Plaintiffs concede that the Eleventh Amendment provides the FDOC with sovereign immunity from Plaintiffs' constitutional claims, and have therefore agreed to the FDOC's dismissal.

for Disease Control & Prevention, 623 F.3d 1371, 1379 (11th Cir. 2010). Under Rule 8, "[a] pleading that states a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief," and "[e]ach allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(a)(2), (d)(1). "[T]he statement need only 'give the defendant fair notice of what the ... claim is and the ground upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citation omitted). However, the plaintiff must present "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[C]onclusory allegations, unwarranted deductions of fact or legal conclusions masquerading as facts will not prevent dismissal." *Bell v. J.B. Hunt Transp., Inc.*, 427 F. App'x 705, 707 (11th Cir. 2011). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

I. *Ex post facto*

The *Ex Post Facto* Clauses of the United States Constitution prohibit the enactment of a law that retroactively enhances the punishment for a criminal offense. U.S. CONST. art. 1, § 9, cl. 3 & § 10 cl. 1; *see also Collins v. Youngblood*, 497 U.S. 37, 43 (1990) ("Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts."). The Supreme Court has directed that *ex post facto* challenges should first be evaluated by determining whether the law at issue was intended to be a civil regulation or a criminal penalty. *Smith v. Doe*, 538 U.S. 84, 92 (2003). Here, Plaintiffs concede that the Miami-Dade Board of County Commissioners intended for the Book Ordinance to be a civil regulation, rather than a criminal penalty. The Book Ordinance clearly states the County Commissioners' intent to "promote, protect, and improve the health, safety and welfare of the citizens of the County,

particularly children . . . ." MIAMI-DADE COUNTY CODE § 21-278(b). Indeed, even the ordinance's full title—"The Lauren Book Child Safety Ordinance"—reveals a legislative intent to protect children, rather than to further punish convicted sex offenders.

Because the County Commissioners intended for the Book Ordinance to be civil in nature, the Supreme Court has directed that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92 (citations, quotations omitted). As stated by the Supreme Court, several factors are particularly relevant to a determination of whether a purportedly civil law is, in effect, criminal:

> The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been 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 (citations omitted). Though *Smith* addressed registration and notification restrictions on sex offenders, its framework is "equally instructive" to residency restrictions. *See Wallace v. New York*, 40 F. Supp. 3d 278, 311–12 (E.D.N.Y. 2014). Indeed, more than a dozen federal courts have evaluated such claims under the *Smith* framework, and all but one have found that residency restrictions prohibiting convicted sex offenders from living near schools did not violate the *Ex Post Facto* Clause. *See id.* at 312 n.30 (citing cases); *see also McGuire v. Strange*, No. 2:11-cv-1027, 2015 WL 476207 at *29 (M.D. Ala. Feb. 5, 2015) (citations omitted) ("Residency restrictions, employment restrictions, and community-notification schemes have all been deemed individually to be reasonable measures for increasing public safety.")

A. Rational connection to a nonpunitive purpose

Though the *Smith* factors are "neither exhaustive nor dispositive," the Supreme Court noted that the "nonpunitive purpose" consideration is "a most significant factor in our determination." *Id.* at 102 (citations, punctuation omitted). Here, the obvious nonpunitive purpose of the Book Ordinance is to protect children and diminish the risk of repeat sexual offenses against minors. *See* MIAMI-DADE COUNTY CODE § 21-278(b). Plaintiffs, however, argue that the Book Ordinance fails to achieve this purpose, because it restricts only where convicted sex offenders live, and does not prohibit them from visiting places frequented by children. This argument concerns the ordinance's effectiveness, not its rational connection to a nonpunitive purpose, and the Supreme Court has made clear that "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 U.S. at 103. Under the framework elaborated by the Supreme Court in *Smith*, it is not this Court's role to evaluate the efficacy of a law enacted by the elected political representatives of Miami-Dade County. *See John Does 1–4 v. Snyder*, 932 F. Supp. 2d 803, 813 (E.D. Mich. 2013) (rejecting argument on effectiveness of sex offender residency restriction, because "it is not for a federal court to tell a state legislature whether a particular law is effective or not").

Rather, the restriction must simply advance a legitimate governmental interest. *See Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1015 (8th Cir. 2006). Here, the County's interest in protecting children from the threat of repeat offenses posed by sex offenders is obvious, and the Book Ordinance's restrictions advance that interest by reducing opportunities for contact between sex offenders and children. *See Smith*, 538 U.S. at 103 (citations omitted) (noting that the risk of recidivism among convicted sex offenders is "frightening and high"). Most federal courts faced with an *ex post facto* challenge have found that a rational connection

exists between the public interest in protecting children from the risk of repeat offenses and residency restrictions for convicted sex offenders. *See Weems*, 453 F.3d at 1015 ("[W]e believe that a residency restriction designed to reduce proximity between the most dangerous offenders and locations frequented by children is within the range of rational policy options available to a state legislature charged with protecting the health and welfare of its citizens."); *Wallace*, 40 F. Supp. 3d at 318 ("By minimizing contact between children and convicted sex offenders after their release from prison, these restrictions reduce the chance that a sex offender might re-offend against a child victim."); *Doe v. Baker*, No. 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 center is certainly an appropriate step in achieving the ultimate goal of protecting children."). This Court agrees.

B. Excessiveness

Plaintiffs argue that the Book Ordinance is excessive due to its lack of any individualized risk assessment. Plaintiffs contend that because the ordinance applies for life without regard to the particular risk or lack thereof posed by particular individuals, and because it fails to account for rehabilitation and treatment imposed by Florida law on all convicted sex offenders, it effectively punishes individuals who pose no threat to the public. However, the Supreme Court has made clear that legislative policymakers are empowered to impose "regulatory burdens on individuals convicted of crimes without any corresponding risk assessment." *Smith*, 538 U.S. at 104 (citations omitted). "The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause." *Id.*

Further, Plaintiffs overstate the sweep of the Book Ordinance. Rather than applying to any person convicted of a sexual crime, the Book Ordinance is tailored to cover only those

offenders who pose the greatest danger to children. Specifically, the ordinance explicitly applies to offenders convicted of any one of five enumerated Florida sexual crimes in which the victim was a minor aged 15 or younger. *See* MIAMI-DADE COUNTY CODE § 21-281(a). It was certainly within the County Commissioners' policymaking discretion to consider offenders convicted of such crimes to pose the greatest risk to the public. *See Wallace*, 40 F. Supp. 3d at 321 (noting that a conviction of a sexual offenses in which the victim was a minor "demonstrates that the offender is capable of harming children and, thus, poses precisely the threat that these restrictions seek to neutralize").[2] Indeed, the Middle District of Alabama, in *McGuire v. Strange*, recently upheld against an *ex post facto* challenge Alabama's much broader sex offender law, which barred individuals convicted of sexual crimes from residing *or working* within 2,000 feet of a school, *regardless of the victim's age*. 2015 WL 476207 at *29[3]; *see also Wallace*, 40 F. Supp. 3d at 326 (citing cases upholding residency restrictions that did not include any individualized determination of risk and that, in many cases, applied to any offender).

The fact that the Book Ordinance applies for life also does not, on its own, mandate a finding of excessiveness. The Alaska statute under review in *Smith* also provided for a lifetime

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[2] At oral argument, Plaintiffs attempted to distinguish *Wallace*'s excessiveness analysis by noting that *Wallace* examined a residency restriction that included a tiered system for determining individual risk. According to Plaintiffs, this "individualized determination" rendered the residency restriction at issue in *Wallace* less punitive than the Book Ordinance, and more rationally related to the goal of protecting children. A closer reading of *Wallace*, however, leads to a different conclusion. The group of offenders in *Wallace* who had been determined to be most dangerous, and therefore subject to the most sweeping residency and registration restrictions, included two kinds of offenders. First, this group included offenders who were individually determined to pose a substantial risk of re-offense, *regardless of the age of the offender's victim*. *Wallace*, 40 F. Supp. 3d at 320. And second, these offenders included any sex offender who had committed an offense in which the victim was under the age of 18. *Id.* In other words, the statute under review in *Wallace*, despite providing for individualized determinations of risk, actually employed a broader standard for those subject to its most-restrictive conditions than the Book Ordinance, which applies only to offenders convicted of a specific sexual crime in which the victim was 15 or younger.

[3] *McGuire* held that Alabama's in-person weekly registration requirements for homeless sex offenders—perhaps the strictest sex offender restrictions in the country—were so punitive as to constitute an unconstitutional *ex post facto* law. *Id.* at *31. *McGuire*, however, upheld the state's residency and work restrictions as reasonable, nonpunitive, civil measures. *See id.*

restriction on certain sex offenders, and the Supreme Court found this restriction not to be excessive, in light of "empirical research" showing that "most reoffenses do not occur within the first several years after release, but may occur as late as 20 years following release." *Smith*, 538 U.S. at 105 (citation, quotations omitted). The County Commissioners likewise reasonably concluded that a lifetime residency restriction would best protect the public from the risk of repeat sexual offenses against minors, which may occur long after the offender's release from prison. *See id.* ("The excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy."); *see also Valentine v. Strickland,* No. 5:08-CV-00993-JRA, 2009 WL 9052193, at *5 (N.D. Ohio Aug. 19, 2009) (upholding lifetime residency restriction applied to sex offenders without explicit regard for the victim's age); *Gautier v. Jones*, No. CIV-08-445-C, 2009 WL 1444533, at *8–9 (W.D. Okla. May 20, 2009) *rev'd on other grounds,* 364 F. App'x 422 (10th Cir. 2010) (upholding lifetime residency and registration restrictions).

Finally, while the Book Ordinance prohibits a convicted sex offender from establishing a new residence within 2,500 feet of a school, it grants exceptions to covered individuals who established their residences either before the school's opening or the ordinance's effective date. *See* MIAMI-DADE COUNTY CODE § 21-282(1)(a) & (c). This "grandfather clause" further underscores the Book Ordinance's civil, nonpunitive effects. *See Wallace*, 40 F. Supp. 3d at 326 (noting that a similar "grandfather clause" also mitigated "any excessiveness relating to the lifetime application of these restrictions"); *Snyder*, 932 F. Supp. 2d at 811–12 ("grandfather clauses" also "significantly negate the harshest potential consequences of the Act.").

C. Affirmative disability or restraint

The affirmative disability or restraint prong of an *ex post facto* analysis examines "how the effects of the Act are felt by those subject to it." *Smith*, 538 U.S. at 99. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* The disability or restraint imposed by the Book Ordinance is indisputably less severe than imprisonment, which the Supreme Court has called "the paradigmatic affirmative disability or restraint." *Id.* Unlike a prisoner, a convicted sex offender subject to the Book Ordinance's residency requirement may seek employment, move freely throughout Miami-Dade County, establish a residence at any location not within 2,500 feet of a school, and remain in an existing residence pursuant to the ordinance's "grandfather clause." MIAMI-DADE COUNTY CODE §§ 21-281(a) & 21-282(1); *see also Wallace*, 40 F. Supp. 3d at 317 ("Although sex offenders to whom these restrictions apply may be less free than the average person to live or even travel where they want, these restrictions are not the equivalent of imprisonment, and the offenders are not akin to prisoners, without any freedom of movement.").

Plaintiffs nevertheless argue that the ordinance constitutes an affirmative disability or restraint because its residency restrictions "are so onerous that they have caused hundreds of individuals in Miami-Dade County to become homeless or transient." *Smith* indicates that such broad, conjectural claims are insufficient to establish that an affirmative disability or restraint is *imposed by* a regulatory restriction on convicted sex offenders. In *Smith*, the Supreme Court rejected the contention that Alaska's registration and notification requirements were likely to render sex offenders subject to these requirements unemployable and incapable of finding housing. The Court reasoned that "[t]he record in this case contains no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders *that would not*

have otherwise occurred through the use of routine background checks by employers and landlords." *Smith*, 538 U.S. at 100 (emphasis added).

Similarly, Plaintiffs have pled no facts indicating that their difficulty in obtaining housing "would not have otherwise occurred" due to their personal financial circumstances. Indeed, Plaintiffs' own allegations indicate that factors other than the Book Ordinance's residency restriction have caused their difficulty in finding housing. For example, the Amended Complaint makes clear that John Does #2 and 3 became homeless not because of the Book Ordinance, but because both plaintiffs failed to pay their rent and, as a result, were evicted from residences that complied with the Book Ordinance at the time that both Plaintiffs lived in them. As to John Doe #1, the Amended Complaint states that a probation officer directed him to the encampment at the railroad tracks on the border of the City of Hialeah as a location in compliance with the Book Ordinance; Plaintiffs do not allege, and could not plausibly do so, that the Book Ordinance's residency restriction is the sole and exclusive cause of his homelessness. *See Wallace*, 40 F. Supp. 3d at 327 (finding "no support for Plaintiffs' allegation that these restrictions directly cause forced or *de facto* homelessness among the County's registered sex offenders").

Plaintiffs also argue that the application of the Book Ordinance in Miami-Dade County is particularly onerous because "Miami-Dade County is predominantly urban." The fact that two of three John Doe Plaintiffs were, as described above, able to obtain compliant housing in some of the County's most densely populated areas belies this contention. Further, Plaintiffs' characterization of Miami-Dade County is implausible. Miami-Dade County is larger than the states of Rhode Island and Delaware, and contains extensive urban, suburban, and rural neighborhoods.[4] Plaintiffs have pled no facts supporting a plausible inference that such a vast

[4] MIAMIDADE.GOV, *About Miami-Dade County*, http://www.miamidade.gov/info/about_miami-dade.asp

and varied geographical area has no housing that is compliant with the Book Ordinance's residency restriction.[5]

D. Similarities to historic punishments

Plaintiffs' contention that the Book Ordinance's effects are similar to the historic criminal punishments of banishment and probation is also unsupported by the ordinance's plain terms. The Book Ordinance permits convicted sex offenders falling within its purview to travel throughout Miami-Dade County, to work within the County, and to live where they choose, as long as their residence is not within 2,500 feet of a school. *See* MIAMI-DADE COUNTY CODE § 21-281(a). This is a far cry from the historic punishment of banishment, which "entailed the inability to ever return to the place from which an individual had been banished." *See Doe v. Miller*, 405 F.3d 700, 719 (8th Cir. 2005) ("Unlike banishment, [Iowa's residency restriction] restricts only where offenders may reside."); *Wallace*, 40 F. Supp. 3d at 316–17 (citations omitted) (holding that New York's residency restrictions "cannot be equated to the historic punishment of banishment," because they "do not have the effect of either putting the affected individuals on display for ridicule or 'running them out of town'"). Further, those covered by the Book Ordinance are not subject to the mandatory conditions, supervision, or threat of revocation imposed on probationers. *See Smith*, 538 U.S. at 101 (Alaska's registration and notification requirements were not similar to probation, because "offenders subject to the [] statute are free . . . to live and work as other citizens, with no supervision").

[5] Plaintiffs also argue that the Book Ordinance's failure to provide individualized risk assessments further supports a finding that the ordinance imposes an affirmative disability or restraint. And yet, as described above, the Supreme Court has clearly held that a law's uniform application, standing alone, does not render it punitive. *Smith*, 538 U.S. at 104 (citations omitted).

E. Traditional aims of punishment

The County concedes that the Book Ordinance serves one traditional aim of punishment—deterrence of future crimes. However, given the ordinance's plainly civil legislative intent and the absence of other facts illustrating a criminally punitive effect, this factor alone is far from dispositive. *See Smith*, 538 U.S. at 102 ("Any number of governmental programs might deter crime without imposing punishment."); *see also Miller*, 405 F.3d at 720 (holding that Iowa's residency restriction "could have a deterrent effect, but we do not agree that the deterrent effect provides a strong inference that the restriction is punishment"). Further, to the limited extent that the Book Ordinance poses some retributive effect, this effect is incidental to the ordinance's civil, regulatory aim of protecting the public from the risk of recidivism posed by sex offenders convicted of crimes involving victims aged 15 and under. [6]

F. Conclusion

In light of the *Smith* factors described above, the Court holds that the Book Ordinance does not, on its face, violate the United States Constitution's *Ex Post Facto* Clause. Therefore, Plaintiffs' *ex post facto* claim is dismissed.

II. Vagueness

Plaintiffs also contend that the Book Ordinance is void for vagueness, in its definition of a "school." The Due Process Clause of the United States Constitution requires that lawmakers define prohibited conduct "with sufficient definiteness that ordinary people can understand what

[6] Plaintiffs finally contend that their *ex post facto* claim is too fact-intensive to resolve on a motion to dismiss, and that they are entitled to develop factual proof of the Book Ordinance's excessiveness and ineffectiveness at achieving its purpose. Plaintiffs argue that, for this reason, most courts faced with similar claims have resolved them after conducting bench trials or, at least, taking evidence. No precedent, binding or otherwise, supports the proposition that a plaintiff who has pleaded an implausible claim may survive a motion to dismiss under Rule 12(b)(6) with the contention that subsequent discovery could bolster the claim. Further, Plaintiffs ignore the substantial number of decisions that have resolved such claims as a matter of law. *See Wallace*, 40 F. Supp. 3d at 285; *Weems*, 453 F.3d at 1012; *Snyder*, 932 F. Supp. 2d at 807.

conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983). Here, the Book Ordinance's definition of a "school"—as a "public or private kindergarten, elementary, middle or secondary school"—is consistent with the plain meaning and understanding of the term. Indeed, at oral argument, Plaintiffs' counsel conceded that the ordinance's definition of "school" is clear for most facilities.

In *Stansberry v. Holmes*, the former Fifth Circuit Court of Appeals upheld a local zoning ordinance that defined "school" as "a building where persons regularly assemble for the purpose of instruction or education together with the playgrounds, dormitories, stadiums, and other structures or grounds used in conjunction therewith." 613 F.2d 1285, 1292 (5th Cir. 1980).[7] The former Fifth Circuit reversed the district court's ruling of this definition as unconstitutionally vague, because the language of the ordinance "clearly narrows the definition to schools for primary, secondary, and college education." *Id.* at 1290. The Book Ordinance's definition of a school is clearer than that contained in the statute examined in *Stansberry*. Moreover, the title of the ordinance and its broader context all make its application to children obvious and understandable.[8]

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[7] Under *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981), the decisions of the former Fifth Circuit are binding on courts within the Eleventh Circuit.

[8] Plaintiffs also argue that *Stansberry* does not control the Court's analysis here because it evaluated a civil regulation, and the Supreme Court has directed that statutes imposing a criminal penalty should be subject to a stricter review. While this may be a correct statement of the law, *see Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982), the Court is not convinced that the purportedly heightened review applied to statutes imposing criminal liability would make a difference here. In *City of Chicago v. Morales*, the Supreme Court stated that a criminal law may be vague either by failing to provide fair notice of prohibited conduct, or by authorizing or encouraging arbitrary enforcement. 527 U.S. 41, 56 (1999). As described above, the plain terms of the Book Ordinance pass muster under either test.

Plaintiffs, however, argue that the Book Ordinance fails to provide constitutional "fair notice" of prohibited conduct, because the ordinance's definition of the term "school" is unclear in the context of "alternative education programs" such as the Miami Bridge. In support, Plaintiffs cite the County's and the FDOC's allegedly arbitrary and inconsistent enforcement of the ordinance. Whether these contentions could support an as-applied challenge to the enforcement of the Book Ordinance under these circumstances or similar circumstances in the future, however, is not before the Court. Rather, the issue on Plaintiffs' facial challenge for vagueness is whether the plain language of the statute itself provides fair notice of the prohibited conduct. *See Seling v. Young*, 531 U.S. 250, 273–74 (2001) (Thomas, J., concurring in judgment) ("[T]o the extent that the conditions result from the fact that the statute is not being applied according to its terms, the conditions are *not* the effect of the statute, but rather the effect of its improper implementation."). The Court concludes that the Book Ordinance's definition of a school clearly does provide such fair notice of what a "school" is, and consequently, where a convicted sex offender may establish a new residence.[9]

III. Substantive due process

Finally, Plaintiffs bring two substantive due process claims, based on Ukenye's and the County's alleged violations of their "fundamental rights" to personal security and to acquire residential property. Neither of these purported rights has been explicitly recognized by the Eleventh Circuit or the Supreme Court as "fundamental." *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (enumerating the rights recognized as "fundamental"). At best, some decisions cited by Plaintiffs have recognized a "liberty interest" in personal security in the

[9] In fact, the Miami-Dade County Police Department provides an interactive map, readily available on the Internet, that demonstrates the location of all schools in the County, all registered sex offenders, and the areas in which registered sex offenders may establish a new residence. *See* http://gisweb.miamidade.gov/seopbuffer/.

context of a custodial relationship or involuntary commitment, neither of which are present here. *See e.g. Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (recognizing a "liberty interest" in safety in the context of involuntary commitment proceedings). Similarly, the case relied on most heavily by Plaintiffs to support the existence of a fundamental right to acquire property, *Coppage v. Kansas*, does not support Plaintiffs' claim. *Coppage* addressed the "liberty of contract" in the context of employment negotiations, 236 U.S. 1, 9–11 (1915), and, as the Eleventh Circuit has noted, *Coppage*'s "interpretation of the Due Process Clause" has been "expressly reject[ed]" by the Supreme Court. *Whitney v. Heckler*, 780 F.2d 963, 972 n.13 (11th Cir. 1986) (citing *Lincoln Federal Labor Union No. 19,129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 533–37 (1949)). Further, at least one Circuit Court of Appeals has held that "we cannot agree that the right to choose one's place of residence is necessarily a fundamental right." *Prostrollo v. Univ. of S. Dakota*, 507 F.2d 775, 781 (8th Cir. 1974).

"The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in" the recognition of fundamental rights. *See Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992). This is because, "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720. Because no controlling decision identified by Plaintiffs has ever articulated a fundamental right to personal security (in a non-custodial context) or the acquisition of housing, the Court declines to do so here. *See Miller*, 405 F.3d at 710 ("We do not believe that the residency restriction of § 692A.2A implicates any fundamental right of Plaintiffs that would trigger strict scrutiny of the statute."). Therefore, the Book Ordinance is subject to rational basis review; that is, review of whether it "rationally advanc[es] some legitimate governmental purpose." *Reno v. Flores*, 507

U.S. 292, 306 (1993). Under this deferential standard of review, the law in question need not be perfect, or even superior to other potential options—it must only be rational. *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2083 (2012); *see also Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005) ("[W]e hold legislative acts unconstitutional under a rational basis standard in only the most exceptional circumstances.").

Plaintiffs argue that the Book Ordinance is an ineffective means to the end of protecting children. Plaintiffs allege that most sexual abuse of children is perpetrated by individuals with a connection to the child's family, and that the Book Ordinance does nothing to protect these victims. Plaintiffs also contend that, because the Book Ordinance regulates only where convicted sex offenders live, and not where they travel throughout their days, it fails to protect children from convicted sex offenders who might choose to visit school zones. Plaintiffs, however, fail to recognize that deferential rational basis review does not entail an intensive investigation of whether the County Commissioners enacted the best and most effective public policy available. Rather, the ordinance must only be rationally related to a legitimate purpose.

The vast majority of federal and state courts from across the country, including the United States Supreme Court, the Eleventh Circuit, and the Florida Supreme Court, have found that reasonable restrictions on convicted sex offenders serve the legitimate public interest in protecting children from the "frighteningly high" risk of recidivism posed by such individuals. *See Smith*, 538 U.S. at 102–03 (Alaska's sex offender registration requirement had a legitimate connection to public safety); *Moore*, 410 F.3d at 1345 (holding that Florida's sex offender registration act was rationally related to the governmental interest in protecting the public); *Miller*, 405 F.3d at 714 (rejecting argument that legislature was required to base a residency restriction on scientific data showing its effectiveness, because it "understates the authority of a

state legislature to make judgments about the best means to protect the health and welfare of its citizens in an area where precise statistical data is unavailable and human behavior is necessarily unpredictable"); *Westerheide v. State*, 831 So. 2d 93, 104 (Fla. 2002) (holding that Florida law compelling involuntary commitment of sexually violent predators was justified by the state's "compelling and proper" interests in protecting the public and treating predators). Plaintiffs have offered no compelling reason for the Court to deviate from the rationale of these well-established decisions, and the Court therefore concludes that the Book Ordinance rationally advances the legitimate governmental purpose of protecting children from the risk of recidivism posed by convicted sex offenders.[10]

Plaintiffs, however, argue that the Book Ordinance's residency restrictions are so onerous as to create a custodial relationship with County and FDOC law enforcement. Plaintiffs note that the Supreme Court has held that a state's "affirmative act of restraining the individual's freedom to act on his own behalf" triggers some state duties to ensure the restrained person's safety. *DeShaney v. Winnebago Cnty. Dept. of Social Srvs.*, 489 U.S. 189, 200 (1989). However, Plaintiffs overlook *DeShaney*'s further statement that such protections arise only in circumstances of "incarceration, institutionalization, or other similar restraint of personal liberty . . ." *Id.* at 200. The Book Ordinance does not impose a restraint that is similar to incarceration or institutionalization. The ordinance permits convicted sex offenders within its ambit to travel throughout Miami-Dade County, to work, and to establish a residence—albeit not one within

[10] Following oral argument, Plaintiffs filed a Notice of Supplemental Authority [D.E. 59], citing a recent California Supreme Court decision that held California's sex offender residency restriction to be an unconstitutional due process violation as applied to sex offenders living in San Diego County. *In re Taylor*, 60 Cal. 4th 1019 (Cal. 2015). The California Supreme Court's decision relied on an extensive investigation into the law's effectiveness at achieving its aims, *id.* at 1039–42, which, as previously described, would be inappropriate here, under the rational basis standard articulated by the United States Supreme Court and the Eleventh Circuit.

2,500 feet of a school. Plaintiffs identify no precedent supporting the existence of a custodial relationship under these circumstances, and the Court declines to find one here.

IV. Claims based on the Florida Constitution

In their response to the County's motion to dismiss, Plaintiffs contend that their state-law substantive due process claims, predicated on the Florida Constitution, should be subject to a different analysis than their federal counterpart claims.[11] Plaintiffs argue that Florida's rational basis test is stricter than its federal counterpart, and mandates a more searching inquiry into the efficacy of the Book Ordinance at achieving its aims. To the contrary, Florida courts have ruled that state and local laws imposing restrictions on sex offenders are related to the legitimate interest of protecting the public. *Westerheide v. State*, for example, upheld a Florida law compelling involuntary commitment of violent sex offenders against an *ex post facto* challenge, and concluded that the law "serves the dual state interests of providing mental health treatment to sexually violent predators and protecting the public from these individuals." 831 So. 2d at112. Further, in *Calderon v. State*, the Third District Court of Appeal upheld the Book Ordinance against a preemption challenge, and also declined to address the plaintiff's "other issues," concluding that they were "meritless." 93 So. 3d 439, 441 (Fla. 3d DCA 2012).

Plaintiffs have not presented any argument as to why their Florida-law *ex post facto* and vagueness claims should be subject to a different analysis than their federal counterpart claims, and Florida law indicates that they are not. *See, e.g., Westerheide*, 831 So. 2d at 104 (noting that "the Florida [ex post facto clause is] almost identical in wording to that of the federal

[11] The Court notes that Plaintiffs' pleading of its claims arising under the Florida Constitution is itself deficient. Rather than split their counts into separate Florida and federal claims, Plaintiffs have pled all four counts as based on *both* the federal and state constitutions. The Eleventh Circuit characterized a similar complaint as a "'shotgun' pleading," and noted that "a more definite statement, if properly drawn, will present each claim for relief in a separate count, as required by Rule 10(b) . . . ." *Anderson v. District Bd. of Trustees of Cent. Fla. Community College*, 77 F.3d 364, 366 (11th Cir. 1996).

constitution," and "this Court has not construed [the ex post facto provision] in a manner different from its federal counterpart"). Therefore, Plaintiffs' claims based on the Florida Constitution are dismissed for the same reasons as their claims arising under the United States Constitution.

V. Ukenye's specific arguments

Ukenye also contends that Plaintiffs' claims against him should be dismissed for lack of standing and causation. Because the Court has already concluded that Plaintiffs have not stated a claim upon which relief may be granted, it declines to address these additional bases for dismissal.

CONCLUSION

For the foregoing reasons, the County's Motion to Dismiss [D.E. 29] and the FDOC's and Ukenye's Motion to Dismiss [D.E. 39] are hereby GRANTED. Plaintiffs' Amended Complaint [D.E. 25] is hereby DISMISSED WITH PREJUDICE.[12]

DONE in Chambers, Miami, Florida, on April 3, 2015

PAUL C. HUCK
UNITED STATES DISTRICT JUDGE

Copies furnished to:
All Counsel of Record

[12] Because any amendment of Plaintiffs' existing claims would be futile, dismissal with prejudice is appropriate. *See Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001) (citing *Forman v. Davis*, 371 U.S. 178, 182 (1962)) ("A district court need not . . . allow an amendment . . . where amendment would be futile.").