IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

John Doe #4, et al.,	*	
	*	Case No.:
Plaintiffs,	*	14-cv-23933-Huck/McAliley
v.	*	
Miami-Dade County, Florida,	*	
Defendant.	*	

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROPOSED FINDINGS OF FACT

The County's Residence Restriction

1. On November 15, 2005, the County enacted Ordinance No. 05-206, which created Sections 21-277 through 21-285 of the Miami-Dade County Code.

2. Several years later, the Commission named the Ordinance the "Lauren Book Child Safety Ordinance."

3. The County Commission considered Ordinance No. 05-206 on first reading during a meeting on June 21, 2005. Then, Ordinance 05-206 came before the County Commission's Community Outreach, Safety & Healthcare Administration Committee for a public hearing on August 17, 2005. Finally, the County Commission debated and approved Ordinance No. 05-206 during its meeting on November 15, 2005.

4. Ordinance 05-206, codified in Section 21-281 of the Miami-Dade County Code, made it unlawful for an individual convicted as an adult of sexual battery, lewd and lascivious acts, sexual performance by a child, sexual acts transmitted over computer, or the selling or buying of minors for portrayal in sexually explicit conduct in which the victim or apparent victim was less than 16 years old ("Covered Person") to reside within 2,500 feet of any school unless an exception listed in Section 21-282 of the Miami-Dade County Code applied ("Residence Restriction").

5. During the November 15, 2005, hearing on Ordinance 05-206, Commissioner Carey-Schuler stated "I'd like to see sexual predators disappear, disappear completely…I'd like to see them just disappear." Chairman Martinez later suggested that forcing these individuals underground was advantageous because: "then they violate probation and they go back to prison." In response to a concern about where individuals would find housing, Chairman Martinez quipped: "The Everglades," and "hopefully Alabama, Georgia, North Carolina and the borders." Addressing how police would enforce the restrictions, Commissioner Sosa proposed using "animal services" instead, because having animal services "track them down," would "send a message, this is not a place for you . . . ." The record shows commissioners were well-aware that the Ordinance left "very few areas" for Covered Persons to live.

6. A school is defined in Section 21-280(9) as a "public or private kindergarten, elementary, middle, or secondary (high) school." The Miami-Dade public school district is the largest in the state of Florida and the fourth largest in the United States.

7. There are an estimated 1,333 schools in Miami-Dade County.

8. The Residence Restriction's 2,500 foot distance is measured in a straight line from the property line of the school to the property line of the residence. It is not measured by a pedestrian route or vehicular route.

9. The Residence Restriction applies to a Covered Person no matter when the crime occurred. Someone whose criminal offense occurred long before the County enacted Ordinance No. 05-206 on November 15, 2005, must still comply with its requirements.

10. The Residence Restriction has a "grandfather clause" in Section 21-282, which excludes from the Residence Restriction any Covered Person who established their residence prior to November 2005 or prior to a school opening within 2,500 feet of the residence.

11. The Residence Restriction applies to Covered Persons for life. Ordinance No.05-206 provides no mechanism for Covered Persons to receive a partial or complete exemption from the Residence Restriction based on their personal circumstances, age, health conditions, risk of recidivism, or any other factor.

12. Pursuant to Ordinance No. 05-206, the Residence Restriction was originally applicable in unincorporated Miami-Dade County; it was also applicable in each municipality in the County unless a municipality, within 90 days after the effective date of Ordinance No. 05-206, adopted a resolution that Ordinance No. 05-206 would not apply in that municipality.

13. Municipalities that exercised this opt-out provision were free to adopt their own residence restrictions.

14. By 2010, at least 24 separate cities in Miami-Dade County enacted ordinances that prohibited former sexual offenders from living within 2,500 feet of a variety of points, including schools, daycares, parks, playgrounds, bus stops, and other places where children may congregate.

15. Prompted in part by the Julia Tuttle Causeway Bridge encampment, discussed below, in 2010, the County took action to preempt all of the municipal residence restrictions.

16. At its January 21, 2010 meeting, the County Commission enacted Ordinance No. 10-01, which amended Ordinance 05-206, to preempt all of the stricter municipal ordinances and

have the County's Residence Restriction applicable countywide. Prior to enactment, Ordinance No. 10-01 came before the County Commission's Public Safety & Intergovernmental Committee for a public hearing on December 10, 2009.

17. During the December 10, 2009 public hearing, Commissioner Diaz said, "[The Department of Corrections] are here to ensure that we keep the animals locked up, the ones that are the predators, the ones that make sure that they do, they kill the children. The ones that should not be amongst society."

18. The County did not specifically quantify how much additional housing would become available by virtue of preempting these municipal ordinances. Commissioner Sally Heyman stated at the public hearing on December 10, 2009, that Ordinance 10-01 was not "a vehicle to create additional housing" but to bring "continuity" to the various municipal ordinances.

19. The Residence Restriction does not mandate a curfew requiring that a Covered Person returns to their residence at any particular time.

20. The Residence Restriction does not prohibit a Covered Person from living near where children reside.

21. The State of Florida also has a residence restriction (Fla. Stat. § 775.215) that prohibits a person convicted of certain sexual offenses (when the victim was less than 16) from living within 1,000 feet of a school, child care facility, park, or playground. But, Florida's residence restriction does not apply retroactively. It explicitly does not apply to anyone whose qualifying sexual offense occurred prior to the effective date of the statute (October 1, 2004).

22. Anyone who violates the County's Residence Restriction shall by punished by a fine not to exceed $1,000.00 or imprisonment in the County jail for not more than 364 days or by both such fine and imprisonment.

History of Encampments

23. There were no homeless encampments of former sexual offenders prior to 2005, the year when municipalities and the County began enacting residence restrictions at the urging of Ron Book.

24. Ron Book is one of the state's most powerful lobbyists. Mr. Book makes significant financial contributions to many of the County Commissioners.

25. Mr. Book is also a passionate advocate on issues of child abuse because his daughter, State Senator Lauren Book, was the victim of physical and sexual abuse by their live-in nanny.

26. Mr. Book testified at the following Commission hearings in support of the Residence Restriction: August 17, 2005; November 15, 2005; December 10, 2009; and January 21, 2010.

27. Mr. Book is also the Chair of the Homeless Trust Board of Directors.

28. Ron and Lauren Book traveled across Florida to successfully lobby for residence restrictions in approximately 60 jurisdictions across Florida.

29. Mr. Book has also made a host of vitriolic statements about former sexual offenders in the media.

30. By 2006, shortly after the County and other municipalities enacted residence restrictions, homeless former sexual offenders began moving into an encampment under the Julia Tuttle Causeway Bridge. This encampment drew significant local, national, and international media attention.

31. There were at least 60 to 70 people living in the encampment under the Julia Tuttle Causeway Bridge, and likely more than 100 people living there.

32. The residence restrictions passed by the County and other municipalities led directly to the Julia Tuttle Causeway Bridge encampment.

33. The Julia Tuttle Causeway Bridge encampment closed down after the County's Homeless Trust provided temporary rental assistance to relocate residents to other locations.

34. Another encampment formed in the Shorecrest neighborhood near 79th Street, but it eventually diminished after the City of Miami created a pocket park to exclude anyone who had to comply with the State of Florida's 1,000 foot residence restriction.

35. In 2013, a large number of former sexual offenders were forced to leave a mobile home park when the County determined that the Miami Bridge, a nearby facility for homeless youth, met the definition of a school under the ordinance.

36. Many of those residents moved to a new encampment along the County right-of-way and on private property in a warehouse district in the area near NW 71st Street and NW 36th Avenue ("NW 71st Street Encampment").

37. At its height, there were 260-270 individuals registered at the NW 71st Street Encampment.

38. The people residing at the NW 71st Street Encampment lived in tents, vehicles, or make-shift shelters.

39. Not all of the individuals registered at the NW 71st Street Encampment slept there each night.

40. There was no running water or plumbing at the NW 71st Street Encampment.

41. In August 2017, the Health Department found the NW 71st Street Encampment a public health sanitary nuisance.

42. In response, the County and the Homeless Trust began outreach to the people living at the NW 71st Street Encampment.

43. The Homeless Trust offered rental assistance for the people living at the encampment, but the person was required to locate their own housing that complied with the County's Residence Restriction.

44. The Homeless Trust unsuccessfully attempted to locate potential housing for the people living at the encampment.

45. The Director of Landlord Recruitment and Retention for the Homeless Trust, Paul Imbrone, could not locate any available housing.

46. A housing navigator associated with the Homeless Trust, Robert Berman, worked with 60 individuals living at the encampment, but could only locate housing for two people.

47. The Homeless Trust's rental assistance was provided through the HAND Program. It approved 120 applications from people living at the encampment, but only 2 people successfully used the rental assistance.

48. Because of the difficulty finding housing in the County, the Homeless Trust explored relocating Encampment residents to locations outside the County.

49. Prior to January 2018, Section 21-286 of the Code of Miami-Dade County prohibited overnight camping on County facility/property unless otherwise provided for in the County Code. Any person violating that prohibition was required, upon being warned by a County official or a law enforcement officer, to cease the prohibited activity. If the individual continued the prohibited activity, the official or law enforcement office may direct the individual to leave the premises. And, any individual who does not leave as directed is subject to arrest for trespassing pursuant to Fla. Stat. § 810.09.

50. Section 21-286 also provided that any homeless person violating the overnight camping prohibition shall first be offered an opportunity to go to a homeless shelter by a County official or law enforcement officer, if there is space available at such a shelter.

51. On January 2018, the County Commission, in order to give law enforcement a tool to shut down the encampment, amended the County's Overnight Camping Prohibition so that the requirement to offer an opportunity to go to a homeless shelter did not apply to any sexual predator or sexual offender or to any person that is otherwise ineligible to stay at a homeless shelter. The Homeless Trust supported the amendment.

52. Around January 2018, Miami-Dade County also installed temporary restrooms, handwashing stations, and garbage cans at the encampment while these outreach efforts were underway.

53. The County closed the NW 71st Street Encampment in May 2018.

54. After the NW 71st Street Encampment closed, most of its residents relocated other to new encampments at different street corners. Many of the transient sex offenders are now located close to NW 37th Avenue between NW 36th Street up to NW 60 Street.

55. The County and the Homeless Trust have not done any outreach to the residents at the new encampments. The County has not done anything to provide temporary restrooms, handwashing stations, or garbage cans at the new encampments.

Plaintiffs

56. All Plaintiffs (John Does) must comply with the Residence Restriction, and their qualifying offenses occurred prior to the County enacting Ordinance No. 05-206 in November 2005. None of the plaintiffs have committed another sexual offense.

57. All Plaintiffs are homeless and register transient addresses with the County each month.

58. John Doe #4 has a mental disability: schizophrenia and depression. The Social Security Administration found him disabled in 2009, and he currently receives Supplemental Security Income of $750 per month.

59. On January 5, 1994, John Doe #4 was convicted of lewd and lascivious assault on a minor under the age of 16 for dropping his pants and exposing himself during an argument with another man while a child was present. John Doe #4 was not required to attend any sex offender therapy or treatment as part of his sentence.

60. After 2008, John Doe #4 lived in a hotel for one month, and then he lived in a homeless shelter, Camillus House, for over a year.

61. In December 2009, John Doe #4 found a residence in Hialeah. However, he was told that the address was not compliant because it was too close to a daycare, and shortly after moving in to the Hialeah residence he had to vacate.

62. After leaving the Hialeah residence, John Doe #4 went to live under the Julia Tuttle Causeway Bridge.

63. In mid-2010, John Doe #4 received housing assistance and was placed in a residence in Homestead with another former sexual offender.

64. John Doe #4 resided in the Homestead property until he was evicted in July 2015, after his roommate and brother moved out and he could not afford the rent on his own.

65. In July 2015, John Doe #4 moved to the NW 71st Street Encampment.

66. After the County closed the NW 71st Street Encampment in May 2018, John Doe #4 moved to the area near the intersection of NW 36th Street and NW 37th Ave.

67. John Doe #4 has been homeless since 2015, and homelessness has a negative effect on his health because of his disabilities.

68. John Doe #4 locates three to four potential units each month and takes the addresses to the County's registration office, but none of the addresses are compliant addresses where he can live.

69. John Doe #5 is in his late 50's, has Parkinson's disease, and suffers from significant tremors.

70. John Doe #5 was convicted in 1994 of nine counts of related sexual offenses: (a) lewd and lascivious assault on a child (Count I) and attempted sexual battery on a minor (Counts 2-9).

71. John Doe #5 was released from prison in March 2014.

72. John Doe #5 has family members he could live with but for the residence restrictions.

73. John Doe #5 registered the NW 71st Street Encampment as his address from March 2014 until the County closed the NW 71st Street Encampment in May 2018.

74. Since the County closed the NW 71st Street Encampment, John Doe #5 has not registered a permanent address. He registered a transient address near the intersection of NW 135th Street and NW 42nd Ave. as his residence for several months and recently registered a new transient address at NW 58th Street and NW 35th Court.

75. John Doe #5 sleeps in his son's vehicle each night to shelter himself from the elements.

76. John Doe #5's homelessness has a negative effect on his health because of his disabilities.

77. John Doe #5 searches for available housing online and in the newspaper.

78. John Doe #5 is continually looking for available housing, but he has only been able to find one potential unit that was ultimately unavailable to him

79. John Doe #6 is in his 40's and is employed in the culinary field.

80. In September 2004, John Doe #6 pled guilty to one charge of lewd and lascivious molestation of a child less than 12 years of age.

81. At the time the County enacted the Ordinance, John Doe #6 lived in Surfside.

82. John Doe #6 remained at the Surfside residence until around January 2013.

83. John Doe #6 was required to move out of the Surfside residence after the property manager found out that he was a former sexual offender and did not renew his lease.

84. After moving out of Surfside, John Doe #6 stayed for short periods with different friends, but none of the addresses were compliant with the Residence Restriction.

85. In January 2015, John Doe #6 pled guilty to a registration violation for not residing at his registered address, and he was sentenced to six months' probation.

86. After his arrest, John Doe #6 lived at 7821 Carlyle Ave. for a few months, but this was not an eligible location under the Residence Restriction.

87. John Doe #6's probation officer directed him to the 71st Street Encampment until he could find a place to live.

88. John Doe #6 registered the 71st Street Encampment as his residence from Spring 2015 until April 2018.

89. After April 2018, John Doe #6 registered another street corner near the intersection of NE 79th Street and NE 10th Court as his residence.

90. John Doe #6 continually looks for available housing online and in person that will comply with the Residence Restriction.

91. John Doe #7 is in his 70's and uses a wheelchair for mobility.

92. On June 2, 2009, John Doe #7 pled guilty to three sexual offenses that occurred prior to November 2005: sexual battery and lewd and lascivious molestation on a child between the age of 12-16, and lewd and lascivious molestation on a child under the age of 12.

93. John Doe #7 was released from prison in December 2014.

94. Immediately upon his release, John Doe #7 stayed at two hotels or motels.

95. In June 2015, John Doe #7 relocated to the NW 71st Street Encampment.

96. John Doe #7 lived at the NW 71st Street Encampment from June 2015 until May 2018, when the County closed the encampment.

97. John Doe #7 has relocated to a new encampment located near the intersection of NW 43rd Street and NW 37th Ave.

98. John Doe #7 currently has no sources of income other than food stamps.

99. Because of his lack of income, the only source of housing available to John Doe #7 is housing provided to him rent-free by friends, family, the government, or a non-profit organization.

100. With the assistance of friends, John Doe #7 has searched for available housing but has not found any that is available and complies with the Residence Restriction.

101. John Doe #7 has a friend who has offered him an apartment where he could live, but it is too close to a school.

102. John Doe #7's homelessness has a negative effect on his health because of his disabilities.

103. One of John Doe #7's probation conditions prohibits him from living within 2,500 feet of a school, but this is based upon the application of the County's Residence Restriction and would no longer apply to him if the Residence Restriction is held unconstitutional.

Housing Availability

104. The Residence Restriction excludes Covered Persons from the vast majority of housing units in Miami-Dade County, specifically, 93.6% of all residential units and 88.5% of potential rental units.

105. When accounting for affordability[1] and availability[2], the number of housing rental units that would be more than 2,500 feet away from a school and both affordable, and available to rent is estimated to be approximately 338 units.

106. There appear to be at least 300 transient Covered Persons. The stock of affordable and available housing outside of the exclusion zone is inadequate to satisfy this demand for housing.

107. The County knew of this inadequacy when it passed Ordinance 05-206. When reviewing the map of excluded areas and asked where a former sexual offender could live, Commissioner Diaz stated, "When you look at the overlay of all the areas that were put in the 2500 foot radius, circle around it… what you have left are very few areas. Once you get—except the airports, what you have left is a small area here in what appears to be Pinecrest." He later continues, "I would say some sections of the Redlands appear to be open. But, I would say that at least 80-85 percent of the urbanized area of the county will be impacted by the ordinance. Fisher Island is free."

[1] Plaintiff's expert defined affordability as rental units at or below $1,058 per month based on the federal Housing and Urban Development's affordability guidelines for low income households.
[2]Plaintiff's expert determined availability based on average vacancy rates from the Census.

108. Beginning in August 2017, the County's Homeless Trust, working with partner agencies, attempted to provide rental assistance to those living at an encampment along NW 71st Street.

109. The Homeless Trust's Director of Landlord Recruitment, Paul Imbrone, looked for housing in the three areas of the County that he deemed most likely to have available housing. Imbrone could not find any housing outside the buffer zone created by the Residence Restriction.

110. Robert Berman, an experienced housing navigator from Citrus Health Network with a background in real estate, conducted his own search and also found the Residence Restriction made it extremely difficult to find housing.

111. Despite extensive efforts on behalf of 120 homeless offenders between August 2017 and July 2018, the Homeless Trust was only able to assist two former sexual offenders in moving from homelessness into housing.

112. After the County closed the NW 71st Street Encampment, most residents, including all of the Plaintiffs, moved to other street corners and remain homeless.

Recidivism

113. There is no evidence that the Residence Restriction reduces recidivism among Covered Persons.

114. The Residence Restriction only dictates where a former offender sleeps at night, when children are not at school. It does not limit where a former offender goes during the day, when children attend school.

115. As a group, the risk of sexual recidivism from former sexual offenders is significantly lower than that alleged in the County's legislative findings.

116. The evidence relied upon by the County in its legislative findings is based overwhelmingly on sexual offenses committed by high-risk sexual offenders, such as those with a psychiatric diagnosis of pedophilia or other sexual disorder.

117. There is no evidence that a significant proportion of Covered Persons who have committed qualifying offenses under Ordinance 05-206 uniformly present a heightened risk of recidivism, such as individuals with a psychiatric sexual disorder.

118. The vast majority of sexual offenses are committed by offenders who are familiar with the victim.

119. The Residence Restriction addresses the rare subset of sexual offenses committed by strangers unfamiliar with the victim. The Residence Restriction focuses on individuals who have already been convicted of a qualifying sexual offense.

120. Recidivism rates for those previously convicted of sexual offenses are low relative to other serious criminal offenses.

121. Although a high percentage of sexual offenses are unreported or not investigated by law enforcement authorities, this phenomenon is largely driven by unconvicted offenders, a small percentage of whom commit numerous sexual offenses before they are detected. As with sexual offending generally, these serial offenders are predominantly familiar to their victims.

122. Notwithstanding these outliers, the longer former sexual offenders remain offense-free in the community, the less likely they are to re-offend sexually. Eventually, they are less likely to reoffend than a non-sexual offender is to commit a first sexual offense.

123. This trend is true among high-risk groups of former sexual offenders, whose risk of recidivism significantly declines the longer these individuals remain in the community offense free.

124. Only a small fraction of offenders are true pedophiles who present a lifelong risk of recidivism. Individuals who do present such a risk are reliably and readily identified through actuarial and clinical risk assessments.

125. The State of Florida already has measures in place to identify, treat, and surveil the most dangerous sexual offenders. Prior to release, all sexual offenders receive a risk assessment to determine if they are "sexually violent predators" who must be civilly committed. These assessments are highly reliable, and vastly superior to identifying high-risk sexual offenders by their conviction alone.

126. By restricting a significant proportion of housing in Miami-Dade County, the Residence Restriction may increase the risk of recidivism among Covered Persons.

127. Housing stability, along with other factors such as receiving treatment and maintaining employment, are critical to a former sexual offender's successful release from prison.

128. Housing instability, and especially homelessness, undermines successful re-entry by interfering with treatment, employment, and other prosocial factors such as physical and mental health.

129. The homeless encampments that result from the County's Residence Restriction also threaten public health and safety.

130. The encampments facilitate the spread of disease and illness, not only to those at the encampment but to the public at large.

131. The encampments also increase the risk of criminal offenses by and against those residing there.

132. The County has not provided any evidence that the Residence Restriction actually reduces sexual recidivism by covered individuals, or that it serves any other legitimate purpose.

PROPOSED CONCLUSIONS OF LAW

1. Plaintiffs' claims are not barred by the statute of limitations.

Defendant asserts that Plaintiffs' claims accrued by 2010, the year the Ordinance was amended, and are thus outside Florida's four-year limitations period for § 1983 claims. ECF 122 at 3-4. That is incorrect. Plaintiffs challenge the continuing harms imposed by the Ordinance's Residence Restriction. The limitations period thus accrues anew each time the statute is enforced. *Hillcrest Property, LLC v. Pasco County,* 754 F.3d 1279, 1282 (11th Cir. 2014); *see also Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) (where the enforcement of a statute deprive a plaintiff of such essential liberty interests, "each day that the invalid resolution remain[s] in effect, it inflict[s] 'continuing and accumulating harm'") (quoting *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1968)); *Perez v. Laredo Junior College*, 706 F.2d 731, 733-34 (5th Cir. 1983) ("If the statutory violation occurs as a result of a continuing policy, itself illegal, then the statute [of limitations] does not foreclose an action aimed at [ ] enforcement of the policy during the limitations period."). Plaintiffs experience anew their alleged punishment from the Ordinance every day the Ordinance is in effect; every time they search for an address compliant with the Ordinance; and every thirty days when, because they are homeless, they must verify that their current location complies with the Ordinance, Fla Stat. § 943.0435(4)(b)(2).

The County cites *Hillcrest Property, LLC,* for the proposition that the limitations period began to run with the statute's 2010 enactment. But *Hillcrest* concerned the accrual date of a facial substantive due process claim alleging a property deprivation. Applying the accrual date for facial takings claims, the *Hillcrest* court reasoned that "the value of the property at issue depreciated when it became subject to" the challenged ordinance. 754 F.3d at 1283. Although *Hillcrest* recognized that a statute's enactment is the appropriate accrual date in the unique context of

takings, Plaintiffs here do not challenge a discrete devaluation of a property interest. Their lawsuit is therefore timely.

2. John Doe #7 has standing.

The County argues that Plaintiff John Doe #7 does not have standing because he is on probation until 2026, and one of his probation conditions prohibits him from living within 2,500 feet of any school. ECF 122 at 4-5. The County contends that Doe #7's injury cannot be redressed by a favorable decision. *Id.* (emphasis added). This argument lacks merit.

First, Doe #7's plea agreement explicitly states that "[i]f s. 21-281 does not apply to the Defendant, then the Defendant is prohibited from living within one thousand (1,000) feet of any school." *Id.* Further, the buffer-zone prohibition is preceded by the qualifying phrase, "As provided in s. 21-281" (*i.e.*, the Ordinance). ECF 124-13 at 137. The plea agreement therefore incorporates the Ordinance's Residence Restriction. As such, success in this action would prohibit the County's enforcement of the Ordinance against Doe #7 and relieve him of the probation condition requiring him to comply with the Ordinance.

Second, the Ordinance impacts Doe #7 independent of the probation condition: if Doe #7 violates Ordinance, he will be criminally prosecuted. *See* ECF 128-16 at 33:21-24. The prosecution could occur separately from any potential prosecution for violating the related probation condition. Prevailing in this lawsuit would provide Doe #7 redress from the threat of an independent criminal prosecution.

Finally, the length of time until Doe #7 is off of probation does not affect the standing analysis. *See Vill. of Bensenville v. F.A.A.*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) ("Nor do we think the municipalities' alleged injury too attenuated or distant to represent a constitutionally-sufficient injury-in-fact, as the FAA asserts, by virtue of the fact that Chicago will not start

collecting the passenger facility fee the FAA authorized until 13 years from now."); *accord Mead v. Holder*, 766 F. Supp. 2d 16, 25 (D.D.C. 2011) ("temporal remoteness alone does not automatically defeat standing"). The Ordinance applies to Doe #7 today, and he has standing to challenge it today.

3. The Ordinance is an unconstitutional ex post facto law.

Miami-Dade County's prohibition on certain former sexual offenders living within 2,500 feet of a school violates the ex post facto clauses of the federal and Florida constitutions. The protection against retroactive punishment provides "a powerful check on states when they have sought to punish socially disfavored persons without prior notice". *Does #1-5 v. Snyder*, 834 F.3d 696, 699 (6th Cir. 2016), *reh'g denied* (Sept. 15, 2016), *cert. denied sub nom. Snyder v. John Does #1-5*, 138 S. Ct. 55, 199 L. Ed. 2d 18 (2017).

The ex post facto analysis first asks whether the legislature intended to pass a punitive statute; if it did not, the inquiry shifts to whether the law's punitive effects override the government's civil intent. *Smith v. Doe*, 538 U.S. 84, 92 (2003).

On the second prong, the most relevant factors are: (1) whether the act imposes an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether its operation will promote the traditional aims of punishment – retribution and deterrence; (4) whether there is a rational connection to a non-punitive purpose; (5) whether the scheme appears excessive in relation to its non-punitive, regulatory purpose. *Smith* 538 U.S. at 97. No single factor is dispositive. *Hudson v. United States*, 522 U.S. 93, 101 (1997)

The Ordinance is punitive under both prongs of the ex post facto analysis.

A. The County passed the Residence Restriction with punitive intent.

The County passed the Residence Restriction with the intent to punish those formerly convicted of sexual offenses. While declarations of nonpunitive intent ordinarily must carry great weight in this analysis, also relevant are "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993).[3] Examining this context is especially important given that a legislature is unlikely to declare openly its intent to punish a class of individuals.

The historical context and the legislative debates prior to passage of the Ordinance prevent granting the ordinary level of deference to the County's statements of regulatory intent. The floor debates display a strong sentiment by commissioners to pass a law that would go as far as possible in expelling former sexual offenders from the County and sending a clear signal that these individuals are not welcome. Several commissioners voiced concern over the lack of any evidence demonstrating that residence restrictions actually reduce offending, as well as the fact that the laws may in fact push offenders "underground," making them harder to track and supervise. Commissioners acknowledged that the Residence Restriction likely would not advance public safety, but maintained the County could not be seen as passing legislation favorable to sexual offenders.

[3] *See also Doe v. Nebras*ka, 898 F. Supp. 2d 1086, 1096-97, 1125-26 (D. Neb. 2012) (relying on statements by legislator who introduced bill limiting registrants' internet access to find punitive intent under Ex Post Facto Clause); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 479-80 (1977) (in bill of attainder challenge, Court looked to "intent expressed by Members of Congress" during floor debates, among other evidence of punitive intent); *Consolidated Edison Co. of New York v. Pataki*, 292 F.3d 338, 354-55 (2d Cir. 2002) (citing statements made in legislative debate for evidence of punitive intent).

Further, though the County's stated intent in preempting local residence restrictions when it amended the Residence Restriction in 2010 was to leave adequate available housing for covered individuals, this claim is belied by the fact that the County made no effort to quantify what amount of housing would become available and, as the floor debate demonstrates, commissioners knew that there would be inadequate housing even under the new law. This is consistent with the County's failure to consider any facts at all in passing the residence restrictions, save those that confirmed the County's assumptions about recidivism rates for convicted sexual offenders.

Finally, the most influential individual behind the County's Residence Restriction is Ron Book, the Chair of the Miami-Dade County Homeless Trust and a lobbyist that the County routinely retains to represent it at the Florida legislature. Mr. Book's influence on the commission is evident from the record. He and members of his family contribute regularly to commission members, Book helped draft the Ordinance in whole or in major part. Before the vote enacting the 2005 Ordinance, the Commission granted Book a special exemption to speak at the non-public meeting. Commissioners then repeatedly sought Book's expertise on various matters, including how to justify the Residence Restriction. Book was also instrumental in passing the 2010 Ordinance, which resulted in large part from the County's attempts to disband the infamous Julia Tuttle Causeway Bridge encampment—an effort led in tandem with Book in his role with the Homeless Trust.

Book's disdain for convicted former sexual offenders is undeniable, as is his expression of this disdain via advocating for the County's Residence Restriction. While Mr. Book's pain is of course genuine, his efforts—like the County's—to mask the Residence Restriction as regulation rather than punishment are transparent.

B. The Ordinance is punitive in effect.

i. The Ordinances imposes an affirmative disability or restraint.

In assessing "affirmative disability or restraint," the Court must "inquire how the effects of the Act are felt by those subject to it." *Smith*, 538 U.S. at 99-100. The standard is not whether the Ordinance is the only reason any of the hundreds of covered individuals, including Plaintiffs, are homeless. *Smith* simply requires a showing of "substantial…housing difficulties that would not have otherwise occurred." *Smith*, 538 U.S. at 86.

The Ordinance imposes a significant affirmative restraint on housing availability in Miami-Dade County. The maps the parties have produced of the "exclusion zone" created by the Ordinance are roughly the same. However, the County's assessment of available housing merely tallies the number of housing units outside the exclusion zone, without regard to whether the housing is actually available or to whether it is affordable for the population of individuals subject to the Ordinance. The County includes properties for which the owner has claimed a homestead exemption under Florida law, meaning the owner presently lives in the home and the property is unlikely to contain any available units that could be legally rented. It also includes hotels as available housing units, despite agreement among Plaintiffs' and Defendant's witnesses and experts that hotels are not a viable housing solution.

The analysis of available housing must account for the degree to which the Residence Restriction eliminates *reasonably available* housing for covered individuals. To achieve this, consideration must be given to housing affordability and availability. These are the initial conditions under which covered individuals must locate housing, irrespective of the Ordinance, and they are the conditions Plaintiffs rightly assert that the Residence Restriction unduly exacerbates.

Affordability

With respect to affordability, it is reasonable to expect that covered individuals—who upon release not only carry the burden of a felony criminal conviction, but also the undeniable social stigma of being labeled former sexual offenders—will struggle to find jobs and to purchase expensive homes or afford luxury rentals. The evidence demonstrates that Plaintiffs are of limited means, as are the homeless individuals who applied for housing assistance with the County, many of whom report no income. However, in regulating housing the County need only make reasonable, not all, allowances for the likely incomes of covered individuals. Plaintiffs' expert Kelly Socia offers a reasonable middle ground by applying the federal Housing and Urban Development office's standard for "affordable" housing, which assumes that an individual can spend $1,042 per month on rent.[4] It should be noted that *none* of the Plaintiffs or the individuals at the encampment who applied for housing assistance would meet this threshold level of income. Socia's analysis therefore assumes a level of housing affordability that would in all likelihood leave these individuals homeless.

Availability

The assessment must also consider residences that are actually available. A property outside the exclusion zone that does not have any available units is useless to those seeking housing. Some measure of availability is essential to estimate the number of units needed to meet the demand for housing by covered individuals. Plaintiffs' expert Kelly Socia accounts for this issue by assessing the stock of "potentially available rental units." Despite the label, the term

[4]The County offers various objections to Socia's definition and analysis of affordability. However, the County does not offer any competing methodology and instead contends that affordability and actual availability are irrelevant. Because the Court rejects this position, it adopts Dr. Socia's approach as a useful means of estimating the residence restriction's impact on available housing.

"rental units" includes any units for which the owner has not claimed a homestead exemption and thus could potentially be rented. However, this definition is overinclusive, in that it necessarily counts units that, while not owner-occupied, are not on the market. Socia then assesses availability based on the Census's reported vacancy rates for tracts throughout the County. As with affordability, this limitation eliminates a great deal of housing in Miami-Dade. But that is the point: *any* individual attempting to find affordable housing in Miami-Dade faces a steep barrier in finding available housing. The County cannot ignore this basic fact when it places additional housing restrictions on a class of residents.

Before affordability or availability are even considered, the Ordinance eliminates nearly 90% of potential rental units and 94% of all residential housing units in Miami-Dade County. Adding in the considerations of availability and affordability, the Residence Restriction leaves 99.9% of housing unavailable to covered individuals.

The Ordinance thus takes an already difficult housing situation for covered individuals and makes it untenable. Plaintiffs' evidence on the uniquely high degree of homelessness in Miami-Dade County relative to other counties with less restrictive residence restrictions, the County's repeated experiences with homeless encampments of former sexual offenders, and the County's failed efforts to locate housing for covered individuals living in the encampments corroborates Dr. Socia's analysis. The affirmative disability imposed by the County's Residence Restriction goes far beyond *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016), and other cases finding affirmative disability or restraint, none of which involved the degree of homelessness experienced by covered individuals in Miami-Dade.[5]

[5] *E.g.*, *Hoffman v. Village of Pleasant Hoffman v. Village of Pleasant Prairie*, 249 F. Supp. 3d 950, 958 (E.D. Wisc. 2017) (finding that a residence restriction that excluded 90% of a municipality was a severe restraint); *Evenstad v. City of West St. Paul*, 306 F. Supp. 3d 1086, 1091, 1100 (D.

The Grandfather Clauses

The Ordinance's grandfather clauses do not adequately mitigate the impact of the Residence Restriction. One of the exceptions applies to those who established a residence before the Ordinance's effective date nearly 13 years ago. The offenders who may claim this protection are finite and dwindling. None of the plaintiffs can rely on this exception, and at some point no offenders will fall under this provision.

The other exception applies to those who establish a residence before a school is established nearby. Invoking this provision requires that the offender first locate a residence, which, as discussed above, the Residence Restriction makes unduly difficult.

Regardless, an individual no longer qualifies for either grandfather provision the moment he or she moves. A tenant will rarely be able to permanently take advantage of the grandfather provision. In Florida, tenants do not have security of tenure, so a landlord can refuse to renew a lease or terminate a month-to-month tenancy for no reason. *See* Fla. Stat. § 83.57.

The grandfather clauses are limited exceptions that do little to increase housing options for covered individuals, especially those recently released from prison. Because of their limited impact, the Residence Restriction remains a significant impediment to housing.

Minn. 2018) (granting preliminary injunction against 1,200 foot residence restriction that excluded 90% of the City); *Mikaloff v. Walsh*, 2007 WL 2572268 (N.D. Ohio 2007) (finding a 1,000 foot residence restriction is an affirmative restraint); *Commonwealth v. Baker*, 295 S.W. 3d 437, 445 (Ky. 2009) ("We find it difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability or restraint."); *State v. Pollard*, 908 N.E. 2d 1145, 1150 (Ind. 2009) (restraint "neither minor nor indirect" where defendant prohibited from residing in house he owned and would have to incur costs to obtain other housing); *City of Ft. Lauderdale v. Anderson*, 2018 WL 1614204 (Fla. Broward Cty., Mar. 26, 2018) (finding a 1,400 foot residence restriction violates ex post facto clause and is an affirmative restraint because it excludes most affordable rental housing).

ii. The Ordinance is not rationally connected to its stated non-punitive purpose.

Federal Law

The County's Residence Restriction has no rational connection to its stated non-punitive purpose of protecting children. At a minimum, this connection is extremely weak and thus weighs less favorably for the County.

Most significantly, the Residence Restriction only dictates where a former offender sleeps at night, when children are not at school, but it does not limit where a former offender goes during the day, when children attend school. This logical inconsistency is why a number of courts have rejected residence restrictions as irrational.[6]

A comparison of the Residence Restriction to the Ordinance's provision creating child safety zones highlights the ineptness of the Residence Restriction. *See* Miami-Dade County Ord. 21-285(3). The child safety zone provision prohibits a covered individual from loitering or prowling within 300 feet of schools, child care facilities, parks, and school bus stops with the intent to commit a crime while children are present. *See id*. Unlike the Residence Restriction, this regulation is rationally related to the protection of children.

The Ordinance also does not promote public safety because the County fundamentally misunderstands the recidivism risk posed by former sexual offenders. The County premised its

[6] *E.g.*, *Snyder*, 834 F.3d at 704 ("[T]he record before us provides scant support for the proposition that SORA in fact accomplishes its professed goals."); *In re Taylor*, 343 P.3d 867, 882 (Cal. 2015) (finding county's residence restriction "cannot survive rational basis scrutiny because it has hampered efforts to monitor, supervise, and rehabilitate such parolees in the interests of public safety"); *Baker*, 295 S.W.3d at 445-46 (finding residence restriction irrational because "[i]t is difficult to see how public safety is enhanced by a registrant not being allowed to sleep near a school at night, when children are not present, but being allowed to stay there during the day, when children are present"); *see also Anderson*, 2018 WL 1614204 at *2 ("Because the Ordinance keeps sex offenders from spending the nights near places children gather only during the day, it is not reasonably related to its goal to protect children from sex offenses.").

Ordinance on the finding that "sexual offenders are extremely likely…to repeat their offenses." Sec. 21-278 (a). The County cites case law to similar effect, including the assertion that "[t]he risk of recidivism posed by sex offenders is frightening and high" from *Smith v. Doe*, 538 U.S. at 103. However, this contention has no factual support and has been thoroughly debunked.[7]

Florida Law

The County's Residence Restriction also fails rational-basis scrutiny under the Florida Constitution, which is more rigorous than the federal standard. *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014). In *McCall*, the Florida Supreme Court answered a question certified by the Eleventh Circuit Court of Appeals as to whether Florida's statutory cap on noneconomic damages for wrongful death[8] violated the Equal Protection Clause of the Florida Constitution.

The Eleventh Circuit had already concluded that the related statutory cap on noneconomic medical-malpractice damages did not violate equal protection, applying rational-basis review. That court rejected the plaintiff's argument that there was no factual basis for the Florida legislature's determination that the cap would serve its goal of reducing the escalating costs of medical-malpractice insurance. *McCall*, 642 F.3d at 950. The court relied exclusively on a legislative task force's conclusion that the cap would relieve the insurance crisis, and refused to "second guess" that judgment. *Id.* at 950-51.

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[7] *See generally* ECF 136-14; ECF 136-15; *see also* ECF 136-3 at 3-16; *Snyder*, 834 F.3d at 704 ("The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'").

[8] The Eleventh Circuit certified the question of whether Florida's statutory cap on "noneconomic damages" violated Florida's Equal Protection Clause, *Estate of McCall v. United States*, 642 F.3d 944, 952 (11th Cir. 2011), but the Florida Supreme Court revised the question because the case involved a wrongful death, *McCall*, 134 So.3d at 897.

A majority of the justices of Florida Supreme Court nonetheless concluded that the separate cap on noneconomic wrongful death damages failed rational-basis scrutiny under the state constitution. Split into a two-justice plurality and a three-justice concurrence, the justices agreed that they could not simply "rubber stamp" legislative acts, and that the legislature's findings supporting the efficacy of the damages cap "must actually be findings of fact and are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions." 134 So. 3d at 919 (Pariente, J., concurring); *see also id.* at 906 (plurality opinion).

A majority of justices noted that there was no reasonable basis for the legislature's conclusion that the statutory cap would abate insurance premiums because "there [was] no mechanism in place to assure that savings [were] actually passed on from the insurance companies to the doctors." *Id.* at 919 (Pariente, J., concurring) (citing plurality opinion at 911-12). The justices reached this conclusion despite the fact that the noneconomic wrongful death damages cap resulted from the same task force that endorsed the medical malpractice cap, and whose conclusions the Eleventh Circuit declined to scrutinize.

The majority of justices also recognized that a crisis does not last forever, and that its end could "transform[] what may have once been reasonable into arbitrary and irrational legislation." *Id.* at 913 (plurality opinion); *id.* at 920 (Pariente, J., concurring). The majority thus concluded that the statutory cap could not survive rational-basis review because the medical-malpractice crisis that precipitated the policy no longer existed. *Id.* at 914-15 (plurality opinion); *id.* at 921 (Pariente, J., concurring).

Florida's rational-basis analysis consequently provides two reasons why the Residence Restriction is irrational.[9] First, there was no reasonable basis for the County to conclude that the Residence Restriction—a law that only limits where a covered individual sleeps—could limit a covered individual's access to children. The County's rationale was not based on any actual findings of fact and instead was merely a conclusory recitation of the County's belief that cutting off available housing to sex offenders would reduce sexual crimes against children. The County's judgment is more vulnerable than the Florida legislature's in *McCall*, as the County cannot point to a task force or other study it conducted to support the Residence Restriction's efficacy. Affirming the law on these grounds would provide the "rubber stamp" that *McCall* forbids.

The second reason is that, whatever the County could have reasonably believed about recidivism by former sexual offenders or the efficacy of residence restrictions when it passed the Ordinance in 2005, those beliefs are no longer sustainable. A wealth of rigorous, published research with the imprimatur of the federal government now recognizes that recidivism among convicted sexual offenders is much lower than that assumed by the County thirteen years ago. Further, the record demonstrates an emerging and uniform consensus—again including the federal government—rejecting residence restrictions as a valid policy response to sexual recidivism. Thus, under Florida law, "[n]o rational basis currently exists (if it ever existed) between" the Residence Restriction and public safety. *McCall*, 134 So. 3d at 914 (plurality opinion).

[9] The Eleventh Circuit subsequently accepted the Florida Supreme Court's analysis and reversed the district court judgment upholding the statutory cap, thereby suggesting the Eleventh Circuit's recognition that the Florida Supreme Court's state-law rational basis analysis differed from the federal rational basis test. *See Estate of McCall*, 571 F. App'x at 745. The Florida Supreme Court has since upheld the *McCall* majority's approach to rational basis review. *North Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49, 53-56 (Fla. 2017).

iii. The Ordinance is excessive relative to its state nonpunitive purpose.

The Residence Restriction is excessive relative to its purported nonpunitive purpose of promoting public safety. *See Doe v. Miami-Dade Cty., Fla.*, 846 F.3d 1180, 1185-86 (11th Cir. 2017). The most salient factors are that the Ordinance 1) applies based solely on the fact of prior conviction, irrespective of an individual's recidivism risk over time; 2) applies for an individual's entire life regardless of circumstances that might warrant an exemption, such as a person no longer having to register under Florida law; 3) marks 2,500 feet by straight lines, thus excluding property even if there is no feasible way to reach a school within 2,500 feet; 4) persists despite the absence of any demonstrated, empirical link between residential proximity to schools and recidivism; and 5) undermines public safety by exacerbating transience and homelessness among covered individuals, thereby irreparably damaging these individuals' prospects for successful re-entry and increasing their risk of recidivism. *Id.* As such, the County's Residence Restriction fails the reasonableness inquiry under *Smith*. 538 U.S. at 105.

The most significant factor in the analysis of excessiveness is the County's failure to present any evidence of the Residence Restriction's offers salutary benefits to public safety. *See Doe* 846 F.3d at 1186; s*ee also Snyder*, 834 F.3d at 705 ("Further, while the statute's efficacy is at best unclear, its negative effects are plain on the law's face. . . . The punitive effects of these blanket restrictions thus far exceed even a generous assessment of their salutary effects."). Thus, even if the Residence Restriction is rational, the Ordinance is excessive because its connection to public safety is weak at best and counterproductive at worst. *See Hoffman*, 249 F. Supp. 3d 951, 959 (E.D. Wis. 2017) ("[T]he less rational a restriction's connection to its stated purpose, the more excessive it will be in addressing that purpose.") (citing *Smith*, 538 U.S. at 104–05; *Snyder*, 834 F.3d at 704–05; and *Miller*, 405 F.3d at 721–723).

The record establishes an empirical consensus that there is no evidence that the County's Residence Restriction advances public safety, and that the Ordinance likely *undermines* public safety by making it unreasonably difficult for covered individuals to establish stable housing, perhaps the most critical component of successful re-entry. *See* ECF 136-4 at 10-11; ECF 136-6 at 5. Once homeless, these individuals become harder to supervise, more likely to abscond, and more likely to re-offend. *See* ECF 136-4 at 6-9; ECF 136-5 at 1-2, 18; ECF 136-7 at 6-7.

The research the County submits in favor of the Residence Restriction's efficacy bolsters the case against them. These studies confirm that "despite governmental efforts, **there is no evidence that attempts to limit where sex offenders live have been successful**." ECF 123-14 at 17 (emphasis added); ECF 123-15 at 119 (determining that legislation limiting where offenders live "**has not been shown to further reduce already low rates of recidivism**") (emphasis added).

The County's refusal to proffer any concrete, salutary effects weighs heavily in favor of excessiveness. *See Snyder*, 834 F.3d at 705 ("Tellingly, nothing the parties have pointed to in the record suggests that the residential restrictions have any beneficial effect on recidivism."). "The lack of evidence eliminates the possibility that the [County's] action was rational. . . . The [County] fell into the same trap as the Michigan legislature [in *Snyder*]. The [County] could have sought objective evidence to support the Ordinance's severe restrictions but chose not to." *Hoffman*, 249 F. Supp. 3d at 960.

The Court does not find the County's arguments against excessiveness persuasive. Despite the County's assertions it attempted to balance public safety with allowing adequate housing for covered individuals, the County never assessed how much housing would actually be available for covered individuals when it amended the Ordinance in 2010. And, as discussed above, the County continues to make it unreasonably difficult for covered individuals to secure housing. This

difficulty is plain from the County's unsuccessful efforts to find potential housing for the people living at the NW 71st Street Encampment. The Ordinance's grandfather clauses also do not adequately mitigate its excessiveness.

As recognized by the Eleventh Circuit, and numerous other courts, a law's failure to consider an individual's actual risk weighs in favor of excessiveness.[10] *Doe*, 846 F.3d at 1185. Individual assessments of risk guard against the fact that "while it is intuitive to think that at least some sex offenders—*e.g.*, the stereotypical playground-watching pedophile—should be kept away from schools," the harm posed by other offenders "is doubtless far less than that posed by a serial child molester." *Snyder*, 834 F.3d at 705. The lack of individualization weighs even more heavily in favor of excessiveness because the Ordinance imposes such a severe burden on housing. *Hoffman*, 249 F. Supp. 3d at 959 ("[T]o avoid a[n] [excessive] punitive effect, a statute imposing a particularly harsh disability or restraint must allow an individualized assessment. An individualized assessment helps to ensure that a statute's particularly harsh disability or restraint is rationally related to a non-punitive purpose.").[11]

[10] *E.g.*, *Doe v. State*, 189 P.3d 999, 1017 (Alaska 2008) (finding restriction excessive in part because it applied for life without regard to completion of treatment or risk of re-offense); *Baker*, 295 S.W.3d at 446 (citing residency restriction's lack of individualized assessment to support excessiveness); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (finding restriction excessive in part because covered individual could not seek exemption from statute "even on the clearest proof of rehabilitation"); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009) (finding ex post facto violation where offender registration applied for life); *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011) (finding ex post facto violation where requirements applied based solely on crime "without regard to . . . future dangerousness").

[11] Existing risk assessments such as the Static-99R are also relevant in demonstrating that the recidivism risk for sex offenders varies widely, yet predictably. The point of individualization is not that the residence restriction must achieve the best fit with risk; it is that the County's refusal to recognize that this population is not uniformly "risky," or that its risk declines over time, means the residence restriction bears no rational relationship to actual risk.

In, addition, like all convicted sexual offenders in Florida, covered individuals are subject to an intensive regime—comprised of measures like civil commitment,[12] registration, notification, mandatory probation, electronic monitoring, mandatory treatment, and child safety zones—designed to increase supervision of their daily activities. This is more reason to believe that their risk may be reliably determined and managed, and provides further evidence that the Ordinance's Residence Restriction is excessive.

Beyond not accounting for risk, the Ordinance also does not contain any exceptions for individuals in need of long-term hospital care, assisted living facilities, or hospice due to severe illness, injury, or other medical conditions. This is especially relevant for three of the plaintiffs who have mental and physical disabilities. Their homelessness has a negative effect on their health, yet the County's Ordinance is unbending. The Ordinance's failure to account for individual circumstances—especially those that unequivocally render former offenders harmless to others—supports the contention that it is excessive.[13] *See Snyder*, 834 F.3d at 705 (citing as excessive statute's application to plaintiff with obviously low risk of sexual offense).

[12] Prior to release, all sexual offenders receive a risk assessment to determine if they are "sexually violent predators" who must be civilly committed. ECF 136-2 at 11; ECF 136-5 at 11-12. These assessments are highly reliable, ECF 136-5 at 11-12, and far superior to the County's offense-based system for identifying whose recidivism risk "is doubtless far less than that posed by a serial child molester." *Snyder*, 834 F.3d at 705.

[13] The County cites Prentky (1997) and other studies essentially focused on the risk presented by diagnosed pedophiles. Plaintiffs' experts explain extensively how shortcomings in these studies prevent generalizing their findings beyond the specific samples examined. ECF 136-3 at 4-16; ECF 136-5 at 6.

iv. The Ordinance resembles historically regarded punishment.

The Residence Restriction resembles the historical punishments of banishment and probation. The proper inquiry is whether the regulatory scheme *resembles* a historically regarded form of punishment, not whether it is itself a historic form of punishment. *See Doe v. State*, 111 A.3d 1077, 1097 (N.H. 2015) ("[T]his factor inquires only whether the act is *analogous* to a historical punishment, not whether it is an exact replica."). For this reason, the Sixth Circuit in *Snyder* recognized that regardless of lacking direct "ancestors" in American history, a Residence Restriction resembles banishment if it causes individuals great difficulties in finding housing. *Snyder* 834 F.3d at 701-02.

Here, like in *Snyder*, the Residence Restriction severely limits where Plaintiffs can reside and causes them "great difficulties" in finding housing. The County recognized this effective banishment by exploring housing options outside Miami-Dade County when the Homeless Trust provided resources and worked to close down the encampment. The County's Residence Restriction goes farther than Michigan's in effectively banishing former sexual offenders, and the Ordinance's grandfather provisions do not significantly mitigate the law's banishing effects.

Though less strong, the Residence Restriction also resemble a probation condition. Probationers by definition "do not enjoy 'the absolute liberty to which every citizen is entitled.'" *United States v. Knights*, 534 U.S. 112, 119 (2001) (quoting *Morrissey v. Brewer,* 408 U.S. 471, 480 (1972)).

v. The Ordinance advances the traditional aims of punishment.

Though the Ordinance advances all of the aims of punishment—incapacitation, deterrence, and retribution—*see Snyder*, 834 F.3d at 704, its retributive features are most prominent. Specifically, the restriction applies based solely on the crime committed, without regard to an

individual's risk of recidivism over time,[14] and "it marks registrants as ones who cannot be fully admitted into the community." *Snyder*, 834 F.3d at 704. The Ordinance also makes no exceptions for the particular vulnerabilities of covered individuals who might be most impacted by housing instability, such as those with mental or physical disabilities. These features strongly support the conclusion that the Ordinance is more concerned with retribution than with regulation.

The County's only substantive objection is that the Ordinance's aim is to protect children. However, as asserted above, the Ordinance "does so in ways that relate only tenuously to" this end, and therefore the County's stated intent bears little weight. *Snyder*, 834 F.3d at 704.

* * *

Plaintiffs respectfully request that the Court enter the above findings of fact and conclusions of law.

[14] *Doe v. State*, 111 A.3d 1077, 1098 (N.H. 2015) (finding restriction retributive for those affected because it was "based only upon their past action, and not on any individualized assessment of current risk or level of dangerousness"); *Doe v. State*, 189 P.3d at 1013-14 (Alaska 2008) (restrictions for former sexual offenders "based not on a particularized determination of the risk the person poses to society but rather on the criminal statute the person was convicted of violating . . . provide a deterrent and retributive effect that goes beyond any non-punitive purpose and that essentially serves the traditional goals of punishment"); *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004, 1028 (Okla. 2013) ("In evaluating the . . .factor of retribution and deterrence we find the retroactive extension of SORA's registration based solely upon the individual's prior conviction leads us to weigh this factor in favor of a punitive effect."); *Baker*, 295 S.W.3d at 444 ("When a restriction is imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones.").

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that I served the foregoing document to all counsel of record via Notice of Electronic Filing generated by CM/ECF Case Management Electronic Case Filing, on this 15th day of October 2018: Defendant Miami-Dade County, c/o Michael B. Valdes, Assistant County Attorney, E-mail: mbv@miamidade.gov

/s/ Jeffrey M. Hearne