No. 19-10254

United States Court of Appeals
For the Eleventh Circuit

John Doe #4, *et al.*,

Plaintiffs/Appellants,

—v.—

Miami-Dade County,

Defendant/Appellee.

On Appeal from the United States
District Court for the Southern District of Florida

Appellee's Answer Brief

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Corporate Disclosure Statement

This appeal involves a governmental defendant, Miami-Dade County, which is a political subdivision of the State of Florida. There are no parent companies, subsidiaries, or affiliate companies that have issued shares to the public.

Certificate of Interested Parties

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Appellee Miami-Dade County certifies that the following persons and entities may have an interest in the outcome of this case:

1. American Civil Liberties Union ("ACLU") – *Counsel for Appellants*
2. ACLU Foundation, Inc. – *Counsel for Appellants*
3. ACLU Foundation of Florida, Inc. – *Counsel for Appellants*
4. ACLU of Florida, Inc. – *Counsel for Appellants*
5. Book, Ronald L. – *Chair of Miami-Dade County Homeless Trust*
6. Buskey, Brandon – *Counsel for Appellants*
7. Doe #4, John – *Appellant*
8. Doe #5, John – *Appellant*
9. Doe #6, John – *Appellant*
10. Doe #7, John – *Appellant*
11. Hearne, Jeffrey M. – *Counsel for Appellants John Does #4-5*
12. Huck, Hon. Paul C. – *District Court Judge*

13. Jonas, Valerie – *Counsel for Appellants*

14. Legal Services of Greater Miami, Inc. – *Counsel for Appellants John Does #4 and 5*

15. Miami-Dade County – *Appellee*

16. Miami-Dade County Board of County Commissioners - *Appellee*

17. Miami-Dade County Homeless Trust

18. Pastor, Bernard – *Counsel for Appellee*

19. Price-Williams, Abigail – *County Attorney, Counsel for Appellee*

20. Rosenthal, Oren – *Counsel for Appellee*

21. Rowinsky Quintian, Daniel – *Counsel for Appellants John Does #4-5*

22. Tilley, Daniel B. – *Counsel for Appellants*

23. Valdes, Michael B. – *Counsel for Appellee*

24. Weitzner and Jonas, P.A. – *Counsel for Appellants*

/s/ Michael B. Valdes
Michael B. Valdes
Assistant County Attorney

Statement Regarding Oral Argument

Appellee, Miami-Dade County, does not request oral argument. This case presents a single issue on appeal that is reviewed for abuse of discretion. The District Court's decision was fully supported by the record and consistent with binding precedent from this Court. Accordingly, Miami-Dade County does not believe that oral argument is necessary.

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Statement of Jurisdiction

This appeal comes to this Court following a week-long bench trial where the District Court entered final judgment for Miami-Dade County on Plaintiff's facial ex post facto challenge to the County's Lauren Book Child Safety Ordinance, which imposes residency restrictions on registered sexual offenders and predators with victims aged 15 or younger. D.E. 185. In so ruling, the District Court also denied Plaintiff's eleventh-hour request, on the last day of that bench trial, to add a new as-applied challenge to a case that had been expressly and exclusively litigated as a facial challenge for the past 4 years. *See* D.E. 170.

On appeal, Plaintiffs only challenge the District Court's denial of their Motion to Conform the Pleadings to the Evidence, D.E. 168, which sought to add that new claim. This Court has jurisdiction under 28 U.S.C. § 1291. *See generally Mickles v. County Club, Inc.*, 887 F.3d 1270, 1278-79 (11th Cir. 2018).

Statement of the Issue

Did the District Court act within its discretionary authority to deny Plaintiffs' Motion to Conform the Pleadings to the Evidence when (a) the operative pleading only sought facial relief that goes beyond the particular circumstances of the Plaintiffs, (b) Plaintiffs made multiple representations throughout 4 years of litigation that they were exclusively pursuing a facial challenge, (c) the parties' Joint Pre-Trial Stipulation stated the same, (d) Miami-Dade County did not consent (either expressly or impliedly) to allow Plaintiffs to introduce an as-applied challenge at trial, (e) Plaintiffs concede that all of the evidence allegedly related to the unpled as-applied claim was also relevant to their pled claim, and (f) the District Court separately and independently found that this last-minute request on the last day of trial would prejudice Miami-Dade County?

Statement of the Case

The Initial Brief provides an incomplete and misleading recitation of the facts giving rise to this appeal. On the last day of a week-long bench trial, Plaintiffs filed a Motion to Conform the Pleadings to the Evidence in order to add a claim that they could have raised at any time since this litigation began 4 years ago. Contrary to the suggestions in their Initial Brief, the fact that this claim had been unpled this entire time was not an act of inadvertence; it was a deliberate choice. This very issue was discussed in no fewer than 5 hearing and mentioned in no less than 13 filings over the span of 4 years. For purposes of this appeal, a detailed summary of those relevant proceedings is provided below.

I. Background

In 2005, the Miami-Dade County Board of County Commissioners enacted Ordinance No. 05-206, which prohibited individuals convicted of certain sexual offenses in which the victim was 15 years of age or less from residing within 2,500 feet of a school in Miami-Dade County.[1] D.E. 123-1. The stated goal of Ordinance No. 05-206 was "to promote, protect and improve the health, safety and welfare of the citizens of the County, particularly children." *Id.*

[1] Under Ordinance No. 05-206, the residency restriction applied in unincorporated Miami-Dade County and to all municipalities that did not adopt a resolution within ninety (90) days providing that the ordinance would not apply in that municipality. For any municipality that chose to opt out, those municipalities were permitted to "adopt more restrictive requirements than the requirements contained [in the ordinance]." *See* D.E. 123-1 at 4. As explained below, that provision was subsequently amended.

As part of its legislative findings, the Board of County Commissioners explicitly found "that the recidivism rate for released sexual offenders is alarmingly high, especially for those who commit crimes against children." *Id.* at 3. Consequently, the Board of County Commissioners was justifiably "concerned about sexual offenders and sexual predators who are released from custody and repeat the unlawful acts for which they had originally been convicted." *Id.* In order to address that concern, the Board of County Commissioners determined that "prohibiting sexual offenders and sexual predators from living within 2,500 feet of schools . . . will reduce the amount of incidental contact sexual offenders and sexual predators have with children" and that "reducing the amount of incidental contact will decrease the opportunity for sexual offenders or sexual predators to commit new sexual offenses against children." *Id.*

On January 21, 2010, the Board of County Commissioners enacted Ordinance No. 10-01. D.E. 29-2. Ordinance No. 10-01 preempted and repealed all of the municipal regulations relating to sexual offender or predator residency requirements that were more restrictive and made the relevant provisions of the County Code applicable countywide (i.e., throughout incorporated and unincorporated Miami-Dade County). *See* D.E. 123-23 at 7; MIAMI-DADE COUNTY CODE § 21-279.[2]

By its terms, the Lauren Book Child Safety Ordinance's residency restriction applies to sexual offenders convicted of certain enumerated sexual crimes[3] and whose victims

[2] The ordinance was later renamed the "Lauren Book Child Safety Ordinance." *See* D.E. 29-3 (Miami-Dade County Ordinance No. 10-67).

[3] "The sexual offenses covered by the Ordinance include violations of Fla. Stat. §794.011 (sexual battery) § 800.04 (lewd and lascivious acts on/in presence of persons

were aged 15 years or younger, even if they committed their offense prior to the Ordinance's passage in 2005. However, the ordinance contains a "grandfather clause," which provides that the residency restriction does not apply to sexual offenders who: (1) established their residence prior to the enactment of the ordinance or (2) established their residence prior to a school opening within 2,500 feet of the residence. *See* D.E. 123-1 at 9-10.

By virtue of their sexual offenses and the ages of their victims, Plaintiffs (John Does #4-7) are convicted sex offenders of children subject to the residency restriction. At the time of their qualifying offenses, Plaintiffs ranged in age from 30 to 61. John Doe #4 was convicted of both aggravated assault with a firearm and also lascivious assault for exposing himself to a minor under the age of 16. D.E. 189 at 148:14-149:6. John Doe #5 pled guilty to nine counts of related sexual offenses: (a) Lewd and Lascivious Assault (Count 1) and (b) Attempted Sexual Battery (Counts 2-9) on a 12-year old. D.E. 189 at 106:17-108:7. John Doe #6 pled guilty to one charge of lewd and lascivious molestation for fondling an 11-year-old girl that he attempted to follow into a department store bathroom. D.E. 190 at 68:18-71:16. John Doe #7 pled guilty to three sexual offenses involving the sexual battery and molestation of two of his nieces, one of whom was under the age of 12. D.E. 170:12-171:2. All Plaintiffs committed these

under age 16); § 827.071 (sexual performance by a child) or § 847.0145 (selling or buying of minors for portrayal in sexually explicit conduct). In 2010, Miami-Dade County added violations of Fla. Stat. § 847.0135(5) (sexual acts transmitted over computer) to the qualifying offenses." D.E. 184 at 2, n.2.

qualifying sexual offenses against children under the age of 15 prior to the ordinance's enactment.

II. Procedural History Prior to Trial

On October 23, 2014, a group of plaintiffs (John Does #1-3 and the Florida Action Committee, Inc.)[4] filed suit against Miami-Dade County, the Florida Department of Corrections, and Sunny Ukenye for alleged violations of the United States Constitution and the Florida Constitution arising from the Lauren Book Child Safety Ordinance's residency restriction. D.E. 1. After the defendants filed motions to dismiss, the plaintiffs filed an Amended Complaint. D.E. 25. In that pleading, the plaintiffs sought to invalidate the Lauren Book Child Safety Ordinance through three constitutional challenges: (1) void for vagueness; (2) substantive due process; and (3) ex post facto. *See id.* With respect to their ex post facto claims, the plaintiffs sought "a judgment declaring that the Ordinance violates the federal and state prohibitions against ex post facto laws" and "a permanent injunction prohibiting Defendants from enforcing the Ordinance" in both of their pleadings. D.E. 1 at 21; D.E. 25 at 27.

In response to both pleadings, Miami-Dade County filed Motions to Dismiss and expressly noted that it was treating the plaintiffs' claims as facial challenges. *See* D.E. 21 at 5 ("Because the relief requested by the Plaintiffs does not concern a specific

[4] Because all of these individuals have exited this case at one point or another, this brief will refer to them as "plaintiffs" and reserve use of the proper noun "Plaintiffs" exclusively for John Doe #4-7—the remaining appellants in this matter—who entered this matter on Oct. 2017 with the filing of the Second Amended Complaint, D.E. 90.

enforcement action or application of the ordinance to a certain incident, the Complaint is exclusively asserting a facial challenge to this local ordinance."); D.E. 29 at 6 (same).

A day after Miami-Dade County filed its Motion to Dismiss the Amended Complaint, the District Court held a status conference on January 7, 2015. D.E. 207. During that status conference, the District Court stated its understanding "that what the plaintiffs in this case are doing is making **a facial constitutional attack on the Lauren Book Child Safety Ordinance as opposed to an as-applied attack**. In other words, the plaintiffs want an all-or-nothing result in this case." *Id.* at 6:16-20 (emphasis added). Additionally, the District Court asked whether the parties would consider "another way to approach this case, and hopefully one that might be more practical than having the Court resolve the facial attack to the ordinance" by having the parties engage in early stage mediation. *Id.* at 7:22-25.

The parties engaged in those discussions, determined that they could not reach agreement on any issues, and asked the District Court to proceed with its consideration of this case on the claims as pled. *See generally* D.E. 32, 36, 38, 42, 44.[5] At the conclusion of these discussions, the plaintiffs filed a Response to Miami-Dade County's Motion to Dismiss where they unequivocally agreed with Miami-Dade County's characterization of their ex post facto claim as a facial challenge. *See* D.E. 40 at 2 ("**Plaintiffs' vagueness**

[5] As noted in the status reports filed by the parties, those discussions centered on proposals concerning the plaintiffs' vagueness claim against Miami-Dade County and the substantive due process claims against the Florida Dept. of Corrections, not the ex post facto claim. *See* D.E. 42 at 1.

and ex post facto claims are facial challenges to the residency restriction.") (emphasis added).

After the defendants' motions to dismiss were fully briefed, the District Court held a hearing on the motions on March 31, 2015. D.E. 72. During that hearing, the District Court again noted that the plaintiffs had "represented to the court that this is a facial-only challenge." *Id.* at 7:11-12. And, with respect to their ex post facto claim, the plaintiffs provided unwavering agreement with the District Court's assessment. *See id.* at 7:13-15 ("**We state very clearly in our pleadings that our vagueness and ex post facto challenges are facial challenges**…") (emphasis added).

On April 3, 2015, the District Court granted Miami-Dade County's Motion to Dismiss and dismissed the plaintiff's Amended Complaint with prejudice. D.E. 60. In its order, the District Court, once again, noted that the plaintiffs raised a facial ex post facto challenge. *Id.* at 4. ("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.") (emphasis added). And, with specific respect to the plaintiffs' vagueness claim, the District Court also noted that "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." *Id.* at 16.

In response to the District Court's order of dismissal, the plaintiffs filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). D.E. 61. In that motion, the plaintiffs sought leave from judgment in order "to pursue an as-applied vagueness

challenge." *Id.* at 11. Notably, no similar request was made with respect to their ex post facto claim. *See generally id.*

Miami-Dade County objected to the plaintiffs' motion and argued that the plaintiffs' should not be permitted to "reopen this case so that they can assert a claim that they had offered no prior interest in asserting." D.E. 62 at 7. *See also id.* at 3 (citing *The Tool Box, Inc. v. Ogden City Corp.*, 419 F.3d 1084 (10th Cir. 2005), which denied a plaintiff's request to add an as-applied challenge when it offered "no explanation why it had not pursued an 'as-applied' challenge, and did not suggest that it had somehow lacked an opportunity to do so").

On June 12, 2015, the District Court held a hearing on the plaintiffs' Rule 60(b) motion. D.E. 76. At the outset of that hearing, the District Court laid out the procedural history of this case up to that point as follows:

> THE COURT: Okay. I just want to make sure everybody is on the same page here. I think **we can all agree that in this case the plaintiffs brought a facial challenge and only a facial challenge and never asserted an as-applied challenge to the [B]ook ordinance even though it had an opportunity to do so**, and as I recall, we even specifically talked about that. I think I brought it up on one or more occasions. So I assume, Mr. Buskey,[6] you agree that that's the status of this matter.
>
> MR. BUSKEY: **That's correct**.

D.E. 76 at 4:24-5:6 (emphasis added). After hearing argument from all parties, the District Court ultimately denied the plaintiffs' Rule 60(b) motion on June 23, 2015. *See*

[6] Mr. Buskey is counsel for all plaintiffs/appellants in this case.

D.E. 67.[7] And, 95 days after entry of that order, the plaintiffs filed a notice of appeal. D.E. 68.

Thereafter, Miami-Dade County moved to dismiss the plaintiffs' appeal as untimely. On March 4, 2016, this Court issued an order granting in part and denying in part Miami-Dade County's motion to dismiss. *See* D.E. 78. Specifically, this Court's order held that the plaintiffs' appeal was "timely as to the April 3 order [granting dismissal] because the district court did not enter judgment in a separate document," but that the appeal was "untimely as to the June 23 order." *Id.* at 2-3.

On the initial appeal in this matter, the plaintiffs "present[ed] one question for this Court's review: whether the Amended Complaint plausibly alleges that Miami-Dade County's restriction **on those convicted of certain sexual offenses** from living within 2500 feet of a school violates the Ex Post Facto Clause of the United States Constitution." Initial Br. at 6, Case. No. 15-14336 (Apr. 4, 2016) (emphasis added). Notably, the plaintiffs described the scope of this initial appeal to extend beyond their own individual circumstances. *See id.* at 9, 10, 11, 13, 17, 19 (describing impact of residency restriction on not only plaintiffs but also, at varying times, "[h]undreds of others," "covered individuals," "those formerly convicted of certain sexual offenses," and "registered sexual offenders").

In a Revised Panel Opinion, this Court ultimately affirmed the District Court's dismissal order in part, reversed in part, and remanded this matter for further

[7] In that order, the District Court also noted that plaintiffs "[did] not contest the Court's dismissal of their ex post facto [claim]," which had been treated as an exclusively facial challenge. *Id.* at 2.

proceedings consistent with that opinion. *Doe v. Miami-Dade County*, 846 F.3d 1180 (11th Cir. 2017). Specifically, this Court held that two of the plaintiffs (John Doe #1 and #3) could proceed with a facial ex post facto challenge and the other two plaintiffs (John Doe #2 and the Florida Action Committee) could not because they had failed to allege that the County's residency restriction had been applied retroactively to them. *See id.* at 1184-85. This matter was subsequently remanded to the District Court.

On remand, the parties proceeded to litigate the only remaining issue that had been left for further proceedings following this Court's Revised Panel Opinion: the plaintiffs' facial ex post facto challenge. Sometime thereafter, the plaintiffs moved for leave to file a Second Amended Complaint. D.E. 88.

In that request, the plaintiffs did not express any desire to expand the scope of their claims or assert new constitutional challenges. *See id.* Instead, they merely sought "to amend the Complaint **to conform it to the appellate opinion**" and to add additional plaintiffs (i.e., John Doe #4-7) who would simply litigate the same ex post facto claim as the prior plaintiffs. *Id.* at 2 (emphasis added). Relying on those representations, the District Court granted Plaintiffs' motion for leave to amend "on the condition that the addition of these new plaintiffs will not result in a delay of the trial…otherwise, the Motion will be denied because it is in the interest of justice and all presently involved in this 2014 action to have it timely resolved." D.E. 89 at 1.

While Plaintiffs now argue that the "Second Amended Complaint did not specify whether the ex post facto claims were brought as facial or as-applied challenges," Initial Br. at 10, their operative pleading, stipulations, representations, and conduct

throughout this litigation say otherwise. As an initial matter, the Second Amended Complaint goes to great lengths in describing the impact of the residency restriction not only on Plaintiffs but also, at varying times, on "individuals convicted of certain sexual offenses," "hundreds of individuals," "Plaintiffs and numerous others," and "anyone convicted of certain crimes," D.E. 90 at ¶¶ 1-6; 71-72; 84-100; 113-116. And, most importantly, the Second Amended Complaint unambiguously seeks relief that reaches beyond the particular circumstances of the Plaintiffs—the *sine qua non* of a facial challenge. *See id.* at 20 ("Plaintiffs respectfully request that this Court … [i]ssue a permanent injunction prohibiting [Miami-Dade County] from enforcing the Ordinance **against anyone whose qualifying offense occurred before the enactment of the Ordinance**.") (emphasis added).

Based on this explicit request for class-wide relief and their prior, unwavering representations throughout these proceedings as to the nature of their ex post facto claim, Miami-Dade County took Plaintiffs at their word and treated their complaint as one exclusively asserting the same facial challenge that they had been advancing since the outset of this case. For example, Miami-Dade County asserted that (a) "Plaintiffs cannot establish that no set of circumstances exists under which the Ordinance would be valid" and (b) "Plaintiffs are not entitled to a facial challenge based upon the allegations pled" as affirmative defenses. D.E. 91 at 9. There would have been no need to assert either defense if Miami-Dade County thought Plaintiffs were raising anything other than a facial challenge. *See* D.E. 190 at 8:7-14 (noting that Miami-Dade County

created its defenses on the understanding that Plaintiffs "were only litigating a facial challenge").

Over the course of discovery, Plaintiffs made no changes to their pleadings and offered no signal that the nature of their requested relief would differ from what had been previously represented and explicitly pled. *See generally* Docket at D.E. 90-119. On August 8, 2018, Miami-Dade County filed a timely Motion for Summary Judgment in accordance with the District Court's amended Scheduling Order. D.E. 122. In that motion, Miami-Dade County, once again, represented that it operated under the justified understanding that only "one pair of related claims remains: **a facial challenge** under the ex post facto clause of the U.S. and Florida Constitutions." *Id.* at 3 (emphasis added). Elsewhere in that Motion for Summary Judgment, Miami-Dade County also raised a statute of limitations defense and relied on *Hillcrest Property, LLC v. Pasco County*, 754 F.3d 1279, 1281 (11th Cir. 2014), a published decision from this Court that discussed the applicable statute of limitations for a **facial challenge**. *See id.* at 3-4.

In their Response to the Motion for Summary Judgment, Plaintiffs did not dispute Miami-Dade County's characterization of their claim as a facial challenge and, in fact, ostensibly addressed Miami-Dade County's arguments under those very terms by, for example, relying on evidence that went to the impact of the residency restriction on the general offender population rather than Plaintiffs alone. *See, e.g.*, D.E. 138 at 9-11, 13-15. In addition, with respect to Miami-Dade County's statute of limitations argument, Plaintiffs attempted to distinguish *Hillcrest Property, LLC* by arguing that it "decided the accrual date for a **facial substantive due process claim**." *Id.* at 3. Notably, Plaintiffs

did not try to argue that *Hillcrest Property, LLC's* was inapplicable because they were pursuing an as-applied challenge; they simply argued that this type of facial challenge was legally distinct from the facial challenge at issue in *Hillcrest Property, LLC*. *See id.*

Next, Miami-Dade County filed its Reply in Support of its Motion for Summary Judgment, which continued to treat this case as a facial challenge. D.E. 141 at 7, 11. Three days later, on September 13, 2018, the District Court held a telephonic status conference with the parties where "it was determined that the Court would aim to resolve **the issues raised in the Motion for Summary Judgment**[8] at a bench trial." D.E. 145 at 1.

Prior to trial, the parties filed a Joint Pre-Trial Stipulation in accordance with the District Court's Scheduling Order and S.D. Fla. Local Rule 16.1(e). D.E. 149. In that Joint Pre-Trial Stipulation, Plaintiffs re-affirmed that they were seeking relief that went beyond themselves. *See id.* at 1 ("Plaintiffs seek a declaratory judgment that the Ordinance is unconstitutional, **a permanent injunction prohibiting Defendants from enforcing the Ordinance against anyone whose qualifying offense occurred before enactment of the Ordinance**, and attorney's fees and costs.") (emphasis added). Miami-Dade County reiterated for at least the seventh time in these proceedings that Plaintiffs' sole claim was a facial challenge and that this case should be decided by the higher standard of proof reserved for such challenges. *Id.* at 2 ("Plaintiffs raise a

[8] All of the "issues raised in the Motion for Summary Judgment" concerned a facial challenge. None of the briefing on the Motion for Summary Judgment by Plaintiffs or Miami-Dade County in any way raised the specter of an as-applied challenge. *See generally* D.E. 122, 138, 141.

facial challenge to this Ordinance under the Ex Post Facto Clause of the United States and Florida Constitutions. As such, they must establish that no set of circumstances exists under which the Ordinance would be valid and do so by the clearest proof."). And, both sides agreed that an issue of law that would be determined at trial was "[w]hich standard of law applies to **a facial ex post facto challenge**." *Id.* at 14 (emphasis added).[9] Furthermore, the Pre-Trial Stipulation provides no mention of an as-applied challenge. *See generally id.*

On the eve of trial, the parties appeared before the District Court for Calendar Call on October 18, 2019. D.E. 153, 210. At Calendar Call, the District Court explicitly asked, "Both sides, **it's a facial challenge only**; right?" D.E. 210 at 20:23 (emphasis added). Counsel for the Plaintiffs responded, once again, with an unequivocal "**Yes**." *Id.* at 20:24 (emphasis added). After that exchange, discussion continued as to the relevant issues that would need to be tried in light of the fact that this case exclusively dealt with a facial challenge. *See id.* at 22, 28-30.

III. Trial Proceedings

Beginning on October 22, 2018, the District Court conducted a bench trial in this matter over the course of five consecutive days. *See* D.E. 161-162, 165-167, 169.

[9] In their Initial Brief, Plaintiff assert that they "for the first time made one reference to their ex post facto challenge from their Second Amended Complaint as a facial challenge" and that "the issue whether Plaintiffs were preceding under facial and/or as-applied theories…was only mentioned during a hearing held on March 2015." Initial Br. at 10-11. As demonstrated by Miami-Dade County's exhaustively detailed description of the proceedings below, Plaintiffs are simply wrong on both counts.

On the very first day of trial, Plaintiffs' counsel stated, "Your Honor, you know, this case has been active since 2014. **As the County has pointed out numerous times, it is a facial challenge**." D.E. 186 at 80:23-25 (emphasis added). Later that same day, the District Court noted that, in this case, "the remedy is the same for all Does" and analogized the case to a class action because individualized relief was not at issue. *Id.* at 85:1-6. Plaintiffs did not object to this characterization and made no indication that they intended to seek a different scope of relief during this trial. *See generally id.*

During the next three trial days, Plaintiffs had various expert witnesses provide testimony that was wholly consistent with a facial rather than as-applied challenge. First, Dr. Kelly Socia offered testimony concerning his estimate of the **general** housing availability for registered sexual offenders that had to comply with the County's residency restriction. *See* D.E. 187 at 65:1-9.[10] And he expressly disavowed having conducted any analysis as to the available housing for individuals at the Plaintiffs' income level and offered no testimony relating to Plaintiffs' individual circumstances. *Id.* at 68:17-19. Second, Dr. Jill Levenson testified as to the **general** effectiveness and efficacy of residency restrictions. *See* D.E. 188 at 47:22-24. She also testified that she had no knowledge of the Plaintiffs, had never met them, was not retained to provide individualized risk assessments on them, and had not been asked to review any matters concerning their individual criminal cases. *See id.* at 48:13-49:2. Third, Dr. Andrew

[10] On cross-examination, Dr. Socia conceded that, based on his methodology, "only 1.09 percent of all the housing in Miami-Dade County would be uniquely unavailable to registered sex offenders due to the residency restrictions themselves." *Id.* at 78:6-10.

Harris testified as to **general** opinions concerning the recidivism risk of sexual offenders. Yet, he was not asked by Plaintiffs to offer any testimony regarding their individualized recidivism risk. *See* D.E. 171-1, 189 at 40-86.[11]

Consequently, Miami-Dade County's expert witness, Dr. Richard McCleary, only provided opinions in response to the generalized issues raised by Plaintiffs' experts. *See* D.E. 123-1.

On the fourth day of trial, three of the Plaintiffs testified. *See* D.E. 189 at 93-185. During their testimony, the District Court reaffirmed the parties understanding that "**this is a facial challenge,**" and Plaintiffs' counsel represented that the testimony of the Plaintiffs regarding their individual circumstances was being offered in support of such a claim and could be considered. *Id.* at 131:3. After the testimony concluded for the day, the trial court heard argument from both parties regarding the relevant standard of proof for a facial challenge. In particular, the trial court indicated that it thought "that the County's got it right … the clearest proof is the evidentiary proof standard, but … **since this case is limited to a facial attack or challenge**, that you have to show that

[11] In their Initial Brief, Plaintiffs rely on the testimony of each of those expert witnesses to support their entitlement to as applied relief. However, aside from only offering evidence that would have been relevant to a facial challenge, this Court should not consider their testimony because the District Court discredited their expert testimony and found the testimony of Dr. Richard McCleary, Miami-Dade County's expert witness, "to be the most objective, persuasive, and informative on this point." D.E. 184 at 10. That credibility determination should not be disturbed by this Court. *See Cooper v. Harris*, 137 S.Ct. 1455, 1474 (2017) (noting that appellate courts should "give singular deference to a trial court's judgments about the credibility of witnesses … because the various cues that 'bear so heavily on the listener's understanding of and belief in what is said' are lost on an appellate court later sifting through a paper record")

there are no set of circumstances which are allowed to survive. I think it's a combination of those two that's required." *Id.* at 198:14-19 (emphasis added). *See also id.* at 198:22-199:3 (noting that "**this is a facial and not an as-applied challenge**" and "**we don't have an as-applied case here**"). In response to those statements, Plaintiffs' counsel even expressed skepticism "as to whether or not a facial or as-applied challenge even applies in the ex post facto context." *Id.* at 199:8-10. He then proceeded to double down on his representation that the District Court "can use the individual circumstances of the Plaintiffs to provide context for why the law is punitive" in a facial challenge. *Id.* at 199:15-17. And the District Court stated that it would consider the Plaintiffs' testimony, for purposes of a facial challenge, as examples to "show the effect on I guess **everybody**." *Id.* at 199:19-20 (emphasis added). Thus, the parties left court on the fourth day of trial with the understanding that Plaintiffs had provided testimony in support of a facial challenge and had yet to even suggest a different scope of relief.

IV. Trial Conclusion and Post-Trial Proceedings

Shortly before trial commenced for the fifth and final day, Plaintiffs filed a Motion to Conform the Pleadings to the Evidence, D.E. 168. In it, they asserted, for the first time in over 4 years of litigation, that they sought to "add an as-applied [ex post facto] challenge to their Second Amended Complaint." *Id.* at 1. As noted in the motion, Miami-Dade County "object[ed] to the relief requested." *Id.* at 3. And Plaintiffs failed to provide any contours as to the nature of this newly requested relief for any of the individual Plaintiffs; they simply threw out the phrase "as applied" and left it for others

to divine their intent. *See id.* For example, Plaintiffs did not include an amended complaint with their motion as required under S.D. Fla. Local Rule 15.1.

When the parties convened for trial, Plaintiffs advised the District Court as to their recently-filed motion D.E. 190 at 5:21-23. Given its importance to the sole issue on appeal, Miami-Dade County provides an unedited block quote of that discussion to provide proper context:

> **MR. TILLEY:** Your Honor, I'll also raise that the plaintiffs have just this morning filed a motion to conform the evidence to the pleadings and in that request, leave to amend the complaint to add an as-applied challenge.
>
> **THE COURT:** You're kidding.
>
> **MR. TILLEY:** No, Your Honor. There's case law that -- where -- within the implied consent of the parties, evidence has been presented that goes to that claim that --
>
> **THE COURT:** Does the County agree to that?
>
> **MR. VALDES:** Under no circumstances, Your Honor.
>
> **THE COURT:** I don't think that's appropriate. This case than been up on appeal. You exchanged Does. Part of your case -- but for the fact that you were allowed to amend Does, you've been on notice about the issues with regard to applied versus facial claim from day one in this trial and well before that in motion for summary judgement. I don't think there's been an implied -- there's been anything but an implied acceptance of that.
>
> **MR. TILLEY:** Well, Your Honor, I think actually how the case has been litigated, there's been an extensive discovery, including interrogatories and depositions, very specific about the plaintiff's individual experiences around finding housing, the struggles they faced --
>
> **THE COURT:** Are you saying that's not -- are you saying that's not relevant to the facial challenge?
>
> **MR. TILLEY:** It is, of course, relevant.
>
> **THE COURT:** Well, if that's the case, then it goes to the facial challenge, not to and implied an -- implied or applied to an as-applied challenge.
>
> **MR. TILLEY:** I don't think that's --

> **THE COURT:** You can't have it both ways.
>
> **MR. TILLEY:** Well, I don't think that reflects the case law, Your Honor.
>
> **THE COURT:** Well, I'm going to deny it. I mean, to bring it at this moment when you have half a day of evidence, when we've had all this discussion and I've given you all the time in the world to talk about this. It's not in the pretrial stipulation. It was never suggested. It's not implied by putting on those witnesses, the Does, who testified about their certain offense. I assume that was to show that -- how the impact is on people in the group in general, defenders in general. No, I do not see that as an implied acceptance of that theory.

Id. at 5:21-7:12.

Thereafter, counsel for Miami-Dade County asked the District Court if it could put "anything on the record in terms of opposition on prejudice and lack of notice" notwithstanding the Court's denial of the motion. *Id.* at 7:17-18. The District Court responded, "Put it on the record, because **it's so obvious[] to me**, but it might … I'm sure it's going to go up on appeal with regards to which way I rule, so let's get everything on the record." Id. at 7:19-25 (emphasis added). Miami-Dade County proceeded to state:

> **MR. VALDES:** Sure. I believe that ordinarily it's --notice is required of the parties. I believe here we have the exact opposite. We have essentially a negative notice. As early of October 16, 2015, Your Honor, you held a hearing on the motion to dismiss, and there was multiple instances in which you asked the plaintiffs whether this was an as-applied or a facial challenge. They expressly stated that they were only litigating a facial challenge.
>
> **THE COURT:** I recall that very well, by the way. I recall that very well. On a number of occasions we had that discussion.
>
> **MR. VALDES:** We've litigated this case under those terms. And the discovery was done under those terms. The defenses that we created were under those terms. We would have litigated the case, conducted discovery differently and argued this case differently if it had been an as-applied challenge.
>
> Bringing an as-applied challenge on the last day of the plaintiffs' case in chief when the pretrial stipulation didn't provide any notice of an as-applied challenge.

> When we discussed the issues to be litigated in the pretrial stipulation and the issues of law that were in dispute was purely on the facial standard. We believe that it would be incredibly prejudicial to the County. It completely changes the nature of this case.
>
> As been discussed by the parties, a facial challenge and as-applied challenge are vastly different claims, and as a result, we believe this would have been a vastly different case.

Id. at 8:1-9:3.

The District Court went on to inquire further of Plaintiffs' counsel, "If the same evidence and testimony applies to a facial case, how can you say that implies that it was being offered and accepted on an as-applied challenge? … If it's one and the same, it comes in on the assumption that you're putting it in based on your pleadings, which is – and not only your pleadings but every discussion we ever had about that issue. … And there's been more than a few." *Id.* at 9:24-10:18. Then, in addition to ruling that there was a lack of implied consent, the District Court also found that "the County is exactly correct with regard to their claim to prejudice. And I find it's unduly prejudicial and I'm going to exercise discretion not to allow it." *Id.* at 12:19-24.

That same day, the District Court entered a formal order denying Plaintiffs' Motion to Conform the Pleadings to the Evidence "for the reasons stated on the record at the bench trial on October 26, 2018, including that adding a new claim on the last day of the bench trial in this matter would prejudice [Miami-Dade County]." D.E. 170. On December 18, 2018, the District Court issued its findings of fact and conclusions of law wherein it held that "Plaintiffs have not proven that the Ordinance was enacted with punitive intent or carried their burden of establishing by the 'clearest proof' that the punitive effect of the Ordinance overrides the County's legitimate intent to enact a

nonpunitive, civil measure." D.E. 184 at 45. In that Order, the District Court recognized anew that Plaintiffs' Motion to Conform the Pleadings to the Evidence "would have prejudiced the County since it was not requested until the last day of the non-jury trial, **despite Plaintiffs' repeat representations throughout the extensive pretrial proceedings that they were not asserting an 'as applied' challenge**." *Id.* at 44, n. 35 (emphasis added). Accordingly, Final Judgment was entered on behalf of Miami-Dade County on December 19, 2018. D.E. 185. This appeal followed. D.E. 191.

Standard of Review

This Court reviews a trial court's decision to deny a motion to conform the pleadings to the evidence for abuse of discretion. *Jimenez v. Tuna Vessel Granada*, 652 F.2d 415, 421 (5th Cir. 1981).[12] And, contrary to Plaintiffs' Initial Brief, this Court does not "review[] *de novo* whether the parties did, in fact, litigate the issue in question by express or implied consent." Initial Br. at 27 (providing no citation for proposition). Instead, this Court reviews a trial court's determination as to whether an issue not raised in the pleadings has been tried by the implied consent of the parties for abuse of discretion as well. *See Jimenez*, 652 F.2d at 421 (holding that "the court **abused its discretion** in determining that the unpled issues … were tried by its implied consent") (emphasis added). *Accord Craft v. United States*, 233 F.3d 358, 371 (6th Cir. 2000), *rev'd on other grounds*, 535 U.S. 274 (2002) ("[W]e review for abuse of discretion the district court's decision regarding whether an issue not raised in the pleadings has been tried by the implied consent of the parties."); *Montcrief v. Williston Basin Interstate Pipeline Co.*, 174 F.3d 1150 (10th Cir. 1990).

This Court reviews a trial court's finding as to prejudice for clear error. *See United States v. Villareal*, 613 F.3d 1344, 1356 (11th Cir. 2010). *Accord Dugas v. Coplan*, 506 F.3d 1, 8 (1st Cir. 2007). This Court may also "affirm for any reason supported by the record, even if not relied upon by the district court." *United States v. Hall*, 714 F.3d 1270, 1271 (11th Cir. 2013).

[12] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

Summary of the Argument

"Under the Civil Rules, notice of a claim is a defendant's entitlement, not a defendant's burden." *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1172 (1st Cir. 1995). For four years, the only notice that Miami-Dade County received from Plaintiffs in regard to their ex post facto challenge was that Plaintiffs exclusively sought facial relief. *See, e.g.*, D.E. 90 at 20 (requesting "a permanent injunction prohibiting [Miami-Dade County] from enforcing the Ordinance **against anyone whose qualifying offense occurred before the enactment of the Ordinance**") (emphasis added). And, it was under those terms that Miami-Dade County conducted discovery, took depositions, created witness lists, hired experts, and charted out its litigation strategy ever mindful that neither time nor resources are infinite.

Later on, this matter was set for trial. In the lead up to that trial, the parties conferred, reached agreement on what they could, identified where they couldn't, and made good faith efforts to streamline those issues for the benefit of the parties and the District Court. Once again, Plaintiffs were unwavering in their representations that the sole matter to be tried in this case was a facial ex post facto challenge. *See* D.E. 149.

On the last day of a five-day bench trial, Plaintiffs decided to upend the parties' well-settled expectations and sought leave under Rule 15(b) to bring in new individual claims after most of the Plaintiffs had already testified and the trial was set to conclude. Upon hearing of this last ditch request, the District Court correctly advised Plaintiffs that a party cannot be put on notice of a new claim for purposes of Rule 15(b) when it relies exclusively on evidence that has been introduced for existing claims and denied their request.

Now, on appeal, Plaintiffs asks this Court to reinterpret implied consent under Rule 15(b) in a manner that directly conflicts with this Court's prior precedent and the precedent in every sister circuit in the United States Court of Appeals. But Plaintiffs have already received what our system entitles them to: a meaningful opportunity to have the properly pled claims of their choosing proceed to a resolution at trial.

Accordingly, this Court should affirm the District Court's Order thereby ensuring that Miami-Dade County gets what it is entitled to as a defendant: adequate notice of a claim.

Argument

"The Federal Rules of Civil Procedure are designed to avoid surprise and thus to facilitate a proper ruling on the merits of each case." *Combee v. Shell Oil Co.*, 615 F.2d 698, 701 (5th Cir. 1980). For this reason, the Federal Rules of Civil Procedure contemplate a narrower standard when a party seeks to amend their pleadings during or after trial. *Compare* Fed. R. Civ. P. 15(a) *with* Fed. R. Civ. P. 15(b). Once trial has begun, a party can only amend their pleading under two circumstances: (1) if the trial court finds that the evidence will aid in presenting the merits and that the introduction of such evidence will not prejudice the non-moving party; or (2) if the issue "is tried by the parties' express or implied consent." Fed. R. Civ. P. 15(b).

Given the record below, Plaintiffs unsurprisingly avoid any argument as to express consent. *See, e.g.*, D.E. 168 at 3 ("Plaintiff's counsel has consulted with Defendant's counsel, who object to the relief requested in this motion."); D.E. 190 at 6:3-4 ("**THE COURT:** Does the County agree to that? **MR. VALDES:** Under no circumstances, Your Honor."). Instead, they rested both their Motion to Conform the Pleadings to the Evidence and this appeal entirely on the premise that "the parties tried the as-applied claim by implied consent." Initial Br. at 28. Both the record in this case and the applicable precedent in this Circuit, however, belie that claim.

I. Plaintiffs' As-Applied Challenge Was Not Tried by Implied Consent

Under our case law, "[a] party cannot be said to have implicitly consented to the trial of an issue not presented by the pleadings unless that party should have recognized that the issue had entered the case at trial." *Wesco Mfg., Inc. v. Tropical Attractions of Palm Beach,*

Inc., 833 F.2d 1484, 1487 (11th Cir. 1987) (citing *Jimenez*, 652 F.2d at 421). Based on this record, it is clear that Miami-Dade County did not recognize that an unpled as-applied challenge had entered the case until the moment Plaintiffs filed their Motion to Conform the Pleading to the Evidence. *See, e.g.*, D.E. 190 at 8:5-14 (stating that "there [were] multiple instances in which [the District Court] asked the plaintiffs whether this was an as-applied or a facial challenge. [Plaintiffs] expressly stated that they were only litigating a facial challenge. We've litigated this case under those terms. And the discovery was done under those terms. The defenses that we created were under those terms."). And, contrary to Plaintiffs' coy and erroneous summary of the proceedings below, the records contains at least 20 instances where the topic of litigating a facial challenge was addressed:

1. D.E. 21 at 5 ("Because the relief requested by the Plaintiffs does not concern a specific enforcement action or application of the ordinance to a certain incident, the Complaint is exclusively asserting a facial challenge to this local ordinance.").
2. D.E. 29 at 6 (same)
3. D.E. 207 at 6:16-20 (recognizing that "what the plaintiffs in this case are doing is making a facial constitutional attack on the Lauren Book Child Safety Ordinance as opposed to an as-applied attack. In other words, the plaintiffs want an all-or-nothing result in this case.")
4. D.E. 40 at 2 ("Plaintiffs' vagueness and ex post facto claims are facial challenges to the residency restriction.")

5. D.E. 72 at 7:11-12 (noting that the plaintiffs had "represented to the court that this is a facial-only challenge.")

6. *Id.* at 7:13-15 ("We state very clearly in our pleadings that our vagueness and ex post facto challenges are facial challenges")

7. D.E. 60 at 4 ("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.")

8. D.E. 76 at 4:24-5:6 (THE COURT: I think we can all agree that in this case the plaintiffs brought a facial challenge and only a facial challenge and never asserted an as-applied challenge to the [B]ook ordinance even though it had an opportunity to do so, …MR. BUSKEY: That's correct.)

9. D.E. 90 at 20 ("Plaintiffs respectfully request that this Court … [i]ssue a permanent injunction prohibiting [Miami-Dade County] from enforcing the Ordinance against anyone whose qualifying offense occurred before the enactment of the Ordinance.")

10. D.E. 91 at 9 (including affirmative defenses that bear only on a facial challenge)

11. D.E. 122 at 3 (describing only remaining issue to be litigated as "a facial challenge under the ex post facto clause of the U.S. and Florida Constitutions")

12. D.E. 141 at 7, 11 (continuing to treat Plaintiffs' claim as a facial challenge)

13. D.E. 145 at 1 (stating that "it was determined that the Court would aim to resolve the issues raised in the Motion for Summary Judgment [i.e. a facial challenge] at a bench trial.")

14. D.E. 149 at 1 ("Plaintiffs seek a declaratory judgment that the Ordinance is unconstitutional, a permanent injunction prohibiting Defendants from enforcing the Ordinance against anyone whose qualifying offense occurred before enactment of the Ordinance, and attorney's fees and costs.")

15. *Id.* at 2 ("Plaintiffs raise a facial challenge to this Ordinance under the Ex Post Facto Clause of the United States and Florida Constitutions. As such, they must establish that no set of circumstances exists under which the Ordinance would be valid and do so by the clearest proof.")

16. *Id.* at 14 (stating that an issue of law that would be determined at trial was "[w]hich standard of law applies to a facial ex post facto challenge.")

17. D.E. 210 at 20:23 (THE COURT: "Both sides, it's a facial challenge only; right. MR. HEARNE: Yes.")

18. D.E. 186 at 80:23-25 ("Your Honor, you know, this case has been active since 2014. As the County has pointed out numerous times, it is a facial challenge.")

19. D.E. 189 at 131:3 ("[T]his is a facial challenge.")

20. *Id.* at 198:22-199:3 (noting that "this is a facial and not an as-applied challenge" and "we don't have an as-applied case here")

Notwithstanding these facts, Plaintiffs nevertheless contend that there was implied consent to assert an as-applied challenge because "Plaintiffs testified at length about their personal difficulties obtaining housing under the residence restriction" and the County had the ability to conduct discovery and cross-examine the Plaintiffs. Initial Br. at 30-31. Plaintiffs' analysis, however, hits a critical snag: they concede that Plaintiffs' testimony concerning their individual experiences was relevant to their facial challenge. D.E. 190 at 6:13-20 (acknowledging that discovery and testimony about plaintiffs' individual experiences was "relevant to the facial challenge"). *Id.* at 10:7-9 (admitting that "there is no evidence outside of what was elicited that would go to an as-applied claim that would not go to a facial claim"); Initial Br. at 39 ("[T]he testimony elicited would have been the same for an as-applied or facial challenge."). And, while Plaintiffs may believe that this fact supports their claim, it actually dooms it.

It is well settled in this Court that "[t]he introduction of evidence arguably relevant to pleaded issues cannot serve to give a party fair notice that new issues are entering the case." *Wesco Mfg., Inc.*, 833 F.2d at 1487. *See also Jimenez*, 652 F.2d at 421; *Int'l Harvester Credit Corp. v. East Coast Truck*, 547 F.2d 888, 890 (5th Cir. 1977); *Diaz v. Jaguar Restaurant Group, LLC*, 627 F.3d 1212, 1215 (11th Cir. 2010); *Cioffe v. Morris*, 676 F.2d 539, 542 (11th Cir. 1982); *Dawley v. NF Energy Saving Corp. of America*, 374 F. App'x 921, 924 (11th Cir. 2010). Here, the testimony of the Plaintiffs was—by their own admission—more than "arguably relevant" to the pleaded facial challenge. D.E. 190 at 6:13-20. As a result, the District Court correctly held that it could not find implied consent because "If the same evidence and testimony applies to a facial case, how can [Plaintiffs] say that implies

that it was being offered and accepted on an as-applied challenge." *Id.* at 9:24-10:2. *Accord Jimenez*, 652 F.2d at 421.

It is for that very reason that *McCauley v. University of Virgin Islands*, No. CIVIL 2005-188, 2009 WL 2601637 (D.V.I. Aug 20, 2009)—the only decision Plaintiffs cite where a Rule 15(b) motion was granted—is wholly distinguishable. While *McCauley* would appear on the surface to be supportive since it granted leave to add an as-applied challenge, Plaintiffs overlook the fact that, in that case, "the evidence regarding the University's charges against McCauley [i.e. the unpled as-applied challenge] **was not relevant** to McCauley's facial challenge to the language of the Code provisions." *Id.* at *4 (emphasis added). That critical fact is lacking in this case. Moreover, *McCauley's Cf.* cite to *Douglas v. Owens*, 50 F.3d 1226, 1235 (3d. Cir. 1995) suggests that it too would have ruled differently if, like here, "evidence relevant to the new claim is also relevant to the claim originally pled." *Id.*

In fact, this Court has previously held that if the District Court had granted Plaintiffs' request under these circumstances, then it would have committed reversible error. *See, e.g., Diaz*, 627 F.3d at 1215 (reversing district court because "Diaz's testimony was relevant to another defense in this case"); *Jimenez*, 652 F.2d at 421 (reversing because "[a]ll of the evidence … on unpled grounds was relevant in one degree or another to the issue made in the pleadings, set out in the pretrial order, and elaborated slightly in plaintiff's proposed finding of fact"). And every sister circuit has held the same. *See, e.g.*, *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1173 (1st Cir. 1995); *Grand Light & Supply Co. v. Honeywell, Inc.,* 771 F.2d 672, 680 (2d Cir.1985); *Douglas v. Owens,* 50

F.3d 1226, 1235 (3d Cir.1995); *Pinkley, Inc. v. City of Frederick, MD.*, 191 F.3d 394 (4th Cir. 1999); *Kehoe Component Sales Inc. v. Best Lighting Products, Inc.*, 796 F.3d 576 (6th Cir. 2015); *Reynolds v. Tangherlini*, 737 F.3d 1093 (7th Cir. 2013); *Gallon v. Lloyd–Thomas Co.,* 264 F.2d 821, 825 n. 3 (8th Cir.1959); *In re Acequia, Inc.*, 34 F.3d 800, 814 (9th Cir. 1994); *Koch v. Koch Industries, Inc.*, 203 F.3d 1202 (10th Cir. 2000).

Thus, Plaintiffs are squarely foreclosed from claiming implied consent and the Motion to Conform the Pleadings to the Evidence was properly denied. *See DCPB, Inc. v. City of Lebanon*, 957 F.2d 913, 917 (1st Cir. 1992) ("In a brief on appeal, DCPB crowed that 'all evidence that supposedly went to the issue of enhanced compensatory damages ... also clearly and directly relate[d] to the [basic breach-of-contract] issue." Under the circumstances, that declamation sounds the death knell for an implication of consent. The introduction of evidence directly relevant to a pleaded issue cannot be the basis for a founded claim that the opposing party should have realized that a new issue was infiltrating the case.").

II. Miami-Dade County Would be Prejudiced by Plaintiffs' Eleventh Hour Effort to Alter the Nature of this Case

In addition to the well-settled principle espoused in *Wesco Mfg., Inc.*, 833 F.2d at 1487, and other decisions, this Court has separately held that "implied consent under Rule 15(b) will not be found if the defendant will be prejudiced; that is if the defendant had no notice of the new issue, if the defendant could have offered additional evidence in defense, or if the defendant in some way was denied a fair opportunity to defend." *Cioffe v. Morris*, 676 F.2d 539, 541-42 (11th Cir. 1982). At trial, Miami-Dade County represented that all of those factors applied in its case:

> We would have litigated the case, conducted discovery differently and argued this case differently if it had been an as-applied challenge. Bringing an as-applied challenge on the last day of the plaintiffs' case in chief when the pretrial stipulation didn't provide any notice of an as-applied challenge. When we discussed the issues to be litigated in the pretrial stipulation and the issues of law that were in dispute was purely on the facial standard. We believe that it would be incredibly prejudicial to the County. It completely changes the nature of this case. As been discussed by the parties, a facial challenge and as-applied challenge are vastly different claims, and as a result, we believe this would have been a vastly different case.

D.E. 190 at 8:17-9:3.

Based on those representations, the District Court found that "the County is exactly correct with regard to their claim to prejudice. And I find it's unduly prejudicial and I'm going to exercise discretion not to allow it." *Id.* at 12:21-24. A similar finding was included in the District Court's order denying Plaintiffs' Motion to Conform the Pleading to the Evidence. D.E. 170 at 1 ("adding a new claim on the last day of the bench trial in this matter would prejudice the Defendant").

In response, Plaintiff argue that "no prejudice could exist to the County because Plaintiffs essentially seek to bring the same legal theory as fleshed out by their individual circumstances, with a more limited remedy." Initial Br. at 36. But that takes an incredibly selfish view of prejudice. For Plaintiffs, there is no prejudice to be found because **their** case would not have changed. That says nothing, however, about the only inquiry the District Court should be concerned with: would this have changed Miami-Dade County's case? The answer to that question is undeniably yes.

For example, in every Motion to Dismiss, Motion for Summary Judgment and corresponding reply that it filed, Miami-Dade County always made it a point to reiterate

the heightened standard for facial challenges, as articulated by the United States Supreme Court in *United States v. Salerno*, 481 U.S. 739, 745 (1987). *See, e.g.*, D.E. 122 at 3. And Miami-Dade County litigated this action from inception to trial with an understanding that it would simply need sufficient proof to assure that Plaintiffs could not establish that "no set of circumstances" exists under which the [Ordinance] would be valid," *id.*, or, at a minimum, that Plaintiffs were going to have to show by the clearest proof how the Ordinance was punitive to "anyone whose qualifying offenses occurred before the enactment of the Ordinance," D.E. 90 at 20. That framework radically influences all types of decisions concerning litigation strategy and the efficient allocation of resources.

To further the example, Miami-Dade County had Plaintiffs sit for a deposition and served them with standardized interrogatories and document requests. *See, e.g.*, 173-5. Contrary to Plaintiffs' characterization, this discovery hardly amounted to a "vigorous[] pursu[it] of the details of the lives of each of the individual Does." Initial Br. at 31. All of the questions were related to one of two purposes: (1) potential impeachment material or (2) getting a sense of the testimony Plaintiffs might offer at trial on their facial challenge since they were listed as witnesses.

If Miami-Dade County had adequate notice that Plaintiffs were raising as-applied challenges that centered on their individual circumstances, Miami-Dade County would have certainly expanded the scope of its discovery requests. For example, Plaintiffs would have likely been asked to submit to physical or mental examinations under Fed. R. Civ. P. 35. Miami-Dade County may have retained additional expert witnesses that

could have spoken to individualized recidivism concerns of the Plaintiffs. Miami-Dade County could have also sought out any individuals who had provided Plaintiffs with sex offender treatment while in prison or under supervised release.

Lastly, and perhaps most obviously, Miami-Dade County would have devoted more time during trial to the cross examination of the Plaintiffs if it knew that entire claims hinged on their individual testimony. To illustrate this point, consider this exchange prior to the cross examination of John Doe #4:

> **THE COURT**: Who is going to be doing the cross-examination?
>
> **MR. VALDES**: It should be relatively brief. …
>
> **THE COURT**: Relatively brief means what?
>
> **MR. VALDES**: Maybe 15 minutes. I don't think he's going to be difficult to get the various things that I've said here and we're going to just move on. Fifteen minutes should be enough.

D.E. 189 at 147:12-24.

That would not have been Miami-Dade County's approach to John Doe #4's cross-examination if there was a corresponding as-applied challenge. Simply put, more time would have been devoted to impeachment especially considering the incredulous nature of some of this testimony. *See, e.g.*, D.E. 189 at 149:21-150:3 (explaining how, when he tested positive for cocaine while on probation, it was because of a painkiller that he had been given by his dentist); 158:9-12 (clarifying that he previously said "The further I am from women and children, it's best for me" "not because [he] would do something like that but [because he] was afraid that [he] would be accused falsely").

With these considerations in mind, Miami-Dade County meets all three examples of prejudice listed in *Cioffe*, 676 F.2d at 541-42. It did not "get notice of the new issue."

Id. It would "have offered additional evidence in defense." *Id.* And it "was denied a fair opportunity to defend" because three of the Plaintiffs had already testified prior to the filing of the Motion to Conform the Pleadings to the Evidence. *Id.* Accordingly, the District Court did not commit clear error in finding prejudice and, having found that Miami-Dade County was prejudiced, it was obligated to deny Plaintiffs' Motion. *See Int'l Harvester Credit Corp.*, 547 F.2d at 890 (holding that "an implied amendment of the pleadings will not be permitted where it results in substantial prejudice to a party").

Conclusion

This matter has been through extensive proceedings for nearly 5 years. During that span, Plaintiffs have had every opportunity to assert an as-applied challenge. But, instead, they expressly disavowed any desire to proceed with that challenge at every turn. Plaintiffs then maintained that stated preference until the waning moments of a bench trial after the relevant witnesses had already testified, Miami-Dade County's opportunity to cross-examine had concluded, and there was no ability to conduct additional discovery or raise additional defenses on the newly pled claim. This is no way to litigate. Recognizing that, the District Court properly exercised its discretion to prevent this case from devolving into a "trial by ambush." *Combee*, 615 F.2d at 701. This Court should affirm that decision.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5), the type style requirements of FED. R. APP. P. 32(a)(6), and the type-volume limitation of FED. R. APP. P. 32(a)(7)(A) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Garamond for text and 14-point Source Sans Pro for headings, and it contains 9,734 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served on counsel for Appellants via Appellate CM/ECF on June 26, 2019.

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