UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 19-10254

JOHN DOE #4, *et al.*, *Plaintiffs-Appellants*,

v.

MIAMI-DADE COUNTY, *Defendant-Appellee*.

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

BRIEF OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants state, pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, that the following individuals and entities have an interest in the outcome of this appeal:

American Civil Liberties Union, Inc. (Counsel for Plaintiffs-Appellants)

American Civil Liberties Union Foundation, Inc. (Counsel for Plaintiffs-Appellants)

American Civil Liberties Union Foundation of Florida, Inc. (Counsel for Plaintiffs-Appellants)

American Civil Liberties Union of Florida, Inc. (Counsel for Plaintiffs-Appellants)

Book, Ronald L. (Chair of Miami-Dade County Homeless Trust)

Buskey, Brandon J. (Counsel for Plaintiffs-Appellants)

Doe #4, John[1] (Plaintiff-Appellant)

Doe #5, John (Plaintiff-Appellant)

Doe #6, John (Plaintiff-Appellant)

Doe #7, John (Plaintiff-Appellant)

[1] At docket entry 30, the district court entered a minute order granting Plaintiffs' motion for leave to proceed anonymously.

Hearne, Jeffrey M. (Counsel for Plaintiffs-Appellants John Does #4 - #6)

Huck, Hon. Paul C. (District Court judge)

Jonas, Valerie (Counsel for Plaintiffs)

Legal Services of Greater Miami, Inc. (Counsel for Plaintiffs-Appellants John Does #4 - #6)

Miami-Dade County (Defendant-Appellee)

Miami Dade County Homeless Trust

Pastor, Bernard (Counsel for Defendant-Appellee)

Rowinksy Quintian, Daniel (Counsel for Plaintiffs-Appellants John Does #4 - #6)

Tilley, Daniel B. (Counsel for Plaintiffs-Appellants)

Valdes, Michael B. (Counsel for Defendant-Appellee)

Weitzner and Jonas, P.A. (Counsel for Plaintiffs)

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, Plaintiffs-Appellants state that there are no corporate disclosures.

/s/ Daniel B. Tilley
Daniel B. Tilley

STATEMENT REGARDING ORAL ARGUMENT

Given the importance of the issue presented in this appeal—regarding whether Plaintiffs-Appellants are entitled to raise an as-applied challenge to a residence restriction that was fully litigated at trial, in addition to their facial challenge—Plaintiffs-Appellants respectfully request oral argument.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The district court had subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343(a)(3) (civil rights). This Court has appellate jurisdiction because the order and judgment on appeal are final and dispose of all parties' claims. *See* 28 U.S.C. § 1291 ("[F]inal decisions of district courts"). The appeal is timely because the district court's Final Judgment in favor of Defendant Miami-Dade County was entered on December 19, 2018. ECF 185. Appellants timely filed their Notice of Appeal on January 18, 2019. ECF 191.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellants present one question for this Court's review: whether the district court improperly denied Plaintiffs' motion to conform the pleadings to the evidence (ECF 168) in order for Plaintiffs to explicitly add an as-applied ex post facto challenge to their Second Amended Complaint, which does not specify whether Plaintiffs are bringing an as-applied or a facial challenge.

STATEMENT OF THE CASE

Course of Proceedings and Dispositions Below

Plaintiffs-Appellants (the "Does") filed their Complaint on October 23, 2014. Compl. (ECF 1). They filed an Amended Complaint on December 20,

2014. Am. Compl. (ECF 25). In Count IV of their Amended Complaint, Plaintiffs alleged that the retroactive application of Miami-Dade County's Lauren Book Child Safety Ordinance (the "Ordinance"), which prohibits covered individuals from residing within 2,500 feet of a school, violates the federal and state Ex Post Facto Clauses. *Id.* ¶ 176. Defendants moved to dismiss. Miami-Dade County's Mot. to Dismiss, (ECF 29); Def. Fla. Dep't of Corrs.' and Def. Sunny Ukenye's Mot. to Dismiss Pls.' Am. Compl. (ECF 39).

On April 3, 2015, the district court entered an order dismissing the Amended Complaint with prejudice. Order Granting Mot. to Dismiss (ECF 60). Plaintiffs filed their notice of appeal on September 25, 2015. Pls.' Notice of Appeal (ECF 68).

In a published opinion, the 11th Circuit reversed the district court and found that Does #1 and #3 alleged sufficient facts to raise plausible claims that the residence restriction is so punitive in effect that it violates the Ex Post Facto Clause. *Doe v. Miami-Dade Cty., Fla.*, 846 F.3d 1180 (2017). The Court affirmed the district court's dismissal as to Doe #2 and the Florida Action Committee.

On remand, Doe #1 withdrew his claims. Doe #3 subsequently filed a Second Amended Complaint (ECF 90) on October 5, 2017, which added Does #4-#7 and asserted ex post facto claims under the United States and Florida constitutions solely against Miami-Dade County. The Second Amended Complaint

did not specify whether the ex post facto claims were brought as facial or as-applied challenges to the Ordinance. Doe #3 voluntarily dismissed his claims (ECF 96) on January 25, 2018, leaving Does #4-#7.

Following the Court's May 22, 2017, scheduling order (ECF 84), the parties engaged in 15 months of discovery, in preparation for trial ultimately on October 22, 2018. Defendant Miami-Dade County moved for summary judgment on August 8, 2018 (prior to the close of discovery, per the court's scheduling order). ECF 122. Defendant's brief addressed Plaintiffs' claims as facial challenges. However, Plaintiffs did not specify a theory in their Opposition. The court held a hearing on Defendant's Motion for Summary Judgment on September 21, 2018. ECF 148. The court, with Defendant's consent, declined to rule on Defendant's motion, in favor of proceeding to trial.

Two weeks before trial, in the parties' joint pre-trial stipulation, Plaintiffs for the first time made one reference to their ex post facto claim from the Second Amended Complaint as a facial challenge. Joint Pre-Trial Stipulation ("Stipulation") (ECF 149) ("Which standard of law applies to a facial ex post facto challenge."). Prior to that, the issue whether Plaintiffs were preceding under facial and/or as-applied theories on the ex post facto claim was only mentioned during a

hearing held in March 2015. ECF 72.[2] The hearing took place before the court dismissed Plaintiffs' Amended Complaint and before Does #3-#7 filed the Second Amended Complaint.

On October 22, the parties began a five-day bench trial. On the afternoon of the fourth day of trial, the judge indicated that Plaintiffs' individual circumstances had been heavily litigated, and discussed the viability of an as-applied challenge:

> So what else do we have? And since it's -- by the way, I talked about this when we first met this afternoon. Since this is a facial and not an as-applied challenge, we heard a lot from the Does about their individual circumstances. Some of them are pretty compelling. Maybe they would survive the as-applied challenge because it's so onerous for them to be able to comply with the statute and go about any kind of reasonable existence. But we don't have an as-applied case here. So think about that. I'm kind of addressing the plaintiffs' counsel in this case.

Trial Tr., Day 4 ("T4") (ECF 196) at 198-99.

The next morning, on the last day of trial, Plaintiffs filed a Motion to Conform the Pleadings to the Evidence under Rule 15(b). ECF 168. In the motion, Plaintiffs sought to amend the Second Amended Complaint to assert explicitly an as-applied challenge. Defendant objected to the request on the general grounds

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[2] During a June 2015 hearing, the parties discussed whether the vagueness claim was as-applied or facial, but they did not discuss the ex post facto claim. ECF 76.

that the County did not have notice of the as-applied challenge and would have litigated an as-applied theory differently. Trial Tr., Day 5 ("T5") (ECF 197) at 8-9. But Defendant did not proffer any specific explanation of what would have changed or how it would be prejudiced by adding an as-applied theory. The district court denied the Motion without hearing argument from Defendant and without allowing any further argument from Plaintiffs. T5 (ECF 197) at 7. In the written order denying the Motion, the Court merely found: "adding a new claim on the last day of a bench trial in this matter would prejudice the Defendant." ECF 170.

Ultimately, the Court entered judgment for Defendant, finding that Plaintiffs did not establish by the clearest proof that the punitive effect of the Ordinance overrides the County's legitimate intent to enact a non-punitive, civil measure. Order (ECF 184). But the court also wrote:

> Plaintiffs also criticize the Ordinance for not containing any exceptions for offenders with particular hardships, such as three of the Plaintiffs, who have mental or physical disabilities. The Court notes that there may be instances when such offenders could have a potential "as applied" challenge to the Ordinance, such as Doe #7, who is in a wheelchair. However, no Doe has alleged an "as applied" claim here.

Id. at 44 n.35.

Statement of the Facts

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 (the

"Ordinance"). Stipulation (ECF 149) at 3. The Ordinance applies to individuals convicted as adults of certain sexual offenses when the victim was less than 16 years of age. *Id.* The Ordinance prohibits a covered person from living within 2,500 feet of a school. *Id.* It applies to individuals whose criminal offenses occurred prior to the County enacting the Ordinance. *Id.* at 4. The only exceptions to the Ordinance are if the person established his or her residence prior to November 15, 2005, or if the person established the residence prior to a school opening within 2,500 feet. *Id.* The Ordinance applied to covered individuals for life and provided no mechanism for covered individuals to receive a partial or complete exemption based upon their personal circumstances, risk of recidivism, or any other factor. *Id.*

Following the 2005 passage of the Ordinance, 24 municipalities in the County subsequently enacted their own, more expansive, residence restrictions. Before these enactments, there were no known homeless encampments comprised primarily of former sexual offenders. Trial Tr., Day 3 ("T3") (ECF 195) (Sarria) at 166; Trial Tr., Day 5 ("T5") (ECF 197) (Book) at 47; T4 (ECF 196) (Fernandez) at 16. By 2006 (after the Ordinance's passage), a group of at least 60 to 70 homeless former sexual offenders moved into an encampment under the Julia Tuttle Causeway bridge in Miami. Stipulation (ECF 149) at 6. The Julia Tuttle Causeway

encampment closed down in 2010 after the Homeless Trust provided rental assistance to relocate residents to compliant housing. *Id.*

On January 21, 2010, the County enacted Ordinance No. 10-01, which amended the 2005 Ordinance to preempt all of the municipal restrictions and impose a single, county-wide residence restriction of 2,500 feet from any school. *Id*. at 4. The 2010 amendment retained the original exceptions for those who established a residence either prior to the 2005 enactment or before a school opened within 2,500 feet. But the 2010 amendment also continued to prevent any covered individual from ever being exempt—to any degree or for any reason—from the residence restriction as long as they remain in the County.

Though the 2010 amendments purported to create adequate housing opportunities for covered individuals, by 2014, another encampment of homeless former sexual offenders formed in a warehouse district in the area near NW 71st Street and NW 36th Avenue ("NW 71st Street Encampment"). *Id.* at 7. At its height, there were 260-70 individuals registered at the NW 71st Street Encampment. *Id.*

There was no running water or plumbing at the NW 71st Street Encampment, and the Health Department eventually found it to be a public-health sanitary nuisance. *Id*.; Order (ECF 184) at 4. In May 2018, the County closed down the NW 71st Street Encampment and many of its residents, including Plaintiffs, relocated to other street corners. Stipulation (ECF 149) at 8. Based on publicly available data

from the Florida Department of Law Enforcement that Plaintiffs presented to the district court, at the time of trial at least 311 former sexual offenders covered by the Ordinance registered with the County as transient. *See* Order (ECF 184) at 19 n.18; *accord* Pls.' Suppl. Mem. Requested by the Ct. (ECF 178) at 2; Def's Resp. to Pls.' Suppl. Mem. Requested by the Ct. (ECF 182) at 2.

Today, Miami-Dade County has approximately 860,696 residential units. Order (ECF 184) at 16 n.14. There are approximately 1,300 public, private, and charter schools in Miami-Dade County. T5 (ECF 197) at 194. The County's witness, Joshua Brashears, testified that there are approximately 124,694 residential units outside the Ordinance's 2,500-foot exclusionary zone from schools. Order (ECF 184) at 18. By these estimates, then, the Ordinance excludes nearly 90% of residences for covered individuals.

However, the Court found that the County's number of potential units for former sexual offenders was "substantially over-inclusive and unrealistic because it does not take into account whether the properties are available or exclude units that are already registered as the owner's homestead, suggesting the units are not rentable." *Id.* Consistent with the Court's critique, Plaintiffs submitted unrebutted evidence from Dr. Kelly Socia establishing that 479,950 of the 860,696 residential units in the County are potentially available, in that they are not registered as the owner's homestead. *See* Pls.' Trial Ex. 2 (Rebuttal Report of Dr. Kelly M. Socia)

("Socia Rebuttal") (ECF 171-2) at 18. Approximately 55,274 of these available units are outside the exclusion zone. *Id.* Thus, only about 6% of residences (55,274 of 860,696) in Miami-Dade County are both potentially available *and* outside the excluded zone. *Id.*

It should be noted that this analysis does not account for the inevitable fact that many of the remaining residences are not actually available at any given time. For example, the residence may be a rental unit that has already been rented and is not currently on the market. The Court thus properly found that the Ordinance "exacerbates housing difficulties for individuals subject to the residency restriction." Order (ECF 184) at 33.

At trial, several witnesses testified about the difficulties of finding housing for former sexual offenders. For example, Paul Imbrone, from Miami-Dade County's Homeless Trust—whose mission is to address homelessness in the County—testified about searching three areas of the County where he thought there might be available housing because the 2,500-foot buffer zone excluded less land. T3 (ECF 195) at 200-05. He searched online and drove around attempting to identify available units. *Id.*

Mr. Imbrone could not find any available housing for homeless former sexual offenders in Miami-Dade County. *Id.* The only available housing Mr.

Imbrone located was outside the County, in Pahokee, Florida and Saint Petersburg, Florida. *Id.* at 205-06.

Robert Berman, a housing navigator for Citrus Health Network, also testified about his experience trying to find housing for homeless former sexual offenders. Berman Decl. (ECF 136-8). The Homeless Trust provided Mr. Berman with a list of 35 addresses believed to be multifamily housing, outside the 2,500-foot buffer zone, where a former sexual offender was already living (indicating the landlord was willing to rent to former sexual offenders). *Id.* at 1-2.

None of the addresses had available units. *Id.* Mr. Berman searched for available units in the areas around those 35 addresses and still could not find available housing. *Id.* at 2. Mr. Berman worked with approximately 60 former sexual offenders looking for housing. However, he was only able to secure housing for one individual covered by the Ordinance. *Id.* at 2-3.

In addition to the evidence about the barriers covered individuals face in locating housing, the two homeless shelters in the County that do not serve children are within the 2,500-foot buffer zone; thus, sexual offenders cannot live there. T3 (ECF 195) at 166. Some former sexual offenders are residing in public storage units, warehouses, and trailers in junk yards. T5 (ECF 197) at 209. Plaintiffs are included in this group with barriers to locating housing, because, as

described in detail below, they are all homeless, cannot find housing, and register as transient.

JOHN DOE #4

John Doe #4 must comply with the 2,500-foot residence restriction because he exposed himself during an argument. T4 (ECF 196) at 148:19-149:4. John Doe #4 has never attended or been required to attend any therapy or treatment for former sexual offenders, even as part of his sentence. *Id*. at 157:22-25.

John Doe #4 has physical and mental disabilities. *Id.* at 144:1-6. The Social Security Administration found him disabled in 2009, and, at the time of the trial, he was receiving $750 per month in benefits. *Id.* at 140:5-15.

John Doe #4's homelessness has had a negative effect on his health because of his disabilities. Stipulation (ECF 149) at 68. John Doe #4 takes several medications daily to treat his multiple mental and medical conditions. T4 (ECF 196) at 144:19-20. Some of these medications cannot be stored at hot temperatures. *Id.* at 145:11-14**.** John Doe #4 also has a respiratory condition that he treats with an electric machine that must be plugged in to operate. *Id.* at 144:13-16, 156:12-14. A friend of John Doe #4 who resides in a house in Homestead, Florida allows him to store the medications and to use the machine at his house. *Id.* at 144:19-22. John Doe #4 travels approximately four hours a day by public transportation from the location where he sleeps to his friend's house in

Homestead. *Id.* at 144:24–145:7. If John Doe #4 does not take his psychotropic medication he starts hearing voices and gets depressed. *Id.* at 145:20-22.

Most of John Doe #4's treating physicians' offices are located in and around the Little Havana area of Miami, T4 (ECF 196) at 159:25–160:2, which is roughly 25 miles away from his friend's home in Homestead, Florida.[3] John Doe #4 must visit a doctor almost every day. *Id.* at 159:23-24. Since he does not have a car, he needs to reside in a location close to the public transportation system. *Id.* at 160:3-8.

John Doe #4 has a history of homelessness because of the residence restriction. John Doe #4 separated from his wife in 2008, and began residing at a homeless shelter, Camillus House. *Id.* at 151:19-25. In January 2010, John Doe #4 went to live under the Julia Tuttle Causeway Bridge. *Id.* at 138:24–139:6. There were no facilities under the bridge, and he used to relieve himself under his tent and then dispose his waste into the ocean. *Id.* at 139:16-18.

In mid-2010, John Doe #4 received housing assistance and was placed in a residence in Homestead. *Id.* at 152:14-25, 153:4-20. John Doe #4 resided in the Homestead residential complex until he moved out in July 2015, after his

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[3] The Court may take judicial notice of distances on Google Maps. *E.g.*, *Pahls v. Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013).

roommate and brother moved out, and he could no longer afford the rent. *Id.* at 153:19-154:1. The Homestead property is no longer a valid address compliant with the residence restrictions. *Id.* at 153:11-17.

In July 2015, John Doe #4 moved to the NW 71st Street Encampment. *Id.* at 133:24–134:10. There were no bathrooms at this location. *Id.* at 134:18-24. There were also animals roaming around the area. *Id.* Individuals residing at the NW 71st Street Encampment had to relieve themselves wherever they could. *Id.* at 135:4-11. 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. *Id.* at 136:12-14; Pls.' Trial Ex. 25 (ECF 171-25) (five photographs of the area where John Doe #4 resides) at 1-5. There are several other homeless former sexual offenders living at this location with him. T4 (ECF 196) at 136:24-137:2. There are no bathroom facilities at this location. *Id.* at 137:3-5. John Doe #4 goes to a nearby casino to use the bathroom. *Id.* at 136:20-22. John Doe #4 has observed other individuals living at this location urinating and defecating in the nearby bushes. *Id.* at 137:3-5.

John Doe #4 locates several potential units each month and takes the addresses to the County's registration office, but all of the addresses are excluded by the Ordinance. *Id.* at 141:4-17. John Doe #4 testified that if there were no Ordinance he would immediately be able to find an available and affordable unit,

most likely in Little Havana. *Id.* at 146:22-147:5. He has several friends that reside in that area that would permit him to live with them while he secures his own residence. *Id.* at 147:1-5.

JOHN DOE #5

John Doe #5 has Parkinson's disease and suffers from significant tremors. Stipulation (ECF 149) at 9. He is in his late 50's. *Id.* John Doe #5 also has serious back problems and high blood pressure. T4 (ECF 196) at 96:5-9. John Doe #5 receives $750 per month in disability benefits. *Id.* at 100:7-12.

John Doe #5 was convicted in 1994 of his qualifying offense. Stipulation (ECF 149) at 9. When John Doe #5 entered his plea, there were no residence restrictions. *Id.* After his release in 2003, John Doe #5 stayed with his niece at a residence in North Miami until he was arrested again in 2006 for failure to register this address, in violation of the state's registration requirements for former sexual offenders. T4 (ECF 196) at 114:12-20, 115:10-16. John Doe #5 was incarcerated from his arrest in 2006 until he was released from prison in March 2014. *Id.* at 94:3-10. Upon release, John Doe #5 stayed at his sister's home for a month, but could not continue to stay there because the address did not comply with the Ordinance. *Id.* at 94:14–95:7. John Doe #5 subsequently became homeless and moved to a warehouse district on NW 71st Street in Miami. *Id.* at 95:8-12. While there, John Doe #5 slept on a pad he placed on concrete steps, and when it rained,

he would shelter under a roof overhang. *Id.* at 95:20-22; 96:14-19. There was no water or bathroom facilities for him to use, and the area was infested with roaches, mosquitos, and snakes. *Id.* at 95:23-96:4.

Since the County closed the NW 71st Street Encampment, John Doe #5 stayed temporarily near warehouses at the intersection of NW 135th Street and NW 42nd Ave. *Id.* at 97:9-13. He then moved to another warehouse area near NW 58th Street and NW 36th Court. *Id.* at 97:25-98:3; Pls.' Trial Ex. 26 (ECF 171-26) (four photographs of the area where John Doe #5 resides) at 1-4. At this new location, John Doe #5 sleeps in the front seat of his son's vehicle each night for shelter. T4 (ECF 196) at 98:4-10. There are 10 to 15 other homeless individuals living near this intersection each night. *Id.* at 99:5-7. Because of his disabilities, John Doe #5's homelessness has a negative effect on his health. Stipulation (ECF 149) at 10; T4 (ECF 196) at 96:5-13. In particular, sleeping outside exposed to the elements and sleeping in his car exacerbates his Parkinson's, his nerves, his back giving out, and his blood pressure. *Id*.

John Doe #5 spends his days at a family member's home. *Id.* at 99:8-23. He cannot sleep there at night because it does not comply with the Ordinance, but he is allowed to stay there during the day. *Id.* John Doe #5 searches for available housing online and in the newspaper. *Id.* at 100:13-17. John Doe #5 has found affordable housing, but it was within the 2,500-foot buffer zone. *Id.* at 100:18–

101:2. John Doe #5 only found one available residence outside the 2,500-foot buffer zone, which he was going to share with another offender; however, the house was rented out before they could verify the address with the Doral office of the Miami-Dade Police Department. *Id.* at 101:3-10. John Doe #5's disabilities limit his ability to look for housing and the locations where he searches for housing. *Id.* at 101:11–102:2.

JOHN DOE #6

John Doe #6 has a learning disability. T5 (ECF 197) at 48:13-49:3. John Doe #6 must comply with the 2,500-foot residence restriction because of an offense from 2003. Trial Tr., Day 2 ("T2") (ECF 194) at 25:1-4. He was sentenced to 5 years of probation and successfully completed his sexual offender (MDSO) class. T5 (ECF 197) at 51:1-5. He currently works as a chef. *Id.* at 48:25–49:1.

At the time the County enacted the Ordinance, John Doe #6 lived in Surfside. T2 (ECF 194) at 37:19-23, 45:4-12. Because he established the residence before the County enacted the Ordinance, he was covered by the law's grandfather exception and was not required to comply with the residence restriction. T5 (ECF 197) at 58:1-5. John Doe #6 remained at the Surfside residence until around January 2013. *Id.* at 49:20-21.

After moving out of Surfside, John Doe #6 stayed for short periods with different friends, but each time he had to move out because none of the addresses

complied with the Ordinance. *Id.* at 49:22-50:5. In January 2015, John Doe #6 was arrested for a registration violation for not residing at his registered address as required by Florida law, and he was sentenced to six months' probation. *Id.* at 50:6-16.

Once John Doe #6 was on probation, he became homeless. *Id.* at 50:11-16. Because he could not find a place to live, his probation officer directed him to the NW 71st Street encampment. *Id.* at 66:15-24. John Doe #6 could only find housing from 2013 through 2015 by staying in locations that did not comply with the residence restriction. *Id.* at 81:7-13. When he complied with the Ordinance, he became homeless. *Id.* at 66:15-24.

John Doe #6 lived at the NW 71st Street Encampment from August 2015 until April 2018. *Id.* at 51:6-16. When it rained, John Doe #6 would place all of his belongings in a plastic bag and either stand under an overhang until it stopped raining or use an umbrella. *Id.* at 52:2-7. After the encampment closed, John Doe #6 began living at another street corner near the intersection of NE 79th Street and NE 10th Court. *Id.* at 54:17-20. At this location, he sits against a wall road near a construction site. *Id.* at 54:21-55:6; Pls.' Trial Ex. 27 (ECF 171-27) (three photographs of the area where John Doe #6 resides) at 1-3. There is no bathroom or other sanitary facilities at this location, and he has no protection from the elements, other than an umbrella. T5 (ECF 197) at 55:7-13.

John Doe #6 continually looks online and in person for available housing that will comply with the residence restriction. *Id.* at 55:14-22. John Doe #6 is dependent on public transportation to get to and from his job. *Id.* at 56:6-9. He typically works from 4 p.m. to midnight, so he often rides the bus during early morning hours, *Id.* at 53:10-13, when there are fewer transportation options.[4]

JOHN DOE #7

John Doe #7 is in his 70's and uses a wheelchair. Doe #7 Trial Decl. (ECF 152-1) at 1-2. John Doe #7 must comply with the 2,500-foot residence restriction because he pled guilty to three sexual offenses that occurred prior to November 2005. T4 (ECF 196) at 168:10-25.

John Doe #7 was incarcerated from 2009 until his release in December 2014. *Id*. at 172:15-16. At the time of his release, his prior residence was unavailable because his parents had passed away while he was in prison, and the apartment had been rented to someone else. *Id*. at 172:15-21. John Doe #7 temporarily stayed at hotels and motels, and then he became homeless. Doe #7 Trial Decl. (ECF 152-1) at 3.

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[4] *See, e.g.*, Metrobus Route Details, Route 112 Route L, https://www8.miamidade.gov/transportation-publicworks/routes_schedule.asp?srv=WEEKDAY&dir=Westbound&rt=112&rtName=112%20Route%20L.

In June 2015, John Doe #7 relocated to the NW 71st Street Encampment. *Id*. He was required to travel 30 minutes by foot to a nearby Wal-Mart when he needed to use the restroom. *Id*. at 4. During the time he resided at the NW 71st Street Encampment, he observed other residents urinate and defecate in the bushes near the tents where they lived. *Id*. He observed rodents, cockroaches, raccoons, and stray dogs at the location. *Id*. During Hurricane Irma, John Doe #7 was required to spend four days in prison at the South Florida Reception Center, because there were no other available locations where he could stay. *Id*.

After the NW 71st Street Encampment closed, John Doe #7 relocated to a new encampment near the intersection of NW 48th Street and NW 37th Avenue. *Id*. at 1. There are no bathrooms at this location. *Id*. at 4. He has to defecate in plastic bags and urinate in plastic bottles that he then throws away in nearby trash cans. *Id*. John Doe #7 had no sources of income other than food stamps at the time of trial. *Id*. at 6. John Doe #7 cannot stay in either of the two homeless shelters that do not serve children because the Ordinance makes them off-limits to him. T3 (ECF 195) at 166:1-15.

John Doe #7's homelessness has a negative effect on his health because of his disabilities. Stipulation (ECF 149) at 12. He broke his hip in prison, and he has severe pain from the injury. Doe # 7 Trial Decl. (ECF 152-1) at 1-2. He also has an anxiety disorder that he developed while he was a political prisoner in Cuba. *Id*. at

2. During the time the Cuban government detained John Doe #7 for being a political dissident, John Doe #7 was regularly tortured psychologically and physically. *Id*. At the time of trial, John Doe #7 was very sick. *Id*. at 4. The skin on his hands and arms was red, itchy, and peeling off, making it difficult to hold items and to use his wheelchair to move around. *Id*.

John Doe #7's restricted mobility makes it difficult for him to search for housing on his own. *Id*. at 5. With the assistance of friends, John Doe #7 has searched for available housing but has not found any that complies with the Ordinance. *Id*. John Doe #7 also tried to work with other homeless former sexual offenders to find shared housing. *Id*. However, their attempts at finding compliant housing have been unsuccessful. *Id.*

Statement of the Standard or Scope of Review

This Court reviews for abuse of discretion a trial court's ruling on a Rule 15(b) motion to allow a party to amend the pleadings to conform to the evidence presented at trial. *Borden, Inc. v. Florida East Coast Ry. Co.*, 772 F.2d 750, 758 (11th Cir. 1985). However, because a motion to conform the pleadings to the evidence *must* be allowed if the parties litigate an issue outside the pleadings by express or implied consent, *id.*, the Court necessarily reviews *de novo* whether the parties did, in fact, litigate the issue in question by express or implied consent.

SUMMARY OF THE ARGUMENT

Rule 15(b) explicitly contemplates that motions to conform the pleadings to the evidence may be made at trial or even following judgment. It was thus proper for Plaintiffs to file the motion during trial.

Here, there was no reason to deny the motion to conform the pleadings to the evidence, because the motion would merely modify the scope of the relief, and the evidence addressing an as-applied challenge is the same as the evidence developed in the case. Thus, there is no notice problem, and there is no prejudice. While the County complains that the as-applied challenge would be "vastly different," it did not explain how, nor is that the case. Finally, the amendment would not be futile, as Plaintiffs established an as-applied challenge.

Because the parties tried the as-applied claim by implied consent, the district court erred as a matter of law in denying Plaintiffs' motion. Thus, the district court abused its discretion in not allowing the amendment.

ARGUMENT

I. The district court committed reversible error when it denied Plaintiffs' motion to conform the pleadings to the evidence.

Under Rule 15(b)(2) of the Federal Rules of Civil Procedure,

> When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to

> conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

Fed. R. Civ. P. 15(b)(2). "Thus, Rule 15(b) applies when evidence has been admitted or unpled issues have been litigated by the parties." *Amodeo v. United States*, 743 F. App'x 381, 386 (11th Cir. 2018) (citing *Cioffe v. Morris*, 676 F.2d 539, 541 & n.7 (11th Cir. 1982) (stating Rule 15(b) permits "a judgment [to] be based on an unpled issue as long as consent to trial of the issue is evident")). Although "[t]he decision whether to allow a party to amend the complaint at the close of trial to conform to the evidence presented is within the discretion of the trial court," "when issues not within the pleadings are tried by the express or implied consent of the parties, amendment *must* be allowed." *Thews v. Wal-Mart Stores, Inc.*, 560 F. App'x 828, 831 (11th Cir. 2014) (citing *Borden, Inc. v. Fla. E. Coast Ry. Co.*, 772 F.2d 750, 758 (11th Cir. 1985)) (emphasis added).

With respect to the differences between facial and as-applied challenges, this Court, relying on Supreme Court precedent, has stated that:

> [T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction ... goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.

Am. Fed'n of State, Cty. & Mun. Employees Council 79 v. Scott ("*AFSCME*"), 717 F.3d 851, 863 (11th Cir. 2013) (rejecting state's objection that plaintiffs shifted from a facial challenge to an as-applied challenge in their motion for summary judgment).

Here, as in *AFSCME*, Plaintiffs were "not stating a new claim, only clarifying the scope of [their] desired remedy." *Id.* Applied here, Plaintiffs' basic ex post facto claim is the same whether pursued under an as-applied or facial theory. The relief Plaintiffs' seek under these respective theories is the only important distinction: the facial challenge would effectively enjoin the County from enforcing the Ordinance against all covered individuals, whereas the as-applied challenge would enjoin the County from enforcing the Ordinance against only the named Plaintiffs

Moreover, the manner in which the parties litigated this case entirely encompasses an as-applied challenge. Plaintiffs testified at length about their personal difficulties obtaining housing under the residence restriction, including how the residence restriction exacerbates their existing burdens of poverty and physical and mental disabilities. *See supra* at 18-27. They also elicited testimony, without objection, about the effects of homelessness on their physical and mental conditions. *See id.* In turn, the County explored at length Plaintiffs' individual risks to re-offend, and it cross-examined Plaintiffs on the details of their individual

housing searches. *See, e.g.*, T4 (ECF 196) (Doe #4) at 148:20–149:19 (questions about underlying offense), 150:25–154:4 (questions about housing); T2 (ECF 194) (Doe #5) at 6:12–11:20 (questions about underlying offense); T4 (ECF 196) (Doe #5) at 104:9–110:2 (questions concerning underlying offense and acceptance of responsibility), 116:14–126:18 (questions about housing search), 126:19–128:11 (questions concerning rehabilitation); T5 (ECF 197) (Doe #6) at 59:12–68:17 (questions about housing search), 68:18–73:5 (questions about underlying offense and rehabilitation); T4 (ECF 196) (Doe #7) at 166:24–171:23 (questions about underlying offense and rehabilitation), 178:2-15 (questions about rehabilitation), 172:15–183:9 (questions about housing search).

There is thus no question that the case was tried with the parties' implied consent to the as-applied issue. Far from objecting to testimony that would go towards an as-applied challenge, the County itself vigorously pursued the details of the lives of each of the individual Does. For example, the interrogatories to Doe #5, which were typical, included the following:

> 1. State the exact address (giving street number, unit number, city, state, and zip code) at which you resided at the time of the qualifying offense that made you subject to the residency restrictions at issue in this case. Provide all former addresses at which you resided from the time of your qualifying offense to the present together with (1) the approximate dates you lived at each address and (2) the amount of rent/mortgage that you paid at each residence.

2. State the full name, street address, and a contact name and telephone number for each place where you have been employed since the time of qualifying offense that made you subject to the residency restrictions at issue in this case to the present. For each place of employment, state your weekly or monthly gross pay.

3. For each year beginning in November 1, 2005 to the present, give your annual gross income from all sources, including government benefits. If unknown, provide what information you know such as your normal gross weekly income for any time periods for which you have information from November 1, 2005 to the present.

4. List all federal, state or local government benefits (e.g., disability, unemployment, supplemental nutrition assistance, welfare, housing relocation assistance, Medicare, Medicaid, Social Security Disability ("SSD") and/or Supplemental Security Income ("SSI") benefits etc.) that you have applied for or received since November 1, 2005. For each benefit, include in your answer, (a) the status of your application (i.e., whether it was accepted or rejected); (b) the nature/type of benefits received (i.e., Medicare Part A, Medicare Part B, Medicare Part C, Medicare Part D, Medicaid, SSD, SSI, etc.); (c) the cause, basis or reason for each/any of those benefits; (d) the date(s) each/any of those benefits were received; (e) the amount received for each/any of those benefits, per date; (f) your current status as a Medicare, Medicaid, Social Security Disability, and/or Supplemental Security Income recipient, and/or recipient of any other government benefit of any kind; and (g) if you are currently receiving that benefit, whether there is an anticipated end to your receipt of that benefit.

5. Name every bank account to which you have access as either owner or co-owner; give the full name of the bank, address of the bank and account number; and state the amount of money in the account as of November 1, 2017.

6. Give the full street address of any place where you have found housing that complied with the residency restrictions at issue in this case from November 1, 2005 to the present.

7. List every address that you have considered when trying to find housing in Miami-Dade County. For each address, provide the full street address, the date you considered the residence, and the reason you did not reside there, for the time period of November 1, 2005 to the present.

8. Describe in detail the methods you used to find legal housing in the last 10 years. Included in your answer, provide the names and contact information for any government agencies that you contacted, any real estate brokers that you used, any listing services that you consulted, and describe in detail the basis supporting your allegation in paragraph 46 of the Complaint that "despite repeated attempts, [you have] been unable to obtain rental housing in compliance with the Ordinance."

9. Before living at the encampment described in the Complaint, have you ever been homeless? If so, give the approximate dates and describe what caused you to be homeless.

10. List all residential locations where you have showered, slept, or eaten at over the last five years. Describe the length of your stay at these location and the frequency of occurrence.

11. Describe in detail why you believe that you would be able to find housing if you were not subject to the residency restrictions at issue in this case notwithstanding that you would still be otherwise subject to, as applicable, (i) residency restrictions required under the terms of your probation or state law and (ii) restrictions on your ability to obtain public housing.

12. Have you ever contacted or been approached by an employee of the Miami-Dade County Homeless Trust or other similar social worker who offered to help you find housing? If so, identify the time, date, place, person, circumstances, and describe the results. If not, are you currently willing to work with an employee of the Homeless Trust or other similar social worker to help you find housing? If yes, obtain your attorney's permission and state the best times and ways to contact you.

13. State how much rent you are currently able to pay for housing.

14. State if you are or have ever been married, the name of your current or former spouse(s) and the name and age of your children.

15. If you have someone that you can live with (including, but not limited to, the niece described in paragraph 44 of the Complaint), state the name, address, and telephone number of that person; give the name and address of that person's place of employment; and state the person's gross pay on a weekly basis. (**Note**: This information is asked to allow an estimate of how much rent the two (or more) of you could pay for housing).

16. Give the names, addresses, and telephone numbers of (1) all probation and parole officers that you have had, (2) all individuals who have provided sex offender treatment to you, (3) all qualified practitioners that have created a safety plan or risk assessment relating to you, and (4) all doctors, therapists, or other qualified practitioners that have examined your mental or physical health, since the date of the qualifying offense that made you subject to the residency restrictions at issue in this case.

17. For each instance where you were found to have violated the conditions of probation, parole, or community control, describe in detail the circumstances that resulted in that violation.

> **Note**: *Request No. 17 specifically seeks information for any period of time (including events prior to Nov. 1, 2005).*
>
> 18. List each time you engaged or were accused of engaging in any sexual activity with a minor fifteen years of age or less when you were twenty years old or older. For purposes of this question, "sexual activity" means sexual battery, a lewd or lascivious offense, the use of a child in a sexual performance, engaging in a prohibited computer transmission as defined by Fla. Stat. 847.0135, or engaging in any other conduct that would constitute a sexual offense as defined in Sec. 21-280(11), Miami-Dade County Code. To avoid confusion, multiple instances of sexual activity with the same minor are to be logged as separate instances. For each instance, give the date, the circumstances, whether you engaged in the activity or were accused of engaging in the activity, the age of the minor(s), and, if your listing includes multiple minors, provide an anonymous descriptor for each minor (e.g. Minor #1, Minor #2, etc.). DO NOT give the name, address, or other identifying information of any minor.
>
> **Note**: *Request No. 18 specifically seeks information for any period of time (including events prior to Nov. 1, 2005).*

See, e.g., SEALED Ex. 7 to Def.'s Mot. for Summ. J. (Doe #5 Dep. at PDF pp.115-21). These questions clearly represent the County's effort to investigate the application of the Ordinance to particular Plaintiffs. As demonstrated by these interrogatories and other discovery, Plaintiffs were asked to disclose, and did disclose, their rental history, employment history, medical history, criminal history, and compliance with various laws concerning former sexual offenders. *See generally* SEALED Ex. 5 to Def.'s Mot. for Summ. J. (Doe #4 Dep.); SEALED

Ex. 7 to Def.'s Mot. for Summ. J. (Doe #5 Dep.); SEALED Ex. 1 to Def.'s Mot. for Summ. J. (Doe #6 Dep.); SEALED Ex. 13 to Def.'s Mot. for Summ. J. (Doe #7 Dep.). This case was litigated as an as-applied challenge.

Moreover, there is no prejudice to the County in allowing an as-applied challenge. In *Thews*, the plaintiff was injured by a shopping cart at Wal-Mart. She then sued Wal-Mart for failure to train, failure to warn, and improper design of the shopping-cart area. 560 F. App'x at 829. After trial, she sought to conform the pleadings to the evidence by raising a general negligence claim and to add the doctrines of res ipsa loquitur and vicarious liability. *Id.* at 830. In finding no abuse of discretion in denying leave to amend, the Eleventh Circuit noted Wal-Mart's argument that "an amendment would be prejudicial to Wal–Mart because Wal–Mart focused its entire case—beginning in discovery and continuing through opening statements at trial—on the training of Wal–Mart's employees and the design and maintenance of the store's shopping cart vestibule," *id.* at 831—not the negligence of its employees.

By contrast, 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. The County conducted extensive discovery about each of the plaintiffs, including depositions and interrogatories, all before Plaintiffs expressly declared their intent to pursue a facial challenge. Even

after Plaintiffs specified a facial challenge, the County cross examined each of the plaintiffs on the very issues that would be raised in an as-applied challenge. *See, e.g.*, T4 (ECF 196) (Doe #4) at 148:20–149:19 (questions about underlying offense), 150:25–154:4 (questions about housing); T2 (ECF 194) (Doe #5) at 6:12–11:20 (questions about underlying offense); T4 (ECF 196) (Doe #5) at 104:9–110:2 (questions concerning underlying offense and acceptance of responsibility), 116:14–126:18 (questions about housing search), 126:19–128:11 (questions concerning rehabilitation); T5 (ECF 197) (Doe #6) at 59:12–68:17 (questions about housing search), 68:18–73:5 (questions about underlying offense and rehabilitation); T4 (ECF 196) (Doe #7) at 166:24–171:23 (questions about underlying offense and rehabilitation), 178:2-15 (questions about rehabilitation), 172:15–183:9 (questions about housing search). As such, the County suffers no prejudice. *See, e.g.*, *McCauley v. Univ. of Virgin Islands*, No. CIVIL 2005-188, 2009 WL 2601637, at *4 (D.V.I. Aug. 20, 2009) (during trial, granting Rule 15(b) motion for leave to add as-applied claim in addition to facial claim because "after McCauley testified as to the University's charges against him, and the nature of the conduct triggering such charges, the Defendants undertook an extensive cross-examination of McCauley on those issues").

The district court and the County saw it differently. The County objected that the motion was brought "on the last day of the plaintiffs' case in chief when

the pretrial stipulation didn't provide any notice of an as-applied challenge." T5 (ECF 197) at 8:17-19. But that is not a valid objection to a Rule 15(b) motion, which specifically contemplates that it may be filed at trial or even after judgment. *See* Fed. R. Civ. P. 15(b)(2). The fact that the motion was filed during trial is not an anomaly—it is the reason for the rule's existence.

The County also objected on the basis that, in the motion-to-dismiss hearing from 2015, Plaintiffs "expressly stated that they were only litigating a facial challenge." T5 (ECF 197) at 8:7-8. Plaintiffs did indeed state at that hearing that the ex-post-facto challenge was a facial challenge. ECF 72. However, that hearing concerned Plaintiffs' Amended Complaint, which is no longer the operative pleading. Indeed, the district court dismissed the Amended Complaint, and the Eleventh Circuit reversed that dismissal. Plaintiffs filed a Second Amended Complaint on remand that alleged solely an ex post facto claim and did not specify whether it was facial or as-applied. *Cf. United States v. Renfro*, 702 F. App'x 799, 806 (11th Cir. 2017) ("Because she fails to specify whether her challenge is facial, as-applied, or both, we assume, like the district court did, that she made both facial and as-applied challenges.").

But even assuming that the Second Amended Complaint—filed almost *three years* after the previous complaint, with almost entirely new plaintiffs—was a facial challenge, that is beside the point. As Plaintiffs' counsel explained at trial,

"the testimony elicited is no different than the testimony that would have [been] elicited had there been an explicit reference in the second amended complaint to there being [an as-applied challenge[5]]." T5 (ECF 197) at 9:18-21. Thus, because the testimony elicited would have been the same for an as-applied or facial challenge, it is irrelevant whether Plaintiffs' counsel had declared immediately upon filing the Second Amended Complaint, and throughout discovery, that the challenge was solely a facial one.

By the same reasoning, Plaintiffs' pre-trial stipulation referencing the standard for a facial challenge does not inform the issue. That document was submitted after the parties conducted 15 months of extensive discovery without reference to the as-applied or facial nature of the ex post facto claim.

The County also complains that such an as-applied challenge "completely changes the nature of this case." *Id*. at 8:23-24. It said the facial and as-applied challenges "are vastly different claims, and as a result, we believe this would have been a vastly different case." *Id*. at 9:1-3. The County did not elaborate on or provide any examples to support this general assertion. Moreover, despite

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[5] The Court began speaking before Plaintiffs' counsel could speak these final words, but that is presumably because the Court knew that this is what counsel would say.

requesting to put its objection on the record, *id.* at 7:16-18, 21-22, the County offered no specifics on how an as-applied challenge would be "vastly different."

Regardless, the County is incorrect. As explained above, the claims are not vastly different. Plaintiffs were "not stating a new claim, only clarifying the scope of [their] desired remedy." *AFSCME*, 717 F.3d at 863.

For all these reasons, the motion to conform the pleadings to the evidence should have been granted. The district court's contrary decision should be reversed so that judgment can be entered on Plaintiffs' as-applied claims.

II. Plaintiffs established an as-applied claim at trial.

To demonstrate the non-futility of this Court reversing the denial of Plaintiffs' motion to conform the evidence to the pleadings, Plaintiffs explain in this section how the evidence successfully establishes their as-applied claim.

The ex post facto analysis first asks whether the legislature intended to pass a punitive statute. Plaintiffs do not contend in the as-applied challenge that the County specifically intended to punish them. The inquiry therefore 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: (i) whether the act imposes an affirmative disability or restraint; (ii) whether it has historically been regarded as a punishment; (iii) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (iv) whether there

is a rational connection to a non-punitive purpose; and (v) 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).

In examining the Ordinance as applied to the Plaintiffs, the *Smith* factor most impacted is the evaluation whether the residence restriction is excessive with respect to its purported public safety goal. Under the Court's earlier analysis in this case, the key factors to determine whether the Ordinance places an undue burden on Plaintiffs are the unique difficulties Plaintiffs face in securing housing compliant with the residence restriction, and that the County will enforce the Ordinance against them for life, without ever offering any opportunity for an exemption based on their particular hardships, and regardless of their individual recidivism risks over time. *See Doe v. Miami-Dade Cty., Fla.*, 846 F.3d 1180, 1185-86 (11th Cir. 2017). While the district court concluded that these factors do not render the Ordinance facially invalid in all its applications, it recognized that the Ordinance's lack of exceptions for those with "particular hardships" could make it vulnerable to an as-applied challenge. Order (ECF 184) at 44 n.35; *see also United States v. Salerno*, 481 U.S. 739, 745, n.3 (1987) (recognizing that Court's rejection of facial claim that that Bail Reform Act of 1984 was punitive did not foreclose as-applied challenge).

The Court identified Plaintiffs' disabilities and poverty as evidence that factors other than the residence restriction contribute to homelessness among those subject to the Ordinance. Order (ECF 184) at 43-44. But Plaintiffs' disabilities and poverty are precisely the "particular hardships" that Plaintiffs contend render the Ordinance punitive as applied to them and warrant individualized relief. Plaintiffs' position is supported by the fact that, despite the County's extensive examinations of Plaintiffs' individual recidivism risks, the record demonstrates that Plaintiffs do not belong to the high risk category of offenders that the Ordinance contemplates.

As discussed above, all four Plaintiffs have physical or mental disabilities[6] or both that substantially limit where they can reside, and thus significantly limit the housing reasonably available to them under the residence restriction:

Doe #4 has schizophrenia and depression. *Id*. at 6. While he stores the medications for these conditions with a friend in Homestead, Florida, his doctors are all located in the Little Havana area of Miami, T4 (ECF 196) at 159:23-160:2,

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[6] The Americans with Disabilities Act defines "disability" as "a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102 (1). The Fair Housing Act has a similar definition for handicap. 42 U.S.C. § 3602(h).

roughly 25 miles away.[7] Doe #4 has not limited his housing search to any region of the County. *See id*. at 141: 4-17. However, living closer to his doctors, for example by living with one of his friends in Little Havana, would save him the four hours he loses everyday traveling on public transportation to take his medication. *See id*. at 144:24-145:7.

Doe #5 has Parkinson's disease, which has advanced to the point of significant tremors, along with serious back problems and high blood pressure. Order (ECF 184) at 7; T4 (ECF 196) at 96:5-9. The district court found Doe #5 has limited his housing search to Northern Miami-Dade County. Order (ECF 184) at 7. However, this limitation is because his disabilities force him to remain close to family for housing and care during the day. T4 (ECF 196) at 101:11-102:2; *id.* at 99:8-23.

Doe #6 has a learning disability. T5 (ECF 197) at 48:13-49:3. He is frequently confused about where he can reside given the overlapping state and County residence restrictions. *See* Order (ECF 184) at 7-8.

Doe #7 uses a wheelchair due to severe pain from breaking his hip in prison, Doe #7 Trial Decl. (ECF 152-1) at 1, and he also has an anxiety disorder from

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[7] This Court may take judicial notice of distances on Google Maps. *E.g.*, *Pahls*, 718 F.3d at 1216 n.1.

being tortured by the Cuban government, *id*. at 2. Though, as the district court noted, Doe #7 has also only searched for housing in the northern part of the County, Order (ECF 184) at 8, it is also uncontested that his dependence on a wheelchair for mobility limits his ability to search for housing. ECF 152-1 at 5.

Plaintiffs' homelessness has a negative effect on their health, for instance, forcing Doe #7, who in in his 70's and uses a wheelchair, to sleep outside exposed to the elements, and forcing Doe #5 to sleep in his son's car, despite severe back pain and significant Parkinson's tremors. *Id.* at 1-2; T4 (ECF 196) at 96:5-13. Despite these hardships, the Ordinance is unbending. It is noteworthy that the State of Florida authorizes conditional medical release to inmates in Florida prisons who are permanently incapacitated or terminally ill and who do not present a danger to themselves or others. Fla. Sta. § 947.149. By contrast, the Ordinance's failure to account for individual circumstances—especially those that essentially incapacitate and render an individual harmless to others—supports the contention that residence restriction is excessive. *See Does #1-5 v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016) (citing as excessive statute's application to plaintiff with obviously low risk of sexual offense on as-applied ex post facto challenge).

All four Plaintiffs are all also of limited economic means, which has also restricted the housing reasonably available to them. The district court accepted Plaintiffs' assertion that an analysis of housing availability must account for

whether a property is actually available on the market, and is not, for example, currently owner-occupied. Order (ECF 184) at 18 (finding the County's housing expert's estimate of available housing "substantially over-inclusive and unrealistic" for failing to "take into account whether the properties are available or exclude units that are already registered as the owner's homestead, suggesting the units are not rentable"). However, as discussed below, the district court rejected Plaintiffs' contention that housing availability must also be limited by affordability on a facial challenge.

The court specifically criticized Plaintiffs' expert Dr. Kelly Socia's housing analysis for limiting his conclusions about housing availability to rental units at or below $1,058 per month. Order (ECF 184) at 16-17. The Court found the evidence did not support an "assumption that all or any reliable number of offenders are low income," in part because a County witness observed, on two occasions, individuals registered as transient driving luxury automobiles (a Porsche and Mercedes, respectively) and, on an unspecified number of occasions, "others wearing expensive jewelry." *Id.* at 17. The Court also speculated that some individuals subject to the Ordinance may be able to buy a home, or live with family or friends outside the excluded area. *Id.* The Court next opined that individuals may live in nursing homes or motels, or move out of the County. *Id.* at 17-18.

As an initial matter, the court's reliance on these latter "options"—nursing homes or motels or leaving the County—is patently erroneous. Plaintiffs' and the County's witnesses uniformly agreed that motels are *not* suitable housing placements, *e.g.*, T2 (ECF 194) at 137:1-21; T5 (ECF 197) at 29:5-12, 150:6-21; and there is no evidence in the record that Miami-Dade County has any nursing homes outside the excluded area that would accept individuals with sexual offense convictions—indeed, there are not even any homeless shelters that will do so. T3 (ECF 195) at 166:1-15.

Further, it is erroneous to evaluate whether the County's Ordinance unduly restricts housing options *based on housing available outside the County*. The ex post facto analysis turns on whether the County has unreasonably limited housing *within the County*. Relying on housing in other jurisdictions to defeat an ex post facto claim would allow the County to banish every covered individual from its borders, so long as those individuals could find housing in another county or state (or perhaps country). Yet it is beyond dispute that banishment on this order is a prototypical punishment that, when applied retroactively, would violate the Ex Post Facto Clause. *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168, n.23 (1963).

With respect to Plaintiffs' ability to afford housing, the record demonstrates that all Plaintiffs cannot afford to purchase a home and therefore must limit their

search to rentals. But none of them has enough income even to qualify for "low income" rentals under Dr. Socia's analysis. Three of the Does are unemployed and rely on federal benefits: Doe #7's only source of income at the time of trial was food stamps; Does #4 and #5 subsist on disability benefits and food stamps.

Plaintiffs' difficulties in finding housing that is both affordable and compliant with the residence restriction is illustrated by the efforts of the Miami-Dade County Homeless Trust to locate housing for the homeless individuals at the NW 71st Street Encampment. But the Trust, despite an intensive effort by individuals experienced in locating housing over the course of several months to locate affordable housing for 120 applicants living at the Encampment, only managed to provide rental assistance to two people. ECF 136-8 at 2-3. This extensive but failed effort by experienced professionals demonstrates the difficulty faced by impoverished and disabled individuals in securing affordable housing that also complies with the residence restriction.

Though the district court found that Doe #6's income of $30,000 was not a barrier to housing, Order (ECF 184) at 17, that conclusion misstates the record. Doe #6 testified that he could afford $800 or $900 per month, T5 (ECF 197) at 56: 10-11, well below Dr. Socia's assumption of $1,058 per month for a low-income individual making $42,300 per year. Pls.' Trial Ex. 1 (Socia Report) (ECF 171-1) at 8. Doe #6's estimate is consistent with guidelines from the United States

Department of Housing and Urban Development stating that individuals should spend approximately 30% of their income on housing. *Id*. It should be noted that Doe #6 has limited his housing search to northern Miami-Dade County to remain close to his job and avoid losing it, which would prevent him from obtaining any level of affordable housing. *See* T5 (ECF 197) at 56:3-9; *see also id.* at 49:4-11.

The record also establishes that Plaintiffs do not have family or friends outside of the excluded area with whom they can live. T4 (ECF 196) at 147:1-5 (Doe #4 testifying he could live with friends in Little Havana but for the Ordinance); *id*. at 99:8-23 (Doe #5 testifying that he stays with family during the day but leaves at night because they live in the excluded area); T5 (ECF 197) at 49:22-50:5 (Doe #6 testifying that he has stayed with various friends but had to move out because their addresses did not comply with Ordinance); ECF 152-1 at 5 (Doe #7 testifying that the Ordinance has kept him from finding compliant addresses with friends). To the contrary, the potential residences of all of their family or friends are within the excluded area. *Id.* Plaintiffs, like Doe #5, often stay at these restricted locations during the day, when schools are in session, then return to their designated street corners at night, when schools have closed. T4 (ECF 196) at 99:8-23.

Further, while several Plaintiffs stayed in grandfathered residences in the past, all are currently homeless. They therefore cannot return to a grandfathered

residence. Their experience is consistent with Plaintiffs' expert Dr. Levenson's uncontested opinion, and common sense, that the number of individuals protected by the grandfather clause necessarily diminishes over time. Pls.' Trial Ex. 4 (Levenson Report) (ECF 171-4) at 8. This phenomenon is a natural result of fact that few people, especially poor people, are able to stay in a residence permanently and must eventually move. For instance, the grandfather clause would have allowed Doe #7 to return to his parents' rental apartment after his release from prison. However, both of his parents died while he was incarcerated, and the apartment was no longer available. Without that support or a stable source of income, Doe #7 soon became homeless.

Thus, as with Plaintiffs' disabilities, the residence restriction predictably exacerbates the difficulties Plaintiffs' poverty already imposes on finding affordable housing. The Ordinance's failure to account for these difficulties in any way further establishes its punitive nature as applied to Plaintiffs.

Against Plaintiffs' particular hardships, the Ordinance's lifelong application regardless of Plaintiffs' individual risks is unreasonable. The district court implicitly recognized that the Ordinance targets a small subset of sexual offenders, such as pedophiles, whose extremely high risk of recidivism likely persists over a lifetime. Order (ECF 184) at 12. But there is no dispute that the state of Florida and Miami-Dade County have highly reliable means already in place to identify

such high risk offenders. These include the Static 99R risk-assessment tool, clinical interviews and treatment protocols, civil commitment, and ongoing law enforcement supervision, both by state probation officers and County sexual offender units. *See* Levenson Rebuttal (ECF 171-5) at 8-12.

The district court, relying on testimony from the County's expert Dr. McCleary, rejected the Static 99R as a means of assessing offender risk *generally*. However, this finding does not speak to the Static 99R's reliability with respect to identifying high risk offenders. On that score, Dr. McCleary conceded that the Static 99R was highly effective at isolating high and extremely high risk individuals, particularly when combined with these other means of assessment and supervision. Plaintiffs' expert Dr. Jill Levenson established without contradiction that Florida, like many jurisdictions, requires its Department of Corrections to evaluate whether individuals present an unmanageable recidivism risk prior to their release from prison. Levenson Rep. (ECF 171-4) at 16; Pls.' Trial Ex. 5 (Levenson Rebuttal) (ECF 171-5) at 11. If they do, these individuals are designated as Sexually Violent Predators, and they are not released at the end of their sentence. *Id.*

The County's reliance on charge alone, rather than these superior means of risk assessment, is necessarily over- and under-inclusive. The Ordinance unavoidably applies to individuals who, though convicted of a qualifying offense,

are nonetheless low risks of recidivism, and it just as unavoidably does not apply to individuals who, though not convicted of a qualifying offense, are in fact true pedophiles.

This crude calibration of risk may not doom the Ordinance as a facial matter, but it strongly supports Plaintiffs' as-applied claims. The trial evidence shows that none of the Does present the extreme, lifelong risk of sexual recidivism targeted by the Ordinance. With respect to the two Does who would have been subjected to the Sexually Violent Predator evaluations upon their release from prison (based on the time of their release)—Does #5 and #7—neither was classified as a Sexually Violent Predator—otherwise they would have been civilly committed. Also, none of the Does has committed a new sexual offense in at least a decade since their initial releases,[8] and Does #4, #5, and #7 are over the age of 50. The district court

[8] The district court cited Prentky (1997) for the proposition that some sexual offenders "may reoffend as late as 20 years following release." Order (ECF 184) at 12. However, the district court omitted the facts that Prentky's study focused on Sexually Violent Predators who had been committed between 1959 and 1985 to a Massachusetts facility for the criminally insane and exceptionally dangerous; in other words, individuals who would not be released from prison under Florida's current SVP protocols. Plaintiffs' experts testified extensively on how this and other shortcomings in the studies prevent generalizing its findings beyond the specific, unusually high risk sample examined. Pls.' Trial Ex. 3 (Harris Rebuttal) (ECF 171-3) at 4-16; Pls.' Trial Ex. 5 (Levenson Rebuttal) (ECF 171-5) at 6. Thus, while the district court's finding is correct as far as it goes, it does not go very far—only to that small subgroup. And to the extent the finding is intended to

accepted that these traits indicate a lowered risk of recidivism. Order (ECF 184) at 11.

The district court also endorsed "the rather unremarkable propositions that one-time sexual offenders are significantly less likely to reoffend sexually than those with more than one previous sexual conviction." *Id.* To this point, Does #4 and #6 each committed a single, isolated sexual offense, which, while serious, did not involve sexual abuse.

Finally, Doe #5, who has advanced Parkinson's disease, and Doe #7, who relies on a wheelchair for mobility, live with disabilities that have physically incapacitated them. Their physical conditions will only continue to deteriorate over time, and, as a result, so too will whatever risk of recidivism they pose.

The Ordinance's disregard for Plaintiffs' individual risk is made more excessive by the fact that there are treatment and supervision measures to manage their lower recidivism risks. The district court accurately listed several of these measures, such as "registration, notification, mandatory probation, mandatory treatment, and GPS monitoring." Order (ECF 184) at 44-45. But the district court incorrectly labeled these measures as "options that the County could have chosen

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encompass the Plaintiffs here, the finding is clearly erroneous, for the reasons stated here.

to reduce the risk of sexual recidivism." *Id.* at 44. These measures are not "options"; they are procedures and requirements *already in place*, either at the state or county level, that do, in fact, reduce Plaintiffs' risk of sexual recidivism. Levenson Rebuttal (ECF 171-5) at 8-12; Pls.' Trial Ex. 3 (Harris Rebuttal) (ECF 171-3) at 17. To illustrate, it is undisputed that all Does are subject to registration and notification. Doe #6 completed probation and sexual offender treatment, and described how he uses the skills he learned from supervision and treatment to manage his behavior. T5 (ECF 197) 51:1-5. Doe #5 is on GPS monitoring. In fact, his monitor alarmed in the middle of his trial testimony, which requires him to report to his probation officer. T4 (ECF 196) at 124:11-14, 129:20-24.

The trial evidence establishes that the Ordinance is unduly burdensome with respect to Plaintiffs' disabilities and limited economic means. Their particular hardships dramatically limit the housing that is reasonably available to them; yet, the Ordinance precludes any accommodation of these unique challenges, despite Plaintiffs' lowered recidivism risk. The district court therefore should have considered Plaintiffs' as-applied ex post facto challenge.

CONCLUSION

For the reasons above, the district court's order dismissing the case should be vacated, the motion to conform the evidence with the pleadings should be

granted, and the district court should be directed to enter an order on Plaintiffs-Appellants' as-applied challenge.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), Plaintiffs-Appellants state that this brief complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,876 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

CERTIFICATE OF SERVICE

Today, I electronically filed this document with the Clerk of Court using CM/ECF, which will serve opposing counsel Michael B. Valdes (mbv@miamidade.gov) and Bernard Pastor (pastor@miamidade.gov) via electronic transmission of Notices of Docket Activity generated by CM/ECF.

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