IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

WENDY WHITAKER, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action
	:	No. 4:06-140-CC
SONNY PERDUE, et al.,	:	
	:	
Defendants.	:	

PROPOSED ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, all but one of whom is a registered sex offender in the State of Georgia, seek to enjoin the Defendants from the enforcement of the school bus stop provision of the Georgia Sex Offender Residency Statute (hereinafter Residency Statute) enacted by Act 571, HB 1059, codified at O.C.G.A. § 42-1-15 (hereinafter "Act"). They claim that portion of the Act is unconstitutional. The relevant portion of the statute provides that:

> O.C.G.A. § 42-1-15.
>
> (a) No individual required to register pursuant to Code Section 42-1-12 shall reside or loiter within 1,000 feet of any child care facility, church, school, or area where minors congregate. Such distance shall be determined by measuring from the outer boundary of the property on which the individual resides to the

> outer boundary of the property of the child care facility, church, school, or area where minors congregate at their closest points.

A school bus stop, which is included within the definition of "where minors congregate," is defined as one which is "designated by local school boards of education or by a private school." O.C.G.A. § 42-1-12(a)(19). After issuing a Temporary Restraining Order, the Court set a hearing date for July 11, 2006. The Plaintiffs and the Defendants presented evidence at the two-day hearing. After considering the evidence presented and the argument on both sides the Court denies the motion as Plaintiffs have failed to meet their burden.

FINDINGS OF FACT

Plaintiffs presented testimony from personnel in eight sheriffs' offices in regard to their role in enforcing the Sex Offender Registry Statute. None of these witnesses knew whether the school bus stops they relied upon were designated by the local school board. Further, none of those witnesses testified that any sex offender would be banished from a particular county or from the State of Georgia.

Sheriff Ted Paxton of Forsyth County testified that there were 60 registered sex offenders living in his county; based on information he obtained from the transportation department at the local board of education, all sixty would be required to move because of proximity to school bus stops. (T. 23, 32). Sheriff Paxton had no personal knowledge whether the list of school bus stops had been

designated or approved by the board of education. (T. 32-35). He acknowledged however that based on this list of school bus stops, there were two small areas in the county where sex offenders could live. (T. 25).

Investigator Russell Finley from the Cobb County Sheriff's Office testified that there were 200 registered sex offenders in Cobb County and that all but four would have to move based on their proximity to school bus stops. (T. 36-38). Finley admitted he presumed that the list of school bus stops he obtained from a supervisor of bus routes in the Cobb school system was an official list. (T. 41). He did not know how the list was developed and was unaware of any resolution or other official action taken by the Cobb Board of Education in regard to school bus stops. (T. 42). Finley was surprised to read in a letter to the Plaintiffs (Defendants' Exhibit 16) that the Cobb Board of Education had not yet designated school bus stop locations and that "bus stop locations are undetermined at this time." (T. 42). Finley conceded that all locations of school bus stops on his map (Plaintiffs' Exhibit 4) did not mean a thing in the absence of designation by the board. (T. 43, 44).

Captain David Davis of the Bibb County Sheriff's Office said that 200 sex offenders in Bibb County could be affected by the new law. (T. 49). All but eight would have to move. (T. 50). Captain Davis did not testify that any of the

registered sex offenders in Bibb County would have to leave the county, only that they would have to move from their current residence. Davis had no knowledge of whether the Bibb County Board of Education had taken any official action on the list he was using. (T. 53, 54). Davis based his estimates on the presumption that the school bus stop list he was using had been officially designated as such by the Bibb County Board of Education. (T. 53, 54). Davis identified a map of Bibb County (Plaintiffs' Exhibit 5), based on the same list, showing the school bus stops and a 1,000 foot buffer around each location. (T. 49). Davis conceded that the list he was using may be different from the list designated by the Board of Education. (T. 54). Davis also conceded that even using his map, there were many places in Bibb County where registered sex offenders could live and that the areas marked on the map as "A" through "G" were specific areas where sex offenders would not be prohibited from residing. (T. 55-58).

Corporal Steven Lifland from the DeKalb County Sheriff's Office testified that all 490 registered sex offenders in DeKalb County would have to move. (T. 62). Lifland identified two maps (Plaintiffs' Exhibits 6 and 7) but neither map was a map of school bus stops. Instead, the maps showed the residences of registered sex offenders. (T. 63, 64, 67, 68). Lifland had no personal knowledge about whether the DeKalb County Board of Education had taken any action in approving

or designating the list of school bus stops upon which he was relying. (T. 69). Even using his list, Lifland conceded that there were areas in DeKalb County where registered sex offenders could live. (T. 68). Thomas Lucky, from the DeKalb County mapping division (graphic information systems) followed Corporal Lifland and produced a map of school bus stops, Plaintiffs' Exhibit 15. (T. 74). Like Corporal Lifland, Lucky did not know whether the DeKalb Board of Education had approved or designated the list of school bus stops he was using. (T. 75, 76). Even presuming Plaintiffs' Exhibit 15 was an accurate map of designated school bus locations, Lucky admitted that there were quite a few places in DeKalb County that would not be restricted for registered sex offenders. (T. 78-83). There were at least ten circled areas on the map that were not restricted. (T. 79).

Corporal Karen Pirkel from the Gwinnett County Sheriff's Office testified that 277 out of 278 registered sex offenders in Gwinnett County would have to move. (T. 85). She did not talk to the Gwinnett County Board of Education and had no knowledge about whether the Board had officially designated school bus stops. (T. 89). She had received her information from someone in the school district transportation office. (T. 88). Corporal Pirkel did not identify any map of

Gwinnett County and there was no evidence presented to show that sex offenders could not live anywhere in Gwinnett County under the new residency restriction.

Sergeant Jay Baker from the Cherokee County Sheriff's Office testified that 88 out of 95 registered sex offenders in his county would have to move. (T. 132). This was based on comparing a list of sex offenders with information on school bus stops he had obtained from the bus stop department at the Cherokee County school district. (T. 131, 135). Baker did not know if the bus stop information he obtained was designated or approved by the Cherokee County Board of Education. (T. 136, 137). No evidence was presented that any sex offender would be required to leave Cherokee County.

Charlene Giles of the Houston County Sheriff's Office had looked into the situation of 75 of the 136 registered sex offenders in her county and determined that all but four of the 75 would be required to move. (T. 141). Her conclusion was based on the list she had obtained from Ms. Alford and Mr. Rodriguez at the local Houston County schools office. (T. 144, 145). When shown the definition of "school bus stop" contained in the sex offender law, Ms. Giles said that her office did not follow that definition but used their own definition. (T. 144, 145). Further, no proof was offered that the registered offenders would be required to move out of Houston County.

Lt. Ezell Brown of the Newton County Sheriff's Office testified that 98% of the county's 127 registered sex offenders would be affected by the new law. (T. 147, 148). Lt. Brown had considered the ability of offenders to find another place to live. He said it would be "somewhat difficult" for sex offenders to find a place to live in Newton County but they were not banished from the county and could find places mostly in rural areas of the county. (T. 149, 151). Lt. Brown obtained his information about school bus stops from the transportation personnel at the school office and had no knowledge of whether the Board of Education had been involved or how they came up with their information; he thought it might be any place a bus stops. (T. 150, 151).

Deputy Glenn Hoover of the Fulton County Sheriff's Office testified that he had reviewed 345 sex offender locations in Fulton County and 295 would have to move based on the information reviewed up to that point. (T. 172-173). The Fulton County Sheriff's Office did not tell any registered sex offenders that they would have to move for living within 1000 feet of a school bus stop. (T. 176). Officer Hoover had no personal information and could not confirm that the Fulton County School Board had actually designated the school bus stops obtained from the county website. (T. 178).

Investigator Gene Higdon of the Rockdale County Sheriff's Office testified that his office notified 51 of 52 sex offenders in the county that under HB 1059 they would need to move from their residence, which was within 1000 feet of a school bus stop. (T. 159-160). However, Higdon could not confirm that the list of school bus stops had been designated by the local school board. (T. 163).

Plaintiffs also called personnel from two local school districts to testify about designation of school bus stops. Robin Blackburn, the Transportation Director from Seminole County Schools, testified that although he assumed he was authorized to set up bus routes, he had received no direction from the Board of Education and that the Board had not been involved in regard to designation of school bus stops. (T. 94, 95). He said there were no fixed designated school bus stops in Seminole County and looking at the definition contained in the sex offender law, none of their school bus stops had been designated by the Board of Education. (T. 94). He identified Plaintiffs' Exhibit 16 as a list of bus routes although the list also indicated stops. (T. 96). According to Blackburn, in Seminole County busses run like a taxi service; the bus goes down the road to pick up children at their homes and there are no stops separate and apart from those homes. (T. 96, 97). Seminole County is 325 square miles and the pick-up spots for children could change from morning to afternoon. (T. 97). No evidence was

presented about the impact of the new statute on registered sex offenders in Seminole County.

Janice Barrett, the Transportation Director for Lumpkin County schools, in north Georgia, testified that her county more or less did house-to- house pick up and had no designated stops. (T. 103, 105). She said Plaintiffs' Exhibit 17 was a bus route map although it did have stops on it. (T. 104). She said routes were different from stops, that their buses do not always stop at the same place, and that they go wherever the child is. (T. 107, 108). The Board of Education was not involved at all in designation of stops. (T. 107, 110).

Defendants also called three school officials in regard to the designation of school bus stops. Steve Dunn, the Superintendent of the Pelham, Georgia independent school system said Pelham City Schools has 1,550 students in the 25 square mile south Georgia city and that there are no designated school bus stops. (T. 114-116). No bus service is provided. (T. 116).

Sheila Garrett, Transportation Director for the Bremen City Schools, testified that Bremen City Schools, like those in Pelham, provide no regular bus service for students. (T. 125, 126). Of the 1,700 students in the Bremen school system, only 8 special education students are provided transportation. (T. 125, 126). All others use parents, car pools, or walk to school. (T. 126).

Dr. Lula Mae Perry, the Superintendent of the Jeff Davis County school district, testified that in 335 square mile Jeff Davis County there are no school bus stops designated by the Board of Education. (T. 118-119). She explained that in rural south Georgia, the bus simply goes down the roads and highways and picks up the children, and where it stops can change from day to day. (T. 120). Dr. Perry said she had no stops that met the definition in the new sex offender law. (T. 121).

Plaintiffs presented testimony from Tony Mitchell, Department of Corrections, Cedartown Probation Office. Officer Mitchell testified he did not notify any of his registered sex offenders that they would have to move in light of HB 1059 and the school bus stop provision. (T. 189). Officer Mitchell further testified that he did not know whether the local school board had officially designated any bus stops, and that the information he had was furnished by the Polk County Sheriff's Office. (T. 190). Officer Mitchell testified that Plaintiff Lori Collins is currently in compliance with HB 1059. (T. 191). Officer Mitchell further testified that Plaintiff Jeffrey York is currently in jail on drug possession charges. (T. 191).

Next, Plaintiffs offered the testimony of Dr. Kevin Baldwin. Dr. Baldwin testified that sex offender treatment is similar to the treatment of alcoholism from

the perspective of keeping the offender or alcoholic away from the temptation of re-offending or drinking. (T. 221). According to Dr. Baldwin, the issue with sex offenders is like alcoholics in that it is a management issue and not one of "cure." (T.221). Not even treatment would eliminate reoffending and there is no way to predict which offenders will re-offend. Further, Dr. Baldwin acknowledged that decreasing access to children is a well-intentioned method of protecting children. (T. 224-228, 236). Dr. Baldwin did testify that disruption of residence or employment could increase the risk of reoffending. Further, however, the recidivism rate of sex offenders according to at least one study is between 10 and 15%.

Defendants' expert, Dr. Mario Dennis, confirmed that there is no known cure for those who commit sexual offenses, and that the tools for controlling reoffending would be risk reduction and self-management. (T. 324). Dr. Dennis also testified that a residency restriction would be a helpful external control for sex offenders. (T. 327). He encourages offenders he treats to stay away from children to reduce the likelihood of reoffending and to reduce the possibility of allegations of illegal conduct. (T. 326). Dr. Dennis further testified that the most important factor in preventing recidivism is to control access to children. (T. 332).

There was testimony from both experts about the effectiveness of residency restrictions. While Dr. Baldwin provided information about the lack of effectiveness in a few states, Dr. Dennis' testimony that the residency restrictions are too new to have significant empirical data for the short term is more reasonable.

Plaintiffs also presented the testimony of Amy Whitaker (not a named Plaintiff) and Lori Sue Collins. Both testified about the difficulties they were having finding a suitable residence. (T. 243, 258). Both further acknowledged that they did not take into account the definition of a school bus stop that is present in the statute. (T. 244, 258-259).

Plaintiffs offered the testimony of Peter Wagner, a consultant who created maps of six counties using information provided by a 2000 U.S. Census, a 2003 road map of Muscogee County, and data provided by several counties school districts. (T. 260-291). (While Plaintiffs' counsel stated Wagner made six maps, only three were presented in court.) Wagner could not confirm that the data provided by the county school boards contained school bus stops designated by the local school boards. (T. 284-85, 289). Even based on Wagner's testimony, there are areas in Muscogee, Richmond, and McDuffie counties where sex offenders

could live, although they are quite limited in Richmond County under his analysis. (T. 268-69, 288-89).

Defendants presented testimony from Laura Tate, program operations manager for the sex offender registry maintained by the Georgia Bureau of Investigation, regarding the composition of the registry and the increase in the number of registered offenders since the inception of the registry. (T. 296-300). The number of sex offenders added to the registry since its creation in 1996 has steadily increased, (T. 299), and currently there are roughly 12, 000 sex offenders on the registry. (T. 299). The number of sex offenders added to the registry between 2003 and 2005 has nearly doubled for those convicted of sex crimes in general, and for sex crimes against children. (T. 299-300).

Defendants presented testimony from Michele Knox, Manager, Sex Offender Administration unit, Department of Corrections. (T. 301-305). Knox testified to the reconviction rates of sex offenders generally and specifically persons originally convicted of sexual offenses against minor victims in particular. The charts identified by Knox (Defendants' Exhibits Nos. 13 and 14) showed that the reconviction rate for certain categories of crimes was as high as 16%. (T. 303-04).

Defendants also presented testimony from Richard Oleson, program manager, Pardons and Paroles. Oleson testified that of the 333 sex offender parolees 52% were not being forced to leave their homes as a result of HB 1059. (T. 309).

CONCLUSIONS OF LAW

Plaintiffs have argued that a school bus stop is "anywhere a bus stops," and that as a result of the large number of school bus stops, individuals on the registry cannot comply with the residency requirement and are effectively banished from the community. Defendants argue that Plaintiffs have neglected to recognize the definition of school bus stop as provided by the legislature and as a result have offered no evidence to support their argument that the requirements of the statute, when properly applied, constitute a violation of constitutional rights. Defendants further argue that, even accepting Plaintiffs' definition of school bus stop, Plaintiffs have failed to meet their burden for issuing a preliminary injunction. The Court agrees with the Defendants.

First, it is important to note that if there are two possible interpretations of a statute, one of which is constitutional and the other which is not, the Court is obligated to accept the interpretation that is constitutional. See Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001).

Here the Court has two definitions to choose from. The first, proffered by the Plaintiffs, is that a school bus stop is wherever a bus stops; this results in numerous fluid and ever-changing locations which, if Plaintiffs are correct, could result in a lack of notice to potential offenders. The second definition requires some affirmative act by a locally elected governing body and is the definition contained within the statute. Plaintiffs have not attempted to argue or put forth evidence that suggests a constitutional problem with this second definition. The only thing they have argued is that the definition provided in the statute is not the definition that should be applied. In support of this argument they have alleged, but not proven, that no county in the state has school bus stops that are designated by a local school board. Defendants counter that even if it were true that no school board currently designates school bus stops, the legislature has provided local school boards with a tool that can be used to protect the children riding the school bus. They suggest that many school boards have chosen door to door service as a means to protect their students and others may choose to formally designate school bus stops as an alternative to protect children from persons known to commit sexual assault. The Court finds this argument compelling.

The Georgia legislature provided a definition of a school bus stop. The legislature has used similar definitions in other statutes which have resulted in an

appropriate board or official body taking affirmative action. *See, e.g.*, O.C.G.A. §§ 40-6-54; 40-14-17; 40-14-3. Legislators are, or at least should be, familiar with practices at the local level and are presumed to know how school children are transported to school in their constituencies. It cannot be argued that the definition of school bus stop is simply surplusage in the statute. Since a definition of school bus is provided, the Court is obligated to use it. *See* TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks omitted); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) ("[C]ourts should disfavor interpretations of statutes that render language superfluous."); Bouchard Transp. Co. v. Updegraff, 147 F.3d 1344 (11th Cir. 1998) ("[W]e avoid statutory constructions that render provisions meaningless.").

In order to prevail on a preliminary injunction Plaintiffs must show:

(1) a substantial likelihood of prevailing on the merits;

(2) that Plaintiff will suffer irreparable injury unless the injunction issues;

(3) that the threatened injury to the movant outweighs whatever damages the proposed injunction may cause the opposing party; and

(4) that if issued, the injunction would not be adverse to the public interest.

Baker v. Buckeye Cellulose Corp., 856 F.2d 167, 169 (11th Cir. 1988); Levi Strauss and Company v. Sunrise International Trading Inc., 51 F.3d 982 (11th Cir. 1995).

Since the Plaintiffs have provided no evidence to support any of these prongs using the appropriate definition of school bus stop, their motion must be denied. Moreover, even if Plaintiffs' definition of school bus stop is correct, they have failed to meet their burden.

The Court notes that "a preliminary injunction is an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion." Canal Authority of Florida v. Callaway, 489 F.2d 567, 573 (11th Cir. 1974). Moreover when, as here, a movant seeks to enjoin a government agency, "his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own affairs." Rizzo v. Goode, 423 U.S. 362, 378-379 (1976). Applying the four prongs to the evidence shown, the Court finds that Plaintiffs have not met their burden.

I. PLAINTIFFS HAVE NOT SHOWN A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS.

Plaintiffs have not shown a substantial likelihood of prevailing on the merits. Plaintiffs raise several claims in their complaint. They have focused the entirety of their evidence and argument on their claim that the statute violates the *Ex Post*

Facto Clause of the United States Constitution. In addition the Court asked the parties for additional briefing on whether the statute is void for vagueness. Despite Plaintiffs' focus on only one of their claims the Court will address all the claims as presented in their complaint.

A. PLAINTIFFS HAVE NOT SHOWN AN *EX POST FACTO* VIOLATION

Plaintiffs allege the Residency Statute imposes retroactive punishment in violation of the *Ex Post Facto* Clause. The clear and stated purpose of the legislature was to regulate the behavior of sex offenders rather than to punish them. Legislation that is merely regulatory does not violate the *Ex Post Facto* Clause. Smith v. Doe, 538 U.S. 84 (2003). The goal of lessening the potential for those offenders inclined toward recidivism "to have contact with, and possibly victimize, the youngest members of society," is an important one. Doe v. Baker, 1:05-CV-2265-TWT (N.D. Ga. 2006) citing Mann v. State, 278 Ga. 442, 443-44(2004). "Where a legislative restriction is an incident of the State's power to protect the health and safety of its citizens, it will be considered as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment." Smith v. Doe, 538 U.S. at 93-94 (2003); See also Doe v. Baker, 1:05-CV-2265-TWT (N.D. Ga. 2006).

In determining whether a statute is truly regulatory, the Court must determine whether the punitive effects outweigh the regulatory intent by applying the factors set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)(whether the law was regarded in history and traditions to be punishment, whether it promotes the traditional aims of punishment, whether it imposes an affirmative disability or restraint, whether it has a rational connection to a non punitive purpose, and whether it is excessive with respect to that purpose). See Miller, 405 F.3d at 719, citing Smith v. Doe, 538 U.S. at 97. The ultimate question is whether any punitive effect of the law is so severe as to constitute the "clearest proof" that a statute deemed to be regulatory and non punitive should nonetheless be deemed to impose *ex post facto* punishment. Id. The United States Supreme Court has never held that a law with a non punitive purpose violated the *Ex Post Facto* Clause in light of the Mendoza-Martinez factors.

The first factor for consideration is whether the law is regarded in history and tradition as punishment. Plaintiffs assert that the Residency Statute is the functional equivalent of banishment which constitutes a historical and traditional form of punishment. However, "banishment" refers to being sent away from a city, place, or country for a specified period of time or life, United States v. Ju Toy, 198 U.S. 253, 269-70 (1905), or "expulsion from a country." Doe v. Miller, 405

F.3d 700, 719 (8th Cir. 2005) (citing to Black's Law Dictionary 154, 614 (8th ed. 2004)). Historically, banished persons were permanently expelled from their community and prevented from returning. Smith v. Doe, 538 U.S. at 98.

The Residency Statute does not prevent Plaintiffs from accessing those identified areas at any time of the day or night for any purpose other than establishing residence. The Residency Statute contains no restriction against owning, visiting, conducting business upon, or leasing the property, nor does the statute prohibit Plaintiffs from going to places which may be within 1000 feet of one of the identified areas. As such, Plaintiffs are not "expelled" from the community nor are they prohibited from being in the community. Even assuming Plaintiffs' definition of school bus stops is correct they have failed to show that individuals will be unable to find a home in the majority of Georgia's counties. At most they have demonstrated that they may have difficulty in finding a place to live in some of the metropolitan areas but they have not shown a single county where they will not be able to find anywhere to live. In looking at the correct definition of the statute, Plaintiffs have not shown that even a majority of individuals on the registry will have to move let alone be banished from the community.

The second Mendoza-Martinez factor is whether the law promotes the traditional aims of punishment, i.e., deterrence and retribution. The mere presence of a deterrent impact of a law should not be overemphasized as a way to criminalize an otherwise regulatory statute because making such an inferential leap would "severely undermine the Government's ability to engage in effective regulation." Smith, 538 U.S. at 102. While the Georgia Residency Statute might deter sex offenders from re-offending, that fact alone does not imply that the restriction is punishment. Miller, 405 F.3d at 720. The Court in Doe v. Baker opined that regardless of the potential for a deterrent effect, the Georgia Residency Statute is "still consistent with a regulatory purpose," and therefore is not sufficiently aimed at deterrence or retribution so as to negate its regulatory intent. Doe v. Baker, 1:05-CV-2265-TWT (N.D. Ga. 2006).[1]

The third consideration, whether the Georgia Residency Statute imposes an affirmative restraint or disability, must be answered in the negative. See Miller, 405 F.3d at 720-21. The Supreme Court allows states considerable leeway in adopting regulations that impose "substantial disabilities." Kansas v. Hendricks, 521 U.S. 346 (1997) (involuntary commitment of mentally ill sex offenders found

[1] The Eighth Circuit likewise found that the residency restriction was consistent with the regulatory objective of protecting the health and safety of children and therefore not punishment. Doe v. Miller, 405 F.3d at 700.

to be non-punitive). The Georgia Residency restriction is certainly less disabling than a commitment statute and is a minor and indirect effect of a conviction for a sexual offense or a criminal offense against a victim who is a minor. It does not significantly restrain or disable Plaintiffs inasmuch as they are still able to own, visit, lease, or conduct business at their home or any other property within the identified areas. While the residency restrictions impose limitations on Plaintiffs, the ultimate issue is whether the law has a "rational connection to a non punitive purpose" (deemed the "most significant factor" in an *ex post facto* analysis), and whether it is excessive in relation to that purpose. Miller, 405 F.3d at 721; Smith, 538 U.S. at 102. The Court finds that there is such a rational connection.

The legitimate, non-punitive purpose of the Georgia Residency Statute is to protect the public, and specifically minors, from those offenders who have been deemed to have a higher rate of recidivism than any other class of offenders. See Smith, 538 U.S. at 103. The Residency Statute is rationally related to that purpose by preventing those convicted of crimes against children and certain sex offenses from residing near locations where children are likely to congregate, thereby reducing the risk that they will re-offend against innocent child victims. The Georgia General Assembly could rationally conclude that the restriction on residence and employment would reduce the likelihood and opportunities for

recidivism. Doe v. Baker, 1:05-CV-2265-TWT (N.D. Ga. 2006). While there is clearly a difference of opinion as to whether this is the best approach to achieve that goal the Court is reminded that the rational basis standard is highly deferential and a court should only find a legislative act unconstitutional in the "most exceptional circumstances." Doe v. Baker, 1:05-CV-2265-TWT (N.D. Ga. 2006), citing Doe v. Moore, 410 F.3d 1337, 1345 (11th Cir. 2005).

A statute is not excessive simply because it "lacks a close or perfect fit" with the non punitive goals it seeks to advance, and the lack of an individual risk assessment does not convert a regulatory scheme into punishment. Smith, 528 U.S. at 103, 105; Miller, 405 F.3d at 721-22. The *Ex Post Facto* Clause does not preclude legislative bodies from making categorical judgments that conviction of certain crimes requires certain regulatory consequences. Miller. 410 F.3d at 721. In light of the high risk of recidivism posed by sex offenders, and the "imprecision" of determining what measures best prevent recidivism, the Georgia General Assembly acted properly and within its authority by enacting this regulatory scheme for the purpose of protecting the public from harm. Miller, 405 F.3d at 722. Inasmuch as school bus stops are more likely to lack adult supervision when compared to schools and child care facilities, the concern for protecting

children at those more vulnerable venues is clearly rationally related to the stated regulatory purpose.

B. THERE IS NO EIGHTH AMENDMENT VIOLATION

Plaintiffs also argue that the Georgia Residency Statute violates the Eighth Amendment to the United States Constitution in that it is cruel and unusual punishment. Since it is not punishment it cannot violate the Eighth Amendment prohibition against cruel and unusual punishment. See Miller, 405 F.3d 700, 723, n.6; citing Smith, 538 U.S. at 97. Even if the Court were to agree that the statute imposes punishment it still does not violate the Eighth Amendment as it does not "inflict[] torture, is otherwise barbaric, or where the punishment inflicted is so excessively severe that it is disproportionate to the offense charged." Coker v. Georgia, 433 U.S. 584 (1977). The residency restriction found in O.C.G.A. § 42-1-15 is limited in scope, proximity, and application, and is neither barbaric or tortuous, nor excessively severe. Miller, 405 F.3d 700, 723, n.6; Smith, 538 U.S. at 103.

C. THERE IS NO VIOLATION OF PROCEDURAL DUE PROCESS

Further, the statute does not violate the Plaintiffs' right to procedural due process. The Residency Statute does not require an individualized showing of dangerousness, but rather, the restriction applies to any offender required to

register on the Georgia Sex Offender Registry, O.C.G.A. § 42-1-12. The triggering event for the residency restriction is the conviction for a sex offense or a crime against a child. Due process does not entitle sex offenders to a hearing to prove a fact that is immaterial under the statute. Procedural due process does not bar a state from creating distinctions between sex offenders and other offenders. See Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003); Miller, 405 F.3d at 709, citing Conn. Dep't of Pub. Safety, 538 U.S. at 7-8.

D. THERE IS NO SUBSTANTIVE DUE PROCESS VIOLATION

Plaintiffs ask the Court to create a substantive due process right to family privacy. The Court declines the invitation to expand substantive due process rights. See Williams v. Attorney General of Alabama, 378 F.3d 1232, 1235 (11th Cir. 2004); See, e.g., Glucksberg, 521 U.S. at 725 (fundamental rights are "not simply deduced from abstract concepts of personal autonomy").

E. THERE IS NO VIOLATION OF THE TAKINGS CLAUSE

Plaintiffs allege the Residency Statute constitutes a "taking" in violation of the United States Constitution. Since the statute does not deny Plaintiffs all economically beneficial or productive use of land they have failed to state a valid "takings" claim. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-16

(1992)(physical taking of property); see also Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)(regulatory restriction on property).

F. THERE IS NO VIOLATION OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

Plaintiffs also claim a violation of the Religious Land Use and Institutionalized Persons Act, (RLUIPA), 42 U.S.C.S. §2000 which prohibits the government from regulating land in a manner that imposes a substantial burden on the religious exercise of a person or a religious assembly or institution. RLUIPA is a land use regulation. This statute does not regulate land use, only a sex offender's ability to live in certain places. Plaintiffs have failed to state a claim under RLUIPA. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 648-49 (2002). Here, the Residency Statute contains no restrictions relating to the ability of Plaintiffs to exercise their religious beliefs.

G. THERE IS NO VIOLATION OF THE RIGHT TO INTER/INTRASTATE TRAVEL

The statute does not violate Plaintiffs right to inter/intrastate travel. The "right to travel" exists only to the extent that a statute prevents a citizen from entering or leaving a state or erects a barrier to movement in and around Georgia or other states. Saenz v. Roe, 526 U.S. 489 (1999). Nothing contained in the

Residency Statute remotely suggests that Plaintiffs are prohibited from traveling inter or intrastate.

H. THE STATUTE IS NOT UNCONSTITUTIONALLY VAGUE

Lastly, Plaintiffs seek relief in the form of a declaration that the school bus stop provision is vague and overbroad. They make this statement without any suggestion of how the phrase "school bus stop" is either vague or overbroad. The prohibition against excessive vagueness does not justify invalidating a statute merely because a reviewing court could have drafted the legislation with greater precision. Grayned v. City of Rockford, 408 U.S. 104, 110 (1972). See Papachristou et al. v. City of Jacksonville, 405 U.S. 156 (1972)(statute only void for vagueness if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden). Here, the statute defines "school bus stop" as one which is "designated by local school boards of education or by a private school." This definition is neither vague nor overbroad. This same language has been utilized in any number of other state and federal statutes. *See* O.C.G.A. § 40-6-54; O.C.G.A. § 40-14-17; O.C.G.A. § 40-14-3; 7 U.S.C. § 1961; 10 U.S.C. § 705; 6 U.S.C. § 444.

II. PLAINTIFFS HAVE NOT SUFFERED AN IRREPARABLE INJURY

Next, Plaintiffs must show that they have suffered an irreparable injury. A showing of irreparable injury is "the *sine qua non* of injunctive relief." Siegel v. LaPore, 234 F.3d 1163 (11th Cir. 2000). Plaintiffs offered evidence of two lay witnesses only one of which is a Plaintiff in this case. Both witnesses testified that they have been told by their probation officer that they might have to move, neither stated that would have to move. Evidence was offered that another named Plaintiff, Jeffrey York is currently in custody as is another named Plaintiff. Clearly these Plaintiffs cannot show irreparable injury that is actual or imminent. Moreover Plaintiffs offered the testimony of several Sheriffs and presented maps of several counties. Of the officials from sheriffs' offices that testified, none could say that the bus stops they were using had been designated by the school board. Even assuming that the school bus stops had been designated by the school board in each county for which a map was presented, evidence was presented that there were places where individuals could live. Plaintiffs argue that these places may not have suitable housing but have offered no evidence to support this contention. If Plaintiffs are knowingly within 1000 feet of a bus stop they will have to move. Moving is something that people do everyday and can hardly be classified as irreparable harm.

Moreover, as noted in Doe v. Miller, 405 F.3d 700 (8th Cir. 2005) there is no right "to live where you want." In Miller, the Court was not persuaded by the argument that Plaintiffs could not find housing in urban areas, live with specific family members, or move to certain areas of town because of Iowa's residency restriction. Id. at 706. Clearly this "harm" was not considered significant by the Eighth Circuit Court of Appeals. This Court is similarly not persuaded.

Plaintiffs have offered evidence from a small number of Georgia's counties. They suggested that the production of maps for all of Georgia's 159 counties was financially burdensome. The maps they did produce however interesting do not provide persuasive evidence to the Court. First, the maps did not indicate whether the bus stops were designated by the school board. Second, even assuming that the bus stops they used are considered officially designated by the school board, they made too many assumptions in preparing them for the maps to be of any value. For example, on the map of McDuffie County, Plaintiffs marked out areas that they determined were uninhabitable based upon the fact that the 2000 census indicated they were sparsely populated. They did this in the same color they used to block out other areas they deemed to be uninhabitable. The fact that the 2000 census did not reflect people living in an area does not make it an uninhabitable area at the time the census was taken much less in 2006. In Richmond County they showed

large areas blocked out because the plot came within 1000 feet of a prohibited area without acknowledging that plots are readily subdivided upon development. Lastly, the 4 maps that they decided to plot out are 4 small counties in Georgia. The Court has virtually no evidence with regard to a majority of the 159 counties in the state.

III. ANY HARM TO THE PLAINTIFFS IS OUTWEIGHED BY THE POTENTIAL DAMAGE TO THE DEFENDANTS

The reality is that children wait for school buses early in the morning at times when it is still dark. They return from school on those buses at times when traffic is typically light as people are at work. There is no organized supervision at the bus stops so children are particularly vulnerable. Not every parent has the luxury of waiting with their child for the bus or waiting for the bus when the child returns from school. The schools have no ability to prevent a registered sex offender from moving into a neighborhood where the bus must stop due to the number of children in a neighborhood. As shown above the public has reason to be concerned as there is demonstrated evidence of sex offenders stalking and taking advantage of the vulnerability of the children at school bus stops. That being the case the public's need to protect its children must outweigh the inconvenience of the sex offenders having to move.

There is indisputable evidence that these individuals have a propensity to re-offend. As one Court noted, 48 % of the recidivist sex offenders repeated in the first 5 years and 52 % during the next 17 years. Doe v. Poritz, 662 A.2d 367, 374-75 (N.J. 1995). The fact that, "[s]ex offenders are a serious threat in this Nation" is a fact that Plaintiffs have not attempted to disprove. Connecticut Dept. of Public Safety v. Doe, 123 S.Ct. 1160, 1163 (2003). Both the Plaintiffs' and Defendants' experts testified that instability does increase the likelihood of recidivism for those individuals who are otherwise in stable environments but they both recognized that there is no cure for a sex offender and that opportunity or access to victims is the greatest controlling factor against reoffense. The Plaintiffs' expert even testified that many attacks that occur at school bus stops occur as the offender is driving by the bus stop and in many cases the offender knows his victim. He acknowledged that people tend to befriend and associate with people who live near them. He further acknowledged that people in general drive most often near their own homes. Thus, if a school bus stop is close to the home of the sex offender, he is more likely to drive near the school bus stop. Thus, the opportunity or access to potential victims at school bus stops is increased if the residence of the sex offender is close to a school bus stop.

Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.... "When the frame of reference moves from a unitary court system....to a system of federal courts representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." Rizzo v. Goode, 423 U.S. 362, 378-79 (1976)(citations omitted). "[T]hese principles []have applicability where injunctive relief is sought, not against the judicial branch of state government, but against those in charge of an executive branch of an agency of state or local governments...." Id. at 380. The Georgia legislature made the decision to reduce the opportunity or access to potential victim created by a sex offender's proximity to school bus stops. It is not up to the Court to second guess this decision by substituting its own. Clearly this is a rational goal.

IV. A PRELIMINARY INJUNCTION IS NOT IN THE PUBLIC'S INTEREST

Plaintiffs also bear the burden of showing that the preliminary injunction would serve the public interest. Baker v. Buckeye Cellulose Corp., 856 F.2d 167, 169 (11th Cir. 1988). Plaintiffs have not met this burden. Plaintiffs claim that the

public interest will not be served by this statute because they claim that it will force sex offenders not to register or advise officials of their whereabouts. They offer evidence that suggests similar provisions in Iowa's statute resulted in this very thing. As noted above, Plaintiffs' expert testified that instability was one of the factors that caused sex offenders to re-offend and claimed that this statute would cause instability. People experience instability at various times in their lives. Without opportunity to offend the propensity to do so cannot manifest itself. Reducing that opportunity is a laudable goal that cannot be ignored or taken lightly. By Plaintiffs' own admissions, the criminal consequences of failing to comply with Georgia's registry requirements are much more severe then they are in Iowa. As a result the sex offenders residing in Georgia have a greater incentive to comply with the statute. Clearly the Georgia legislature saw a real need to take further action to protect the citizens of this State. The rising number of sexual offenders in this state along with the knowledge that sexual predators are a real threat to public safety convinced the legislative body of this state as well as the legislative bodies of other states that further action is necessary. Plaintiffs do not dispute the need but offer their belief and the belief of others that the solution will be ineffective. This Court will not speculate as to the efficacy of this statute. Residency statutes are simply too new to provide any concrete evidence as to their

effectiveness or harm. Plaintiffs have not met their burden in demonstrating that the public's need to deny opportunity to sex offenders is outweighed by the sex offenders' need for stability.

Finally, the injunction that Plaintiffs seek does not serve the public interest because it is not narrowly tailored to "fit the nature and extent of the established violation." Gibson v. Firestone, 741 F.2d 1268, 1273 (11th Cir. 1984). Each named and potential plaintiff is unique in their living situation and offense. While admittedly the legislation treats them all the same, the preliminary injunction cannot. The balance and the societal need may change depending upon the level of offense and the effect of the statute on the individual. What Plaintiffs' own evidence shows is that some offenders can and have found housing. As a result, extending any injunction to them would be far too overreaching.

CONCLUSION

WHEREFORE, for the above and foregoing reasons, Plaintiffs' motion for preliminary injunction is denied.

_____

THE HONORABLE CLARENCE COOPER
JUDGE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF GEORGIA

PRESENTED BY:

_____

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2006, I electronically filed a **Proposed Order Denying Plaintiffs' Motion For Preliminary Injunction** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

Sarah Geraghty
Stephen Bright
Lisa Kung
Southern Center for Human Rights

Gerald Weber
Margaret Garrett
Beth Littrell
American Civil Liberties Union

This 19th day of July, 2006.

s/Devon Orland
Assistant Attorney General

Please serve:
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CERTIFICATION AS TO FONT

Pursuant to N.D. Ga. Local Rule 7.1 D, I hereby certify that this document is submitted in Courier New 12 point type as required by to N.D. Ga. Local Rule 5.1(b).

s/Devon Orland
Georgia Bar No. 554301