UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No.15-14336

JOHN DOE #1, *et al.*,

Plaintiffs-Appellants,

v.

MIAMI-DADE COUNTY,

Defendant-Appellee.

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants certify, pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, that the Certificates of Interested Persons filed in Appellants' and Appellee's earlier briefs are complete.

/s/ Daniel B. Tilley
Daniel B. Tilley

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INTRODUCTION

Plaintiffs' Amended Complaint "simply, concisely, and directly" alleges facts demonstrating that the Lauren Book Ordinance ("Ordinance") in Miami-Dade County ("Miami-Dade" or "County") is an unconstitutional ex post facto law. *Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 347 (2014) (describing the "substantive plausibility" requirement of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009)). The Amended Complaint details how the Ordinance's residency restriction operates to punish covered individuals by routinely forcing them into homelessness and transience, thus undermining their rehabilitation and successful reentry into society. Despite Plaintiffs' specific allegations that Miami-Dade's residency restrictions exacerbate housing insecurity, increase the risk of recidivism among the formerly incarcerated, and ultimately threaten public safety, the County applies the restrictions to all covered individuals for life, without exception. These factors more than establish a substantively plausible ex post facto claim under the Supreme Court's *Mendoza-Martinez* balancing test. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 544, 567-68 (1963) (setting out factors for determining if a law is punitive in its effects).

The County's Answer Brief largely asks this Court to disbelieve Plaintiffs' factual allegations. It also attempts to evade the *Mendoza-Martinez* balancing test

by isolating each factor without conducting any balancing and by invoking the County's unsubstantiated legislative findings to immunize the law from further review. As explained below, these arguments are insufficient to warrant dismissal as a matter of law under both *Kennedy-Mendoza* and *Iqbal*. If anything, the County's submissions emphasize the need for factual development on these crucial issues. This Court should therefore reject Miami-Dade's arguments on appeal and reverse the district court's dismissal for failure to state a claim.

I. THE RESIDENCY RESTRICTION'S MOST SALIENT FEATURES AND EFFECTS WEIGH DECISIVELY IN FAVOR OF PUNITIVENESS.

A. The Residency Restriction Causes Extensive Homelessness and Transience.

The central issue in this case is the degree to which Miami-Dade County's residency restriction limits available housing. Plaintiffs' Amended Complaint specifically alleges that the residency restriction drastically reduces housing, thus leaving Plaintiffs and hundreds of covered individuals homeless or transient. *See* Brief of Plaintiffs-Appellants ("Appellants' Br.") at 14-19 (summarizing relevant factual allegations). The manner by which the residency restriction causes housing instability is uncontroversial. The law imposes an affirmative restraint on where covered individuals may obtain housing. *See* Vol. 1, Doc. 25 at A034 ¶ 2. This makes it more difficult for covered individuals to locate housing. *Id.* at A052-53 ¶ 146. Indeed, there are only a "few locations thought to be eligible under the

Ordinance with affordable rental housing." *Id.* at A045 ¶ 86. For this reason, after the County preempted local residency restrictions and imposed the current 2500-feet restriction from schools in 2010, homeless encampments persisted. *Id.* at A034 ¶¶ 4-6, A044-45 ¶¶ 83-85, A047 ¶ 106. That a 2500-feet residency restriction from schools would cause homelessness and transience in Miami-Dade County is unsurprising, considering Miami-Dade County is the seventh most populous county in the nation, and has the fourth largest school district. Appellants' Br. at 19 nn.6, 7.

The County's Answer Brief does not substantively engage any of Plaintiffs' allegations about the tremendous difficulties that covered individuals face in locating housing. Rather, it attempts to cast them aside as conclusory and focuses instead on supposed "alternative causes" for Plaintiffs John Doe #2 and #3's homelessness. Appellee's Answer Brief ("Answer Br.") at 18. But, as the County acknowledges elsewhere in its brief, an ex post facto claim is a facial, rather than as-applied, challenge to a statute. *Id.* at 28. Any "alternative causes" for Plaintiffs' homelessness are therefore irrelevant.

Nonetheless, the County's alleged "alternative causes" are merely explanations for why the Does had to find new housing under the Ordinance; they say nothing of why the Does remain homeless. *See* Answer Br. at 18. To this end, the Amended Complaint makes clear that the Does remain homeless *because of* the

Ordinance. Vol. 1, Doc. 25 at A037 ¶¶ 23, 27-28, A039-40 ¶¶ 50-51, 53-54. And the Does are not alone. Members of Plaintiff Florida Action Committee suffer the same barriers to housing, either in moving to or remaining in Miami-Dade County. *Id.* at 040-41 ¶¶ 58-63.

The same is also true of the forty individuals living lawfully – despite their status as former sexual offenders – at the River Park Trailer Park, who could not locate compliant housing after Defendants wrongfully evicted them. *Id.* at A047 ¶¶ 104-06. Though the County prefers that this Court ignore the River Park eviction, *see* Answer Br. at 28, this event powerfully reveals the devastating impact the residency restriction has on any covered individual's ability to locate new housing, regardless of why that person must obtain new housing. If true, these facts, along with the voluminous allegations in the Amended Complaint about the hundreds of covered individuals who have also been made homeless or transient by the residency restriction, most certainly establish "substantial . . . housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by . . . landlords." *Smith v. Doe*, 538 U.S. 84, 100, 123 S. Ct. 1140, 1151 (2003).

The County further attempts to undermine Plaintiffs' well-pleaded allegations about the residency restriction's effects on homelessness by noting that, when the Miami-Dade County Board of County Commissioners ("Board")

amended the law in 2010, it professed an intent to leave covered individuals with sufficient housing. Answer Br. at 4, 23. The County also repeatedly invokes the fact that the amended Ordinance included a grandfather clause for those who establish a residence before a new school is established. *E.g.*, *id.* at 22. But the County's intent to leave available housing is irrelevant. As the County itself acknowledges, the issue is whether the actual effects of the Ordinance are punitive. *See id.* at 13 (stating that only question is whether residency restriction "is so punitive either in purpose or effect as to negate [the County's] intention to deem it civil" (citing *Smith*, 538 U.S. at 85, 123 S. Ct. at 1142-43)) (alteration added) (internal quotation marks omitted). To this end, the Amended Complaint unambiguously alleges that the residency restriction remains among the strictest in the nation despite the 2010 amendments, and that it still causes widespread homelessness and transience. *See*, *e.g.*, Vol. 1, Doc. 25 at A043 ¶ 74.

Glossing over these allegations, the County declares that the Board "is entitled to make its own legislative findings," Answer Br. at 24, and insists that the Board's belief that it was leaving adequate housing must trump any contrary reality. However, as the Florida Supreme Court has recognized, "'While courts may defer to legislative statements of policy and fact, courts may do so only when those statements are based on actual findings of fact.'" *Estate of McCall v. United States*, 134 So. 3d 894, 906 (Fla. 2014) (plurality opinion) (quoting *N. Fla.*

Women's Health & Consulting Serv., Inc. v. State, 866 So. 2d 612, 627 (Fla. 2003)). The Amended Complaint amply demonstrates that there is no empirical basis for the County's conclusory assertions that the residency restriction leaves adequate available housing for covered individuals, notwithstanding its drafters' intent. *See McCall*, 134 So. 3d at 906 ("[Legislative findings] are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions and *they are always subject to judicial inquiry.*") (alteration added) (emphasis in original) (internal quotation marks omitted). Indeed, the fact that the residency restrictions have continuously made hundreds of individuals homeless since 2010 suggests Miami-Dade has utterly failed its intentions. The district court's premature dismissal prevented any resolution of this central factual dispute.

The County attempts to minimize the punitive impact of the residency restriction by stressing that it is "not the equivalent of imprisonment," and citing "arguably more restrictive" laws the Supreme Court has upheld in cases like *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072 (1997), which involved the civil commitment of certain former sexual offenders. Answer Br. at 15-16. This argument contravenes the Supreme Court's unequivocal guidance that the *Mendoza-Martinez* factors must be carefully balanced, rather than considered in isolation. *See Hudson v. United States*, 522 U.S. 93, 101, 118 S. Ct. 488, 496

(1997). The fact that the residency restriction routinely forces individuals into homelessness and transience cannot be disregarded simply because the County has abstained from re-imprisoning these individuals.

The County's reliance on *Hendricks* is especially misguided, as it overlooks several critical distinctions between the Miami-Dade and Kansas systems. First, Kansas only allowed civil commitment for individuals who, after a full judicial hearing, were found beyond a reasonable doubt to suffer from a "mental abnormality or a personality disorder" and were also "likely to engage in predatory acts of sexual violence." *Hendricks*, 521 U.S. at 350, 117 S. Ct. at 2076 (internal quotation marks omitted). Second, a single commitment in Kansas lasted just one year; further confinement had to be reauthorized yearly through the same rigorous process. *Id.* at 364, 117 S. Ct. at 2083. Third, all individuals were released "[i]f, at any time, the confined person [was] adjudged safe to be at large." *Id.* (internal quotation marks omitted). These requirements persuaded the Supreme Court that the statute would not impose the affirmative restraint of civil commitment longer than necessary to address an individual's dangerousness. *Id.* The Ordinance contains no such limitations; it applies for life, based solely on the crime of conviction and without any initial or subsequent hearings to assess the propriety of

continued restraint. It is thus improper to suggest that *Hendricks*, or any other factually dissimilar case,[1] could justify dismissal of this action as a matter of law.

B. The Residency Restriction Undermines Public Safety.

The Amended Complaint's allegations about the housing insecurity caused by the residency restriction strongly support Plaintiffs' contentions that the restriction undermines public safety. As the Amended Complaint explains in detail, preventing individuals from securing safe, stable housing only increases their risk of recidivism. Vol. 1, Doc. 25 at A050-53 ¶¶ 133-151.[2] It is therefore

[1] The County's repeated reliance on *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), and *Wallace v. New York*, 40 F. Supp. 3d 278 (E.D.N.Y. 2014), is similarly misplaced. Though both cases rejected ex post facto challenges to residency restrictions, neither case involved allegations or evidence of homelessness and transience. Indeed, the district court in *Doe* heard trial evidence "that while the statute made it more difficult for sex offenders to find housing, virtually everyone among the covered parolees and probationers . . . was able to locate housing in compliance with the statute." *Doe*, 405 F.3d at 707. In *Wallace*, one of the major issues was the adequacy of the county's program to provide housing for those who otherwise would be left homeless by the residency restriction. *Wallace*, 40 F. Supp. 3d at 301. Because of these significant factual dissimilarities, these decisions say nothing about how a court should evaluate a regime that causes as much homelessness and transience as the Ordinance.

[2] *See also* Tracy Velazquez, *The Pursuit of Safety: Sex Offender Policy in the United States*, 20-21 VERA INSTITUTE OF JUSTICE (2008) (reviewing relevant research and concluding that "[e]vidence also suggests that residency restrictions compromise public safety by making it more difficult for offenders to re-integrate into society" because they "often force offenders to live in areas where there are few opportunities for employment, few social services, poor access to transportation, and few housing options")

implausible that implementing a residency restriction whose principal effect is to cause massive homelessness and transience would advance public safety.

Contrary to the County's assertions, *see* Answer Br. at 25, Plaintiffs' contentions go far beyond mere disagreement with the County's public policy choices. Under the *Mendoza-Martinez* factors, the fact that the residency restriction undermines its stated goal of reducing recidivism demonstrates that the restriction is excessive, as preventing covered individuals from obtaining housing goes well beyond the means reasonably necessary to protect the public.[3] The County's insistence on imposing the residency restriction despite its proven counterproductive effects also supports Plaintiffs' contention that the law's true nature is retributive, rather than regulatory.

Despite the requirement that the Court assume the truth of Plaintiffs' allegations, the County attempts to contradict the Amended Complaint's assertions about how its residency restriction undermines public safety. The County first cites to *McKune v. Lile*, 536 U.S. 24, 122 S. Ct. 2017 (2002), which relied on data now over two decades old to make conclusions about the recidivism risk posed by those formerly convicted of sexual offenses. *Id.* at 32-33, 122 S. Ct. at 2024. But

[3] For instance, after the Department of Corrections evicted fifty-four covered individuals from the River Park Trailer Park, three absconded from justice, presumably because they were unable to locate housing. Vol. 1, Doc. 25 at A047 ¶ 105. The Ordinance's demonstrated tendency to force individuals "underground" in this manner undermines public safety. *Id.* at A053 ¶¶ 148-49.

McKune was not a case about whether residency restrictions violate the ex post facto clause; it was a case about whether mandatory sexual abuse treatment violated the right against self-incrimination. And the recidivism risk the Court identified in *McKune* was of former offenders who had not received sexual abuse treatment. *Id.* at 33, 122 S. Ct. at 2024. The Supreme Court expressly recognized that the risk of recidivism is significantly reduced in those who do receive such treatment. *Id.* This clarification is particularly relevant here, since individuals covered by the Ordinance must complete sexual abuse treatment as a mandatory condition of Florida probation. *See* Fla. Stat. § 948.30(1)(c). Yet the Ordinance does not account for this reduced recidivism among covered individuals. The County instead selectively reads *McKune* to support a finding *McKune* expressly forecloses: that former offenders who have received treatment present the same recidivism risk as those who have not.

The County next cites a short piece in a law journal for the proposition that "'studies show that sexual predators tend to strategically place themselves near potential victims.'" Answer Br. at 24 (quoting Samantha Imber, *Sexual Offenses: Prohibit Sexual Predators from Residing Within Proximity of Schools or Areas Where Minors Congregate*, 20 Ga. St. U. L. Rev. 100 (2003)). But this piece only recites the legislative history behind Georgia's own residency restriction. The portion of the article the County relies upon is a summary of floor statements by

State Senator David Adelman. Imber at 101. The only source for the referenced "studies" is a 1997 opinion piece in the *Decatur-Dekalb News* by Senator Adelman himself. *Id.* at 100 nn.1-2. Neither the County nor Imber's article reveal the identity of these studies.[4] Still, even if the County's baseless proposition about recidivism was true, this would at most create a contested factual issue; it is not an appropriate inquiry on a motion to dismiss.

C. The Residency Restriction Applies for Life, Without Exception.

The punitive effects of the residency restriction are enhanced by the facts that the Ordinance applies for life, without exception, to all covered individuals, regardless of their individual risk. Combined with the fact that the County makes any violation of the residency restriction a crime punishable by incarceration, Vol 1., Doc. 25 at A044 ¶ 81, it is reasonably plausible that the Ordinance is punitive. *See* Order, *Florida Action Comm., Inc. v. Seminole Cty.*, No. 15-cv-01525, at *16 (M.D. Fla. June 17, 2016), ECF No. 61 ("By imposing arrest and criminal prosecution for a violation, the Court can reasonably infer that Seminole County intended the Ordinance to be criminal in nature, rather than civil or regulatory."). The County defends the unyielding nature of the residency restriction by citing the Supreme Court's statement in *Smith v. Doe* that sexual reoffenses "may occur as late as 20 years following release." 538 U.S. at 104, 123 S. Ct. at 1153. As noted

[4] Senator Adelman does not appear to have any relevant expertise in social science research. https://www.reedsmith.com/david_adelman/.

in the Brief of Plaintiffs-Appellants, the study cited to support this conclusion is inherently unreliable. Appellants' Br. at 24. Regardless, while this inflated recidivism concern purportedly justified Alaska's lifetime *registration* scheme, it cannot immunize from scrutiny the County's far more debilitating residency restriction. Left unsaid in *Smith* is that a covered individual who does not commit a new sexual offense after twenty years has a lower recidivism risk than a felon *without* a known history of sexual offending.[5] Yet the Ordinance applies for life to the class of lower risk offenders, while completely excluding the higher risk class, all based on the County's selective and skewed reading of the social science.

The County additionally defends the Ordinance's lack of an individualized risk assessment on the grounds that the residency restriction only applies to those who have committed a range of offenses against those under the age of sixteen. Answer Br. at 26. The implication is that the residency restriction is not punitive because the County could have, but did not, expose more categories of former sexual offenders to its strictures. But the Supreme Court recently clarified that, in facial challenges like the one here, "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects"; thus, "[t]he proper focus of the constitutional inquiry is the group for whom the law is a

[5] J. Stephen Wormith, Sarah Hogg, & Lina Guzzo, *The Predictive Validity of a General Risk/Needs Assessment Inventory on Sexual Offender Recidivism and an Exploration of the Professional Override*, 39 Crim. Just. & Behav. 1511, 1529-32 (2012).

restriction, not the group for whom the law is irrelevant." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015) (internal quotation marks omitted). In other words, the fact that the County could have passed a more broadly punitive law is beside the point.[6] The Amended Complaint adequately alleges that the residency restriction operates to punish those to whom it applies.

II. THE RESIDENCY RESTRICTION IS NOT RATIONALLY RELATED TO PUBLIC SAFETY.

There is no reasonable basis to support Miami-Dade's assertion that its residency restriction advances public safety. Appellants' Br. at 21-23, 26-27. The County nonetheless claims that "prohibiting [covered individuals] . . . from residing within [2500 feet] of a location where children regularly congregate in large numbers for approximately eight hours every weekday" bears a rational connection to public safety. Answer Br. at 9-10 (quotation omitted). Conspicuous by its absence is any mention of the eight hours at issue: nighttime, when children do not congregate at schools. The Supreme Court of Kentucky, in joining a host of states that have recently rejected the specious basis for residency restrictions, best exposed this glaring fallacy by observing, "It is difficult to see how public safety is

[6] The County repeats this error in an effort to minimize the fact that the residency restriction only applies to those already convicted of a crime, another factor that weighs in Plaintiffs' favor under the *Mendoza-Martinez* test. Specifically, the County points out that the Ordinance also prohibits landlords from renting a property within the residency restriction to a covered individual. Answer Br. at 35-36. Since Plaintiffs do not contend that the restrictions on landlords are punitive, they are simply irrelevant.

enhanced by a registrant not being allowed to sleep near a school at night, when children are not present, but being allowed to stay there during the day, when children are present." *Commonwealth v. Baker*, 295 S.W.3d 437, 445 (Ky. 2009).

Not once does the County attempt to articulate how residency restrictions reduce an individual's contact with children. Instead, the County – and the cases it relies upon – simply incant that it is reasonable to think that they do, so long as the County has concerns about recidivism. *See* Answer Br. at 28-29 (citing cases). But the proposition's plausibility stems only from such stubborn repetition, not objective reality. The Amended Complaint leaves no doubt that there is absolutely no factual basis supporting the efficacy of residency restrictions, particularly as extensive as those in Miami-Dade. This is both because the County's alarmist conclusion that covered individuals "present an extreme threat to the public safety," *id.* at 22, is objectively wrong, notwithstanding the Supreme Court's outdated and unreliable dicta to the contrary,[7] and because decades of research

[7] *See* Ira Mark Ellman & Tara Ellman, *Frightening and High: The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Const. Comment. 495, 497-99 (2015) (evaluating the sources of the Court's assertions about sexual offense recidivism in *Smith* and *McKune* and concluding "the evidence for *McKune*'s claim that offenders have high re-offense rates (and the effectiveness of counseling programs in reducing it) was just the unsupported assertion of someone without research expertise who made his living selling such counseling programs to prisons"). The County mistakenly refers to this article as a "study" calling into question the research the Court relied upon in *Smith*, then states that evaluating such competing studies is a matter to be left to legislatures. Answer Br. at 27 n.9. But the Ellmans' article merely cite checks the Supreme Court's assertions in

conclusively show that residency restrictions cannot reduce recidivism. Vol. 1, Doc. 25 at A050-53 ¶¶ 133-51. These facts were well-established by the 2010 amendments to the Ordinance, and the County is not free to ignore inconvenient truths.

CONCLUSION

The Amended Complaint sufficiently alleges that Miami-Dade's residency restriction forces hundreds into homelessness, undermines public safety, and applies for life to all covered individuals. If true, these excessive, retributive effects are inherently punitive. Nothing in the County's Answer or Motion to Dismiss changes the proper outcome in this case: reversing the district court's order dismissing the Amended Complaint and remanding for further proceedings.

Smith and *McKune*, a task easily achieved by any legislator genuinely motivated to understand the basis for the Court's conclusions. The County cannot pass off as legitimate fact-finding its selective and superficial reading of Supreme Court dicta on factual matters. *See Estate of McCall*, 134 So. 3d at 906 ("[Legislative findings] are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions and *they are always subject to judicial inquiry*.") (alteration added) (emphasis in original) (internal quotation marks omitted).

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 4,335 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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 using Microsoft Word 2010 in 14-point Times New Roman.

Certificate of Service

Pursuant to Federal Rule of Appellate Procedure 25(d)(1)(b), I certify that, today, I electronically filed this document with the Clerk of Court using CM/ECF, which will serve opposing counsel Abigail Price-Williams (apw1@miamidade.gov) and Michael B. Valdes (mbv@miamidade.gov) via electronic transmission of Notices of Docket Activity generated by CM/ECF.

/s/ Daniel B. Tilley
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