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

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

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROPOSED FINDINGS OF FACT

The County's Residence Restriction

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

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

3. Ordinance 05-206, codified in Section 21-281 of the Miami-Dade County Code, made it unlawful for an individual convicted as an adult of sexual battery, lewd and lascivious acts, sexual performance by a child, sexual acts transmitted over computer, or the selling or buying of

minors for portrayal in sexually explicit conduct in which the victim or apparent victim was less than 16 years old ("Covered Person") to reside within 2,500 feet of any school unless an exception listed in Section 21-282 of the Miami-Dade County Code applied ("Residence Restriction").

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

5. Mr. Book has been a fervid advocate on issues of child abuse because his daughter, State Senator Lauren Book, was the victim of physical and sexual abuse by their live-in nanny.

6. In 2010, the Commission named the Ordinance the "Lauren Book Child Safety Ordinance" after State Senator Lauren Book.

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

8. Mr. Book is also the Chair of the Homeless Trust Board of Directors. The Homeless Trust is a County entity charged with developing and executing the County's plan for ending homelessness in Miami-Dade.

9. Ron and Lauren Book traveled across Florida to successfully lobby for residence restrictions in approximately 60 jurisdictions across Florida, or nearly half of the 140 residence restrictions enacted around the state.

10. Mr. Book has also made a host of vitriolic statements about former sexual offenders in the media. For instance, he has referred to sexual offenders as "monsters" and "[t]he creeping crud of society." Pls.' Trial Ex. 29 (ECF 171-29) at 2. He affirmed in his trial testimony that he previously stated that those who oppose residence restrictions "either don't have children, or don't

care about children." He has also advocated that former sexual offenders should live away from the population, in the more rural areas of the County.

11. Before the vote enacting the 2005 Ordinance (05-206), the Commission granted Mr. Book a special exemption to speak at the meeting. Pls.' Trial Ex. 18 (ECF 171-18) at 11-12. Commissioners then repeatedly sought Mr. Book's expertise on various matters, including providing the justification for the Residence Restriction. *Id.* at 46, 50, 56-60.

12. During the November 15, 2005, hearing on Ordinance 05-206, Commissioner Carey-Schuler stated, "I'd like to see sexual predators disappear, disappear completely…I'd like to see them just disappear." Pls.' Trial Ex. 18 (ECF 171-18) at 28-29. Chairman Martinez later suggested that forcing these individuals underground was advantageous because "then they violate probation and they go back to prison." *Id.* at 62. In response to a concern about where individuals would find housing, Chairman Martinez quipped: "The Everglades," and "hopefully Alabama, Georgia, North Carolina and the borders." *Id.* at 49, 53. Addressing how police would enforce the restrictions, Commissioner Sosa proposed using "animal services" instead, because having animal services "track them down," would "send a message, this is not a place for you . . . ." *Id.* at 77. The record shows commissioners were well-aware that the Ordinance left "very few areas" for Covered Persons to live. *Id.* at 50, 61.

13. Several commissioners noted the lack of any evidence demonstrating that residence restrictions actually reduce offending, as well as the fact that the laws may in fact push offenders "underground," making them harder to track and supervise. Commissioners acknowledged that the Residence Restriction likely would not advance public safety, but maintained that the County could not be seen as passing legislation favorable to sexual offenders. *Id.* at 58-59. A school is defined in Section 21-280(9) as a "public or private kindergarten, elementary, middle, or secondary

(high) school." The Miami-Dade public school district is the largest in the state of Florida and the fourth largest in the United States.

14. There are approximately 1,300 schools in Miami-Dade County. This number includes public schools, charter schools, and private schools.

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

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

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

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

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

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

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

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

23. At its January 21, 2010 meeting, the County Commission enacted Ordinance No. 10-01, which amended Ordinance 05-206, to preempt all of the stricter municipal ordinances and have the County's Residence Restriction applicable countywide. Def.'s Trial Ex. DD (ECF 123-23). Prior to enactment, Ordinance No. 10-01 came before the County Commission's Public Safety & Intergovernmental Committee for a public hearing on December 10, 2009.

24. During the December 10, 2009 public hearing, Commissioner Diaz said, "[The Department of Corrections] are here to ensure that we keep the animals locked up, the ones that are the predators, the ones that make sure that they do, they kill the children. The ones that should not be amongst society." Def.'s Trial Ex. HH (ECF 173-26) at 35.

25. The County did not specifically quantify how much additional housing would become available by preempting these municipal ordinances. Commissioner Sally Heyman stated at the public hearing on December 10, 2009, that Ordinance 10-01 was not "a vehicle to create additional housing" but to bring "continuity" to the various municipal ordinances. *Id.* at 20.

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

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

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

29. Under Section 21-281(c) of the Miami-Dade County Code, anyone who violates the County's Residence Restriction shall by punished by a fine not to exceed $1,000.00 or imprisonment in the County jail for not more than 364 days or by both such fine and imprisonment.

History of Encampments

30. There is no evidence of any homeless encampments of former sexual offenders prior to late 2005 or 2006, the period after municipalities and the County began enacting residence restrictions at the urging of Ron Book. No testifying witness could recall encampments of former sexual offenders prior to the original residence restrictions. Given the notoriety of these encampments, it is unlikely one could have escaped the County or the public's notice.

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

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

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

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

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

36. At its height, there were approximately 260 to 270 individuals registered at the NW 71st Street Encampment.

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

38. Not all of the individuals registered at the NW 71st Street Encampment slept there each night. This is in part because those who were not on probation have no electronic monitoring and are not required to report to their registered addresses between 10 p.m. and 6 a.m.

39. There was no running water or plumbing at the NW 71st Street Encampment. People urinated and defecated in and around the area.

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

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

42. The Homeless Trust offered rental assistance for the people living at the encampment. Although the Homeless Trust attempted to assist applicants for rental assistance locate compliant housing, the applicants were ultimately required to locate their own housing that complied with the County's Residence Restriction.

43. The Homeless Trust unsuccessfully attempted to locate potential housing for the people living at the NW 71st Street Encampment. The Homeless Trust sent outreach workers to areas outside the 2,500-foot buffer zones as "boots on the ground looking in the few allowable areas where they can live." *See* Pls.' Trial Ex. 23 (ECF 171-23) (Email dated September 1, 2017, from Victoria Mallette to Sergio Torres and Lazaro Trueba).

44. The Homeless Trust also obtained a list of all addresses where former sexual offenders were living outside of the 2,500-foot buffer zone and where there was a unit number, indicating that there could theoretically be another possible unit for rent. The Trust asked "housing navigator" Robert Berman to go to each of these addresses to see if there was any available housing. There were 37 addresses on the list. Mr. Berman went to each of the properties. He found only one unit for rent, but the landlord would not accept any form of rental assistance. *See* Pls.' Trial Ex. 22 (ECF 171-22) (Email dated January 2, 2018, from Robert Berman to Victoria Mallette).

45. The Director of Landlord Recruitment and Retention for the Rent Connect Program at the Homeless Trust, Paul Imbrone, testified that he could not locate any available housing outside of the 2,500-foot buffer zone. Mr. Imbrone identified the five zip codes that had the most land outside the 2,500-foot buffer zone. These five zip codes were in three regional areas: Doral, Sunny Isles Beach, and Southwest Miami. Mr. Imbrone made several trips to each of these areas, but he could not find any available housing.

46. Mr. Imbrone has explored working with a developer to purchase housing outside the 2,500-foot buffer zone, but that has not been successful. Mr. Berman was only able to find housing for former sexual offenders outside Miami-Dade County: Mathew 25 Ministries in Pahokee, Florida, and a trailer park in St. Petersburg, Florida.

47. Robert Berman testified that as a "housing navigator" he worked with approximately 60 individuals living at the encampment. Over the past year, he could only locate housing for two people living at the encampment. One of those he found housing for was a former sexual offender, but he was not a Covered Person and did not have to comply with the County's 2,500-foot Residence Restriction.

48. The Homeless Trust's rental assistance was provided through the HAND Program, operated by Citrus Health Network. Rosa Noriega testified that Citrus accepted 120 applications from people living at the NW 71st Street Encampment, but only two people successfully used the rental assistance.

49. Because of the difficulty finding housing in the County, the Homeless Trust explored relocating residents of the NW 71st Encampment to locations outside the County. *See* Pls.' Trial Ex. 17 (ECF 171-17) (Email dated August 30, 2017, from Victoria Mallette to Lieutenant Luis Poveda, Rosa Noriega, and Ada Martinez).

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

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

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

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

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

55. After the NW 71st Street Encampment closed, most of its residents relocated to new encampments at different street corners. Some of these new encampments are located close to NW 37th Avenue between NW 36th Street and NW 60th Street.

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

Plaintiffs

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

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

59. The County requires Covered Persons who have found a potential residence to come in person to the County's Sexual Predator and Offender Unit office in Doral to verify whether the address complies with the Residence Restriction. The County will not verify an address by phone, nor does it provide an online service for official verification. This process delays a Covered Person's ability to act quickly on a potential housing opportunity, particularly for Covered Persons who rely on public transportation to reach Doral.

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

61. On January 5, 1994, John Doe #4 was convicted of lewd and lascivious assault on a minor under the age of 16 for dropping his pants and exposing himself during an argument with another man while a child was present. John Doe #4 has never attended or been required to attend any therapy or treatment for former sexual offenders, even as part of his sentence.

62. In 1994, when John Doe #4 entered his plea, there were no residence restrictions applicable to him. Florida's current 1,000-foot residence restriction does not apply to him because he committed his offense prior to the state law's enactment and the law does not apply retroactively.

63. John Doe #4 resided at 9551 Fontainebleau Blvd. from 2006 until 2008 with his estranged wife. After he separated from his wife, he moved out from this residence because he no longer could afford the rent on his own.

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

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

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

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

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

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

70. 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. There are several other homeless former sexual offenders living at this location with him.

71. There are no bathroom facilities or running water at this location. John Doe #4 goes to a nearby casino to use the bathroom. John Doe #4 has observed other individuals living at this location who are on electronic monitoring urinate and defecate in the bushes nearby because they cannot leave the area.

72. Former sexual offenders residing in the area that do not have a car do not have protection from the elements, including rain, wind, heat, humidity and insects. Another former sexual offender that resides in the same area allows John Doe #4 to use his car to protect himself from the elements.

73. John Doe #4 has been homeless since 2015, and homelessness has a negative effect on his health because of his disabilities. John Doe #4 takes several medications daily to treat his

multiple mental and medical conditions. These medications have to be refrigerated, but there are no refrigerators where he currently resides. A friend of John Doe #4 who resides in an apartment in Homestead allows him to use his refrigerator to store the medications. John Doe #4 travels approximately four hours a day back and forth by bus from his current location to Homestead to take the medications he needs to treat his mental and medical conditions.

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

75. John Doe #4 testified that if there were no Residence Restrictions he would immediately be able to find an available and affordable unit, most likely in Little Havana.

76. John Doe #5 is in his late 50's, has Parkinson's disease, and suffers from significant tremors. John Doe #5 also has serious chronic back pain.

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

78. When John Doe #5 entered his plea, there were no residence restrictions.

79. John Doe #5 was incarcerated for probation violations from November 1996 until February 2001 and from November 2002 until September 2003.

80. 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 violating the state's registration requirements for former sexual offenders by not registering where he was living. During this period, John Doe #5 was neither registering his address with Miami-Dade Police Department nor communicating with this probation officer.

81. John Doe #5 was incarcerated from his arrest in 2006 until he was released from prison in March 2014.

82. There is no evidence that John Doe #5 was made aware of or notified about the County's Residence Restriction until he was released from prison in 2014 and his probation officer told him about the NW 71st Street Encampment.

83. John Doe #5 has family members he could live with but for the Residence Restriction.

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

85. Since the County closed the NW 71st Street Encampment, John Doe #5 has only registered transient addresses. He registered a transient address near the intersection of NW 135th Street and NW 42nd Ave. as his residence for several months and recently registered a new transient address at NW 58th Street and NW 35th Court.

86. John Doe #5 sleeps in the front seat of his son's vehicle each night for shelter. This sleeping arrangement is difficult for him because of his back pain. The location where he sleeps is in a warehouse district with no bathrooms and no running water. There are several other homeless individuals living near this intersection each night, all of whom must comply with the County's Residence Restriction.

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

88. John Doe #5 spends his days at a family member's home. He cannot sleep there at night because there are several schools nearby, but he is allowed to stay there during the day.

89. John Doe #5 searches for available housing online and in the newspaper. The housing that John Doe #5 can afford is all within the 2,500-foot buffer zone, and he is prohibited from living there.

90. 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 Doral office of the Miami-Dade Police Department.

91. John Doe #5 has only looked for available housing in the northern half of Miami-Dade County; he has not looked for any available housing in the southern half of Miami-Dade County. John Doe #5 has limited his search to this area because he must rely on his family for transportation, and they all live in the northern part of the County.

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

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

94. At the time the County enacted the Ordinance, John Doe #6 lived at 9064 Collins Avenue in Surfside. John Doe #6 had established this residence on November 2, 2005, so he was covered by the Ordinance's grandfather exception and not required to comply with the Residence Restriction. Def.'s Trial Ex. E (ECF 173-4) at 2.

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

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

97. John Doe #6 testified that he did not learn of the County's Residence Restriction until he left the Surfside address in 2013 and started searching for new housing. Prior to that, when he registered his Surfside address with the Doral office of the Miami-Dade Police Department, the

officers working the registration desk would merely tell him when to come back for his next registration. The officers said nothing about the 2,500-foot County Residence Restriction, and the forms he signed had no reference to the Ordinance, *see* Def.'s Trial Ex. D (ECF 173-3) at 1-4; Def.'s Trial Ex. E (ECF 173-4) at 3.

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

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

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

101. John Doe #6's probation officer directed him to the NW 71st Street Encampment when he could not find a place to live.

102. John Doe #6 registered the NW 71st Street Encampment as his residence from August 2015 until April 2018.

103. After April 2018, John Doe #6 registered another street corner near the intersection of NE 79th Street and NE 10th Court as his residence. At the current location, he sets up a chair on the side of a road near a construction site. There is no bathroom or other sanitary facilities at this location. John Doe #6 is fortunate that he can shower at his place of employment.

104. John Doe #6 continually looks for available housing online and in person that will comply with the Residence Restriction. John Doe #6 must have access to public transportation because he relies on it to get to and from his job. He typically works from 4 p.m. to midnight, so he often rides the bus during early morning hours when there are fewer transportation options.

105. John Doe #6 is confident that he would be able to find housing if there were no Residence Restriction. He found places to live from 2013 through 2015 when he was not complying with the Residence Restriction. He only became homeless once he became compliant with the Residence Restriction.

106. John Doe #7 is in his 70's and uses a wheelchair. He broke his hip in prison, and he has severe pain from the injury. He also has an anxiety disorder that he developed while he was a political prisoner in Cuba. During the time the Cuban government detained John Doe #7 for being a political dissident, John Doe #7 was regularly tortured psychologically and physically. He is currently very sick. The skin on his hands and arms is red, itchy, and peeling off, making it difficult to hold items and to use his wheelchair to move around.

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

108. John Doe #7 was sentenced to 8 years in prison.

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

110. John Doe #7 was not subject to the Residence Restriction until he was convicted of his crime in 2009. While his plea agreement references the Residence Restriction, John Doe #7 was not aware of its impact or subject to its obligations until he was released from prison.

111. At the time of his release, his prior residence was unavailable to him because his parents had passed away while he was in prison, and the apartment had been rented to someone else in the interim.

112. Immediately upon his release, John Doe #7 stayed at a hotel first, then a motel, and when he no longer could afford the motel's rent, he became homeless.

113. In June 2015, John Doe #7 relocated to the NW 71st Street Encampment. There were no bathrooms at this location. He was required to travel 30 minutes to a nearby Walmart when he needed to use the restroom. During the time he resided at this location, he observed the encampment residents urinate and defecate in the bushes near the tents where they lived. There were rodents, cockroaches, raccoons, and stray dogs at the location.

114. 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.

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

116. John Doe #7 has relocated to a new encampment located near the intersection of NW 43rd Street and NW 37th Ave. There are no bathrooms or running water at this location. He has to defecate in plastic bags and urinate in plastic bottles. Due to his limited mobility, he requires the assistance of other residents at the encampment to throw the bags and bottles in nearby trash cans.

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

118. Because of his lack of income, the only source of housing available to John Doe #7 is housing provided to him rent-free by friends, family, the government, or a non-profit organization. John Doe #7 cannot stay in either of the two homeless shelters because the Residence Restriction makes them off-limits to him.

119. With the assistance of friends, John Doe #7 has searched for available housing but has not found any that complies with the Residence Restriction. His restricted mobility makes it difficult for him to search on his own.

120. John Doe #7 also tried to work with other homeless former sexual offenders to find shared housing. However, their attempts at finding compliant housing have been unsuccessful.

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

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

Housing Availability

123. The Residence Restriction excludes Covered Persons from the vast majority of housing units in Miami-Dade County, specifically, 93.6% of all residential units and 88.5% of units that are not owner occupied.

124. When accounting for affordability[1] and availability[2], the number of housing rental units that would be more than 2,500 feet away from a school and both affordable and available to rent at any given time is estimated to be approximately 338 units. Pls.' Trial Ex. 2 (ECF 171-2) at 17-19.

125. Miami-Dade is one of the most difficult rental markets in the United States for individuals in need of affordable housing.

126. There are at least 311 transient Covered Persons. Given that the approximately 338 units noted above are not reserved for Covered Persons and are being sought by other

[1] Plaintiff's expert defined affordability as rental units at or below $1,058 per month based on the federal Department of Housing and Urban Development's affordability guidelines for low income households.

[2] Plaintiff's expert determined availability based on average vacancy rates from the Census.

individuals desiring affordable housing, the stock of affordable and available housing outside of the exclusion zone is inadequate to satisfy this constant demand for housing.

127. The County knew or should have known of this inadequacy when it passed Ordinance 05-206. When reviewing the map of excluded areas and asked where a former sexual offender could live, Commissioner Diaz stated, "When you look at the overlay of all the areas that were put in the 2500 foot radius, circle around it . . . what you have left are very few areas. Once you get—except the airports, what you have left is a small area here in what appears to be Pinecrest." Pls.' Trial Ex. 18 (ECF 171-18) at 50. He later continues, "I would say some sections of the Redlands appear to be open. But, I would say that at least 80-85 percent of the urbanized area of the county will be impacted by the ordinance. Fisher Island is free." *Id.* at 51.[3]

128. This is further demonstrated by the testimony of Lt. Poveda, from the Miami-Dade Police Department's Sexual Predator and Offender Unit, who noted that compliant areas on the map are not necessarily residential and could be warehouses or vacant lots, for example. Indeed, he noted that some offenders live in warehouses, vacant lots, and even storage units—in order to comply with the Residence Restriction.

129. Plaintiffs' uncontested map of the areas excluded by the Residence Restriction clearly shows that the Ordinance pushes Covered Persons either into small clusters of land in the more densely populated areas of the county, such as the industrial area of the County near Hialeah or along NW 37th Avenue, or out to the less populated outskirts of the County, like the agricultural areas of South Dade.

[3] Actually, Fisher Island is not "free" of the restriction. Even accepting the idea that Fisher Island, a private island, could ever be a viable option financially for former sexual offenders such as Plaintiffs, there is a school on Fisher Island, which excludes most of the island under the 2,500-foot restriction.

130. As the County's transit map shows, these less urban areas are inaccessible to public transit. *See* Pls.' Trial Ex. 32 (ECF 171-32).

131. The Residence Restriction's tendency to push individuals to the outskirts of the County creates hardships for Covered Persons who must rely on public transportation to stay connected with their support systems or travel to work.

132. The clustering of former sexual offenders into encampments such as the Julia Tuttle Bridge, NW 71st Street, or along NW 37th Avenue is the natural consequence of the Residence Restriction. While homelessness persists throughout the County, and homeless encampments may occur anywhere within the County, it is equally true that encampments of homeless former sexual offenders can only occur in certain places outside the exclusion zone.

133. Once formed, the trial evidence demonstrates that encampments grow over time. Covered Persons who cannot locate housing hear of the encampments through word of mouth and relocate there. Several witnesses testified that probation officers may also direct supervisees to encampments, in violation of the Florida Department of Corrections' policy.

134. Encampments also provide potential cover for Covered Persons who are not on probation and do not wish to register a noncompliant address. It is very difficult for law enforcement to develop probable cause that a Covered Person is not residing at his registered location. Police must establish continuous surveillance of a residence for three consecutive days to determine if the registrant is actually living at the address. Law enforcement's inability to devote sufficient resources for surveillance provides one plausible explanation for why so many more people were registered at the NW 71st Street Encampment than ever seemed to be physically present at the encampment. These encampments thus appear to compound the County's difficulties with monitoring Covered Persons.

Recidivism

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

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

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

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

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

140. The Court discredits the testimony of Defendant's expert Dr. Richard McCleary that recidivism for former sexual offenders approaches 100% over their lifespan. These estimates are based on research reporting *general* recidivism for former sexual offenders, rather than their risk of sexual recidivism. Pls.' Trial Ex. 3 (ECF 171-3) at 3-16. Further, the claim is based on studies of extremely high-risk individuals who had been institutionalized because of their propensity for sexual deviance. *Id.* Such individuals constitute small, non-representative samples of sexual offenders. *Id.*

141. Dr. McCleary acknowledged on cross examination that risk assessments such as the Static-99R can reliably identify high- and low-risk individuals, especially when law

enforcement officers combine the assessments with "on the ground" intelligence about particular offenders.

142. Dr. McCleary also testified that, as a scientist, he prefers case-by-case determinations of whether individuals should be released from conditions such as the Residence Restriction. He expressed the view that doing so would be appropriate for low-risk individuals who had reformed themselves and had also spent a certain amount of time offense-free in the community.

143. Lt. Poveda, the lieutenant of the Miami-Dade Police Department's Sexual Predator and Offender Unit, testified that he did not have expertise in the recidivism rates of convicted sexual offenders versus recidivism rates of other categories of criminals; that he was not sure whether underreporting of crimes occurred equally to registrants and non-registrants; that he had never read any studies about the difference in crimes committed by registrants and non-registrants, and that neither he nor anyone in his unit kept those figures; that he did not know why victims did not report; and that his unit had not made any efforts to try to ameliorate the problem of underreporting.

144. Lt. Poveda testified that he has never administered a risk assessment instrument and is not familiar with any; he has never been trained in administering one and does not know what is involved. He is not aware whether it is possible to distinguish sexual offenders who present a great risk from those who do not. He testified that even if he knew which sexual offenders were at high risk of re-offense and which were at low risk of re-offense, he would treat them the same because of his duties—he noted that regardless of what risk level they might be given, he had to abide by what his requirements are. When asked whether his role was to assist in the prevention

of re-offending, he testified that his role was to ensure that the offenders are in compliance with local, state, and federal law.

145. Lt. Poveda testified that nobody in his department is determining whether or not the Residence Restriction is working. He said that type of evaluation would be a lot of work, and he suggested that an outside agency could do that. He is not aware of any County entity that observes, documents, studies, or makes recommendation for policies and laws concerning registrants that are covered by the Ordinance and that are transient.

146. There is no dispute that the vast majority of sexual offenses are committed by offenders who are familiar with the victim.

147. There is also no dispute that the Residence Restriction addresses the rare subset of sexual offenses committed by strangers unfamiliar with the victim.

148. The Residence Restriction also focuses on individuals who have already been convicted of a qualifying sexual offense.

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

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

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

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

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

154. The State of Florida already has measures in place to identify, treat, and surveil the most dangerous sexual offenders. Prior to release, all sexual offenders receive a risk assessment to determine if they are "sexually violent predators" who must be civilly committed. Because of this system, the individuals whose risk the Residence Restriction is designed to manage simply are not released from state custody. These assessments are highly reliable, and vastly superior to identifying high-risk sexual offenders by their conviction alone.

155. There are also myriad other restrictions for former sexual offenders that are better suited to lowering their risk of sexual recidivism, including registration, notification, mandatory probation, mandatory treatment, and GPS monitoring.

156. The most significant of these additional restrictions in Miami-Dade County are child safety zones, which prohibit Covered Persons from loitering with the intent to commit a sexual offense within 300 feet of schools. Ron Book testified that he lobbied the County to pass child safety zones based in part on statements from Covered Persons that the Residence Restriction did not actually keep them away from schools, since they could go wherever they wanted during the day.

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

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

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

160. Lt. Poveda testified that he believes hundreds of registrants are falsely reporting their addresses. He testified that he did not have the resources to look into that because of the surveillance required to establish probable cause.

161. The homeless encampments that result from the Residence Restriction also threaten public health and safety.

162. As Plaintiffs' expert Dr. Pedro Greer testified, the encampments facilitate the spread of disease and illness, not only to those at the encampment but to the public at large.

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

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

165. Though the County maintains general crime statistics, it has not offered any evidence demonstrating that the Residence Restriction has any effect on offenses committed by Covered Persons.

166. The County also has not submitted any evidence on sexual offenses committed by individuals who live within the exclusion zone in grandfathered residences. The County implements the same supervision policies for this group as with Covered Persons living outside the exclusion zone. It is possible that, if grandfathered individuals had higher recidivism rates than

other Covered Persons, the difference could be due to grandfathered individuals' proximity to schools; but the County does not specifically analyze this data as a general matter, nor has it conducted such an analysis in this case.

167. The County's failure to examine this evidence suggests it does not believe these individuals are any greater risk to children, otherwise they would increase supervision or direct more resources to grandfathered individuals living within 2,500 feet of a school.

168. The Court stresses that it does not require statistically significant evidence of the Residence Restriction's impact. The Court accepts Dr. McCleary's testimony that definitive proof in this context is likely not possible**.**

169. The Court also accepts Dr. McCleary's testimony that studies of a law's effectiveness may be "practically significant" even if they do not establish statistical significance, meaning a lawmaker may still find a study useful even if it does not prove either that a given policy works or that it does not work. However, the Court also accepts Dr. McCleary's opinion that relying on practical significance carries serious risks, including legislators improperly assuming laws that work in one place will work in their own jurisdictions.

170. The County's submissions on the Residence Restriction's efficacy commit the very error condemned by its own expert. The County cites a number of studies from other jurisdictions to bolster the theoretical basis for the Residence Restriction. Yet, none of the effect sizes in these studies was statistically significant. By Dr. McCleary's own testimony, this precludes the County from validly assuming that these studies support the Residence Restriction's proposed salutary effects in Miami-Dade.

171. To illustrate, the County cites studies by Walker (2001) and Page (2012). Walker (2001), a study out of Arkansas, concluded under the "Routine Activities Theory" that former

sexual offenders live near children to scout potential victims. But its authors did not examine this finding for statistical significance. Instead, they expressly warn *against* using residence restrictions because "despite governmental efforts, **there is no evidence that attempts to limit where sex offenders live have been successful**." (emphasis added) Def.'s Trial Ex. U (ECF 173-18) at 17. Walker later revisited his 2001 study to re-iterate that policy-makers should not interpret its results as any indication that residence restrictions reduce recidivism. Pls.' Trial Ex. 31 (ECF 171-31).

172. Page (2012) surveyed former sexual offenders undergoing mandatory treatment in North Carolina. The study found that, while a minority of offenders believed a residence restriction might be effective, the overwhelming majority believed otherwise. Surveying the relevant literature, Page (2012) determines that legislation limiting where offenders live "**has not been shown to further reduce already low rates of recidivism**." Def.'s Trial Ex. AAA (ECF 123-15) at 119 (emphasis added). The authors note that residence restrictions cause significant housing barriers that thwart re-entry by preventing former offenders from living with supportive networks, which may increase recidivism. *Id.* at 118.

173. Without evidence, even weak evidence, that the Residence Restriction works in Miami-Dade County, the County's selective and self-serving reading of these and other studies does not support the Residence Restriction's purported salutary effects.

174. The County has also failed to submit evidence establishing that the specific distance of 2,500 feet from schools is reasonably necessary to protect the public. Dr. McCleary testified that he would not except to see any impact on public safety if the County reduced its restriction to 1,000 feet from schools.

175. The barrier to the County reducing the Residence Restriction appears to be politics, not science. In 2009 Ron Book discussed with *Time* magazine that he considered advocating for a lesser distance of 1,750 feet to create more available housing. But he ultimately abandoned this effort because "no public official wants to back a measure that could be depicted as pro-predator." Pls.' Trial Ex. 29 (ECF 171-29).

PROPOSED CONCLUSIONS OF LAW

I. Plaintiffs' Claims Are Not Barred by the Statute of Limitations.

A. Plaintiffs Assert a Continuing Violation of Their Constitutional Rights

Plaintiffs challenge the continuing harms imposed by the Residence Restriction. The limitations period thus accrues anew each time the statute is enforced. *Hillcrest Property, LLC v. Pasco County*, 754 F.3d 1279, 1282 (11th Cir. 2014); *see also Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) (where the enforcement of a statute deprive a plaintiff of such essential liberty interests, "each day that the invalid resolution remain[s] in effect, it inflict[s] 'continuing and accumulating harm'") (quoting *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1968)); *Perez v. Laredo Junior Coll.*, 706 F.2d 731, 733-34 (5th Cir. 1983) ("If the statutory violation occurs as a result of a continuing policy, itself illegal, then the statute [of limitations] does not foreclose an action aimed at [ ] enforcement of the policy during the limitations period."). Plaintiffs experience anew their alleged punishment from the Ordinance every day the Ordinance is in effect; every time they search for an address compliant with the Ordinance; and every thirty days when, because they are homeless, they must verify that their current location complies with the Ordinance, Fla Stat. § 943.0435(4)(b)(2). The case law is sparse concerning the accrual of ex post facto challenges to post-release restrictions on liberty. However, at least three federal district courts have considered accrual in the unique context of an ex post facto challenge to ongoing sexual-offender restrictions, and each has held that such claims accrue as long as the government enforces the restriction. *Doe v. Haslam*, No. 3:16-cv-02862, 2017 WL 5187117, at *13 (M.D. Tenn. Nov. 9, 2017) ("The Ex Post Facto Clause does not merely protect a defendant from some specific procedurally improper conduct at the time his punishment is set down—it protects him from the punishment itself. The "wrongful conduct" challenged is therefore the ongoing infliction of that punishment. Insofar as the requirements of the Act are, as

Plaintiffs allege, a punishment, it is a punishment that is inflicted on Plaintiffs every day and will continue to be inflicted every day in the foreseeable future."); *Doe v. Gwyn*, No. 3:17-cv-504, 2018 WL 1957788, at *6 (E.D. Tenn. Apr. 25, 2018) (adopting *Haslam*'s reasoning); *Wallace v. New York*, 40 F. Supp. 3d 278, 303 (E.D.N.Y. 2014) ((("The accrual exception [for continuing violations], however, salvages Plaintiffs' [ex post facto] claims challenging the State's *current* sex offender regime. Although the current State registration requirements and residency restrictions took effect more than three years before this case was filed, they remain in effect today.").

Haslam is particularly instructive because it distinguishes Plaintiffs' ex post facto challenge to ongoing punishment from ex post facto claims raised against parole procedures in cases like the Eleventh Circuit's decision in *Lovett v. Ray*, 327 F.3d 1181 (11th Cir. 2003), which held the latter claims accrue once the plaintiff has notice of the altered procedure. The *Haslam* court explained:

> [I]t is debatable whether Plaintiffs' allegations should be considered under the same rubric applied to claims challenging changes to parole procedures. Those petitioners are still incarcerated pursuant to their original, lawfully imposed sentences and merely challenge the procedures associated with determining their release. The Plaintiffs' challenges involve the imposition of wholly new burdens unrelated to their initial, lawful sentences.

Haslam, 2017 WL 5187117, at *13.

The Court additionally noted that, unlike plaintiffs challenging past procedural changes, "Plaintiffs, on an ongoing and continuing basis, face the very real possibility of criminal prosecution by the State if they do not rigidly conform their behavior to the requirements of the Act." *Id.*; *see also Moore v. Olens*, No. 1:13-cv-0374, 2013 WL 12097640, at *6 (N.D. Ga. Nov. 18, 2013) (rejecting Plaintiff's due process claims against procedures used to impose electronic monitoring and ex post facto claim against his designation as a "sexually violent predator" but holding that "Plaintiff's Eighth Amendment claim alleges a continuing constitutional violation

each day Plaintiff is subjected to the 'punishment' of lifetime [electronic] monitoring") (footnote omitted); *cf. Abiff v. Slaton*, 806 F. Supp. 993, 996 (N.D. Ga. 1992) (Carnes, J.) (wrongful failure to release individual from imprisonment was a "continuing violation" that continued until plaintiff was released (citing *Donaldson v. O'Connor*, 493 F.2d 507, 529 (5th Cir. 1974), *vacated on other grounds*, 422 U.S. 563 (1975) (holding false imprisonment claim was continuing violation))), *aff'd*, 3 F.3d 443 (11th Cir. 1993).

Defendant asserts that Plaintiffs' claims accrued by 2010, the year the Ordinance was amended, and are thus outside Florida's four-year limitations period for § 1983 claims. ECF 122 at 3-4. That is incorrect. The County cites *Hillcrest Property, LLC*, for the proposition that the limitations period began to run with the statute's 2010 enactment. But *Hillcrest* concerned the accrual date of a facial substantive due process claim alleging a property deprivation. Applying the accrual date for facial takings claims, the *Hillcrest* court reasoned that "the value of the property at issue depreciated when it became subject to" the challenged ordinance. 754 F.3d at 1283. Although *Hillcrest* recognized that a statute's enactment is the appropriate accrual date in the unique context of takings, Plaintiffs here do not challenge a discrete devaluation of a property interest. Their lawsuit is therefore timely.

B. The limitations period did not accrue while Plaintiffs were incarcerated or residing in a grandfathered residence.

In the alternative, as discussed below, the Court concludes that John Does #5 and #7's ex post facto claims did not accrue during their respective incarcerations, and that John Doe #6's claims did not accrue while he resided at a grandfathered residence.

a. Incarceration

John Doe #7 was convicted of qualifying offenses in June 2009, and he was released in December 2014. He therefore was only subject to the Residence Restriction after the 2010 amendments, and he joined this lawsuit in October 2017, less than three years after his release. John Doe #5 was incarcerated from August 2006 until March 2014, and he joined this lawsuit a little over three years after his release. When John Doe #5 went to prison in 2006, he had been subject to the County's original 2005 Ordinance for 9 months, even though he was unaware of its existence. When John Doe #5 was released in 2014, he first became subject to the County's amended 2010 Ordinance.

It is axiomatic that a limitations period does not begin to run until claim is ripe. *Alabama v. United States*, 630 F. Supp. 2d 1320, 1326–27 (S.D. Ala. 2008) (affirming "the general rule that for limitation of actions, a cause accrues when it is sufficiently ripe that one can maintain suit on it") (quotations omitted); *see also Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp.*, 522 U.S. 192, 200 (1997) ("Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief."); *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 588 (11th Cir.1990) ("In suits for deprivation of property under section 1983, the same considerations that render a claim premature prevent accrual of a claim for limitations purposes.") (quotations omitted); *Bell v. Aerodex, Inc.*, 473 F.2d 869, 873 (5th Cir. 1973) ("Ordinarily, a cause of action accrues when the plaintiff could first have successfully maintained a suit based on that cause of action.").

The Eleventh Circuit has held that ex post facto challenges to post-release conditions are not ripe while the plaintiff is incarcerated. *Kirby v. Siegelman*, 195 F.3d 1258, 1290 (11th Cir.

1999). Applying the traditional ripeness test,[4] the court in *Kirby* determined 1) that a pre-release challenge to sexual-offender notification was not fit for judicial review because it depended on the speculation that the statute at issue would remain in effect and without amendments prior to the plaintiff's release, and 2) that the plaintiff would not suffer any hardship from delaying adjudication of the claim given his lengthy sentence. *Id.*; *see also Waldman v. Conway*, 817 F.3d 1283, 1293 (11th Cir. 2017) (ex post facto challenge to post-release conditions like travel restriction not ripe during plaintiff's incarceration). Pursuant to this binding precedent, John Doe #5 and #7's ex post facto claims were not justiciable while they were incarcerated; thus their claims also did not accrue during those periods.

John Doe #5 illustrates *Kirby*'s wisdom in denying pre-enforcement review of post-release sexual-offender restrictions. When he first went to jail in 2006, he would have been covered under the 2005 version of the Ordinance.[5] Had he filed an ex post facto challenge during the first four years of incarceration, he would have been unable to establish whether he might be released to an area covered by the County's residence restriction, or to one of the municipalities that opted out of the restriction. Only a few years later, the Ordinance changed significantly, perhaps mooting his hypothetical lawsuit, and John Doe #5 would have no reasonable expectation that it would not change again before his release.

Indeed, neither John Doe #5 nor John Doe #7 could be certain that they would return to Miami-Dade County upon release. But a rule accruing their cause of action against the Residence

[4] "Ripeness requires the weighing of two factors: (1) the hardship to the parties of withholding court consideration; and (2) the fitness of the issues for judicial review." *Kirby*, 195 F.3d at 1290.

[5] John Doe #5 testified that he was not aware of the 2005 Ordinance by the time he went to prison, and the County presented no evidence to contradict his testimony.

Restriction would similarly have required them to file lawsuits against every county (and every state) where they might have resided upon release that had a retroactive residence restriction.

b. Grandfathered Residence

The same analysis requires the conclusion that John Doe #6's ex post facto claims did not accrue while he resided at a grandfathered property for nearly eight years. Because of this grandfather status, the Residence Restriction did not apply to him until he was evicted in 2013. Until his eviction, there was no hardship caused by the Residence Restriction until he was actually searching for housing. This lack of hardship alone would have precluded judicial review. *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235, 1248-49 (3d Cir. 1996). Further, his status would have prevented him from establishing critical facts, such as the extent to which the Residence Restriction would inhibit his housing search. The Supreme Court has instructed that a court should not decide constitutional claims where it cannot ascertain such critical facts, even where declining review would cause the plaintiff substantial hardship. *Babbitt v. Union Farms Nat. Union*, 442 U.S. 289, 300 (1979).

C. **The claims of Does #4, #5, #6, and #7 relate back to the filing of the original complaint.**

Multiple cases in this circuit demonstrate that the claims of newly added plaintiffs relate back to the claims in the original complaint. The Eleventh Circuit has made clear that the relevant considerations for newly added plaintiffs are notice and prejudice. *See Cliff v. Payco General American Credits, Inc.*, 363 F.3d 1113, 1132 (11th Cir. 2004); *accord Harris v. Johns*, No. 3:06-cv-433-J-32MCR, 2007 WL 2310784, at *2 (M.D. Fla. Aug. 8, 2007) ("[T]o determine whether relation back will apply, the Court needs to decide if the claims of the new plaintiffs arose out of the same conduct set forth in the original complaint, whether Defendants had adequate notice and whether Defendants will suffer unfair prejudice if the amendment is permitted."). *Harris*

concerned migrant farm workers who sued for labor violations over several seasons. The farm work was both the unifying conduct as well as the adequate notice. Moreover, no prejudice was shown because discovery was ongoing and the defendant had not taken any of the plaintiffs' depositions. *See Harris*, 2007 WL 2310784, at *2-3 ("The Court does not believe the addition of the work during the very brief potato season is enough to defeat the same transaction and occurrence test"; "In this case, the original complaint clearly puts Defendants on notice that they have potentially violated the rights of the farm workers hired for the 2003, 2004 and 2005 seasons. Livingston and Smith were farm workers hired for those seasons and Defendants clearly should have known that both men would have such claims. Accordingly, the Court finds Defendants had adequate notice that they could be called upon to defend against the claims of Livingston and Smith.").

The same analysis applies here. The unifying conduct is the challenge to the enforcement of the Residence Restriction; the County was on notice that any other former sexual offenders could make such claims against the County; and there is no prejudice because the County had the full opportunity to conduct discovery, both depositions and interrogatories, against the newly added plaintiffs (and indeed never conducted discovery against the former plaintiffs). The second amended complaint was filed on October 5, 2017. ECF 90. The County filed an answer on October 27, 2017, that included thirteen affirmative defenses, ECF 91, and did not raise statute of limitations until it amended its answer on May 5, 2018, ECF 107-1. The County is hard-pressed to contend prejudice when it could have pursued its statute of limitations defense before its motion for summary judgment filed on August 8, 2018, yet nevertheless chose to engage in extensive discovery practice involving numerous plaintiffs, experts, and lay witnesses. *Accord Clingman & Hanger Mgmt. Assocs., LLC v. Knobel*, No. 16-cv-62028, 2018 WL 2006763, at *6 (S.D. Fla. Jan.

9, 2018) ("[T]he Amended Complaint asserts the same claims as the initial Complaint, albeit with more detail. Defendants will not be unfairly prejudiced by having to defend against identical claims.").

The County's cited cases do not help their position. The published Eleventh Circuit decision they cite (apart from a former Fifth Circuit case) explicitly does not apply because the rule announced was limited to diversity cases, not federal-question cases. *Saxton v. ACF Indus., Inc.*, 254 F.3d 959, 963 (11th Cir. 2001) (en banc) ("[W] join the other circuits in holding that Rule 15(c)(1) allows federal courts *sitting in diversity* to apply relation-back rules of state law where, as here, state law provides the statute of limitations for the action.") (emphasis added).[6] The former Fifth Circuit case the County cites fairs no better. Although the Fifth Circuit there cited the purportedly general rule that "relation back will not apply to an amendment that substitutes or adds a new party for those named initially in the earlier timely pleadings"—which, taken at face value, is flatly contradicted by the Eleventh Circuit's opinion in *Cliff*—the Fifth Circuit then went on to find relation back appropriate. *Williams v. United States*, 405 F.2d 234, 237-39 (5th Cir. 1968). It held that "[n]ot only must the adversary have had notice about the operational facts, but it must have had fair notice that a legal claim existed in and was in effect being asserted by, the party belatedly brought in," *id.* at 238—here, the enforcement of the ordinance is the operational fact, and the legal claim is the same. The Fifth Circuit in *Williams* also found no prejudice, explicitly rejecting a contention that merely having to defend the lawsuit constitutes prejudice. *Id.* at 239 ("True, it must now defend a claim which— from the mere passage of time—it might have thought was barred, and to this extent it has 'lost' something it thought it had. But neither limitations nor laches, affords such an automatic insulation in so mechanical a way.") (citation omitted).

[6] The County's cited state-law cases are therefore irrelevant.

Although the court in *Bloom v. Alvereze*, 498 F. App'x 867 (11th Cir. 2012)., in denying relation back, noted that the original complaint did not include notice of the newly added plaintiff's claim, the concerns animating *Bloom* are not present here. *Bloom* recognized that "[l]imits to relation back are designed to protect defendants from prejudice not just from lost and destroyed evidence, but from an unexpected increase in liability and an inherently more complex defensive strategy long after the statute of limitations had run." *Id.* at 883. None of these concerns applies here. Here, the defense strategy is exactly the same. The newly added plaintiff in *Bloom* also brought additional Defendants. Not so here. The plaintiffs in *Bloom* sought damages. In this injunctive-relief case, no such increase in liability is possible.

Finally, the concerns of *Young v. Lepone*, 305 F.3d 1 (1st Cir. 2002), do not apply. The First Circuit's doctrinal focus was on privity of identity, but its reasoning was that "[w]here, as here, real issues of fact still hover as to what representations and reassurances were proffered and who owed what duties to whom, the accession of new plaintiffs and claims will likely entail new legal theories and tactics against which Deloitte must defend and a geometric increase in its potential liability." *Id.* at 17. None of this applies. There is no confusion over the central question—whether the Residence Restriction is an ex post facto violation. No "new legal theories and tactics" need be employed—they are the same for all potential plaintiffs. And there is no risk in increased liability, because it is not a damages action.

II. John Doe #7 has standing.

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

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

Second, the Ordinance impacts John Doe #7 independent of the probation condition: if John Doe #7 violates Ordinance, he will be criminally prosecuted. The prosecution could occur separately from any potential prosecution for violating the related probation condition. Prevailing in this lawsuit would provide John Doe #7 redress from the threat of an independent criminal prosecution.

Finally, the length of time until John Doe #7 is off of probation does not affect the standing analysis. *See Vill. of Bensenville v. F.A.A.*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) ("Nor do we think the municipalities' alleged injury too attenuated or distant to represent a constitutionally-sufficient injury-in-fact, as the FAA asserts, by virtue of the fact that Chicago will not start collecting the passenger facility fee the FAA authorized until 13 years from now."); *accord Mead v. Holder*, 766 F. Supp. 2d 16, 25 (D.D.C. 2011) ("temporal remoteness alone does not automatically defeat standing"). The Ordinance applies to John Doe #7 today, and he has standing to challenge it today.

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

Miami-Dade County's prohibition on certain former sexual offenders living within 2,500 feet of a school violates the Ex Post Facto Clauses of the federal and Florida constitutions. The protection against retroactive punishment provides "a powerful check on states when they have sought to punish socially disfavored persons without prior notice". *Does #1-5 v. Snyder*, 834 F.3d 696, 699 (6th Cir. 2016), *reh'g denied* (Sept. 15, 2016), *cert. denied sub nom. Snyder v. John Does #1-5*, 138 S. Ct. 55 (2017). There is no question that former sexual offenders, like the John Doe plaintiffs, are socially disfavored and that elected officials are unwilling to vote for legislation that appears to protect them.

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

On the second prong, the most relevant factors are: (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; (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).

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

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

The County passed the Residence Restriction with the intent to punish those formerly convicted of sexual offenses. While declarations of non-punitive intent ordinarily must carry great weight in this analysis, also relevant are "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the

legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993).[7] Examining this context is especially important given that a legislature is unlikely to declare openly its intent to punish a class of individuals.

The historical context and the legislative debates prior to passage of the Ordinance prevent granting the ordinary level of deference to the County's statements of regulatory intent. The floor debates display a strong sentiment by commissioners to pass a law that would go as far as possible in expelling former sexual offenders from the County and sending a clear signal that these individuals are not welcome.

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

Finally, the most influential individual behind the County's Residence Restriction is Ron Book, the Chair of the Miami-Dade County Homeless Trust and a lobbyist that the County routinely retains to represent it at the Florida legislature. Mr. Book's influence on the commission

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

is evident from the record. Book was also instrumental in passing the 2010 Ordinance, which resulted in large part from the County's attempts to disband the infamous Julia Tuttle Causeway Bridge encampment—an effort led in tandem with Book in his role with the Homeless Trust.

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

B. The Ordinance is punitive in effect.

i. The Ordinance imposes an affirmative disability or restraint.

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

The Ordinance imposes a significant affirmative restraint on housing availability in Miami-Dade County. The maps the parties have produced of the "exclusion zone" created by the Ordinance are roughly the same. However, the County's assessment of available housing merely tallies the number of housing units outside the exclusion zone, without regard to whether the housing is actually available or to whether it is affordable for the population of individuals subject to the Ordinance. The County includes properties for which the owner has claimed a homestead exemption under Florida law, meaning the owner presently lives in the home and the property is unlikely to contain any available units that could be legally rented. It also includes hotels as

available housing units, despite agreement among Plaintiffs' and Defendant's witnesses and experts that hotels are not a viable housing solution.

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

Affordability

With respect to affordability, it is reasonable to expect that Covered Persons—who upon release not only carry the burden of a felony criminal conviction, but also the undeniable social stigma of being labeled former sexual offenders—will struggle to find jobs and to purchase expensive homes or afford luxury rentals. The evidence demonstrates that Plaintiffs are of limited means, as are the homeless individuals who applied for housing assistance with the County, many of whom report no income. Further, every witness for Plaintiffs (e.g., Drs. Socia and Levenson) and the County (e.g., Dr. McCleary and Ron Book) who testified on this point acknowledged that affordability was a critical consideration in identifying potential housing.

However, in regulating housing the County need only make reasonable, not all, allowances for the likely incomes of Covered Persons. Plaintiffs' expert Kelly Socia offers a reasonable, though certainly not definitive, middle ground by applying the federal Housing and Urban Development office's standard for "affordable" housing, which assumes that an individual can spend $1,058 per month on rent.[8] Dr. Socia's assumption is highly conservative: *none* of the

[8]The County offers various objections to Dr. Socia's definition and analysis of affordability. However, the County does not offer any competing methodology and instead contends that affordability and actual availability are irrelevant. Because the Court rejects the County's position,

Plaintiffs or the individuals at the encampment who applied for housing assistance would meet this threshold level of income.

Availability

The assessment must also consider residences that are actually available. A property outside the exclusion zone that does not have any available units is useless to those seeking housing. Some measure of availability is essential to estimate the number of units needed to meet the demand for housing by Covered Persons. Dr. Socia accounts for this issue by assessing the stock of "potentially available rental units." Despite the label, the term "rental units" includes any units for which the owner has not claimed a homestead exemption and thus could potentially be rented.

However, this definition is over inclusive, in that it necessarily counts units that, while not owner-occupied, are not on the rental market. Dr. Socia then assesses availability based on the Census's reported vacancy rates for tracts throughout the County. As with affordability, this limitation eliminates a great deal of housing in Miami-Dade. But that is the point: *any* individual attempting to find affordable housing in Miami-Dade faces a steep barrier in finding available housing. The County cannot ignore this basic fact when it places additional housing restrictions on a class of residents, eliminating most housing in the County

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

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it adopts Dr. Socia's approach as a useful means of estimating the Residence Restriction's impact on available housing.

The Ordinance thus takes an already difficult housing situation for Covered Persons and makes it untenable. Plaintiffs' evidence on the uniquely high degree of homelessness in Miami-Dade County relative to other counties with less restrictive residence restrictions, the County's repeated experiences with homeless encampments of former sexual offenders, and the County's failed efforts, through Mr. Imbrone and Mr. Berman, to locate housing for Covered Persons living in the encampments corroborates Dr. Socia's analysis. The affirmative disability imposed by the County's Residence Restriction goes far beyond *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016), and other cases finding affirmative disability or restraint, none of which involved the degree of homelessness experienced by Covered Persons in Miami-Dade and the formation of homeless encampments comprised primarily of former sexual offenders.[9]

The Grandfather Clauses

The Ordinance's grandfather clauses do not adequately mitigate the impact of the Residence Restriction. One of the exceptions applies to those who established a residence before the Ordinance's effective date nearly 13 years ago. The offenders who may claim this protection are finite and dwindling. For example, John Doe #7 could have returned to his parents' home when he was released from prison, but they died and the grandfathered unit was no longer available to

[9] *E.g.*, *Hoffman v. Village of Pleasant Hoffman v. Village of Pleasant Prairie*, 249 F. Supp. 3d 950, 958 (E.D. Wisc. 2017) (finding that a residence restriction that excluded 90% of a municipality was a severe restraint); *Evenstad v. City of West St. Paul*, 306 F. Supp. 3d 1086, 1091, 1100 (D. Minn. 2018) (granting preliminary injunction against 1,200-foot residence restriction that excluded 90% of the City); *Mikaloff v. Walsh*, 2007 WL 2572268 (N.D. Ohio 2007) (finding a 1,000-foot residence restriction is an affirmative restraint); *Commonwealth v. Baker*, 295 S.W. 3d 437, 445 (Ky. 2009) ("We find it difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability or restraint."); *State v. Pollard*, 908 N.E. 2d 1145, 1150 (Ind. 2009) (restraint "neither minor nor indirect" where defendant prohibited from residing in house he owned and would have to incur costs to obtain other housing); *City of Ft. Lauderdale v. Anderson*, 2018 WL 1614204 (Fla. Broward Cty., Mar. 26, 2018) (finding a 1,400-foot residence restriction violates Ex Post Facto Clause and is an affirmative restraint because it excludes most affordable rental housing).

him. None of the plaintiffs can rely on this exception, and at some point no offenders will fall under this provision.

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

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

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

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

Federal Law

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

Most significantly, the Residence Restriction only dictates where a former offender sleeps at night, when children are not at school, but it does not limit where a former offender goes during

the day, when children attend school. This logical inconsistency is why a number of courts have rejected residence restrictions as irrational.[10]

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

The Residence Restriction also does not promote public safety because the County fundamentally misunderstands the recidivism risk posed by former sexual offenders. The County premised the Residence Restriction on the finding that "sexual offenders are extremely likely…to repeat their offenses." Sec. 21-278 (a). The County cites case law to similar effect, including the assertion that "[t]he risk of recidivism posed by sex offenders is frightening and high" from *Smith v. Doe*, 538 U.S. at 103. However, this contention has no factual support and has been thoroughly debunked.[11]

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

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

Florida Law

The County's Residence Restriction also fails rational-basis scrutiny under the Florida Constitution, which is more rigorous than the federal standard. *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014). In *McCall*, the Florida Supreme Court answered a question certified by the Eleventh Circuit Court of Appeals as to whether Florida's statutory cap on noneconomic damages for wrongful death[12] violated the Equal Protection Clause of the Florida Constitution.

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

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

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

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

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

Florida's rational-basis analysis consequently provides two reasons why the Residence Restriction is irrational.[13] First, there was no reasonable basis for the County to conclude that the Residence Restriction—a law that only limits where a covered individual sleeps—could limit a covered individual's access to children. The County's rationale was not based on any actual findings of fact and instead was merely a conclusory recitation of the County's belief that cutting off available housing to former sexual offenders would reduce sexual crimes against children. The

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

County's judgment is more vulnerable than the Florida legislature's in *McCall*, as the County cannot point to a task force or other study it conducted to support the Residence Restriction's efficacy. Affirming the law on these grounds would provide the "rubber stamp" that *McCall* forbids.

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

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

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

thereby irreparably damaging these individuals' prospects for successful re-entry and increasing their risk of recidivism. *Id.* As such, the County's Residence Restriction fails the reasonableness inquiry under *Smith*. 538 U.S. at 105.

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

The record establishes an empirical consensus that there is no evidence that the County's Residence Restriction advances public safety, and that the Ordinance likely *undermines* public safety by making it unreasonably difficult for Covered Persons to establish stable housing, perhaps the most critical component of successful re-entry. Once homeless, these individuals become harder to supervise, more likely to abscond, and more likely to re-offend.

The research the County submits in favor of the Residence Restriction's efficacy bolsters the case against them. These studies confirm that "despite governmental efforts, **there is no evidence that attempts to limit where sex offenders live have been successful**." Def.'s Trial Ex. U (ECF 173-18) at 17 (emphasis added); *see also* Def.'s Trial Ex. AAA (ECF 123-15) at 119

(determining that legislation limiting where offenders live "**has not been shown to further reduce already low rates of recidivism**") (emphasis added).

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

The Court does not find the County's arguments against excessiveness persuasive. Despite the County's assertions it attempted to balance public safety with allowing adequate housing for Covered Persons, the County never assessed how much housing would become available when it amended the Ordinance in 2010. And, as discussed above, the County continues to make it unreasonably difficult for Covered Persons to secure housing. This difficulty is plain from the County's unsuccessful efforts to find potential housing for the people living at the NW 71st Street Encampment. The Ordinance's grandfather clauses also do not adequately mitigate its excessiveness.

As recognized by the Eleventh Circuit, and numerous other courts, a law's failure to consider an individual's actual risk weighs in favor of excessiveness.[14] *Doe*, 846 F.3d at 1185.

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

Individual assessments of risk guard against the fact that "while it is intuitive to think that at least some sex offenders—*e.g.*, the stereotypical playground-watching pedophile—should be kept away from schools," the harm posed by other offenders "is doubtless far less than that posed by a serial child molester." *Snyder*, 834 F.3d at 705. This lack of individualization is highlighted by John Doe #4's case. In the early 1990's, he exposed himself during an argument with an adult. Because there was a child present, he was convicted for lewd and lascivious conduct. He has no other sexual offense, yet the County treats him as if he significant is a risk to children and he must comply with the Residence Restriction for life. The lack of individualization weighs even more heavily in favor of excessiveness because the Ordinance imposes such a severe burden on housing. *Hoffman*, 249 F. Supp. 3d at 959 ("[T]o avoid a[n] [excessive] punitive effect, a statute imposing a particularly harsh disability or restraint must allow an individualized assessment. An individualized assessment helps to ensure that a statute's particularly harsh disability or restraint is rationally related to a non-punitive purpose.").[15]

In, addition, like all convicted sexual offenders in Florida, Covered Persons are subject to an intensive regime—comprised of measures like civil commitment,[16] registration, notification, mandatory probation, electronic monitoring, mandatory treatment, and child safety zones—

(finding ex post facto violation where requirements applied based solely on crime "without regard to . . . future dangerousness").

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

[16] Prior to release, all sexual offenders receive a risk assessment to determine if they are "sexually violent predators" who must be civilly committed. Pls.' Trial Ex. 5 (ECF 171-5) at 11-12. These assessments are highly reliable, *id.* at 11-12, and far superior to the County's offense-based system for identifying whose recidivism risk "is doubtless far less than that posed by a serial child molester." *Snyder*, 834 F.3d at 705.

designed to increase supervision of their daily activities. This is more reason to believe that their risk may be reliably determined and managed, and provides further evidence that the Ordinance's Residence Restriction is excessive.

Beyond not accounting for risk, the Ordinance also does not contain any exceptions for individuals in need of long-term hospital care, assisted living facilities, or hospice due to severe illness, injury, or other medical conditions. This is especially relevant for three of the plaintiffs who have mental and physical disabilities. Their homelessness has a negative effect on their health, yet the County's Ordinance is unbending, forcing John Doe #7, who in in his 70's and uses a wheelchair, to sleep outside exposed to the elements, and forcing John Doe #5 to sleep in his son's car, despite severe back-pain and significant Parkinson's tremors. It is noteworthy that the State of Florida authorizes conditional medical release to individuals 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 unequivocally render former offenders harmless to others—supports the contention that it is excessive.[17] *See Snyder*, 834 F.3d at 705 (citing as excessive statute's application to plaintiff with obviously low risk of sexual offense).

In finding the Residence Restriction excessive, the Court notes that the County need not provide individualized assessments or exemptions immediately after a Covered Person's release or for all Covered Persons. The County could withhold considering an individual for an exemption for a certain number of years, and it could restrict this review to certain classes of individuals, say,

[17] The County cites Prentky (1997) and other studies essentially focused on the risk presented by diagnosed pedophiles. Plaintiffs' experts explain extensively how shortcomings in these studies prevent generalizing their findings beyond the specific samples examined. Pls.' Trial Ex. 3 (ECF 171-3) at 4-16; Pls.' Trial Ex. 5 (ECF 171-5) at 6.

lower-risk individuals who have remained offense free in the community. For individuals who qualify, the County could also reduce their residence restriction to 1,000 feet, rather than eliminate it completely. The Court's task, however, is not to prescribe viable alternatives. The point is simply that the unyielding, lifelong application of the Residence Restriction is excessive.

iv. The Ordinance resembles historically regarded punishment.

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

Here, like in *Snyder*, the Residence Restriction severely limits where Plaintiffs can reside and causes them "great difficulties" in finding housing. The County recognized this effective banishment when the Homeless Trust explored housing options outside Miami-Dade County. Mr. Fernandez from the Florida Department of Corrections testified that he only knew of people who left the NW 71st Street Encampment by moving outside of Miami-Dade County. A review of the map shows the significant unrestricted areas of the County are on the outskirts of the County's urban areas. Pls.' Trial Ex. 1 (ECF 171-1) at 25. The County's Residence Restriction goes farther than Michigan's in effectively banishing former sexual offenders, and the Ordinance's grandfather provisions do not significantly mitigate the law's banishing effects.

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

v. The Ordinance advances the traditional aims of punishment.

Though the Ordinance advances all of the aims of punishment—incapacitation, deterrence, and retribution—*see Snyder*, 834 F.3d at 704, its retributive features are most prominent. Specifically, the restriction applies based solely on the crime committed, without regard to an individual's risk of recidivism over time,[18] and "it marks registrants as ones who cannot be fully admitted into the community." *Snyder*, 834 F.3d at 704. The Ordinance also makes no exceptions for the particular vulnerabilities of Covered Persons who might be most impacted by housing instability, such as those with mental or physical disabilities. These features strongly support the conclusion that the Ordinance is more concerned with retribution than with regulation.

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

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

* * *

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that I served the foregoing document to all counsel of record via Notice of Electronic Filing generated by CM/ECF Case Management Electronic Case Filing, on this 27th day of November 2018: Defendant Miami-Dade County, c/o Michael B. Valdes, Assistant County Attorney, E-mail: mbv@miamidade.gov

__/s/ Jeffrey M. Hearne____