IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSHUA VASQUEZ, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 16 C 8854
v.	)	
	)	Judge St. Eve
ANITA ALVAREZ, et al.	)	Magistrate Judge Finnegan
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT ALVAREZ'S MOTION TO DISMISS

Plaintiffs, through counsel, respond in opposition to Defendant Anita Alvarez's Motion to Dismiss as follows:

INTRODUCTION

This case challenges the constitutionality of 720 ILCS 5/11-9.3(b-10) ("the residency restrictions"), a section of the Illinois criminal code that prohibits individuals classified as "child sex offenders" from living within 500 feet of certain prohibited locations, including daycare centers and playgrounds. Pursuant to this statute, individuals classified as child sex offenders can be forced to vacate their homes any time that a day care or other prohibited facility opens within 500 feet of their homes. Plaintiffs, both of whom have received notices stating that their current residences violate the statute, challenge the constitutionality of the statute on the grounds that it violates the Ex Post Facto Clause, the Fifth Amendment Takings Clause, and the Fourteenth Amendment guarantee of due process.

Defendant Anita Alvarez seeks to dismiss the complaint (1) under Fed. R. Civ. P. 12(b)(1), arguing that the court lacks jurisdiction; and (2) under Fed. R. Civ. P. 12(b)(6), arguing that the complaint does not state a claim on which relief can be granted. For the reasons set forth below, the Defendants' arguments should be rejected.

ARGUMENT

I. *Younger* Abstention Does Not Apply and this Court Has Jurisdiction

Defendant Alvarez's first argument is that this court "lacks subject matter jurisdiction" over this matter pursuant to *Younger v. Harris*, 401 U.S. 37 (1971) and *Fenner v. Boykin*, 271 U.S. 240 (1926). Dkt. 26, Defendant Alvarez's motion, at 5–10. The *Younger* abstention doctrine counsels that "absent extraordinary circumstances federal courts should abstain from enjoining ongoing state criminal proceedings." *Simpson v. Rowan*, 73 F.3d 134, 137 (7th Cir. 1995) (citing *Younger*, 401 U.S. at 53). Although there is no ongoing state criminal proceeding at issue here, Defendant Alvarez nonetheless argues that *Younger* abstention should apply because the Plaintiffs are being "threatened" with prosecution. Dkt. 26 at 9.

The Cook County States' Attorneys' Office has repeatedly and unsuccessfully asserted this argument in §1983 actions. It is flatly contrary to well-settled law and this court and the Seventh Circuit have both rejected it on numerous occasions. See, *e.g.*, *Pindak v. Cook County Sheriff Thomas Dart,* Case No. 10 C 6237 (N.D. Ill, September 14, 2011) (Pallmeyer, J.) ("Because there is no ongoing state proceeding involving Plaintiff, *Younger* abstention is inapplicable here."); *Perkins v. County of*

Cook, Case No. 13 C 2430 (N.D. Ill., September 24, 2014) (Wood, J.) ("Defendants' arguments concerning *Younger* abstention do not apply" where there is no ongoing state court proceeding.); *Leaf v. Supreme Court of State of Wis.*, 979 F. 2d 589, 595 (7th Cir. 1992) ("the abstention doctrine only applies when there is an ongoing state proceeding."); *Sykes v. Cook County Circuit Court Probate Division*, 15-1781 (7th Cir., Sept. 14, 2016) ("*Younger* is now a moot question because there is no ongoing state proceeding for us to disturb.")

As purported authority for the claim that *Younger* abstention should apply in the absence of ongoing state court proceedings, Defendant Alvarez cites *ACLU of Ill. v. Alvarez*, 679 F. 3d 583 (7th Cir. 2012). Defendant's reliance on this case is mystifying because it does not support their position at all. There, Alvarez claimed that *Younger* abstention should bar the federal courts from ruling on the ACLU's constitutional challenge to the Illinois eavesdropping statute although there were no pending criminal charges for violation of the statute against ACLU members. The Seventh Circuit described the argument as "obviously not right" and allowed the case to proceed. *Id*. at 594. The Court wrote as follows:

> *Younger* abstention is appropriate only when there is an action in state court against the federal plaintiff and the state is seeking to enforce the contested law in that proceeding. ... By [the state's attorneys'] logic, *Younger* precludes all federal preenforcement challenges to state laws. That's obviously not right. ... *Younger* abstention does not apply ....

Id. at 594 (internal citations omitted).

In the face of repeated and forceful rejections of this argument by this court and the Seventh Circuit, it is puzzling that Alvarez continues to assert it. This court should reject Alvarez's 12(b)(1) motion.

II. Plaintiffs' Complaint States a Claim

A. Plaintiffs' Complaint States a Claim for Violation of the Ex Post Facto Clause

Plaintiffs are aware that the Illinois Appellate Court ruled that a previous version of 720 ILCS 5/11-9.3(b-10) was not an ex post facto enactment because its restrictions were civil rather than punitive. See, *People v. Leroy*, 357 Ill. App. 3d 530 (5th Dist. 2005). Likewise, Plaintiffs are aware that the Illinois Appellate Court upheld a statute prohibiting people deemed child sex offenders from residing within 500 feet of a school in *People v. Morgan*, 377 Ill. App. 3d 821 (3rd Dist. 2007) on the same grounds. Alvarez makes a perfunctory argument that the Illinois appellate court decisions in *Leroy* and *Morgan* mandate that Plaintiffs' ex post facto count be dismissed, claiming that the decisions are "directly on point and dispositive." Dkt. 26, Alvarez's Motion to Dismiss, at 11.

Put simply, they are neither on point nor dispositive. Decisions of the Illinois appellate courts on matters of constitutional law are not binding on this Court. Moreover, *Leroy* and *Morgan* are inapposite because they concerned constitutional challenges to statutes not at issue here that imposed much less onerous restrictions on where individuals deemed child sex offenders are permitted to reside.

1. This Court Is Not Bound by Decisions of the Illinois Appellate Courts on Matters of Constitutional Law

The decisions of the highest court of a state on federal constitutional issues are "persuasive" authority, not binding precedent. Federal district courts are bound to follow persuasive state court precedents only if they are convinced that their interpretation of federal law is correct. *RAR, Inc. v. Turner Diesel, Ltd*., 107 F. 3d 1272, 1276 (7th Cir. 1997) ("federal courts are under no obligation to defer to state court interpretations of federal law. ... Although state court precedent is binding upon us regarding issues of state law, it is only persuasive authority on matters of federal law."); *Grantham v. Avondale Industries, Inc*., 964 F.2d 471, 473 (5th Cir.1992) ("It is beyond cavil that we are not bound by a state court's interpretation of federal law regardless of whether our jurisdiction is based on diversity of citizenship or a federal question."); *Donahue v. Rhode Island Dept. of Mental Health*, 632 F.Supp. 1456, 1478, (D.R.I. 1986) ("[I]n construing a state statute, a federal court must defer to the highest court of a state as the best arbiter of state law. Such deference involves the meaning of the enactment; once the meaning is established, the question of whether or not the ordinance passes constitutional muster is one within the primacy of the federal courts.")

In *Joseph v. Blair*, 482 F.2d 575 (4th Cir. 1973), the court addressed the issue of whether it was proper to determine the constitutionality of a state ordinance that the state supreme court had found valid under the federal constitution. The ordinance prohibited the massage of any person by another of the opposite sex. After the Supreme Court of Virginia held the ordinance valid, a different plaintiff

brought suit in the federal district court, claiming the statute violated federal law. The court held that it had an obligation to independently decide the issue of the constitutionality of the state statute notwithstanding state precedent holding that it was constitutional.

> Although entitled to great respect, and perhaps completely persuasive, the decision of a state court of last resort is not binding on federal court on a federal constitutional question raised by persons who were not parties in the state litigation.

Id. 482 F.2d at 580, fn.4.

Here, Defendants claim that two state appellate court decisions upholding as constitutional different, less restrictive, residency restrictions obligate this court to dismiss Plaintiffs' complaint. The law is to the contrary. The federal district court must decide for itself whether the current residency restrictions at issue here satisfy constitutional scrutiny.

2. The Illinois Appellate Court Decisions in *Leroy* and *Morgan* Are Inapposite Because the Courts There Considered Much Less Onerous Restrictions

In *Leroy*, an Illinois appellate court upheld as constitutional a 2000 enactment of the Illinois legislature that made it "unlawful for a child sex offender to knowingly reside within 500 feet of a playground or a facility providing programs or services exclusively directed toward persons under 18 years of age." *Leroy*, 828 N.E. 2d at 775. In *Morgan*, an Illinois appellate court upheld as constitutional 720 ILCS 5/11-9.3(b-5), a statute not at issue here, which makes it unlawful for a person deemed a child sex offender to reside within 500 feet of a school. *Morgan*, 881 N.E. 2d at 509. These decisions are of limited relevance when deciding whether the

current version of 720 ILCS 5/11-9.3(b-10) is constitutional because the burdens imposed under the statute challenged in this case are much more onerous than those at issue in *Leroy* and *Morgan*.

Specifically, after *Leroy* was decided, the Illinois legislature amended the residency restrictions in 2006 to add a prohibition on individuals classified as "child sex offenders" from living within 500 feet of "a child care institution, day care center, or part day child care facility." The legislature amended the statute again in 2008 to add a prohibition on individuals classified as "child sex offenders" from living within 500 feet of "a day care home or group day care home."

It is the current version of this statute that Plaintiffs are challenging because both Plaintiffs have been informed that they must move because of home daycare facilities in their neighborhoods. The statutes considered by the *Leroy* and *Morgan* courts did not prohibit living within 500 feet of home daycare facilities. Indeed, both Plaintiffs' current residences comport with the restrictions that were challenged in *Leroy* and *Morgan*.

The Courts in *Leroy* and *Morgan* found that the challenged statutes were not ex post facto enactments because—both in intent and effect—they were regulatory and not punitive. See, *Morgan* at 510 (finding the statute "was not punitive but rather ... a regulatory act of the General Assembly to create a civil, nonpunitive statutory scheme ..."). (citing *Leroy*, 357 Ill.App.3d at 538). Citing to the Supreme Court's decision in *Smith v. Doe*, 538 U.S. 84, 92, (2003), in which Alaska's sex offender registry was upheld, both the *Leroy* and *Morgan* courts noted that the

statutes at issue placed only minor burdens on where people deemed child sex offenders could live. *Id.* at 511–512 (finding the statute restricted residency "to a degree, and did not otherwise curtail the movement and activities of child sex offenders.")

Here, the addition of a restriction on living within 500 feet of home daycare facilities changes the equation substantially. First, the addition of home daycares to the residency restrictions greatly expands the amount of residential housing that is off limits to individuals regulated by the statute. There are more than 10,000 licensed home daycare providers in Illinois. See, Illinois Department of Children and Family Services Provider Index, available at: https://sunshine.dcfs.illinois.gov/Content/Licensing/Daycare/Search.aspx. Putting a 500-foot buffer zone around each of these locations puts a much greater burden on the ability of those regulated by the statute to find compliant housing. Moreover, the locations of schools and playgrounds are typically predictable and longstanding. In contrast, any residential property can become a home daycare if the resident obtains a license from the state to provide home daycare services. Therefore, the likelihood that an offender will be forced to move after establishing a residence at a compliant address is much greater under the current statute than it was under the statutes considered in *Morgan* and *Leroy*. Based on this, there is reason to believe that the Illinois courts would view the current statute as having crossed the line from a regulatory scheme into the realm of punishment.

Indeed, several courts to have recently considered the constitutionality of residency restrictions have determined that the ever-increasing burdens imposed under these schemes have converted them from civil regulations into ex post facto punishments. See, *Does v. Snyder*, 15-1536 (6th Cir. Aug. 25, 2016) ("A regulatory regime that severely restricts where people can live, work, and loiter, ... is something altogether different from and more troubling than Alaska's first-generation registry law. SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live."); *In Re Taylor*, 60 Cal. 4th 1019, 1038 (Cal., 2015) (finding a residency law that "imposed harsh and severe restrictions" on where parolees could live violated ex post facto clause notwithstanding the Supreme Court decision in *Smith v. Doe*).

For these reasons, *Morgan* and *Leroy* do not compel dismissal of the complaint, and accordingly Defendant's motion to dismiss Plaintiffs' ex post facto challenge should be denied.

B. Plaintiffs' Complaint States a Claim that 720 ILCS 5/11-9.3(b-10) Violates Plaintiffs' Right to Procedural Due Process

With regard to Plaintiffs' claim that the challenged residency restrictions violate Plaintiffs' procedural due process rights, Defendant Alvarez states (without argument) that several Illinois appellate courts' decisions finding the statue

constitutional compel dismissal. See, Dkt. 26 at 12 (claiming that state appellate decisions are "dispositive.")

As set forth above, this court is not bound by decisions of the Illinois appellate courts and has an obligation to independently assess the constitutionality of the challenged regulations. Moreover, the reasoning of the decisions Defendants cite is not persuasive and should not be followed here. All three decisions—*People v. Pollard*, 2016 IL App (5th) 130514; *People v. Avila-Briones*, 2015 IL App (1st) 132221; and *People v. Stork*, 305 Ill. App. 3d 714, 719-720 (Ill. App. 2nd Dist. 1999)—simply analogize the Illinois residency restrictions to the regulatory scheme upheld in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003). But *Connecticut v. Doe* is easily distinguishable from the case at bar.

There, the Supreme Court found constitutional Connecticut's sex offender registry, which "enabled citizens to obtain the name, address, photograph, and description of any registered sex offender by entering a zip code or town name." *Id.* at 5. The Court held that "injury to reputation" does not constitute "deprivation of a liberty interest" under established law. *Id.* at 6–7. Moreover, the Court observed that an assessment of "current dangerousness" was not necessary under Connecticut's scheme because the state merely made "information more easily available and accessible" to citizens. *Id.* at 7. The statute at issue in *Connecticut v. Doe* did not impose any other burden on registrants.

Here, unlike in *Connecticut v. Doe*, Plaintiffs have alleged that enforcement of the statute interferes with fundamental liberty and property interests. Specifically,

enforcement of the statute would force both Plaintiffs into homelessness and would prevent Plaintiffs from living with and caring for their immediate family members. Dkt. 1 at ¶46–52.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court held that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests ... This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Id*. at 333 (citing *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974); *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931) and *Dent v. West Virginia*, 129 U. S. 114, 124-125 (1889)). The Court went on to explain that "identification of the specific dictates of due process generally requires consideration of ... the private interest that will be affected by the official action; ... the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest ...." *Id*. at 335.

Here, because application of 720 ILCS 5/11-9.3(b-10) will result in Plaintiffs and others being deprived of their fundamental liberty and property interests, they are entitled to a hearing before that deprivation. Therefore, Alvarez's motion to dismiss this count should be denied.

C. Plaintiffs' Complaint States a Claim for Violations of the Takings Clause

Defendant Alvarez asserts three arguments in support of her claim that Plaintiffs' Fifth Amendment takings claim should be dismissed. First, Alvarez

argues that Plaintiff Vasquez cannot assert a takings claim because he leases rather than owns his property. Dkt. 26 at 12–13. Second, Alvarez argues that because the challenged statute was enacted before Cardona bought his property in 2010, the enactment didn't amount to a taking of a vested property interest. *Id*. Third, Alvarez claims that Plaintiff Cardona cannot state a takings claim because the statute simply prohibits Cardona from living in his home, not from owning the property altogether. *Id*. at 13. Plaintiffs address each in turn.

1. Vasquez has a Protectable Property Interest in his Lease

Defendant Alvarez first claims, without citation to any authority, that Plaintiff Vasquez cannot assert a Fifth Amendment takings claim because he leases rather than owns his property. Dkt. 26 at 12. The argument is contrary to law.

The Supreme Court has long held that citizens have a protectable property interest in occupying leased property with which the government cannot unreasonably interfere without just compensation. See *Brown v. Legal Foundation of Wash*., 538 U.S. 216, 233 (2003) ("compensation is mandated when a leasehold is taken"); *United States v. Petty Motor Co*., 327 U.S. 372, 374 (1946) (the United States government could be held liable to tenants for its temporary "taking of their leaseholds"); *Ward v. Downtown Development Authority*, 786 F.2d 1526 (11th Cir. 1986) ("any tenancy, no matter the duration, is a property interest that can be the subject of a compensable taking.")

Under this well-established law, Defendants' claim that Plaintiff Vasquez cannot assert a Fifth Amendment takings claim must be rejected.

2. Enforcement of the Statute Amounts to a Taking

Defendant Alvarez next claims that Plaintiffs' Fifth Amendment takings claim should be dismissed because Plaintiff Cardona cannot "plausibl[y allege] that that the enactment of 720 ILCS 5/11-9.3(b-10) on August 14, 2008 constituted a taking of property that he purchased in 2010." Dkt. 26 at 13. Defendant Alvarez does not explain why she believes the date of the enactment to be dispositive, nor has she cited any authority in support of this argument for dismissal.

Plaintiffs have not alleged that the enactment of the statute itself amounts to a taking of their property. Rather, Plaintiffs allege that forcing them to vacate their homes upon a daycare opening within 500 feet of their residences pursuant to the statute constitutes a taking. Dkt. 1 at ¶¶ 72–79. Specifically, each Plaintiff selected his current residence relying on law enforcement officials' representations that it satisfied the residency restrictions. Now, years after Plaintiffs established their residences, the City seeks to oust them from their homes pursuant to 720 ILCS 5/11-9.3(b-10). It is this action which, Plaintiffs allege, amounts to a taking in violation of their Fifth Amendment rights. *Id.* at ¶¶75–79.

In *Mann v. Georgia Dept. of Corrections*, 653 S.E. 2d 740 (Ga. 2007), the Georgia Supreme Court struck down a regulation very similar to that at issue here on precisely these grounds. Under the Georgia law at issue in *Mann*, sex offenders could be forced to vacate their homes if a "child care facility, church, school or area where minors congregate" opened within 1,000 feet of the residence. *Id.* at 741. The Supreme Court of Georgia concluded that the statute was "unconstitutional to the

extent that it permits the regulatory taking of appellant's property without just and adequate compensation." *Id*. at 745. The Court reasoned as follows:

> [The residency regulation] looms over every location appellant chooses to call home, with its on-going potential to force appellant from each new residence whenever, within that statutory 1,000-foot buffer zone, some third party chooses to establish any of the long list of places and facilities encompassed within the residency restriction. While this time it was a day care center, next time it could be a playground, a school bus stop, a skating rink or a church. [The regulation] does not merely interfere with, it positively precludes appellant from having any reasonable investment-backed expectation in any property purchased as his private residence.

Id. at 744.

Here, as in *Mann*, enforcement of the residency regulation against Plaintiffs amounts to a taking of their property. Defendant Alvarez's argument for dismissal of Plaintiffs' Fifth Amendment takings count should thus be rejected.

3. A Government Regulation that Prohibits Someone From Residing at his Property Amounts to a Taking

Finally, Defendant Alvarez argues that Plaintiffs' Fifth Amendment claim fails because the statute does not bar Cardona from owning his property, but rather only prohibits him from living there. Dkt. 26 at 13. This argument is without support in the law.

Specifically, Courts have explained that a government regulation that unreasonably impairs a property owners' intended use of his property effects a taking even if it does not foreclose all possible uses of the property. See, *Mann*, 653 SE 2d at 744 (the residency regulation, "by prohibiting appellant from residing at the Hibiscus Court house, thus utterly impairs appellant's use of his property as the

home he shares with his wife.") (citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980) (holding that relevant inquiry is whether the owners' intended use of its property as a shopping center was unreasonably impaired)).

As the Supreme Court recognized in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005), a government regulation that falls short of a "direct appropriation or ouster" may still violate the takings clause if it is "so onerous" that its effect is to substantially impair the property's beneficial economic use, taking into account the "economic impact on the landowner," the extent to which the regulation "interferes with reasonable investment-backed expectations," and the "interests promoted by the government action." *Id*. In *Mann*, the court concluded that forcing an individual to vacate a home that he had purchased solely for use as his primary residence is "functionally equivalent to the classic taking in which government directly... ousts the owner from his domain," notwithstanding the fact that the ousted property owner could sell or lease the property. *Id*. at 744 (citing *Lingle*, 544 U.S. at 539).

Here, as in *Mann*, application of the residency restrictions to Cardona interferes with his intended use of the property—*i.e.*, as his primary residence with his mother—and thus amounts to a taking for which just compensation is required. Accordingly, Defendant Alvarez's Motion to Dismiss Plaintiffs' takings count should be denied.

D. Plaintiffs' Complaint States a Claim that 720 ILCS 5/11-9.3(b-10) Violates Plaintiffs' Right to Substantive Due Process

In support of their argument that Plaintiffs' substantive due process count should be dismissed, Defendant Alvarez relies on two Illinois Appellate Court

decisions—*People v. Avila-Briones*, 2015 IL App (1st) 132221; and *People v. Stork*, 305 Ill. App. 3d 714, 719-720 (2nd Dist. 1999). Dkt. 26 at 13–14.

As explained above, decisions of the Illinois appellate courts regarding matters of federal constitutional law do not bind this court. Federal courts have the authority and the responsibility to evaluate the constitutionality of state statutes. This court should do so with the benefit of a full factual record. As set forth in the complaint (see Dkt. 1 at ¶53–63) there is a growing body of evidence that shows that laws such as the residency restrictions challenged here do not actually advance the state interests they are purportedly enacted to serve while they impose severe, lifelong penalties on the citizens subject to their mandates. The Sixth Circuit very recently undertook a thorough review of that body of evidence and found Michigan's scheme of regulating sex offenders unconstitutional. *Does v. Snyder*, 15-1536 (6th Cir. Aug. 25, 2016). Likewise, the California Supreme Court in *In Re Taylor*, 60 Cal. 4th 1019, 1038 (Cal., 2015) found the residency restrictions placed on paroled sex offenders failed rational basis scrutiny because they "hampered efforts to monitor, supervise, and rehabilitate such parolees in the interests of public safety, and as such, bears no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators." *Id*. at 1042.

Indeed, the Illinois appellate court in *People v. Avila-Briones*—the very case that Defendant Alvarez relies on here—acknowledged that it reached its decision to uphold the residency restrictions without the benefit of a full factual record:

> Unlike *Taylor*, this case does not involve detailed factual findings showing that Illinois's sex offender laws undermine the very goal that

> they were designed to serve. Defendant did not file a civil suit and seek an evidentiary hearing before the trial court; he is raising these issues on direct appeal from a criminal conviction—his right, but also his choice. Based solely on the record before us, we cannot say that the laws at issue here are an irrational means to protect the public from sex offenders.

People v. Avila-Briones, 2015 IL App (1st) 132221 ¶85. Based on this authority, Plaintiffs should be allowed to proceed on their substantive due process claim.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Honorable Court deny Defendant Alvarez's motion to dismiss in its entirety.

Respectfully submitted,

/s/ Adele D. Nicholas

/s/ Mark G. Weinberg
Counsel for Plaintiffs

Law Office of Adele D. Nicholas
5707 W. Goodman Street
Chicago, Illinois 60630
847-361-3869

Law Office of Mark G. Weinberg
3612 N. Tripp Avenue
Chicago, Illinois 60641
773-283-3913