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

Joshua Vasquez and Miguel Cardona,	
Plaintiffs,	**16 C 8854**
v.	**Judge Amy St. Eve**
Kimberly M. Foxx, in her official capacity as State's Attorney of Cook County, and the City of Chicago, a municipal corporation,	**Magistrate Judge Sheila M. Finnegan**
Defendants.	

THE STATE'S ATTORNEY'S REPLY BRIEF IN SUPPORT OF HER MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Defendant KIMBERLY M. FOXX,[1] in her official capacity as State's Attorney of Cook County (the "State's Attorney"), by her Assistant State's Attorneys, ANTHONY E. ZECCHIN, ANDREA L. HUFF and JAMES S. BELIGRATIS and, and pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, respectfully submits the following reply brief in support of her motion to dismiss the First Amended Complaint that plaintiffs Joshua Vasquez and Miguel Cardona ("Plaintiffs") have filed.

1 Kimberly M. Foxx was sworn in as State's Attorney of Cook County on December 1, 2016. Plaintiffs sued former State's Attorney Anita Alvarez in her official capacity as State's Attorney of Cook County. Pursuant to FEDERAL RULE OF CIVIL PROCEDURE 25(d)(1), when public "officials sued in this capacity in federal court . . . leave office, their successors automatically assume their roles in the litigation." *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). Consequently, by operation of FEDERAL RULE OF CIVIL PROCEDURE 25(d)(1), State's Attorney Foxx replaces former State's Attorney Alvarez as a defendant in this action.

ARGUMENT

I. Under The Principles of Comity and Federalism, This Court Should Abstain From Exercising Subject Matter Jurisdiction Over Plaintiff's Complaint.

(Reply to Pl. Br. at 2-4.)

Federal courts have long followed "that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. (citation omitted) To justify such interference there must be **exceptional circumstances** and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." *Spielman Motor Sales Co*. v. *Dodge*, 295 U.S. 89, 95 (1935) (emphasis added). The State's Attorney cited *Spielman Motor Sales* and other cases[2] holding that federal courts will not enjoin future criminal State court prosecutions absent some extraordinary circumstances.

Plaintiffs did not distinguish *Fenner*, *Spielman Motor Sales* or any of these cases. In a similar vein, Plaintiff did not argue the existence of extraordinary circumstances that warranted the exercise of federal jurisdiction here. Instead, Plaintiffs argue that abstention principles do not apply "because there is no ongoing State proceeding." (Plaintiffs' Resp. at 3.) In support of this argument, Plaintiffs cite *Leaf v. Supreme Court of Wisconsin*, 979 F.2d 589, 595 (7th Cir. 1992) and *Sykes v. Cook County Circuit Court Probate Division*, ___ F.3d ___, 2016 U.S. App. LEXIS 16778 (7th Cir. September 14, 2016). *Leaf* and *Sykes* are inapposite for the same reason: in both cases, the State court proceedings *ended* before the federal lawsuit was filed. This case presents the exact opposite problem.

Indeed, Plaintiff Vasquez alleged concern that he could be prosecuted any time after

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2 *See Fenner v. Boykin*, 271 U.S. 240 (1926); *Younger v. Harris*, 401 U.S. 37, 45-46 (1971); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Spielman Motor Sales Co*. v. *Dodge*, 295 U.S. 89 (1935); *Beal* v. *Missouri Pac. R. Co*., 312 U.S. 45 (1941); *Watson* v. *Buck*, 313 U.S. 387 (1941); *Williams* v.

September 24, 2016 if he did not leave his apartment at 4834 West George Street in Chicago, Illinois. (R. 1, Complaint at ¶¶ 24 and 28.) Similarly, Plaintiff Cardona alleged concern that he could be prosecuted any time after September 16, 2016 if he did not leave his residence at 3152 South Karlov Street in Chicago, Illinois. (R. 1, Complaint at ¶¶ 38 and 41.) The Seventh Circuit has "suggested in dicta that if a state prosecution 'really *were* imminent, then a federal court might well abstain on comity grounds.'" *ACLU v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012), *citing 520 S. Mich. Ave. Assocs. Ltd. v. Devine*, 433 F.3d 961, 963 (7th Cir. 2006).

Plaintiffs describe the State's Attorney's citation to *Alvarez* as "mystifying," Plaintiffs' Resp. at 3, but that is certainly not the case. The State's Attorney explained exactly why she cited *Alvarez* and *520 S. Mich. Ave.* in her opening brief: both cases recognize that if a State court prosecution is actually imminent, "then a federal court might well abstain on comity grounds." *Id*. *See also* the State's Attorney's motion to dismiss, R. 26. at page 5.

Here, Plaintiffs have alleged that a State court criminal prosecution is imminent. The Seventh Circuit's recognition in *Alvarez* and *520 S. Mich. Ave.*, albeit in *dicta*, that a federal court would likely abstain from enjoining an imminent State prosecution is certainly consistent with the *Fenner* and *Spielman Motor Sales* line of cases which adhere to:

> [t]he general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. (citation omitted) To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights.

Spielman Motor Sales, 295 U.S. at 95.

Plaintiffs cannot have it both ways. They cannot allege that criminal prosecutions are imminent enough to warrant preliminary injunctive relief and yet not imminent enough to allow for

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Miller, 317 U.S. 599 (1942); and *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943).

the exercise of federal jurisdiction.

If the criminal prosecution of Plaintiffs is as imminent as they allege, R. 1, Complaint at ¶¶ 24, 28, 38 and 41, then this Court should abstain from exercising federal jurisdiction over Plaintiffs' constitutional claims. Plaintiffs have not pled the requisite "exceptional circumstances" to warrant the exercise of federal jurisdiction here in contravention of *Fenner*, *Spielman Motor Sales* and *Wooley*. This Court should dismiss Plaintiffs' complaint for lack of subject matter jurisdiction pursuant to FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1).

II. Beyond Lacking Subject Matter Jurisdiction, Plaintiffs' Complaint Also Fails To State A Claim Upon Which Relief May Be Granted.

Putting aside the issues of subject matter jurisdiction and abstention on the grounds of federalism and comity, none of Plaintiffs' constitutional claims have merit.

A. *Leroy* and *Morgan* Are Persuasive Authority
(Reply to Pl. Br. at 5-6.)

In *People v. Leroy*, 357 Ill. App. 3d 530 (5th Dist. 2005) and *People v. Morgan*, 377 Ill. App. 3d 821 (3rd Dist. 2007), the Illinois Appellate Court held that the former 720 ILCS 5/11-9.3(b-5) -- the predecessor of the current 720 ILCS 5/11-9.3(b-10) -- did not violate the *Ex Post Facto* Clause of the United States Constitution.

Plaintiffs argue that *Leroy* and *Morgan* are not binding on the Court. (Plaintiffs' Resp. at 5.) No one has suggested otherwise. *Leroy* and *Morgan* are, however, persuasive authority and are instructive on the issue of whether 720 ILCS 5/11-9.3(b-10) violates the *Ex Post Facto* Clause because it applies retroactively. It does not.

B. 720 ILCS 5/11-9.3(b-10) Does Not Violate *Ex Post Facto* Clause
(Reply to Pl. Br. at 4, 6-9.)

Leroy considered whether 720 ILCS 5/11-9.3(b-5) violated the *Ex Post Facto* Clause because

it applied retroactively. Plaintiffs raised the very same issue in their complaint:

> The retroactive application of 720 ILCS 5/11-9.3(b-10) violates the Ex Post facto Clause of the United States Constitution, Art. I, §10, cl. 1, because it makes more burdensome the punishment imposed for offenses committed prior to the enactment of the law and it applies retroactively.

(Complaint, ¶81.) *Leroy* found this argument unpersuasive, noting that the provision "was civil and not punitive" in nature and that "subsection (b-5) is not so punitive that it negates the state's attempt to craft civil restrictions. Accordingly, [then] subsection (b-5) does not constitute an *ex post facto* law." *See Leroy*, 357 Ill. App. 3d at 541-542. *People v. Morgan*, 377 Ill. App. 3d 821 (3rd Dist. 2007) (same).

Plaintiffs argue that *Leroy* and *Morgan* are inapposite because the courts in those cases examined statutes which imposed restrictions that Plaintiffs deem to be more lenient. (Plaintiffs' Resp. at 7.) Plaintiffs' attempts to distinguish *Leroy* and *Morgan* are unavailing.

As Plaintiffs concede, *Leroy* rejected an *Ex Post Facto* Clause challenge to an Illinois statute which 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*, 357 Ill. App. 3d at 533, *citing* 720 ILCS 5/11-9.4(b-5). Plaintiffs likewise concede that *Morgan* rejected an *Ex Post Facto* Clause challenge to an Illinois statute which made it "unlawful for a child sex offender to knowingly reside within 500 feet of a school." *Morgan*, 377 Ill. App. 3d at 823, 824, *citing* 720 ILCS 5/11-9.3(b-5).

Plaintiffs contend that *Leroy* and *Morgan* are distinguishable because 720 ILCS 5/11-9.3(b-10) makes it "unlawful for a child sex offender to knowingly reside within 500 feet of a playground, child care institution, day care center, part day child care facility, day care home, group day care home, or a facility providing programs or services exclusively directed toward persons under 18

years of age." 720 ILCS 5/11-9.3(b-10) (2016). Thus, the only distinction between *Morgan* and the present case is that 720 ILCS 5/11-9.4(b-5) made it unlawful for a child sex offender to knowingly reside within 500 feet of a school while 720 ILCS 5/11-9.3(b-10) makes it unlawful for a child sex offender to knowingly reside within 500 feet of a "playground, child care institution, day care center, part day child care facility, day care home, group day care home, or a facility providing programs or services exclusively directed toward persons under 18 years of age." This is a distinction without a difference.

No substantive difference exists between schools on the one hand and playgrounds, child care institutions, day care centers, part day child care facilities, day care homes and group day care homes on the other. The rationale of *Leroy* and *Morgan* fully applies to the Ex Post Facto Clause challenge to 720 ILCS 5/11-9.3(b-10) here.

Like the statutes in *Leroy* and *Morgan,* 720 ILCS 5/11-9.3(b-10) is "not punitive but rather intended to protect children from known child sex offenders, and thus [is] a regulatory act of the General Assembly to create a civil, non-punitive statutory scheme to protect the public rather than impose a punishment." *Morgan*, 377 Ill. App. 3d at 825; *Leroy*, 357 Ill. App. 3d at 538.

If this Court were to reach the merits of Plaintiffs' *Ex Post Facto* Clause claims in Count I, those claims should be dismissed pursuant to Rule 12(b)(6).

C. 720 ILCS 5/11-9.3(b-10) Does Not Violate Procedural Due Process
(Reply to Pl. Br. at 9-11.)

Three Illinois courts have already held that 720 ILCS 5/11-9.3(b-10) does not violate procedural due process. *See People v. Pollard*, 2016 IL App (5th) 130514, ¶¶ 46-59; *People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶¶88-92 (same); *People v. Stork*, 305 Ill. App. 3d 714, 719-720 (2nd Dist. 1999) (same)

Plaintiffs note that in reaching this decision, *Pollard, Avila-Briones* and *Stork* relied upon the decision of the United States Supreme Court in *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003). Plaintiffs argue that *Connecticut Dep't of Public Safety* is distinguishable on the grounds that "[h]ere, unlike in *Connecticut Dep't of Public Safety*, Plaintiffs have alleged that the enforcement of [720 ILCS 5/11-9.3(b-10)] interferes with fundamental liberty and property interests." (Plaintiffs' Resp. at 10.) Just a brief review of *Avila-Briones* and *Pollard* shows that Plaintiffs' reliance on *Connecticut Dep't of Public Safety* is misplaced.

In *Pollard*, the court held that even if the Sex Offender Registration Act affected the defendant's liberty or property interests, no additional procedures would be necessary to satisfy due process. *Pollard*, 2016 IL App (5th) 130514 at ¶47; *accord Avila-Briones*, 2015 IL App (1st) 132221 at ¶89. Indeed, in *Avila-Briones*, the court found that:

> The first step in our analysis would ordinarily be asking whether the Statutory Scheme deprives defendant of a life, liberty, or property interest. We need not resolve this question, however, because, even if we were to assume that these laws affect defendant's liberty or property interests, no additional procedures would be necessary to satisfy due process.
>
> Defendant contends that the missing procedure in this case is a mechanism by which the state should evaluate his risk of reoffending. According to defendant, such a procedure would ensure that the burdensome restrictions of these laws are only placed on those who actually pose a risk of committing additional sex crimes.
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> But the United States Supreme Court rejected a nearly identical argument in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003). There, the Court held that Connecticut was not required to hold a "hearing to determine whether [sex offenders] are likely to be 'currently dangerous'" before requiring them to register. *Id.* at 4. The Court noted that Connecticut's sex-offender registration system "turn[ed] on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." *Id.* at 7. Because the defendant's current dangerousness was "of no consequence" under Connecticut law, individuals were not entitled to a hearing to prove something that had no relevance to their registration. *Id.* The Court concluded, "Unless respondent can show that [Connecticut's] *substantive* rule of law is defective

> (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise." (Emphasis in original.) *Id.* at 7-8.
>
> This court has adopted the rationale of *Connecticut Department of Public Safety* when faced with arguments that sex offenders in Illinois should have an opportunity to show whether they are likely to reoffend. *People v. Stanley*, 369 Ill. App. 3d 441, 448-50, 860 N.E.2d 343, 307 Ill. Dec. 689 (2006); *In re J.R.*, 341 Ill. App. 3d 784, 795-96, 793 N.E.2d 687, 275 Ill. Dec. 916 (2003). That is because Illinois's system, like Connecticut's, is based entirely on the offense for which a sex offender has been convicted. A sex offender's likelihood to reoffend is not relevant to that assessment. As the Court held in *Connecticut Department of Public Safety*, defendant had no right to a procedure where he could prove a fact that had no relevance to his registration. Defendant offers no persuasive reason to depart from these cases. We conclude that defendant was not denied his right to procedural due process.

Avila-Briones, 2015 IL App (1st) 132221 at ¶¶89-92.

Avila-Briones shows that Plaintiff' allegation that 720 ILCS 5/11-9.3(b-10) interferes with fundamental liberty and property interests is of no moment because Illinois' statutory regime, like the Connecticut statutory regime in *Connecticut Dep't of Public Safety*, is based the offense for which they already been convicted. Plaintiffs are simply not entitled to a hearing to prove up facts that have no relevance to their registration. *Connecticut Dep't of Public Safety* is directly on point and dispositive.

If this Court were to reach the merits of Plaintiffs' procedural due process claims in Count II, those claims should be dismissed pursuant to Rule 12(b)(6).[3]

D. 720 ILCS 5/11-9.3(b-10) Does Not Violate The Takings Clause
(Reply to Pl. Br. at 11-14.)

Plaintiffs allege an implied Takings Clause claim against the State's Attorney. Plaintiffs cannot do so for three reasons, one of which is that such a claim is not ripe. In order to properly plead

3 The State's Attorney also adopts and incorporates by reference Section IV of the City's reply brief in support of their motion to dismiss, R. 39, at pages 7-9.

an as applied takings claim, Plaintiffs must meet the exhaustion requirement of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 196 (1985), which "applies whether plaintiffs claim an uncompensated taking, inverse condemnation, or due process violation." *See Hager v. City of West Peoria*, 84 F.3d 865, 869 (7th Cir. 1996); *see also Williamson County*, 473 U.S. at 196.

Plaintiffs argue that they should be able to proceed on their takings claim because "there are no state procedures available to the Plaintiffs to challenge an order to vacate their homes within 30 days." (R. 33, Plaintiffs' Response to the City of Chicago's Motion to Dismiss at page 17.). Of course, the exhaustion requirement is not limited to certain specific remedies but also considers that Plaintiffs may bring an action for inverse condemnation in the courts of Illinois. *See Peters v. Vill. of Clifton*, 498 F.3d 727, 732–34 (7th Cir. 2007). In cases where a government takes property without a condemnation proceeding, the Seventh Circuit has held that the owner must file an inverse condemnation suit seeking just compensation with the state court. *See Rockstead v. City of Crystal Lake*, 486 F.3d 963, 965 (7th Cir. 2007); *Peters*, 498 F.3d at 732 ("In Illinois, inverse condemnation is a judicially recognized remedy arising out of the self-executing takings provision of the Illinois Constitution.")

Further, under *Williamson County* and its progeny, if Plaintiffs believe there is no adequate remedy in state court for their as applied takings claim, Plaintiffs bear the burden of showing that available state court procedures would be futile. *See, e.g.*, *Peters*, 498 F.3d at 733(noting plaintiff had not met his burden of demonstrating it would be futile to pursue available remedies in state court). Just as Plaintiffs included a count for a taking under federal law, they could easily plead a claim under the Illinois version of that constitutional provision. Simply declaring that there are no

state procedures available without further explanation is insufficient grounds to defeat dismissal of an unripe takings claim.

Putting ripeness aside, there are two other problems with Plaintiffs' claims under the Takings Clause. If these takings claims are really a facial challenge to the residency statute, the State's Attorney cannot be held liable in an action for declaratory judgment and injunctive relief for enforcement of an Illinois law. *Cf. Los Angeles County v. Humphries*, 562 U.S. 29 (2010) (holding that Los Angeles County was not liable under Section 1983 in an action for declaratory relief for enforcing a State policy but only its own policies and practices).

In addition, the enforcement of the residency restrictions in 720 ILCS 5/11-9.3(b-10) against Plaintiff Cardona does not implicate the Takings Clause. Cardona alleges that he was convicted of indecent solicitation of a child in 2004. (Complaint, ¶38.) The Illinois Legislature subsequently enacted 720 ILCS 5/11-9.3(b-10) which became effective on August 14, 2008. Cardona has owned his current home since 2010. (Complaint, ¶38.) Cardona has offered no authority to support the notion that a sex offender registration statute enacted two years prior to the purchase of his home somehow constitutes a "taking" of that home in violation of the Fifth and Fourteenth Amendments.

If this Court were to reach the merits of Plaintiffs' Takings Clause claims in Count III, those claims should be dismissed pursuant to Rule 12(b)(6).[4]

4 Plaintiffs cites a decision from the Georgia Supreme Court, *Mann v. Georgia Dept't of Corrections*, 653 S.E.2d 740 (Ga. 2007) in support of their Takings Clause claims. (Plaintiffs' Resp. at 13-14.) *Mann* is inapposite, however, because it does not the fact that these takings Clause claims are unripe and not viable, as they complain about a residency policy that the State of Illinois established when they enacted 720 ILCS 5/11-9.3(b-10).

D. 720 ILCS 5/11-9.3(b-10) Does Not Violate Substantive Due Process
(Reply to Pl. Br. at 15-17.)

Illinois courts have held that 720 ILCS 5/11-9.3(b-10) does not violate substantive due process. *See Stork*, 305 Ill. App. 3d at 720-721 (2nd Dist. 1999). Plaintiffs do not contest that *Stork* and *Avila-Briones* both held that 720 ILCS 5/11-9.3(b-10) does not violate substantive due process. They simply ask that this Court hold otherwise.

The analysis in *Stork* is extensive. *Stork*, for example, found that "section 11--9.3 was intended to protect school children from known child sex offenders." *Stork*, 305 Ill. App. 3d at 721. The court then found that "prohibiting known child sex offenders from having access to children in schools, where they are present in large numbers, bears a reasonable relationship to protecting school children from such known child sex offenders." Id. at 722. The same rational, of course, would apply to children at a "playground, child care institution, day care center, part day child care facility, day care home, group day care home, or a facility providing programs or services exclusively directed toward persons under 18 years of age." *See* 720 ILCS 5/11-9.3(b-10) (2016). *Stork* further held that "Section 11--9.3 serves its purpose by banning known child sex offenders from school zones" and that there was "nothing unreasonable in the statute's method of serving its purpose." *Stork*, 305 Ill. App. 3d at 722-723. Thus, the court held that 720 ILCS 5/11-9.3(b-10) did not violate substantive due process. *Id*. at 723. *Accord Avila-Briones*, 2015 IL App (1st) 132221 at ¶¶70-86.

Avila-Briones and *Stork* are directly on point and dispositive. If this Court were to reach the merits of Plaintiffs' substantive due process claims in Count IV, this Court should follow *Avila-Briones* and *Stork* and those claims should be dismissed pursuant to Rule 12(b)(6).

CONCLUSION

Accordingly, and for all the foregoing reasons, this Court should dismiss plaintiff's Complaint for Injunctive Relief with prejudice.

Respectfully Submitted,

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