No. 17-1061
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOSHUA VASQUEZ and MIGUEL CARDONA, Plaintiffs-Appellants, vs. KIMBERLY M. FOXX and the CITY OF CHICAGO, Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division 16 C 8854 Honorable Amy J. St. Eve, Judge Presiding

BRIEF OF DEFENDANT-APPELLEE KIMBERLY M. FOXX

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Constituional Provisions

JURISDICTIONAL STATEMENT

The jurisdictional statement of Plaintiffs-Appellants Joshua Vasquez ("Vasquez") and Miguel Cardona ("Cardona") (collectively "Plaintiffs") is not complete and correct. The following statement is complete and correct and is provided pursuant to Circuit Rule 28(b). CIR. R. 28(b).

On September 12, 2016, Plaintiffs filed a complaint under 42 U.S.C. §1983. (R. 1.) The complaint challenged the constitutionality and enforcement of a state statute, 720 ILCS 5/11-9.3(b-10) for allegedly violating the United States Constitution's *Ex Post Facto*, Fifth Amendment's Takings and Fourteenth Amendment's Due Process Clauses (R. 1.) The district court had original federal jurisdiction under 28 U.S.C. §1331 (federal question) and 28 U.S.C. §1343(a)(3).

On December 9, 2016, the district court granted the motions to dismiss that Kimberly M. Foxx, the State's Attorney of Cook County (the "State's Attorney") and the City of Chicago (the "City") filed. (R. 43.) The district court entered final judgment dismissing the case on December 19, 2016. (R. 47.) On January 9, 2017, Plaintiffs filed theur notice of appeal. (R. 48.)

Thus appeal is from a final judgment disposing of all parties' claims. Jurisdiction in the Court of Appeals exists pursuant to 28 U.S.C. §1291 (final decision).

ISSUES PRESENTED FOR REVIEW

1. Whether this court may affirm the dismissal of Plaintiffs' complaint against the State's Attorney because there is no basis for liability under *Monell*

where the criminal statute plaintiffs challenge is not the State's Attorney's policy, and the State's Attorney's policies did not cause the alleged violations of plaintiffs' constitutional rights.

2. Whether the district court's dismissal of Plaintiffs' damage claim against the State's Attorney in her official capacity may be affirmed on the grounds that the Eleventh Amendment bars such claims.

3. Whether the district court properly dismissed Plaintiffs' *ex post facto* claim on the merits because the criminal statute does not impose retroactive punishment.

3. Whether this court may affirm the district court's dismissal of Plaintiffs' takings claim on the merits because plaintiffs lack a constitutionally protected property interest in continuing to reside in prohibited locations.

4. Whether the district court properly dismissed plaintiffs' procedural due process claim against the State's Attorney because they have no entitlement to a hearing to challenge the application of a criminal statute, the enactment of which supplied all the process that was due, and when they seek to prove facts not relevant under the statute and will receive all required due process in any criminal proceedings if brought.

STATEMENT OF THE CASE

Plaintiffs allege that they are convicted child sex offenders, as defined in 720 ILCS 5/11-9.3(d)(1) (2017). (R. 1, ¶¶22, 35.) As child sex offenders, Plaintiffs are

subject to the prohibitions of 720 ILCS 5/11-9.3 (2017). (A.21.)[1] One section of that statute, enacted in 2000 and amended in 2006 and 2008, R. 1, ¶¶14-16, makes it a criminal offense for child sex offenders "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) (2017), A21.

The statute contains exceptions allowing the child sex offender to reside at property within 500 feet of protected facilities if he purchased the property before the effective dates of the statute or a relevant amendment -- July 7, 2000, June 26, 2006, and August 14, 2008 -- depending on the type of facility at issue. (R. 1, ¶ 17.) Because Vasquez rents his residence and Cardona purchased his home in 2010, R. 1 at ¶¶ 24, 38, these exceptions do not apply to Plaintiffs. The statute contains no exception allowing the offender to reside at property that was not located within 500 feet of a protected facility when the child sex offender moved in but became a prohibited location when a protected facility later opened up within 500 feet. (R. 1 at ¶¶ 17-19.) The date that the child sex offender was convicted of his qualifying child sex offense is irrelevant under the statute. (R. 1 at ¶ 17.) Whether the child sex offender is required to register with the State also is irrelevant under the statute. (R. 1 at ¶ 20.) A violation of the statute is a class four felony. *See* 720 ILCS 5/11-9.3(f) (2017). Plaintiffs allege that 720 ILCS 5/11-9.3(b-10) violates the

1 Citations to Plaintiffs' brief will be to "Plaintiffs' Br. at ___" and citations to the appendix of Plaintiffs' brief will be to "A___."

United States Constitution's *Ex Post Facto*, Fifth Amendment's Takings and Fourteenth Amendment's Due Process Clauses (R. 1.)

A. Joshua Vasquez.

Vasquez resides in Chicago, Illinois. Vasquez and "is subject to the residency restrictions contained in 720 ILCS 5/11-9.3(b-10)." (R.1 at ¶7.) Vasquez was convicted of one count of possession of child pornography in 2001. (R. 1 at ¶22.) Vasquez is a child sex offender as defined in 720 ILCS 5/11-9.3(d)(1) and is required to register with the State of Illinois as a sex offender. (*Id.*)

Vasquez currently leases an apartment 4834 W. George Street in Chicago, Illinois. (R. 1 at ¶24.) When Vasquez and his family decided to move there, the Chicago Police Department ("CPD") confirmed that it complied with the residency statute. (R. 1 at ¶ 26.) Although there has been a home day care 550 feet from Vasquez's residence since he and his family began living there, "no problems" had arisen. (R. 1 at ¶ 31.)

On August 25, 2016, Vasquez went to Chicago police headquarters to complete his annual registration requirements. (R. 1 at ¶27.) After Vasquez completed his registration, a Chicago police officer handed him a form stating that his address is in violation of 720 ILCS 5/11-9.3(b-10) because of a home day care facility opened at 4918 W. George Street, approximately 480 feet from Vasquez's residence. (R. 1 at ¶28.) The form stated that Vasquez must move by no later than September 24, 2016, and that if he failed to do so, he could be subject to arrest and prosecution for violating 720 ILCS 5/11-9.3(b-10). (*Id.*)

B. Miguel Cardona.

Cardona resides in Chicago, Illinois and "is subject to the residency restrictions contained in 720 ILCS 5/11-9.3(b-10)." (R. 1 at ¶8.) Cardona was convicted of indecent solicitation of a child in 2004, making him a child sex offender as defined in 720 ILCS 5/11-9.3(d)(1). (R. 1 at ¶35.) Cardona is required to register with the State of Illinois as a sex offender until 2017. (*Id.*)

Cardona resides with his mother at 3152 S. Karlov Street in Chicago, Illinois. (R. 1 at ¶38.) Cardona has lived at this address for approximately 25 years. (*Id.*) He has been the owner of the building since 2010. (*Id.*)

Each year between 2006 and 2015 when Cardona completed his annual sex offender registration, the CPD has confirmed that his address complied with the residency statute. (R. 1 at ¶ 39.) On August 17, 2016, Cardona went to Chicago police headquarters to complete his annual registration requirements. (R. 1 at ¶40.) After Cardona completed his registration, a Chicago police officer handed him a form stating that his address is in violation of 720 ILCS 5/11-9.3(b-10) because of a home daycare at 3123 S. Keeler Street, Chicago, Illinois which is approximately 475 feet from Cardona's residence. (R. 1 at ¶41.)

Neither Vasquez nor Cardona have been arrested or charged with violating 720 ILCS 5/11-9.3(b-10).

C. Plaintiffs' Federal Lawsuit.

Plaintiffs filed a four-count complaint challenging the constitutionality of the statute and the City's enforcement procedures. (R. 1.) Count I alleged that the

application of the statute violates the *Ex Post Facto* Clause of the U.S. Constitution. (R. 1 at ¶81.) Count II alleged that the application of the statute to plaintiffs, without notice or hearing to determine whether either poses a threat to the community, violates the Fourteenth Amendment's procedural due process guarantee. (R. 1 at ¶83.) Count III alleges a violation of the Fifth Amendment's Takings Clause because plaintiffs allegedly are deprived "of the use and enjoyment of their property without just compensation." (R. 1 at ¶85.) Count IV, directed solely against the State's Attorney, alleges that the statute violates the Fourteenth Amendment's substantive due process guarantee because it is not rationally related to a legitimate state interest. (R. 1 at ¶¶86, 87.)

The district court entered a temporary restraining order prohibiting defendants from requiring plaintiffs to move from their residences and from bringing criminal charges against plaintiffs or arresting them for violating the statute. (R. 10-11, 14, 22.) That order remains in effect pending this appeal. (R. 46.)

The City and the State's Attorney each moved to dismiss the complaint. (R. 23-24, 26.) The district court granted both the City's and the State's Attorney's motions to dismiss. (A1-A19.) The district court then entered final judgment granting defendants' motions and dismissing the case. (A20.)

Plaintiffs appealed. (R. 48.)

SUMMARY OF ARGUMENT

Plaintiffs have advanced several constitutional challenges to 720 ILCS 5/11-9.3(b-10), an Illinois statute that makes it a criminal offense for child sex offenders "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) (2017), A21. All fail on the merits.

Plaintiffs allege that 720 ILCS 5/11-9.3(b-10) violates the *Ex Post Facto* Clause, procedural due process, the Takings Clause of the Fifth Amendment and substantive due process. None of these claims were legally cognizable.

720 ILCS 5/11-9.3(b-10) is not an *ex post facto* law because its residency requirement is neither retroactive nor penal. 720 ILCS 5/11-9.3(b-10) does not violate procedural due process because the text of the statute itself gives notice of what conduct is prescribed. Moreover, whether or not, Plaintiffs can identify a liberty interest that 720 ILCS 5/11-9.3(b-10) implicates, the Due Process Clause does not entitle them to a hearing to establish a fact that is not material under the Illinois statute.

Plaintiffs cannot show that the regulation in 720 ILCS 5/11-9.3(b-10) amounts to a taking of their property in violation of the Fifth Amendment. Finally, 720 ILCS 5/11-9.3(b-10) bears a rational relationship to a legitimate goal: protecting children from sex offenders. As a result, 720 ILCS 5/11-9.3(b-10) does not violate substantive due process.

ARGUMENT

The City has filed its appellate brief in this matter and in order to avoid needless repetition, the State's Attorney adopts and incorporates the City's arguments on merits at pages 22 through 39 of the City's brief.

I. Plaintiff's Complaint Failed To State A Claim Upon Which Relief May Be Granted.

A. Standard of Review.

The district court granted the 12(b)(6) motions to dismiss that the City and the State's Attorney filed. (A1-A19.) This Court reviews orders granting dismissal pursuant to Rule 12(b)(6) under a *de novo* standard. *Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601, 607 (7th Cir. 2013); *Sorrentino v. Godinez*, 777 F.3d 410, 412 (7th Cir. 2015) (same).

B. Plaintiffs Cannot Bring A *Monell* Claim Against The State's Attorney.

The City also argues the district court's dismissal of counts I through III of the complaint may be affirmed because Plaintiffs cannot support the requirements for municipal liability under *Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978). As the district court held that Plaintiffs' claims failed on the merits, it did not consider the City's *Monell* arguments. (R. 43, p. 6, n. 4.) The State's Attorney adopts and incorporates the *Monell* arguments that the City advances at pages 10 through 22 of its brief and makes two additional points.

First, Plaintiffs do not and cannot make *Monell* claims for damages against the State's Attorney because the Eleventh Amendment bars *Monell* damage claims against State officers such as the State's Attorney. *Garcia v. City of Chicago*, 24

F.3d 966, 969 (7th Cir. 1994). (holding that the Eleventh Amendment bars suits seeking monetary relief against state officers in their official capacity).

Second, under *Los Angeles County v. Humphries*, 562 U.S. 29 (2010), Plaintiffs cannot bring a *Monell* custom, policy or practice claim against the State's Attorney based upon 720 ILCS 5/11-9.3(b-10) because the State Legislature enacted this statue, not the State's Attorney or the City. In *Humphries*, the plaintiffs sought to have their names removed from California's Child Abuse Central Index, an index crated pursuant to a California statute. The plaintiffs brought a *Monell* claim County of Los Angeles and other defendants seeking various relief, including an injunction. The Supreme Court concluded that *Monell* applied to claims against municipalities for injunctive relief. *Humphries*, 562 U.S. at 34. The Court also held that *Monell* applies "where a municipality's *own* violations were at issue but not where only the violations of *others* were at issue." *Id.* at 37 (emphasis in the original).

The State Legislature enacted 720 ILCS 5/11-9.3(b-10), not the State's Attorney or the City. Plaintiffs' cannot bring a *Monell* claim for injunctive relief against the State's Attorney for a statute that the State Legislature enacted. *See Humphries*, 562 U.S. at 37.

Plaintiffs did file claims seeking declarations that 720 ILCS 5/11-9.3(b-10) violated several provisions of the United States Constitutions. As discussed below, the district court properly found that those claims all fail on the merits.

C. 720 ILCS 5/11-9.3(b-10) Does Not Violate *Ex Post Facto* Clause. (Response to Plaintiffs' Br. at 14-25.)

The Illinois courts have already held that a predecessor statute of 720 ILCS 5/11-9.3(b-10) does not violate the *Ex Post Facto* Clause. *See People v. Leroy*, 357 Ill. App. 3d 530 (5th Dist. 2005). The former 720 ILCS 5/11-9.3(b-5) (the predecessor of the current 720 ILCS 5/11-9.3(b-10)) provided:

> It is 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. Nothing in this subsection (b-5) prohibits a child sex offender from residing within 500 feet of a playground or a facility providing programs or services exclusively directed toward persons under 18 years of age if the property is owned by the child sex offender and was purchased before the effective date of this amendatory Act of the 91st General Assembly."

In *Leroy*, the Illinois appellate court considered whether this provision violated the *Ex Post Facto* Clause because it applied retroactively. Plaintiffs advance the same argument here regarding 720 ILCS 5/11-9.3(b-10). (Plaintiffs' Br. at 16-17; R. 1, ¶81.) *Leroy* found this argument unpersuasive, noting that the provision "was civil and not punitive" in nature. Applying the factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), *Leroy* held that "[then] 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). Under *Leroy* and *Morgan*, 720 ILCS 5/11-9.3(b-10) does not violate the *Ex Post Facto* Clause.

Applying federal law on *ex post facto* challenges, the district court likewise

concluded that 720 ILCS 5/11-9.3(b-10) does not violate the *ex post facto* Clause. As the district court noted, "the *Ex Post Facto* Clause 'prohibits "the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred."'" (R. 43 at p. 9, *citing United States v. Diggs*, 768 F.3d 643, 645 (7th Cir. 2014), *quoting Weaver v. Graham*, 450 U.S. 24, 30 (1981) [and] U.S. Const. art. I, § 9, cl. 3; *Peugh v. United States*, 133 S. Ct. 2072, 2081 (2013).) Moreover,"[t]o violate the *Ex Post Facto* Clause, . . . a law must be both retrospective *and* penal." (R. 43 at p. 9, *citing United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011).)

Plaintiffs argue that they were convicted of their crimes before the Illinois Legislature enacted the 500 foot residency requirement in 720 ILCS 5/11-9.3(b-10) and that the Illinois statute imposed retroactive punishment in violation of the *Ex Post Facto* Clause. (Plaintiffs' Br. at 16-25.) Relying upon *Leach*, the district court properly rejected this argument. As the district court noted:

> Plaintiffs are incorrect because, under Seventh Circuit precedent, the residency statute is not "retrospective." In *Leach*, the Seventh Circuit held that even though the Sex Offender Registration and Notification Act's ("SORNA") registration requirements applied to and "impose[d] significant burdens on sex offenders" convicted of a sex offense *before* SORNA's enactment, the registration requirements were not retrospective because "SORNA merely creates new, prospective legal obligations based on the person's prior history." 639 F.3d at 773. Thus, the court rejected the defendant's argument that the registration requirements retrospectively increased the punishment for his pre-SORNA conviction. *Id.* Here, it is impossible to meaningfully distinguish the [Illinois] residency statute, which similarly creates a "prospective legal obligation" regarding a person's residence "based on the person's prior history."

(R. 43 at p. 10, *citing Leach*, 639 F.3d at 773.)

The district court properly found that *Leach* is dispositive and on point. Plaintiffs, however, argue that the district court improperly applied *Leach* because it focused on retroactivity and "did not consider whether Plaintiffs have stated a claim under the second method -- i.e., that the burdens imposed on Plaintiffs under [720 ILCS 5/11-9.3(b-10)] amount to punishment." (Plaintiffs' Br. at 18-19.) Plaintiffs are wrong in two ways. First, the district court found that 720 ILCS 5/11-9.3(b-10), like SORNA in *Leach*, was neither retroactive nor penal in nature. (R. 43 at p. 10.) Second, Plaintiffs mistake the law. As this Court stated in Leach, "[t]o violate the *Ex Post Facto* Clause, moreover, a law must be both retrospective *and* penal." *Leach*, 639 F.3d at 773 (emphasis in the original).

Plaintiffs' understanding of both *Leach* and the *Ex Post Facto* Clause is wrong. To show a violation of the *Ex Post Facto* Clause, Plaintiffs must prove that the residency requirement is retroactive in nature[2] as well as punishment. Plaintiffs must prove both prongs. And *Leach* shows that they cannot do so. SORNA, the law at issue in leach, imposed significant burdens on persons convicted of a sex offense prior to SORNA's enactment. This Court found that SORNA was neither retroactive nor penal but instead found that "SORNA merely creates new,

2 A violation of the statute is a class four felony. *See* 720 ILCS 5/11-9.3(f) (2017). To not be retroactive, at least some of the conduct necessary to commit the felony must be committed after the law's effective date. Here, the establishment of day care centers and Plaintiffs' residence within 500 feet took place after the law's effective date. 720 ILCS 5/11-9.3(f) created new, prospective legal obligations based on Plaintiffs' prior history. Under *Leach*, that does not violate the *Ex Post Facto* Clause.

prospective legal obligations based on the person's prior history." *Leach*, 639 F.3d at 773.

Plaintiffs have cited no post-*Leach* case to show that *Leach* is not the law of this Circuit. Instead, Plaintiffs cite a Sixth Circuit case, *Does#1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016) in support of their *ex post facto* argument. (Plaintiffs' Br. at 17.) But *Snyder* does not aid Plaintiffs at all, as the Sixth Circuit held that the *Ex Post Facto* Clause only bans "retroactive punishment, a codification of what many in the founding generation believed to be a self-evident truth." *Id.* at 699.

In sum, *Leach* is controlling and the he residency requirement in *Leach* is indistinguishable from 720 ILCS 5/11-9.3(b-10). As a result, this Court should affirm the district court's dismissal of plaintiffs *Ex Post Facto* claim for failing to state a cause of action.

D. 720 ILCS 5/11-9.3(b-10) Does Not Violate Procedural Due Process. (Response to Plaintiffs' Br. at 31-34.)

Illinois courts have 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). The district court also found that Plaintiffs' procedural due process "claim does not succeed." (R. 43 at p. 8.) This Court should affirm.

It is well established that "[a] criminal statute must clearly define the conduct it proscribes." *Skilling v. United States*, 561 U.S. 358, 415 (2010) (Scalia, J., concurring in part and concurring in the judgment). In this regard, a penal

statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In other words, it is the text of criminal statutes that give notice that certain conduct is illegal and carries a criminal penalty.

720 ILCS 5/11-9.3(b-10) gives notice that it is a felony "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) (2017), A21. Nonetheless, Plaintiffs argue that this statute violates Plaintiffs' rights of procedural due process because it does not provide a hearing before depriving Plaintiffs of what they characterize as "a protectable liberty interest in choosing where . . . they live." (Plaintiffs' Br. at 31.) This argument is legally unsound for several reasons.

First, 720 ILCS 5/11-9.3(b-10), by its terms, gives Plaintiffs notice of what conduct is prohibited. Procedural due process does not require additional notice. *See Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003) (Scalia, J., concurring) (noting that the enactment of Connecticut's sex offender registration law "suffices to provide all the process that is 'due'").

Second, Plaintiffs have not identified a liberty or property interest at issue. 720 ILCS 5/11-9.3(b-10) simply places a condition on those individuals who are child sex offenders: they cannot "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) (2017), A21. The statute does not preclude anyone from owning or leasing real property and does not take away liberty. The statute simply places "prospective legal obligations based on the person's prior history." *Leach*, 639 F.3d at 773. In *Conn. Dep't of Pub. Safety*, the United States Supreme Court declined to decide whether public disclosure of a state's sex offender registry implicated a liberty interest. *Conn. Dep't of Pub. Safety*, 538 U.S. at 7. Other courts have found that no such liberty interest exists. *See, e.g., State v. Hayden*, 96 Ohio St. 3d 211 (Ohio 2002) (Ohio Supreme Court held that the classification of an offender as a "sexually oriented offender" without a hearing did not deprive the offender of any protected liberty or property interest); *Cutshall v. Sundquist*, 193 F.3d 466, 478 (6th Cir. 1999) (holding that a sex offender registry implicated no liberty interest, because the law "involved no physical restraint" and "imposed no punishment"). 720 ILCS 5/11-9.3(b-10) involves no physical restraint and imposes no punishment.

Third, even if Plaintiffs have identified a liberty interest, *Conn. Dep't of Pub. Safety* forecloses their procedural due process claim. In *Conn. Dep't of Pub. Safety*, the Supreme Court held it was unnecessary to decide whether a sex registry implicated a liberty interest because

> even assuming, *arguendo*, that respondent has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the Connecticut statute.

Conn. Dep't of Pub. Safety, 538 U.S. at 7.

Here, Plaintiffs admit that the City provided them with actual notice that their addresses were non-compliant with 720 ILCS 5/11-9.3(b-10) and that they could be arrested and prosecuted after a thirty day grace period. (R. 1, ¶¶28, 41; R. 33-1.) Plaintiffs do not argue that this notice failed to comply with procedural due process. Instead, Plaintiffs argue that they are entitled to additional notice, R. 1, ¶51, and a "pre-enforcement hearing." (R. 1, ¶50.) *Conn. Dep't of Pub. Safety* completely forecloses this argument.

This Court should affirm the district court's dismissal of Plaintiffs' procedural due process claim.

E. 720 ILCS 5/11-9.3(b-10) Does Not Violate The Takings Clause.
(Response to Plaintiffs' Br. at 25-33.)

The Takings Clause of the Fifth Amendment states that government shall not take private property for "public use without just compensation." U.S. Const. amend. V; *Sorrentino v. Godinez*, 777 F.3d 410, 413 (7th Cir. 2015); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005).

Neither plaintiff advanced a cognizable claim under the Takings Clause. As an initial matter, Vasquez has not alleged that enforcement of 720 ILCS 5/11-9.3(b-10) will require him to leave real property that he owns. (R.1 at ¶24 (alleging that Mr. Vasquez leases his current residence).) Vasquez rents the apartment where he resides, and his lease has now expired. (R. 1 ¶ 24.) Consequently, he has enjoyed the full year's term of his lease without interruption. Under 720 ILCS 5/11-9.3(b-10), Vasquez can no longer reside in this location knowing it is within 500 feet of a

protected facility. No state or local law grants a right to renew a lease even where the renewal would not violate state law. The cases on which plaintiffs rely to support a property interest in leased property, Plaintiffs' Br. at 28 n.9, do not describe any such right to renew. No authority exists supporting a state-created right to renew a lease and reside in a location prohibited by state law. With no legitimate claim of entitlement, Vasquez's takings claim fails because he lacks a constitutionally protected property interest.

Plaintiff Cardona alleges that he has owned his current home since 2010. (R. 1, ¶38.) Cardona further alleges that future enforcement of 720 ILCS 5/11-9.3(b-10) would force him to leave this home, as the home is less than 500 feet from a day care center. (R.1, ¶41.) 720 ILCS 5/11-9.3(b-10) provides in part:

> Nothing in this subsection (b-10) prohibits a child sex offender from residing within 500 feet of a child care institution, day care center, or part day child care facility if the property is owned by the child sex offender and was purchased before June 26, 2006. Nothing in this subsection (b-10) prohibits a child sex offender from residing within 500 feet of a day care home or group day care home if the property is owned by the child sex offender and was purchased before August 14, 2008 (the effective date of Public Act 95-821).

The prohibition on child sex offenders residing within 500 feet of a daycare center in 720 ILCS 5/11-9.3(b-10) does not apply if the child sex offender purchased his before August 14, 2008, the effective date of Public Act 95-821. Here, Mr. Cardona purchased his home in 2010, two years after the effective date of Public Act 95-821 and was, therefore, on notice that he could not live within 500 feet of a daycare center when he purchased his home in 2010. While the "[t]akings [c]lause prevents the Legislature (and other government actors) from depriving private persons of

vested property rights except for 'public use' and upon payment of 'just compensation,'" *People v. Ramsey*, 192 Ill. 2d 154, 165 (2000), *citing Lynce v. Mathis*, 519 U.S. 433, 440, n. 12 (1997), Cardona did not have a vested property right in his home when the Legislature enacted Public Act 95-821. The enactment of 720 ILCS 5/11-9.3(b-10) on August 14, 2008 did not constitute a taking of property that Cardona purchased in 2010.

Nonetheless, Plaintiffs contend that the regulatory nature of the residency requirement in 720 ILCS 5/11-9.3(b-10) constitutes a taking under the factors articulated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). (Plaintiffs' Br. at 25-33.) Plaintiffs are mistaken.

The district court stated that in determining whether a "regulation goes 'too far [and constitutes a taking],' courts look to the factors articulated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978): "(1) the nature of the government action, (2) the economic impact of the regulation, and (3) the degree of interference with the owner's reasonable investment-based expectations. (R. 43 at p. 16, *citing Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1074 (7th Cir. 2013).)

The first *Penn Central* factor shows that the residency requirement in 720 ILCS 5/11-9.3(b-10) is not a taking. Indeed, as the district court found, the residency statute "promotes the legitimate and important public interest of protecting children from convicted child sex offenders. It does not entail the government "physically invad[ing] or permanently appropriat[ing] any of the [Plaintiffs' property] for its own use." (R. 43 at p. 16, *citing Connolly v. Pension*

Benefit Guar. Corp., 475 U.S. 211, 225 (1986).) The Supreme Court has recognized that "[s]ex offenders are a serious threat in this Nation." *Conn. Dep't of Pub. Safety*, 538 U.S. at 4, *citing McKune v. Lile*, 536 U.S. 24, 32 (2002). 720 ILCS 5/11-9.3(b-10) doesn't invade the property of sex offenders. It simply places a condition that keeps them apart from playgrounds, child care institutions, day care centers, part day child care facilities, day care homes, group day care homes and facilities that provide programs to persons under 18 years of age. The residency statute protects children. The first *Penn Central* factor shows that the 720 ILCS 5/11-9.3(b-10) does not constitute a taking. The same holds true for the second *Penn Central* factor.

As the district court found, "[t]he second [*Penn Central*] factor—the economic impact of the regulation—does little for Plaintiffs." (R. 43 at p. 17.) The district court noted that "the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." (R. 43 at p. 17, *citing Andrus v. Allard*, 444 U.S. 51, 65–66 (1979).) While 720 ILCS 5/11-9.3(b-10) may prevent Plaintiffs from residing in their current homes, "the statute leaves much of the value of Plaintiffs' property interests untouched." (R. 43 at p. 17.) The second *Penn Central* factor offers no aid to Plaintiffs. Neither does the third factor.

Under the third *Penn Central* factor, courts will examine the degree of interference with the owner's reasonable investment-based expectations. As the

district court found, application of this factor "seals the fate of Plaintiffs' Takings Clause claim." (R. 43 at p. 17.) Cardona became the owner of his home in 2010 and Vasquez began renting his in 2013. (*Id.*) The residency statute has included a prohibition of living within 500 feet of "home day cares" since 2008. (*Id.*) Neither Plaintiff could have had any reasonable investment based expectations. All three *Penn Central* factors show that Plaintiffs' Takings Clause claims are legally untenable.

Plaintiffs, however, argue that "the district court erred in placing excessive emphasis on the idea that Plaintiffs were not deprived of *all* potential uses of their property." (Plaintiffs' Br. at 27.) It is Plaintiffs who err with their reading of the law. The district court found that where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. (R. 43 at p. 17.) In making this finding, the district court properly followed both *Penn Central* and *Andrus.*

In contravention of *Penn Central* and *Andrus*, Plaintiffs ask this Court to follow *Mann v. Georgia Dep't of Corrections*, 653 S.E. 2d 740, 744 (Ga. 2007) where the Georgia Supreme Court found that Georgia's residency requirement for sex offenders violated the Takings Clause. (Plaintiffs' Br. at 27.) The district court acknowledged *Mann* but declined to follow it and, instead, found that a district court opinion from the Northern District of Georgia, *Doe v. Baker*, 2006 U.S. Dist. LEXIS 67925 (N.D. Ga. April 6, 2006) to be more persuasive. In *Doe*, the district court found that the very same Georgia residency statute did not violate the

Takings Clause. *Doe*, 2006 U.S. Dist. LEXIS 67925 at *23-*27.

The decision of the Georgia Supreme Court in *Mann* is outlier. In contrast, the decision of the district court in *Doe* applies the *Penn Central* factors and is more faithful to the Supreme Court decisions in *Penn Central* and *Andrus*. The district court correctly found that Plaintiffs failed to state a claim for violations of the Takings Clause. That decision should be affirmed.

F. 720 ILCS 5/11-9.3(b-10) Does Not Violate Substantive Due Process. (Response to Plaintiffs' Br. at 34-37.)

Plaintiffs filed a substantive due process claim against the State's Attorney seeking damages, declaratory and injunctive relief on the grounds that the "prohibitions in 720 ILCS 5/11-9.3(b-10) are not rationally related to a legitimate state interest." (R. 1, ¶87.) The district court dismissed this count on the merits on the grounds that "[t]he residency statute bears a rational relationship to a legitimate end: protecting children from convicted child sex offenders." (R. 43 at p. 12.)

This Court may affirm the district court's dismissal of Plaintiffs' substantive due process claim on any basis that the record supports. *Blow v. Bijora, Inc.*, 855 F.3d 793, 803 (7th Cir. 2017). In this regard, this Court may affirm the dismissal of Plaintiffs' substantive due process claims against the State's Attorney for damages because the Eleventh Amendment bars such claims.

Plaintiffs sued the State's Attorney in her official capacity. (R. 1, ¶9.) In their substantive due process claim in count IV, Plaintiffs sought nominal and compensatory damages against the State's Attorney in her official capacity. (R. 1,

¶87.) Under Illinois law, the State's Attorney is a State official and a damage claim against the State's Attorney is a damages claim against the State. *Garcia*, 24 F.3d at 969. The Eleventh Amendment bars damage claims against the State's Attorney in her official capacity. *Id.* *Hernandez v. Joliet Police Dep't*, 197 F.3d 256, 265 (7th Cir. 1999) (same). The bar that the Eleventh Amendment poses to damage claims against State officials such as the State's Attorney in her official capacity may be raised at any time. *Darryl H. v. Coler*, 801 F.2d 893, 907, n. 13 (7th Cir. 1986). Consequently, the dismissal of Plaintiffs' substantive due process claim for damages against the State's Attorney in her official capacity may be affirmed on the alternative basis of the Eleventh Amendment. *Garcia*, 24 F.3d at 969; *Hernandez*, 197 F.3d at 265.

All of Plaintiffs' substantive due process claims -- for damages, declaratory and injunctive relief -- were properly dismissed on the merits in the district court. Illinois courts have held that 720 ILCS 5/11-9.3(b-10) does not violate substantive due process. *See Avila-Briones*, 2015 IL App (1st) 132221 at ¶¶70-86; and *Stork*, 305 Ill. App. 3d at 720-721 (2nd Dist. 1999) (same). This Court should rule likewise.

In analyzing a substantive due process claim, federal courts will first determine whether the "interest is `fundamental,' that is, whether it is `objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed.'" *Doe v. City of Lafayette*, 377 F.3d 757, 768 (7th Cir. 2004) (*en banc*), *citing Washington v. Glucksberg,* 521 U.S. 702, 721 (1997). Plaintiffs do not argue

that 720 ILCS 5/11-9.3(b-10) impacts a fundamental right and apparently concede the point.

As the statute does not impact a fundamental right, the only remaining question for this Court is whether 720 ILCS 5/11-9.3(b-10) survives rational basis review. *Lafayette*, 377 F.3d at 773. It does.

This Court has recognized that "[u]nless a governmental practice encroaches on a fundamental right, substantive due process requires only that the practice be rationally related to a legitimate government interest, or alternatively phrased, that the practice be neither arbitrary nor irrational." *Charleston v. Bd. of Trustees of the Univ. of Ill. at Chicago*, 741 F.3d 769, 774 (7th Cir. 2013), *citing Lee v. City of Chicago*, 330 F.3d 456, 467 (7th Cir. 2003).

720 ILCS 5/11-9.3(b-10) was enacted to keep children away from convicted sex offenders. That is a legitimate and appropriate goal.[3] Nonetheless, relying upon *Does#1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016) and *In re Taylor*, 343 P.3d

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3 *See Doe,* 2006 U.S. Dist. LEXIS 67925 at *16 ("Prohibiting a sex offender from living near a school or daycare center is certainly an appropriate step in achieving the ultimate goal of protecting children. Thus, this Court finds that this law has a rational connection to a legitimate government purpose"); *Smith v. Doe*, 538 U.S. 84, 102-103 (2003) (explaining that a sex offender registration law bore a rational relationship to the legitimate purpose of protecting the public); *Belleau v. Wall*, 811 F.3d 929, 943 (7th Cir. 2016) (Flaum, J., concurring in the judgment) (explaining that a law requiring certain sex offenders to wear a GPS tracking device was rationally related to the purpose of protecting children); *Doe v. Miller*, 405 F.3d 700, 716 (8th Cir. 2005) (explaining that the Iowa legislature was "entitled to employ . . . 'common sense'" in implementing a similar residency statute); and *Leroy*, 357 Ill. App. 3d at 541 (concluding "that restricting child sex offenders from residing within 500 feet of a playground or a facility providing programs or services exclusively directed toward persons under 18 years of age might also protect society").

867 (Cal. 2015), Plaintiffs argue that 720 ILCS 5/11-9.3(b-10) is not rationally related to a legitimate government objective. (Plaintiffs' Br. at 34-35.) Plaintiffs also compare residency requirements for sex offenders to federal restrictions on homosexuals marrying in the Defense of Marriage Act ("DOMA"). (Plaintiffs' Br. at 35-36, *citing United States v. Windsor*, 133 S. Ct. 2675, 2693, 2696 (2013).) This comparison is highly unfair and unwarranted. In *Windsor*, the Supreme Court found that the federal DOMA was "invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." *Id.* at 2696.

In marked contrast, 720 ILCS 5/11-9.3(b-10) serves the very legitimate interest of protecting children from sex offenders. Plaintiffs' own complaint recognizes that at least some sex offenders present a risk of recidivism, R. 1 at ¶57, and that some strangers commit sex crimes against children. (R. 1, ¶61.) This Court has held that a ban on a sex offender entering all public parks under the City's jurisdiction was rationally related to a legitimate governmental interest: protecting children from sex offenders. *Lafayette*, 377 F.3d at 773-774.

In *Lafayette*, this Court considered whether Lafayette, Indiana could ban a sex offender from entering the city's parks. This Court stated:

> Mr. Doe argues that the ban could be narrower both geographically--limited to certain areas of the park system-- and temporally--it could extend for a finite period of time. This argument ignores that the only "less drastic means" the City must conform to are those which are "reasonable" means of achieving the compelling interest. *Id.* The City cannot reasonably anticipate what parts of the park system children will be located in at all times, and, on this record, we have no basis on which to question its judgment that children are vulnerable

> throughout the park system. As to the temporal nature of the ban, Mr. Doe concedes that his sexual urges toward children *always* will be with him, and his behavior in January of 2000, coupled with his criminal history, presents a compelling case that he is prone to relapse. Nothing in the record suggests this is likely to subside over time.

Lafayette, 377 F.3d at 773-774. Accordingly, this Court found that the park ban on sex offenders in *Lafayette* not only survived rational basis review but would have survived strict scrutiny review if that were the standard.

Lafayette is on point and controlling and is the law of this Circuit. The residency restrictions contained in 720 ILCS 5/11-9.3(b-10), like the park ban on Mr. Doe in Lafayette, serves the legitimate interest of protecting children and survives rational basis review.[4]

The dismissal of Plaintiffs' procedural due process claims should be affirmed.

4 To the extent that *Snyder* and *Taylor* are contrary to *Lafayette*, this Court should disregard the decisions in those cases regarding residency restrictions for sex offenders and, instead, follow *Lafayette*.

CONCLUSION

For the foregoing reasons, the State's Attorney respectfully request that this Court affirm the district court's order dismissing Plaintiff's complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,804 words. In making this certification, I relied upon the word count of the Microsoft Office Word 2010 word processing system used to prepare this brief.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 12 point Century.

/s/ Andrea L. Huff
Andrea L. Huff

CERTIFICATE OF SERVICE

I, Andrea L. Huff, hereby certify that I have caused an original and fourteen copies the BRIEF OF DEFENDANT-APPELLEE KIMBERLY FOXX, STATE'S ATTORNEY OF COOK COUNTY to be filed with the United States Court of Appeals for the Seventh Circuit. I further certify that two copies of the foregoing brief were served to the person named below at the address shown, on this day, August 28, 2017, by depositing the same in the U.S. mail depository located at 500 Richard J. Daley Center, Chicago, Illinois, 60602, proper postage prepaid.

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