

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

WENDY WHITAKER, et al.,	:	
	:	
Plaintiffs,	:	CIVIL ACTION NO.
vs.	:	
	:	4:06-CV-0140-CC
SONNY PERDUE, et al.,	:	
	:	
Defendants.	:	

**ORDER**

This matter is presently before the Court on Defendants Perdue, Baker and Dean’s Motion to Decertify [Doc. No. 181], Plaintiffs’ Motion for Preliminary Injunction to Stop the State of Georgia from Criminalizing Protected Religious Activity [Doc. No. 186], and Defendants Perdue, Baker and Dean’s Motion to Dismiss Plaintiffs’ Claims for Alleged Taking of Property [Doc. No. 199]. The Court considers each motion below.

**I. MOTION TO DECERTIFY**

The class as currently certified in this action consists of all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-12. This Court heard oral argument on Defendants Perdue, Baker and Dean’s Motion to Decertify on November 13, 2008. After hearing oral argument on the motion to decertify, the Court determined that, in light of the changes to O.C.G.A. § 42-1-15 described more fully in the Court’s September 30, 2008 Order, Plaintiffs had failed to meet their burden of establishing that the currently-defined class satisfies the requirements of Federal Rule of Civil Procedure 23. The Court instructed the parties to submit briefing on whether

subclasses should be certified, and this briefing is now completed.<sup>1</sup> The issue of class certification, therefore, is ripe for review.

A. APPLICABLE LAW AND PROPOSED SUBCLASSES

Class certification is governed by Rule 23 of the Federal Rules of Civil Procedure. An action may be maintained as a class action if all four subsections of Rule 23(a) and at least one subsection of Rule 23(b) are satisfied. See Fed. R. Civ. P. 23. The Court must also determine that the proposed class representatives have standing to represent the class. See Mills v. Foremost Ins. Co., 511 F.3d 1300, 1307 (11th Cir. 2008); Wooden v. Board of Regents of Univ. Sys. of Ga., 247 F.3d 1262, 1287 (11th Cir. 2001). The decision whether to grant class certification is vested within the trial court's discretion. See Murray v. Auslander, 244 F.3d 807, 810 (11th Cir. 2001). "[A] certification order is inherently tentative, and the judge remains free to modify [it] in the light of subsequent developments in the litigation, because conformance with Rule 23 is a continuing necessity." Cooper v. Pacific Life Ins. Co., 458 F. Supp. 2d 1368 (S.D. Ga. 2006) (marks omitted) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.11, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978); Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)).

Although Defendants Perdue, Baker and Dean have brought a motion to decertify, available authority indicates that Plaintiffs bear the burden of demonstrating that the prerequisites of Rule 23 are still met. See Ellis v. Elgin Riverboat Resort, 217 F.R.D. 415, 419 (N.D. Ill. 2003) ("The party seeking class certification bears the burden of demonstrating that initial certification is appropriate . . . and likewise on a motion to decertify the class, bears the burden of

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<sup>1</sup> In response to Defendants Perdue, Baker and Dean's motion to decertify, Plaintiffs suggested subclasses as an alternative but did not provide any details regarding the specific subclasses proposed.

producing a record demonstrating the continued propriety of maintaining the class action . . . .”) (citations omitted). In determining whether Plaintiffs have met their burden, the Court’s inquiry is limited to ascertaining whether the prerequisites of Rule 23 are satisfied. Collins v. International Dairy Queen, Inc., 168 F.R.D. 668 (M.D. Ga. 1996). As the Supreme Court held in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), there is “nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” However, “it is appropriate to consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied.” Heffner v. Blue Cross & Blue Shield of Ala., Inc., 443 F.3d 1330, 1337 (11th Cir. 2006) (citation and marks omitted). The Court may consider “both the allegations of the complaint and the supplemental evidentiary submissions of the parties.” Buford v. H&R Block, Inc., 168 F.R.D. 340, 346 (S.D. Ga. 1996) (citation omitted).

Rule 23 permits the maintenance of a class action when: (1) the class is so numerous that joinder of all its members is impracticable; (2) questions of law or fact common to the class are present; (3) the claims or defenses of the representative party are typical of the claims or defenses of the class; and (4) the representative parties will sufficiently protect the interests of the class. See Fed. R. Civ. P. 23(a). These prerequisites are commonly referred to as numerosity, commonality, typicality, and adequacy of representation.

**Numerosity:** Rule 23(a)(1) requires that the class be so numerous that joinder of all class members would be “impracticable.” “‘Impracticable’ does not mean ‘impossible;’ plaintiffs need only show that it would be extremely difficult or inconvenient to join all members of the class.” In re Domestic Air Transp. Antitrust

Litig., 137 F.R.D. 677, 698 (N.D. Ga. 1991). The Court may make common sense assumptions in order to support the finding of numerosity, and Plaintiffs “need not show the precise number of members in the class.” Evans v. United States Pipe and Foundry, 696 F.2d 925, 930 (11th Cir. 1983). A class of greater than forty persons has been recognized as generally adequate under Eleventh Circuit precedent. Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986). In addition to the number of class members, the Court should also consider the geographic locations of the potential class members, judicial economy, the nature of the action, and the ease of identifying potential class members and determining their addresses. Zeidman v. J. Ray McDermott & Co., 657 F.2d 1030, 1038 (5th Cir. 1981); Kreuzfeld A.G. v. Carnehammar, 138 F.R.D. 594, 599 (S.D. Fla. 1991) (citations omitted).

**Commonality:** Rule 23(a)(2) requires that for an action to be properly maintained as a class action, there must be questions of law or fact common to the class. The commonality requirement “is not high, requiring only that resolution of the common questions affect all or a substantial number of the class members.” Collins, 168 F.R.D. at 674. A single common question of law or fact is sufficient. In order to satisfy this requirement, the class action “must involve issues that are susceptible to class-wide proof.” Murray, 244 F.3d at 811.

**Typicality:** Rule 23(a)(3) requires that “the claims of the representative parties [be] typical of the claims of the class.” The typicality requirement focuses on whether named representatives’ claims have the same essential characteristics as the claims of the class at large. Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985). The typicality requirement is met when the proposed class representatives’ claims arise out of the same course of conduct and are based on the same legal theory as the claims of the other class members. Id. The United States Supreme Court has recognized that the commonality and typicality requirements tend to merge. Falcon,

457 U.S. at 157 n.13. “Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.” *Id.* “Traditionally, commonality refers to the group characteristics of the class as a whole [while] typicality refers to the individual characteristics of the named plaintiff in relation to the class.” *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000).

**Adequacy of Representation:** Rule 23(a)(4) has a two-fold standard: (1) the class representatives’ interest must not be antagonistic to those of the other members of the class; and (2) the class representatives’ attorneys must be qualified, experienced, and generally able to conduct the litigation. This requirement “encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action.” *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003) (citation omitted).

In addition to satisfying the requirements of Rule 23(a), the proposed class must satisfy at least one of the conditions of subsection (b) of Rule 23. Rule 23(b)(2), which was previously held to be satisfied in this case, states that class certification is appropriate where “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” The Court additionally previously found that Plaintiffs meet the requirements of Rule 23(b)(1)(A) because the prosecution of separate actions by the class members would create a risk of inconsistent judgments with respect to the members of the class which would establish incompatible standards of conduct for Defendants.

Plaintiffs supplemental briefing proposes the following subclasses: (1) renters; (2) people prevented from engaging in church-related employment and volunteer activity; (3) people residing in counties where school boards have designated school bus stops; (4) people who were convicted before July 1, 2006, who must comply with the residency and employment restrictions in O.C.G.A. § 42-1-15(b) and who do not qualify for an exemption; (5) disabled persons injured by the residency law; and (6) a general class for vagueness and overbreadth claims. The Court will consider each proposed subclass below.

B. PROPOSED SUBCLASSES AND GENERAL CLASS AND WHETHER  
RULE 23 IS SATISFIED

*1. Renters*

Plaintiffs propose the following subclass for the purposes of asserting claims under the takings clause: all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-12 who: (1) entered into a rental agreement for money for their residence; (2) rented a residence that, at the time of entry into the rental agreement, was in a permissible location under Georgia's sex offender residency law; and (3) face eviction (before the expiration of the lease term) due to O.C.G.A. § 42-1-15.

Although the Court agrees with Plaintiffs' position that Plaintiffs Allison and Collins have standing to represent a subclass of renters asserting a takings challenge, the Court finds that such a subclass fails to meet the commonality and typicality requirements of Rule 23(a). As demonstrated below in connection with the Court's analysis of the motion to dismiss Plaintiffs' takings claim, the as-applied takings claim raised in this case can be addressed only through ad-hoc factual determinations. For example, the length of the lease term, the uses allowed under the lease agreement (i.e., whether subleasing or use of the premises for business or

other purposes is permitted), the impact of early termination, and other information regarding the nature of the investment in the leased premises are facts that the Court likely will consider when analyzing the takings claim. The individualized fact-based inquiries required to make a determination on this claim do not support class-wide consideration or relief – that is, the claim is not susceptible to class-wide proof. See Cooper v. Southern Co., 390 F.3d 695, 713 (11th Cir. 2004) (citation omitted). Plaintiffs have failed to meet their burden of demonstrating that a subclass of renters complies with Rule 23, and the Court therefore will not certify a subclass of renters in this case.

2. *Church Employment and Volunteering*

Plaintiffs propose the following subclass for purposes of asserting claims that the church employment and volunteering provisions of O.C.G.A. § 42-1-15 are vague, overbroad, and violate the First Amendment: all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-12 who: (1) are employed by a church or volunteer at a church; or (2) are or have been impeded from employment at a church or volunteering at church due to O.C.G.A. § 42-1-15. Plaintiffs identify Plaintiff Lori Collins as the named representative for this subclass.

The Court agrees with Plaintiffs' position that Ms. Collins has standing to represent this subclass. Ms. Collins has in the past participated without pay in certain religious activities in connection with her church (i.e., she engages in activities that could be considered "volunteering") and she desires to continue those activities. She is a minister and would like to seek employment at a church but she is prevented from doing so by the statute.

The Court next considers whether the numerosity requirement is satisfied. Plaintiffs submit that it is satisfied "because there are over 16,000 people on the sex

offender registry, many of whom participate in faith-based activities.” (Pls.’ Br. Proposing Subclasses [Doc. No. 213], p. 10.) Plaintiffs reference four declarations that were filed in connection with the motion for preliminary injunction that has been filed in this case and state that additional declarations may be submitted “[s]hould the Court wish.” (*Id.*, p. 10 n.15.) While the Court finds that a close question is presented in this case on the issue of numerosity due to Plaintiffs’ failure to provide additional evidence regarding the number of class members, the Court ultimately concludes that, using common sense assumptions about the prevalence of faith in general society, more than forty persons on the sex offender registry fall within the proposed subclass and that, considering factors other than the actual or estimated number of prospective class members, joinder of all class members would be impracticable.

The Court next considers the related concepts of commonality and typicality. The Court finds that these requirements are satisfied because common questions of law relating to the asserted violations of the First Amendment, vagueness, and overbreadth are present in this case. In order to address these claims, the Court must answer and evaluate common legal questions. For example, to determine if the challenged provision is unconstitutionally vague, the Court must examine the provision to determine if it fails to provide adequate notice of prohibited conduct and whether it authorizes or encourages discriminatory enforcement. Each challenge is a facial challenge to the statute. Individualized factual inquiry is not required here – these issues are susceptible to class-wide proof. Moreover, the claims of Ms. Collins are typical of the class claims in that the claims arise out of the same course of conduct and are based on the same legal theory as the class claims. She possesses the same interest (her interest in working in a church and/or participating in unpaid activities there) as other members of the class and she suffers

the same injury (in that she is unable to participate or has determined that she should cease to participate in these activities as a result of the statute). Ms. Collins will fairly and adequately represent the interests of the class members. As to the final prerequisite, the Court finds that there is no conflict between Ms. Collins' interests and those of the class and that Plaintiffs' attorneys are qualified, experienced, and generally able to conduct the litigation in this case.

The Court next evaluates whether the proposed subclass satisfies Rule 23(b). The Court finds that Rule 23(b)(2) is satisfied here because final injunctive relief is an appropriate remedy for the alleged violations and the statute challenged here applies generally to all members of the class. Plaintiffs seek only equitable relief in this action. The Court additionally agrees with Plaintiffs' position that a class action is the superior method of adjudicating this matter.

The Court finds that all the requirements of Rule 23 are satisfied with regard to Plaintiffs' proposed subclass set forth in this section. The Court will certify a subclass of all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-12 who: (1) are employed by a church or volunteer at a church; or (2) are or have been impeded from employment at a church or volunteering at church due to O.C.G.A. § 42-1-15 for purposes of asserting First Amendment, vagueness, and overbreadth challenges to the statute.

3. *School Bus Stops*

Plaintiffs propose the following subclass for purposes of asserting an *ex post facto* and substantive due process challenge to the residency restrictions: all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-15 who (1) reside in counties in which the school board has designated school bus stops for purposes of O.C.G.A.

§ 42-1-15; and (2) either do not own their own homes or do not fall within the homeowner exemption of O.C.G.A. § 42-1-15(f), (g), as determined by the sheriff in the county where the person is registered.

The Court first considers the standing of Ms. Whitaker and Mr. Linaweaver, the identified class representatives for this proposed subclass. Defendants Perdue, Baker and Dean submit that neither Ms. Whitaker nor Mr. Linaweaver can act as class representatives as to these claims. Defendants Perdue, Baker and Dean state that Ms. Whitaker was required to move because of her home's proximity to a day care center, rather than to a school bus stop, and Mr. Linaweaver does not reside in a county that has designated its school bus stops. Plaintiffs contend that Ms. Whitaker resides in Columbia County and wishes to remain there and that the State of Georgia is imposing a substantial burden on Mr. Linaweaver's ability to live in Columbia County. The Court agrees with Defendants Perdue, Baker and Dean's position that Mr. Linaweaver cannot serve as a named representative for this proposed subclass. Mr. Linaweaver does not fall within the proposed subclass as defined by Plaintiffs. Plainly Mr. Linaweaver cannot serve as a class representative. The Court concludes, however, that Ms. Allison may properly serve as a class representative. Ms. Allison resides in Columbia County, where school bus stops have been designated by the local school board, and she currently leases a residence that falls within 1,000 feet of a school bus stop. Ms. Allison is not protected by the statutory provision applicable to homeowners because she does not own a home, and the statutory exemption for homeowners does not, by its own terms, apply to lessees. Ms. Allison is part of the proposed subclass and possesses the same interest and suffers the same injury as the other class members. See Prado-Steiman, 221 F.3d at 1279. The Court concludes that Ms. Allison has standing to represent the proposed subclass.

The Court next considers the requirements of Rule 23(a). First, as to numerosity, Plaintiffs submit that there are 385 people on the registry that currently reside in counties that have designated school bus stops. Using common sense assumptions, the Court concludes that most of those persons, or at a minimum more than forty persons, do not own a home that qualifies for an exemption under O.C.G.A. § 42-1-15. Other factors, including judicial economy, indicate that joinder of the proposed subclass members would be impracticable. The Court therefore concludes that the numerosity requirement is satisfied here.

The Court additionally finds that common questions of law are presented in connection with the *ex post facto* and substantive due process challenges raised by the proposed subclass. To evaluate the *ex post facto* challenge, the Court must determine whether the statute sets forth a civil or criminal scheme. Such a determination will not require individualized inquiry. Similarly, to conduct an analysis under substantive due process principles, the Court will consider the nature of the right impacted by the statute. The description of asserted right and the Court's determination regarding whether it is fundamental present common questions of law. The Court additionally concludes that Ms. Allison's claims are typical of the claims raised by the subclass. Mr. Allison currently resides within 1,000 feet of a school bus stop in a county where the local school board has designated school bus stops. She is a registered sex offender and is subject to the statute. She will fairly and adequately represent the class. As to the final prerequisite, the Court finds that there is no conflict between Ms. Allison's interests and those of the class and that Plaintiffs' attorneys are qualified, experienced, and generally able to conduct the litigation in this case.

The Court next evaluates whether the proposed subclass satisfies Rule 23(b). The Court finds that Rule 23(b)(2) is satisfied here because final injunctive relief is

an appropriate remedy for the alleged violations and the statute challenged here applies generally to all members of the proposed subclass. Plaintiffs seek only equitable relief in this case and a favorable decision would not only benefit the named Plaintiff but all similarly situated persons.

The Court accordingly finds that all the requirements of Rule 23 are satisfied with regard to Plaintiffs' proposed subclass set forth in this section. The Court will certify the following subclass: all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-15 who (1) reside in counties in which the school board has designated school bus stops for purposes of O.C.G.A. § 42-1-15; and (2) either do not own their own homes or do not fall within the homeowner exemption of O.C.G.A. § 42-1-15(f), (g), as determined by the sheriff in the county where the person is registered.

4. *Pre-July 1, 2006 Convictions*

Plaintiffs propose the following subclass for asserting an *ex post facto* challenge to the residency restrictions: all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-12 and who: (1) were convicted before July 1, 2006; (2) are prohibited from residing within 1,000 feet of a church, swimming pool, or school bus stop or working within 1,000 feet of a church, school, or child care center; and (3) do not qualify for the homeowner exemption or employment exemption set forth in O.C.G.A. § 42-1-15(f), (g) as determined by the sheriff in the county where the person is registered.

Plaintiffs identify the following named Plaintiffs as class representatives: Janet Allison, Lori Collins, Joseph Linaweaver, Al Marks, Jeffery York, Dewayne Owens, and Wendy Whitaker. Defendants Perdue, Baker and Dean continue to take the position that the aforementioned named Plaintiffs cannot serve as class

representatives for this proposed subclass.<sup>2</sup> The Court agrees with Plaintiffs' position that the proposed class representatives have standing for the reasons stated by Plaintiffs and for the reasons stated previously by the Court in this case.

As to numerosity, Plaintiffs submit that 11,000 persons on the sex offender registry were convicted before July 1, 2006. Plaintiffs submit that more than 40 out of those 11,000 persons do not own their own homes. The Court, applying common sense assumptions, concludes that the numerosity prerequisite is satisfied here. As to commonality and typicality, the Court also concludes that these prerequisites are met. Evaluation of the *ex post facto* challenge brought by this subclass will require the Court to make determinations regarding the civil or criminal character of the residency restrictions and whether the statute is punitive. These inquiries are not individualized. The Court additionally finds that the named Plaintiffs' claims are typical of those of the proposed subclass. The named Plaintiffs are registered sex offenders who are subject to the residency restrictions imposed by the statute challenged in this case. The named Plaintiffs' contention that the residency restrictions impose retroactive punishment is typical of the other class members. The Court similarly finds that the requirements of adequacy of class representatives and counsel have been met here.

Finally, the Court evaluates whether the proposed subclass satisfies Rule 23(b). The Court finds that Rule 23(b)(2) is satisfied here because final injunctive relief is an appropriate remedy for the alleged violations and the statute challenged here applies generally to all members of the proposed subclass. All registered sex

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<sup>2</sup> On numerous occasions throughout this lawsuit, Defendants Perdue, Baker and Dean have taken the position that the named Plaintiffs lack standing because their residences currently comply with the statutory restrictions and because they have not been arrested, threatened with arrest, or asked to move. The Court has previously addressed this contention that the named Plaintiffs lack standing and will not do so again here.

offenders are subject to the residency restrictions. A decision enjoining the enforcement of the residency restrictions is an appropriate remedy.

The Court, having found that the requirements of Rule 23 are satisfied, will certify the following subclass: all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-12 and who: (1) were convicted before July 1, 2006; (2) are prohibited from residing within 1,000 feet of a church, swimming pool, or school bus stop or working within 1,000 feet of a church, school, or child care center; and (3) do not qualify for the homeowner exemption or employment exemption set forth in O.C.G.A. § 42-1-15(f), (g) as determined by the sheriff in the county where the person is registered.

5. *Disabled Persons*

Plaintiffs propose the following alternative subclasses for purposes of asserting a substantive due process claim: (A) all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-12 and who: (1) have a "disability" as defined in 42 U.S.C. § 12102 (the Americans with Disabilities Act); (2) face eviction pursuant to O.C.G.A. § 42-1-15(b); and (3) do not qualify for the homeowner exemption or employment exemption set forth in O.C.G.A. § 42-1-15(f), (g) as determined by the sheriff in the county where the person is registered or (B) all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-12 and who: (1) reside in a hospice care facility, residential care facility for the elderly, nursing home, assisted living facility, or personal care home; and (2) face eviction due to O.C.G.A. § 42-1-15(b).

The Court will not certify the proposed subclass because Plaintiffs admit that there is no named Plaintiff that has standing to represent the proposed subclass.

While Plaintiffs request an opportunity to amend their complaint to add such a representative, the Court finds that amendment at this late stage of the litigation is not warranted. Plaintiffs have had numerous opportunities to file amended complaints in this action. As Plaintiffs themselves note, Plaintiffs filed a motion for preliminary injunction on behalf of disabled persons on October 12, 2006. Plaintiffs do not provide any information regarding the name or circumstances of the proposed new class representative. The Court disagrees with Plaintiffs' position that the Court is required to permit amendment pursuant to Lynch v. Baxley, 651 F.2d 387, 388 (5th Cir. July 23, 1981).<sup>3</sup> In Lynch, following a change to the state statute that was being challenged in the case, the district court, *sua sponte*, dismissed the case without prejudice because there was no proof that the named Plaintiffs had standing under the revised statute. Id. The former Fifth Circuit held that the class certified by the district court had a legal status separate from that of the named Plaintiffs and that the Court should not have dismissed the case "without considering the effect of the new statute upon that class." Id. In the instant case, the Court is not dismissing the case for lack of standing of the named Plaintiffs. The named Plaintiffs' standing has not been impacted by an amendment to the challenged statute. Instead, there has never been a named Plaintiff in this action that has had standing to assert claims on behalf of disabled persons. The Court does not read Lynch as requiring that the Court allow Plaintiffs to file a fifth amended complaint. In addition, the Court agrees with Defendants Perdue, Baker and Dean's position that Plaintiffs have failed to establish that this proposed subclass satisfies the numerosity requirement of Rule 23. Plaintiffs have pointed to the filing of four

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<sup>3</sup> Decisions by the former Fifth Circuit issued before October 1, 1981, are binding precedent in the Eleventh Circuit. See Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

declarations of registered sex offenders who are presumably disabled and submit that Plaintiffs have identified twenty-one persons who reside in nursing homes. Such numbers plainly fall short of the numerosity presumption established by the Eleventh Circuit in Cox. Plaintiffs otherwise have provided no information regarding the geographic dispersion of the members of the proposed class or any other factor that would indicate that joinder of all such persons would be impracticable. For these reasons, the Court will not certify a subclass of disabled persons in this case.

6. *General Class*

Plaintiffs propose the following general class for the assertion of vagueness and overbreadth challenges: all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-12.

The Court concludes, for the reasons stated by Plaintiffs, that the named Plaintiffs have standing with regard to this proposed general class and that it satisfies all the requirements of Rule 23. There are more than 16,000 registered sex offenders who are subject to the statutory provisions challenged in this case. Plaintiffs' facial vagueness and overbreadth challenges will require the evaluation of common legal principles - individualized inquiries will not be required. Moreover, the named Plaintiffs claims arise from the same course of conduct (the enactment and enforcement of the statute) and rely on the same constitutional theories as the claims of other class members. The named Plaintiffs and their counsel are adequate representatives for purposes of Rule 23. Finally, injunctive relief, which is sought in this case, is the proper remedy for the alleged statutory violations, which apply to all members of the class on the same basis. For these reasons, the Court will certify the following class for the purposes of asserting

vagueness and overbreadth challenges to the statute: all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-12.

C. CONCLUSION AND CERTIFICATION

In sum, the Court concludes that the motion to decertify is due to be **GRANTED in part and DENIED in part**. The Court hereby **CERTIFIES** the following class for purposes of asserting vagueness and overbreadth claims in this action: all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-12. In addition, the following subclasses are hereby **CERTIFIED** for the purposes of asserting the identified claims in this action:

- (1) For the purpose of asserting claims that the church employment and volunteering provisions of O.C.G.A. § 42-1-15 are vague, overbroad, and violate the First Amendment: all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-12 who: (1) are employed by a church or volunteer at a church; or (2) are or have been impeded from employment at a church or volunteering at church due to O.C.G.A. § 42-1-15.
- (2) For the purpose of asserting an *ex post facto* and substantive due process challenge to the residency restrictions: all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-15 who (1) reside in counties in which the school board has designated school bus stops for purposes of O.C.G.A. § 42-1-15; and (2) either do not own their own homes or do not fall within the homeowner exemption of O.C.G.A. § 42-1-15(f), (g),

as determined by the sheriff in the county where the person is registered; and

- (3) For the purposes of asserting an *ex post facto* challenge to the residency restrictions: all persons who are registered, are required to register, or in the future will be required to register as sex offenders pursuant to O.C.G.A. § 42-1-12 and who: (1) were convicted before July 1, 2006; (2) are prohibited from residing within 1,000 feet of a church, swimming pool, or school bus stop or working within 1,000 feet of a church, school, or child care center; and (3) do not qualify for the homeowner exemption or employment exemption set forth in O.C.G.A. § 42-1-15(f), (g) as determined by the sheriff in the county where the person is registered.

The Court **HEREBY APPOINTS** as class counsel for the class and all subclasses Gerald R. Weber, Lisa L. Kung, Sarah E. Geraghty, and Stephan Brooks Bright with the Southern Center for Human Rights.

## **II. MOTION FOR PRELIMINARY INJUNCTION**

The Court held an evidentiary hearing on Plaintiffs' motion for preliminary injunction on November 13, 2008. Having heard evidence and argument on this motion and having carefully considered the applicable law, the Court hereby enters the following findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 65:

### A. FINDINGS OF FACT

1. O.C.G.A. § 42-1-15(c)(1) (the "Church Volunteer/Employment Provision") states that "[n]o individual [who is required to register as a sex offender] shall be employed by or volunteer at any . . . church[.]"

2. "Church" is defined as "a place of public religious worship." O.C.G.A.

§ 42-1-12(a)(7).

3. Violation of the Church Volunteer/Employment Provision exposes persons on the sex offender registry to criminal prosecution and a sentence of 10 to 30 years in prison.

4. The Church Volunteer/Employment Provision fails to define the term "volunteer." See O.C.G.A. § 42-1-12(a).

5. Webster's Dictionary defines a "volunteer" as one who "offers himself for a service of his own free will." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1322 (9th ed. 1983).

6. Plaintiffs have shown that many class members were ordered to stop participating in religious activities by parole officers, sheriffs' deputies and other law enforcement personnel, while others were deterred from participating in such activities by the statute's apparent breadth and penalty of 10 to 30 years in prison.

7. The religious activities that have been addressed include: singing in adult choir, playing piano, reading in a service, cleaning the church kitchen, serving on church committees, preparing food for the homeless, audio recording of services, adult Bible study, setting up for church events, and speaking to the congregation during services.

8. Plaintiffs have shown confusion among law enforcement officials as to the meaning of the term "volunteer:"

- On August 29, 2008, parole officer Gary Crosby sent an email to the State Board of Pardons and Paroles seeking clarification as to whether parolee James Canty could sing in his adult church choir or clean the church kitchen. Richard Oleson, Program Manager of the Board's Field Operations Division, advised that he could not: "I believe this parolee may attend church services,

however in my opinion his activities in the choir and the kitchen are in conflict with [the Church Volunteer/Employment Provision] . . . . I would suggest the parolee be instructed to cease these activities at once.” (Email from Richard Oleson to Gary Crosby, Sept. 2, 3008 [Doc. No. 202-4, p.1].)

- On July 24, 2008, an officer from the Cordele Probation Office sent an email to the Georgia Department of Corrections (“GDC”) seeking advice on whether a probationer could play a hymn during a church service. The officer observed that “the waters continue to get muddier re: volunteer status.” (Email from Jeff Ellis to Ahmed Holt, July 24, 2008 [Doc. No. 202-4, p.2].)
- On August 8, 2008, an attorney at the GDC sent an email to the Office of the Attorney General entitled “what's a volunteer?” The email asked the Office of the Attorney General to “sen[d] me something that lays out the position y’all took in court on what a ‘volunteer’ is.” The sender added: “We don't want to accidentally sabotage your efforts.” (Email from Andre Castaing to Joseph Drolet, Aug. 8, 2008 [Doc. No. 202-4, p. 4].)
- A September 9, 2008 email to the legal office of the Georgia GDC indicates that a county probation officer informed Robert Still that he could not attend adult Sunday school class at his church. (Email from Andre Castaing to Ahmed Holt, Sept. 9, 2008 [Doc. No. 202-4], p.5].)
- At 5:50 p.m. on the evening before the hearing on Plaintiffs’ motion for preliminary injunction, the GDC informed its probation officers that Plaintiff class members can assist in

worship services and sing in church choirs. An affidavit submitted by GDC official Ahmed Holt, however, stated that, “unless clear cut,” decisions about how to interpret the statute would be made on a “case by case basis” and would be “generally fact-specific.” (Affidavit of Ahmed Holt [Doc. No. 206-3] ¶¶11, 16.)

9. Several class members presented declarations and/or testified about<sup>4</sup> restrictions placed on religious activities by the statute and various law enforcement agencies’ interpretations of the statute:

- Omar Howard was actively involved in Heartbound Ministries after being “saved” while incarcerated. In prison, he sang in the church choir and volunteered as a chaplain’s aid, assisting in communion and Bible study. Upon his release, but before July 1, 2008, Howard became involved in church activities. He was an active participant in adult church choir, and served as a lay reader and speaker at several churches where he talked about the redemptive and reformatory power of Christ. Howard’s parole officer instructed Howard to stop these activities or be prosecuted. (Declaration of Omar Howard [Doc. No. 194]; Transcript of Nov. 13, 2008 Hearing (hereinafter “Tr.”) [Doc. No. 218], pp. 56-60, 62.)
- Lori Collins served as an assistant to the chaplain and completed the GDC Faith and Character Program while incarcerated. She

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<sup>4</sup> At the November 13, 2008 hearing, Plaintiffs presented testimony from three registered sex offenders, Lori Collins, Andrew Norton, and Omar Howard, and the operator of a faith-based program that works with the Georgia prison system, Andrea Shelton.

is now a licensed minister and churchgoer at Mt. Paran Church of God. Because of the statute, she no longer speaks to church audiences about her faith and experience. She no longer participates in church-based revival meetings or seminars. She no longer participates in prayer vigils at the International House of Prayer, or leads the Women's Aglow prayer group. She was unable to apply for a paid position at the media ministry of Mt. Paran Church of God. She also, as a licensed minister, is able to "give communion, handle the elements, [and] do different functions in the church." She has stopped these activities "[b]ecause if it's against the law, then I would face ten to thirty years, and I'm not going to break the law." (Declaration of Lori Collins [Doc. No. 186]; Tr. at pp. 5-9, 16-17, 18, 20, 22.)

- Matthew Cornell served as a lay reader and helped to set up amplification at Church of Jesus Our Shepard. After the passage of SB 1, Cornell inquired at the Gwinnett County District Attorney's Office as to the scope of the statute. An assistant district attorney told Cornell he could only "go to church, listen to the service, and leave." (Declaration of Matthew Cornell [Doc. No. 194-3].)
- Steven Lee Williams was ordered by a Polk County Probation Officer to stop singing praise and worship music in front of a church audience, to cease playing the drums in adult church band, and to refrain from staying after the worship service to talk with his pastor. (Declaration of Steven Lee Williams [Doc. No. 202-2].)

- Barry Randolph played piano and sang in adult church choir, but was told by Glynn County Sheriff's Major Debra Thomas that it was illegal. In September 2008, he was arrested, prosecuted, and tried for violations of the Church Volunteer/Employment Provision. The indictment stated that he was working as a pianist at a church in violation of O.C.G.A. § 42-1-15. (Declaration of Barry Randolph [Doc. No. 202-3].)
- Andrew Norton is a father of two and a member of Trinity Fellowship Church in Marietta. Prior to July 1, 2008, he assisted with sound recording of praise and worship music at his church. He also helped set up church events, cleaned the church, did electrical work, and attended and volunteered for an adults-only class called "Growing Kids God's Way." While church activities have provided a stabilizing force in his life, he must now refrain from all volunteering at his church. His probation officer specifically told him that he must stop volunteering "based on the statute." (Declaration of Andrew Norton [Doc. No. 194]; Tr. at pp. 26-32, 36-37.)
- Donnie Boone was initially told by his parole officer that he could not attend church and remains barred from serving as an usher or pall bearer. (Declaration of Donnie Bonnie [Doc. No. 186].)

10. Plaintiffs also presented affidavits and testimony from religious leaders about the importance of religious activities to faith and the reformatory impact of religious participation:

- Andrea Shelton is the President of Heartbound Ministries, an

organization that works with prison chaplains in the GDC to meet the spiritual needs of people in prison and to reduce recidivism. Her organization works with 37 state prisons, 11 transitional centers, juvenile facilities and some county facilities. Ms. Shelton, who has worked with many people on the sex offender registry, including Omar Howard, testified that the prohibition on volunteering at a church does more harm than good from a public safety perspective. She has witnessed the reformatory impact that being involved in faith communities has on people on the sex offender registry. (Declaration of Andrea Shelton [Doc. No. 194-5]; Tr. at pp. 44-45, 48.)

- Richard Hemphill serves as senior pastor at Trinity Fellowship Church in Marietta and is Plaintiff Andrew Norton's pastor. He describes how church involvement can keep ex-offenders accountable and reduce recidivism. (Declaration of Richard Hemphill [Doc. No. 194].)
- Charles Ohrenschall is a member of the vestry of the Church of Jesus Our Shepherd in Norcross. He explained how faith communities help to keep ex-offenders accountable and in compliance with the law. He also describes churches' own mechanisms to protect congregations from sexual abuse. (Declaration of Charles Ohrenschall [Doc. No. 194].)
- Barbara Pritchett is a minister at the Mt. Paran North Church of God in Marietta, where she leads an adult Bible study group for formerly incarcerated men and women. She states that the Statute's ban on volunteering will hinder, rather than help,

public safety. (Declaration of Barbara Pritchett [Doc. No. 194].)

- Floyd Rose is a minister at The Church at Pine Hill in Valdosta, Georgia. He often works with people on the sex offender registry, and his church takes several precautions when doing so to ensure no contact with minors. He has “seen the life-changing power of Christ” bend formerly incarcerated persons into “productive, law abiding citizens.” (Declaration of Floyd Rose [Doc. No. 186].)

11. Defendants Perdue, Baker and Dean presented four affidavits, including affidavits from Tracy Masters, Director of Legal Services for the Board of Pardons and Paroles, and Ahmed Holt, the Manager of the Sex Offender Administration Unit for the GDC:

- Mr. Masters explained that the Parole Board has special conditions for sex offenders. The Board and its staff have identified a pattern of criminality whereby offenders at an increased risk of committing a sex offense seek to place themselves in positions of trust and respected status in order to gain access to potential victims. The Board has reviewed numerous cases for executive clemency in which offenders have sought involvement in extra-curricular activities of religious organizations in an effort to develop trusting relationships among members of the church, or their children, in order to gain access to potential sexual victims. Such pattern includes volunteering for positions in religious organizations that may give the impression to other members that the offender is a trusted member of the religious organization. As a result, the

Board restricts volunteering at church or religious groups, children/youth ministries, choirs and activities as part of its inherent authority to apply conditions to parole. Mr. Masters also stated in his affidavit that a memo from Richard Oleson to Parole Officer Gary Crosby had mistakenly said that singing in the choir was restricted by the law. The activity was actually prohibited by the special parole conditions. (Affidavit of Tracy D. Masters [Doc. No. 206-2].)

- Mr. Holt testified that there are currently 5,800 registered sex offenders on probation. (Doc. 206-3, 3, 8). Holt stated he is familiar with the Church Volunteer/Employment Provision and that the Sex Offender Administration Unit interprets the provision narrowly and does not read the provision as prohibiting activities at church that constitute worship, service, or any other part of the religious life of a church. According to Mr. Holt, the provision does not prohibit sex offenders on probation from participating in worship services, assisting in worship services (including singing in the choir or playing a musical instrument at a service), teaching adult Sunday School, cutting the grass at the church, raking leaves or helping clean church buildings. Mr. Holt stated that sex offenders are not permitted to engage in activities that bring them in direct contact with children. The GDC has transmitted this guidance to probation officers in the field and probation officers were instructed not to prohibit any activity at a church without first obtaining approval from the Sex Offender Administration Unit.

Mr. Holt additionally stated that the determination of whether an activity is prohibited is fact specific. To the best of Holt's knowledge, no sex offender has had probation revoked for violating the "volunteer" provision. Mr. Holt additionally addressed specific instances where parolees had been instructed to cease certain church-related activities, including Steven Lee Williams and Andrew Norton, and either stated that the parole officer's interpretation was incorrect and has been rectified or that the instruction to cease the activities was related to a condition of parole, rather than the statutory provision. (Affidavit of Ahmed Holt [Doc. No. 206-3].)

**B. CONCLUSIONS OF LAW**

The standard for granting a preliminary injunction is well-settled. To obtain a preliminary injunction, the movant must show that "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damages the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). The party seeking the injunction bears the burden of establishing all prerequisites by a clear showing. Mazurek v. Armstrong, 520 U.S. 968, 972 (1997).

**1. Likelihood of Success on the Merits**

Plaintiffs have raised three constitutional challenges to the Church Volunteer/Employment Provision: (1) a free exercise clause challenge, (2) a vagueness challenge, and (3) an overbreadth challenge. The Court concludes that Plaintiffs have clearly established a substantial likelihood on the merits as to the

claim that the Church Volunteer/Employment Provision's prohibition on volunteering is unconstitutionally vague.<sup>5</sup>

The Due Process Clause of the Fourteenth Amendment forbids the state from depriving "any person of life, liberty, or property, without due process of law." U.S. CONST. AMEND. XIV. A basic tenant of due process is that "[all persons] are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L.Ed. 2d 888 (1939); Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L.Ed. 2d 222 (1972). A law will be voided for vagueness if it: (1) "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or (2) "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." City of Chicago v. Morales, 527 U.S. 41, 56, 119 S. Ct. 1849, 144 L.Ed. 2d 67 (1999).

The Church Volunteer/Employment Provision does not define the term "volunteer." Cf. Karriem v. Barry, 743 F.2d 30 (D.C. Cir. 1984) (the term "volunteer" defined in statute relating to minister's access to jail). As the Court's findings of fact demonstrate, the term has been interpreted in various ways by law enforcement officials, and several have been confused regarding its meaning. While Defendants Perdue, Baker and Dean submit that the term volunteer encompasses only employment-type situations, it is unclear even what would be included in such a definition for purposes of enforcing the statute. Would volunteering to play the piano during service be prohibited because it is possible to be employed as a

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<sup>5</sup> Having reached this conclusion, the Court need not consider the remaining claims.

pianist?<sup>6</sup> Would volunteering in a church's office to send mailings, answer phones, or organize files be prohibited because it is possible to be employed as an office assistant? The lack of definition of the term "volunteer" authorizes discriminatory and arbitrary enforcement, and the significant criminal penalties associated with violating the statute have led Omar Howard, Lori Collins, and other class members to forgo certain religious activities. Because the Church Volunteer/Employment Provision fails to provide fair warning to Plaintiffs or adequate guidance to law enforcement, it is substantially likely that it is unduly and unconstitutionally vague.

## **2. Irreparable Injury**

The second factor for the Court to determine is whether the Plaintiffs will suffer irreparable harm absent a preliminary injunction. The Court concludes that Plaintiffs have clearly established irreparable harm in this case. Plaintiffs have presented evidence that certain named Plaintiffs and members of the relevant subclass have ceased participating in a wide range of church-related activities that are required or encouraged by their particular religious beliefs. In a number of instances, Plaintiffs have ceased engaging in such activities because of their concern that the statute may be violated and because of the harsh penalties that will be faced if a particular activity is considered "volunteering" under the Church Volunteer/Employment Provision. There is no adequate remedy at law for this deprivation.

## **3. Weighing the Harm of an Injunction**

Granting an injunction will not substantially harm others and will preserve the status quo. Georgia has never before had a law prohibiting people on the registry from volunteering at church, and Plaintiffs assert that no other state has

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<sup>6</sup>One member of the relevant Plaintiff subclass appears to have been prosecuted for just such activity.

such a law. Moreover, sex offenders are already prohibited from loitering at or within 1,000 feet of anywhere minors congregate, and offenders on probation or parole are prohibited from any unsupervised contact with minors. The State itself has submitted evidence establishing that it imposes conditions on supervised release, where necessary for particular sex offenders, including limits on church attendance or participation. (See Affidavit of Ahmed Holt [Doc. No. 206-3].) Finally, religious institutions have other tools to protect children including background checks, escorts, and prohibitions against contact with minors. (Declaration of Reverend Floyd Rose [Doc. No. 186].) For all these reasons, Plaintiffs have clearly shown that the balance of harms weighs in their favor.

#### **4. Public Interest**

Allowing Plaintiffs to continue to participate in their faith communities will further public safety by providing support, stability, and a grounded sense of right and wrong. Both the Board of Pardons and Paroles and the GDC recognize that encouraging people to be involved with faith-based programs will reduce recidivism. The Board of Pardons and Paroles and GDC started a Faith Based Community Initiative that partners churches with offenders to reduce recidivism.

Criminological research identifies social support, stability, and employment as factors that decrease recidivism. See Kruttschnitt, Uggen, & Shelton, Predictors of Desistance Among Sex Offenders, JUSTICE QUARTERLY 17:61-87 (2000) (sex offenders with stable employment and social relationships have lower recidivism rates); COLORADO DEP'T OF PUBLIC SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 4 (2004) (sex offenders with positive support systems are less likely to re-offend and violate probation). Plaintiffs have also presented evidence from several ministers and others who work with sex offenders who testified about the reformative powers of

faith and volunteering in faith communities. A preliminary injunction here is in the public interest.

C. SUMMARY

For the reasons stated above, the Court **GRANTS** the motion for preliminary injunction. All Defendants in this action are hereby **RESTRAINED AND ENJOINED** from enforcing O.C.G.A. § 42-1-15(c)(1) to the extent that it restricts registered sex offenders from engaging in volunteer activities at churches.

**III. MOTION TO DISMISS**

On September 30, 2008, this Court granted Plaintiffs' request for reconsideration of this Court's dismissal of the takings claims asserted in this action on behalf of renters. Plaintiffs filed an amended complaint asserting such claims, and Defendants Perdue, Baker, and Dean filed a motion to dismiss the takings claim on the grounds that Plaintiffs lack standing to assert such a claim and, even if Plaintiffs have standing, the alleged violation of the Takings Clause fails to state a claim for relief. This Court disagrees.

A. Standard of Review

Federal Rule of Civil Procedure 12(b)(1) provides that a defendant may move for dismissal on the grounds that a court lacks subject matter jurisdiction. Rule 12(b)(1) motions may involve facial or factual attacks on a court's subject matter jurisdiction. The Eleventh Circuit summarized the court's inquiry when, as here, a standing challenge is raised in a motion to dismiss:

When standing is questioned at the pleading stage . . . general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. We accept as true all material allegations contained in the complaint and construe the complaint in a light most favorable to the complaining party. Moreover, in the context of a Rule 12(b)(1) challenge to standing, we are obligated to consider not only the pleadings, but to examine the record as a whole to determine whether we are empowered to adjudicate the matter at hand.

Elend v. Basham, 471 F.3d 1199, 1208 (11th Cir. 2006) (citation and internal marks omitted).

Pursuant to Rule 12(b)(6), a defendant may also seek to dismiss a complaint for failure to state a claim upon which relief can be granted. While detailed factual allegations are not required in order to withstand a motion to dismiss under Rule 12(b)(6), “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atlantic Corp. v. Twombly, \_\_ U.S. \_\_, 127 S. Ct. 1955, 1964-65, 167 L.Ed 2d 929 (May 21, 2007).<sup>7</sup> The complaint must allege facts sufficient “to raise a right to relief above the speculative level.” Id. at 1965. “In evaluating such a motion, [the court] accept[s] the factual allegations in the complaint as true and . . . construe[s] them in the light most favorable to the plaintiff.” 75 Acres, L.L.C. v. Miami-Dade County, 338 F.3d 1288, 1293 (11th Cir. 2003) (citing Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003)). The Court evaluates the plausibility of the grounds pleaded in support of the claims for relief, rather than either their possibility or probability. See Twombly, 127 S.Ct. at 1965, 1966.

A court evaluating a Rule 12(b)(6) motion may not consider matters outside the pleadings unless the court treats the motion to dismiss as a motion for summary judgment under Federal Rule of Civil Procedure 56 and gives all parties “reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”

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<sup>7</sup> In Twombly, the United States Supreme Court rejected the frequently-quoted “no set of facts” language from Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (stating that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”), explaining that “[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” Twombly, 127 S.Ct. at 1969.

Fed. R. Civ. P. 12(b); see also Moss v. W & A Cleaners, 111 F. Supp.2d 1181, 1185 (M.D. Ala. 2000). The court may, however, consider documents attached to the complaint and documents referenced in the complaint that are central to the plaintiff's claims. See Brooks v. Blue Cross and Blue Shield of Florida, Inc., 116 F.3d 1364 (11th Cir. 1997).

B. Analysis

1. *Standing*

Defendants Perdue, Baker and Dean contend that the only named Plaintiffs that are alleged to rent their homes pursuant to a written lease – Janet Allison and Lori Collins – have not been required to break leases and do not currently live in a residence that violates the residency restrictions. Defendants Perdue, Baker and Dean argue that Ms. Allison and Ms. Collins' property interests have not been taken because their current residences comply with the statute.

The standard that this Court uses to evaluate whether Plaintiffs have standing is well-settled. As stated by the Eleventh Circuit,

First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Doe v. Pryor, 344 F.3d 1282, 1285 (11th Cir. 2003) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 550, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (citations, footnote, and some internal marks omitted)). Importantly, as previously noted, insofar as the instant case is before the Court on a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct may suffice," and the Court "presume[s] that general allegations embrace those specific facts that

are necessary to support the claim.” Id. (citation and internal marks omitted). The Court “may consider affidavits and other factual materials in the record.” Nat’l Ass’n of State Utility Consumer Advocates v. Federal Communications, 457 F.3d 1238, 1251 (11th Cir. 2006). The Court does not consider Plaintiffs’ likelihood of success on the merits when evaluating standing. Warth v. Seldon, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

Plaintiffs argue that the injury in fact requirement of standing is satisfied because Ms. Collins and Ms. Allison will be evicted when a school bus stop, church, child care center, or other restricted location moves within 1,000 feet of their residence. The Fourth Amended Complaint alleges that if the relevant local school boards designate bus stops, Ms. Allison and Ms. Collins will be unable to continue to reside in their current residences. (Fourth Am. Compl. ¶¶35, 67.) It further alleges that Plaintiffs Allison and Collins will be required to move if a child care center, swimming pool, or other prohibited location moves within 1,000 feet of their homes. (Id.)

The Court concludes that Plaintiffs’ allegation that Ms. Allison and Ms. Collins **currently** reside within 1,000 feet of where a school bus stops to pick up children is sufficient to satisfy the injury in fact requirement.<sup>8</sup> As recognized previously in this case, the Orders of this Court have effectively halted the enforcement of the school bus stop provision and the designation of school bus stops by local school boards. If these Orders were not entered and if this Court’s intent to restrain the enforcement of the school bus stop provision during the pendency of this case was unclear or absent, there is a substantial likelihood that the local school

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<sup>8</sup> Ms. Allison apparently lives in Columbia County, where school bus stops have already been designated by the local school board; however, the enforcement of the school bus stop provision has been halted by reason of an Order entered in this case.

boards would have immediately designated school bus stops. Plaintiffs' injury, therefore, is not merely hypothetical. Plaintiffs Allison and Collins are in imminent danger of suffering an actual injury occasioned by the enforcement of the school bus stop provision. These injuries are caused by the operation of the Act, and an injunction barring the enforcement of the Act would provide a remedy to Plaintiffs. The Court therefore concludes that Plaintiffs Allison and Collins have standing to raise an as-applied takings challenge in this case.<sup>9</sup>

2. *Failure to State a Claim*

Defendants Perdue, Baker and Dean take the position that the residency restrictions do not violate the takings clause as a matter of law because Plaintiffs Allison and Collins are not denied all economically beneficial use of their leaseholds. Defendants Perdue, Baker and Dean concede that leaseholders, including tenants at will, have a protected property interest under Georgia law. See Ammons v. Central of Georgia Railway Co., 215 Ga. 758, 113 S.E.2d 438 (1960); Waters v. DeKalb County, 208 Ga. 741, 69 S.E.2d 274 (1952).

The Supreme Court recognized that a regulatory taking could violate the Fifth Amendment in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922) (noting that "if regulation goes too far, it will be recognized as a taking"). The Court has not provided specific guidance for determining when a regulation "goes too far," instead relying on "essentially ad hoc, factual inquiries." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L.

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<sup>9</sup> Plaintiffs do not appear to assert a facial takings challenge here. Indeed, such a challenge would not likely be successful. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987) (describing facial takings challenges as presenting the question of whether the mere enactment of the challenged statute constitutes a taking and characterizing a facial takings challenge as "an uphill battle").

Ed. 2d 798 (1992) (quoting Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631(1978)). Certainly, where a regulation “denies all economically beneficial or productive use of land,” a categorical finding that the land has been taken is appropriate. Lucas, 505 U.S. at 1015. Where, as here, no per se rule applies, the Court must engage in a factual inquiry, as described in Penn Central. The Court examines “[t]he economic impact of the regulation on the claimant,” “the extent to which the regulation has interfered with distinct investment-backed expectations,” and “the character of the governmental action.” Penn Central, 438 U.S. at 124. “A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by the government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” Id.

The Court first considers the economic impact of the residency restriction. Plaintiffs Allison and Collins submit that the economic impact is substantial because their residences were rented with the primary purpose of serving as homes and that as soon as a prohibited location moves within 1,000 feet of the leased residences, Plaintiffs Allison and Collins must move and bear certain costs associated therewith. Plaintiffs attached copies of Plaintiffs Allison and Collin’s leases to their response to the motion to dismiss. Ordinarily, the Court considers only the complaint and the attached documents when ruling on a motion to dismiss. However, an exception is recognized where “a plaintiff refers to a document in its complaint, the document is central to its claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss.” Financial Security Assurance, Inc. v. Stephens, Inc., 500 F.3d 1276, 1284 (11th Cir. 2007) (citations omitted); see also Pedraza v. Coca-Cola Co., 456 F. Supp. 2d 1262, 1264-64 (N.D. Ga. 2006) (“The Court may also reference documents attached to a motion to dismiss, and responses thereto, but

only where the attached document is central to the plaintiff's claim and is undisputed in the sense that the authenticity of the document is not challenged.") (citation and marks omitted). Defendants Perdue, Dean, and Baker do not appear to challenge the authenticity of the leases filed by Plaintiffs. The Court accordingly has considered the leases of Plaintiffs Allison and Collins in ruling on the motion to dismiss.

Plaintiff Collins' lease is for a five-year term. The lease provides that the premises "shall be used and occupied by Lessee exclusively as a private single family residence, and neither the premises nor any part thereof shall be used at any time during the term of this lease by Lessee for the purpose of carrying on any business, profession, or trade of any kind." (Residential Lease [Doc. No. 207-2], p.1.) The lease additionally prohibits assignment or subletting without the prior written consent of the lessor. (Id., p. 2.) If Ms. Collins abandons the premise, the lease provides that the lessor may re-let the premises and hold Ms. Collins liable for any difference between the rent that she would have been responsible for paying during the term of the lease and the rent realized by the re-leasing of the premises. (Id., pp. 3-4.) Ms. Allison's lease appears to be month-to-month. (Lease Agreement [Doc. No. 207-3], p. 1.) It provides that she may not sublease the premises without written permission from the owner. (Id.) Based on the restrictions in the reviewed lease agreements, the Court cannot conclude that Plaintiffs Allison and Collins' position regarding the substantial economic impact of the residency restriction is implausible. Plaintiffs Collins and Allison are not able to sublease their residences without consent of their lessors. Ms. Collins' lease is for a five-year term, and she is prohibited from using the premises for anything other than a single family residence. Although Ms. Allison's lease is month to month and there is no prohibition on her using the premises for business or other purposes, the Court

cannot conclude at this stage of the litigation that the economic impact of having to vacate the premises would be insubstantial.

The Court next considers the extent to which the residency restrictions interfere with Plaintiffs Allison and Collins' distinct investment-backed expectations. Plaintiffs Allison and Collins doubtlessly entered into the discussed lease agreements with the intention of occupying the premises as residences. Plaintiffs expected that they would be able to reside on the leased premises. The Supreme Court has recognized 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." Andrus v. Allard, 444 U.S. 51, 65-66, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979). A leaseholder does not, however, possess a full bundle of property rights. As Defendants Perdue, Baker and Dean admit, a lease is a limited property right. Plaintiffs Allison and Collins' investment in their leased property is not an investment that remains or retains value if Plaintiffs Allison and Collins can no longer live in the leased property, unlike a homeowner's investment. The Court accordingly finds that Plaintiffs' position that the residency restrictions interfere significantly with their investment-backed expectations is not implausible.

Finally, the Court considers the nature of the state's action. This consideration is "critical in determining whether a taking has occurred." Vesta Fire Ins. Corp. v. State of Florida, 141 F.3d 1427, 1433 (11th Cir. 1998). The Court concludes, consistent with its earlier ruling, that the State of Georgia's interest in preventing sexual abuse is strong and that the purpose of the residency restrictions is to limit contact between registered sex offenders and children. This factor weighs strongly against the finding of a taking in this case.

Having conducted the requisite ad-hoc factual inquiry, the Court concludes

that two of the Penn Central factors could plausibly support Plaintiffs' takings claim while the third and final factor strongly indicates that Plaintiffs' takings claim may not succeed. Under these circumstances, the Court cannot say that Plaintiffs have failed to state a claim under Rule 12(b)(6). The Court therefore **DENIES** the motion to dismiss.

#### **IV. CONCLUSION**

In sum, the Court **GRANTS in part and DENIES in part** Defendants Perdue, Baker and Dean's Motion to Decertify [Doc. No. 181], **GRANTS** Plaintiffs' Motion for Preliminary Injunction to Stop the State of Georgia from Criminalizing Protected Religious Activity [Doc. No. 186], and **DENIES** Defendants Perdue, Baker and Dean's Motion to Dismiss Plaintiffs' Claims for Alleged Taking of Property [Doc. No. 199].

The discovery period in this matter is reopened for a period of ninety (90) days from the date of this Order. At the conclusion of the discovery period, the Court will entertain motions for summary judgment filed in accordance with the Local Rules of this Court.

SO ORDERED this 30th day of March, 2009.

*s/ CLARENCE COOPER*

CLARENCE COOPER  
UNITED STATES DISTRICT JUDGE