UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOES #1-6, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

RICHARD SNYDER, Governor of the State of Michigan, and COL. KRISTE ETUE, Director of the Michigan State Police, in their official capacities,

Defendants.

File No. 2:16-cv-13137

Hon. Robert H. Cleland

Mag. J. David R. Grand

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

Statement on Non-Concurrence

As required by Local Rule 7.1, the plaintiffs have sought concurrence from the defendants in the relief sought. Specifically, the plaintiffs' counsel contacted Adam Sadowski and Jared Schultz, the defendants' counsel, by email on June 27, 2018, who indicated by return email on June 28 that the defendants do not concur in this motion at the present time.

****

Plaintiffs move for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure, and request that the Court:

1. Certify a "primary" class, defined as all people who are or will be subject to

registration under Michigan's Sex Offenders Registration Act;

2. Certify an "ex post facto" subclass, defined as members of the primary class who committed their offense or offenses requiring registration before April 12, 2011;

3. Name John Does #1-6 as representatives of the primary class, and John Does #1-5 as representatives of the ex post facto subclass; and

4. Appoint Miriam Aukerman, Alyson Oliver, and Paul Reingold as class counsel for this action.

In support of this motion, the plaintiffs refer the Court to their accompanying brief.

Respectfully submitted,

s/ Alyson L. Oliver (P55020)
OLIVER LAW GROUP P.C.
Attorneys for Plaintiff
363 W. Big Beaver Rd., Suite 200
Troy, MI 48226
(248) 327-6556
notifications@oliverlg.com

s/ Miriam Aukerman (P63165)
American Civil Liberties Union
Fund of Michigan
Attorney for Plaintiffs
1514 Wealthy SE
Grand Rapids, MI 49506
(616) 301-0930 -
maukerman@aclumich.org

s/ Paul D. Reingold (P27594)
Michigan Clinical Law Program
Attorneys for Plaintiffs
363 Legal Research Building
801 Monroe Street
Ann Arbor, MI 48109
(734) 763-4319
pdr@umich.edu

s/ Michael Steinberg (P43085)
American Civil Liberties Union
Fund of Michigan
Attorneys for Plaintiffs
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6814
msteinberg@aclumich.org

Dated: June 28, 2018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOES #1-6, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

RICHARD SNYDER, Governor of the State of Michigan, and COL. KRISTE ETUE, Director of the Michigan State Police, in their official capacities,

Defendants.

File No. 2:16-cv-13137

Hon. Robert H. Cleland

Mag. J. David R. Grand

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

INTRODUCTION

Michigan subjects almost 44,000 people to Michigan's Sex Offenders Registration Act (SORA), M.C.L. § 28.721 *et seq. See* 2d Am. Compl., ¶ 180, ECF 34, Pg.ID# 381. In *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *cert denied* 138 S. Ct. 55 (2017) ("*Does I*"), the Sixth Circuit found that SORA's 2006 and 2011 amendments impose such severe restrictions and obligations that they constitute punishment, and therefore cannot be applied retroactively. The Sixth Circuit rendered its decision in August 2016 – almost two years ago.

Almost three years ago, this Court, in the same case, issued published opinions holding that certain provisions of SORA are unconstitutionally vague or violate the First Amendment, and that SORA unlawfully imposes strict liability in violation of the Due Process Clause. *See Does #1-5 v. Snyder*, 101 F. Supp. 3d 672 (E.D. Mich. 2015), *rev'd on other grounds*, 834 F.3d 696 (6th Cir. 2016); *Does #1-5 v. Snyder*, 101 F. Supp. 3d 722 (E.D. Mich. 2015). Despite these court decisions, the defendants continue to enforce SORA as written.

The plaintiffs seek class certification to extend the benefit of the Sixth Circuit's and this Court's decisions in *Does I* to all affected Michigan registrants, so that all will be treated uniformly and in conformity with the constitutional limits on sex offender registration. A class action is the only feasible method to ensure that the tens of thousands of registrants affected by *Does I* actually receive the

constitutional relief to which they are entitled.

There are already dozens of lawsuits seeking enforcement of *Does I*, spread across both the Eastern and Western Districts of Michigan, as well as the state circuit courts and the Michigan Court of Claims. If class certification is not granted, these existing constitutional challenges based on the *Does I* rulings – and likely more new challenges – will be decided piecemeal and with the risk of inconsistent judgments. Judicial economy is better served, and the issues will be more appropriately litigated, if a Rule 23(b)(2) class action is used as the vehicle to apply the *Does I* decisions to the thousands of Michigan registrants affected, and to decide any common questions of law or fact in a single forum.

BACKGROUND

This Court is fully aware of the history of the *Does I* litigation, which is also summarized in the just-filed second amended complaint. For the purposes of class certification, three developments that post-date *Does I* are important.

First, the Michigan legislature has not yet amended or rewritten SORA to bring it into compliance with the constitutional limits required by *Does I*. 2d Am. Compl., ¶ 92, ECF 34, Pg.ID#361. While there have been meetings of a legislative work group, legislators are reluctant to publicly advocate for registry reform, and even admit that they would prefer that the courts resolve this issue for them. *Id.* at ¶ 94, Pg.ID#362. *See also* Todd Spangler, "Treatment of Sex Offenders Depends

on Whether They've Challenged Rules," *Detroit Free Press*, June 7, 2018 (quoting Senator Rick Jones, chairman of the Senate Judiciary Committee, regarding the political difficulties of amending SORA: "At this point, I think it's going to be left up to the courts to fix.").

Second, the state continues to enforce SORA as written, despite the judicial rulings that doing so is unconstitutional.[1] The defendants continue to insist that registrants comply with SORA's vague exclusion zones, "loitering" provision, and reporting requirements; obey SORA's internet restrictions despite their impact on speech; and remain strictly liable for inadvertent violations of SORA's complex rules. *Id.* at ¶¶ 93-95, Pg.ID#361-362. Pre-2006 registrants are still required to comply with the exclusion zones. *Id.* at ¶ 97, Pg.ID#363. And pre-2011 registrants are still subjected to lengthened registration terms, are publicly labeled by tier, and are required to comply with a complex array of onerous in-person and immediate reporting requirements. *Id.* at ¶ 98, Pg.ID#363.

Third, *Does I* has spawned a cottage industry of both represented and *pro se* plaintiffs seeking to be brought within its coverage. The plaintiffs' counsel are

[1] To counsel's knowledge, at present only the named *Does I* plaintiffs have directly benefited from the decision, in addition to a few dozen other named plaintiffs who had brought separate lawsuits to enforce *Does I*. *See e.g., Spencer v. Dept. of State Police*, Mich. Court of Claims File No. 16-000274-MZ, Opinion & Order (11/20/17) (granting injunction extending the protection of *Does I* to 33 consolidated plaintiffs) (Exh. B).

aware of about 45 cases filed since *Does I*, affirmatively seeking enforcement of that decision. *See* Partial List of Post-*Does I* Challenges, Exh. A. These cases, which have been filed in both the Eastern and Western District of Michigan, as well as in Michigan circuit courts, and in the Court of Claims, are consuming significant resources of the parties and the judiciary. The plaintiffs' list is likely incomplete, and of course it does not include new cases that will be filed as registrants become increasingly impatient with the state's failure to comply with *Does I*.[2] Nor does that list include criminal cases where defendants rely on the Sixth Circuit's or this Court's decisions in *Does I. See e.g. People v. Temelkoski*, 500 Mich. 1010 (2017); *People v. Tucker*, 2018 WL 2406989 (Mich. May 25, 2018); *People v. Snyder*, 2018 WL 2407026 (Mich. May 25, 2018); *People v. Hadley*, 2018 WL 2372201 (Mich. May 23, 2018); *People v. Hess*, No. 2017 WL 239487 (Mich. Ct. App. Jan. 19, 2017); *People v. Wilson*, 2016 WL 5853140 (Mich. Ct. App. Oct. 4, 2016). Absent class certification, this onslaught of cases – and the demands it places on the courts and on litigants – will continue unabated.

PROPOSED CLASS AND SUBCLASS DEFINITIONS

The plaintiffs seek certification of a primary class consisting of people who are or will be subject to registration under Michigan's Sex Offenders Registration

[2] At least one registrant appears to be selling pro se filings, which can be expected to lead to additional cases. *See* https://www.honorrestored.com/home.html.

Act. The primary class seeks relief on Count I (vagueness); Count II (strict liability), and Count III (First Amendment). The plaintiffs ask that John Does #1-6 be named as representatives of the primary class.

The plaintiffs also seek certification of an ex post facto subclass, defined as members of the primary class who committed their offense or offenses requiring registration before April 12, 2011. The ex post facto subclass seeks relief on Count IV (ex post facto violation). The plaintiffs ask that John Does #1-5 be named as representatives of the ex post facto subclass.

ARGUMENT

I. LEGAL STANDARD FOR CLASS CERTIFICATION

"At an early practicable time after a person sues . . . as a class representative, the court must determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). The class certification inquiry begins with the four prerequisites under Rule 23(a): numerosity, commonality, typicality, and adequacy.

> [T]he plaintiff must show that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the class representative are typical of the claims or defenses of the class, and (4) the representative party will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

Powers v. Hamilton Cty. Pub. Defender Comm'n, 501 F.3d 592, 617 (6th Cir. 2007).

Next, "the plaintiff must satisfy one of the subsections of Rule 23(b)." *Id.* Here, the plaintiffs seek certification of a (b)(2) class and subclass. Rule 23 allows for certification of subclasses when necessary to adjudicate multiple issues in an action. *See* Fed. R. Civ. P. 23(c)(4)-(5); *Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748, 760 (7th Cir. 2000).

II. THE REQUIREMENTS OF RULE 23(a)

Rule 23(a) sets forth the four requirements for class certification identified above. All four requirements are met here.

A. The Class and Subclass Meet the Numerosity Requirement

The first prerequisite to class certification is that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). There is no strict numerical test, and "substantial" numbers alone usually satisfy the numerosity requirement. *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006). Where plaintiffs can show that the number of potential class members is large, the numerosity requirement is met "even if plaintiffs do not know the exact figure." *In re Consumers Power Co. Sec. Litig.*, 105 F.R.D. 583, 601 (E.D. Mich. 1985). "[A] class numbering more than 40 members usually satisfies the impracticability requirement, and classes containing 100 or more members routinely satisfy the numerosity the requirement." *Peters v. Cars To Go, Inc.*, 184 F.R.D. 270, 276 (W.D. Mich. 1998) (internal citation omitted). Furthermore, numbers alone are not

dispositive when "the plaintiff seeking class certification has demonstrated impracticability of joinder." *Turnage v. Norfolk S. Corp.*, 307 F. App'x 918, 921 (6th Cir. 2009) (citing *In re Am. Med. Sys.*, 75 F.3d 1069, 1079 (6th Cir. 1996)).

Here, the proposed class comprises thousands of people who are required to register under SORA. There are almost 44,000 people currently subject to registration, and the registry grows by about 2,000 people a year. Am. Compl., ¶ 180, ECF 34, Pg.ID#381. While the exact number of registrants in the ex post facto subclass is unknown, there are tens of thousands whose offenses occurred before April 12, 2011, the effective date of the 2011 SORA amendments. *Id.*, ¶ 181, Pg.ID#381. With classes this large, the numbers alone demonstrate the impracticality of joinder and satisfy the numerosity requirement. *Bacon v. Honda of America Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir. 2004) (finding that numerosity is satisfied by a class of hundreds of members); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 541 (6th Cir. 2012) (similar).

The joinder of individual lawsuits is also impractical because SORA registrants are scattered across Michigan, and are filing cases in a wide variety of state and federal courts. *See* Partial List of Post-*Does I* Challenges, Exh. A. Moreover, many registrants are indigent and will be unable to retain counsel to secure their rights under *Does I* absent a class action. Am. Compl., ¶ 183, ECF 34, Pg.ID#382; *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980)

(discussing that class actions are appropriate when joinder is not economically feasible for individual plaintiffs); William B. Rubenstein, *Newberg on Class Actions* (5th ed.) (discussing impracticality of joining lawsuits when individual plaintiffs are not financially able to fund them). The numerosity requirement is easily met.

B. The Class and Subclass Meet the Commonality Requirement

The second prerequisite is that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2) (emphasis added). The requirement is not onerous, as "there need be only one common question to certify a class." *Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 853 (6th Cir. 2013). *See also Powers v. Hamilton Cty. Pub. Defender Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007) (commonality satisfied "if there is a single factual or legal question common to the entire class"); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) ("[T]here need only be one question common to the class."). The common question must, however, have the capacity "to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)) (emphasis in original).

Here, the common question, at its core, is: may the state continue to subject

Michigan registrants to provisions of SORA that the Sixth Circuit and this Court held unconstitutional in *Does I*? More specifically, these questions include:

a. Whether SORA's prohibitions on working, residing, or "loitering" within a "student safety zone," and SORA's reporting requirements, are unconstitutionally vague, and therefore cannot be applied to registrants;
b. Whether SORA's internet reporting requirements violate the First Amendment;
c. Whether registrants can be held strictly liable for any violations of SORA;
d. Whether retroactively applying the 2006 and 2011 SORA amendments to registrants whose offenses predate those amendments violates the ex post facto clause of the U.S. Constitution;
e. Whether the 2011 SORA amendments are severable, and if not, whether SORA can be enforced against registrants whose offenses predate those amendments.

All of these questions (with the exception of question e) involve challenges to the continuing enforcement of SORA provisions that have already been declared unconstitutional with respect to the individual plaintiffs in *Does I*. All class members suffer the same injury by being subjected to unconstitutional SORA provisions, and all seek the benefit of having the *Does I* decisions extended to them.

C. The Class and Subclass Meet the Typicality Requirement

The third prerequisite for class certification is that the claims of the representative plaintiffs be "typical" of the claims of the class. Fed. R. Civ. P. 23(a)(3). "Typicality is met if the class members' claims are 'fairly encompassed by the named plaintiffs' claims.'" *Whirlpool*, 722 F.3d at 852 (quoting *Sprague v. Gen.*

Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998) (*en banc*)). The purpose of the typicality requirement is to ensure "that the representatives' interests are aligned with the interests of the represented class members so that, by pursuing their own interests, the class representatives also advocate the interests of the class members." *Whirlpool*, 722 F.3d at 852–53.

> Commonality and typicality "tend to merge" because both of them "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the 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."

Young, 693 F.3d at 542 (quoting *Wal-Mart*, 564 U.S. at 349 n.5).

"A claim is typical if 'it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if [the] claims are based on the same legal theory.'" *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (quoting *In re Am. Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996)). The typicality prerequisite "determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Sprague*, 133 F.3d at 399. "[T]ypical claims need not be identical to one another; something less restrictive is appropriate to satisfy Rule 23(a)(3)." 7A Wright, Miller, and Kane, *Federal Practice & Procedure* § 1764 (3d ed. 2005).

> [C]ases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims. Actions requesting declaratory and injunctive relief to remedy conduct directed at the class clearly fit this mold.

Baby Neal v. Casey, 43 F.3d 48, 58 (3d Cir. 1994) (citation omitted). So long as the class and its representatives have similar legal theories arising from the same practice or course of conduct, the requirement is met "even if substantial factual distinctions exist between the named and unnamed class members." *Rankin v. Rots*, 220 F.R.D. 511, 518 (E.D. Mich. 2004).

Here, each of the named plaintiffs – like thousands of other Michigan registrants – has been harmed by the state's decision to continue enforcing SORA as written, despite the *Does I* decisions. Each of the named plaintiffs asserts that such continued enforcement is unconstitutional. Thousands of other Michigan registrants have the same claims. *See* 7A Wright, Miller, and Kane, *Federal Practice & Procedure*, § 1764 (3d ed. 2005) ("[M]any courts have found typicality if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory.").The named plaintiffs, like other Michigan registrants, have difficulty discerning their obligations under SORA's vague reporting requirements and restrictions on work/living/"loitering"; have had their ability to communicate on the internet restricted; and are strictly liable for even inadvertent

violations of SORA. In sum, because the named plaintiffs and class members share common claims about the unconstitutionality of SORA, the typicality requirement is satisfied. *See Parsons v. Ryan*, 754 F.3d 657, 685-86 (9th Cir. 2014).

With respect to the ex post facto subclass, plaintiffs John Doe #1-5, like all subclass members, have been retroactively subjected to the 2006 and 2011 SORA amendments. All share the same legal claim: that retroactive application of those amendments violates the ex post facto clause. And all seek the same relief: declaratory and injunctive relief barring such retroactive application. It is immaterial that such relief may impact members of the ex post facto subclass in slightly different ways, i.e., that those with offenses before 2006 cannot be subjected to either the 2006 or 2011 amendments, while those with offenses between 2006 and 2011 can be required to comply with the 2006 but not the 2011 amendments.[3] John Does #1-5 and all ex post facto class members are being affected by "a single course of conduct" by the defendants, namely the state's decision to continue applying provisions of SORA that the Sixth Circuit held cannot be retroactively applied. *See Young*, 693 F.3d at 543. It is that course of conduct that "[gave] rise to the claims

[3] The plaintiffs have no objection if the Court prefers to certify two ex post facto subclasses, broken down by those whose offenses pre-date the 2006 amendments (represented by John Does # 1-3) and those whose offenses are between 2006-2011 (represented by John Does # 4-5). But because all members of the ex post facto subclass seek the same relief – application of the Sixth Circuit's ex post facto ruling – the plaintiffs believe that certifying a single ex post facto subclass is the most straightforward and easily administrable course of action.

of each class member," and to the claims of the named plaintiffs. *Id.* The typicality requirement is thus satisfied for the ex post facto subclass as well.

D. The Class and Subclass Meet the Adequacy Requirement

The fourth prerequisite to class certification is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Sixth Circuit has held that the typicality and adequacy of representation elements "[b]oth 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." *Rutherford v. City of Cleveland*, 137 F.3d 905, 909 (6th Cir.1998). "The adequate representation requirement overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members." *In re Am. Med. Sys.*, 75 F.3d 1069, 1083 (6th Cir. 1996).

The Sixth Circuit applies

> a two-prong test to determine whether the class representatives will "fairly and adequately protect the interests of the class" under Rule 23(a)(4): 1) The representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.

Vassalle v. Midland Funding LLC, 708 F.3d 747, 757 (6th Cir. 2013) (internal

quotation marks and brackets omitted). The qualifications, experience, and abilities of counsel to conduct the litigation are taken into account. *Id*. The proposed class representatives and class counsel here easily satisfy these standards.

The first adequacy criterion is met for reasons set forth in the commonality and typicality discussions above. The proposed class representatives and class members all seek the same thing: declaratory and injunctive relief barring enforcement of SORA provisions that were held unconstitutional in *Does I*. Here the interests of the named plaintiffs are the same as the interests of the class. The relief that the proposed class representatives seek would benefit all class members and would not benefit the class representatives at the expense of any other class members. There are no conflicts of interest between the named plaintiffs and the other class members. Therefore, the interests of the proposed class representatives and class members are aligned, satisfying the first prong. *See Bentley v. Honeywell Int'l Inc.*, 223 F.R.D. 471, 485 (S.D. Ohio 2004).

The second adequacy criterion – that the representatives vigorously prosecute the interests of the class as named plaintiffs, and through qualified counsel, *see Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976) – is also clearly satisfied. Here, the named plaintiffs have stepped forward to bring this challenge in part because they *want* to represent the class. They have a strong incentive to pursue their claims because they spend significant time and energy to comply with

SORA's requirements. They are committed to representing the class as a whole.

As to the adequacy of counsel, that requirement is met where "class counsel are qualified, experienced and generally able to conduct the litigation." *Beattie*, 511 F.3d at 562-63. Here the proposed class counsel are Miriam Aukerman of the American Civil Liberties Union Fund of Michigan, Paul Reingold of the Michigan Clinical Law Program, and Alyson Oliver of the Oliver Law Group, supported by other attorneys at their respective organizations. All three are highly qualified and experienced attorneys who are able and willing to conduct this litigation on behalf of the class. *See* Aukerman Resume, Exh. C; Reingold Resume, Exh. D; Oliver Resume, Exh. E.

The Court is fully familiar with the work of Ms. Aukerman and Mr. Reingold, who litigated *Does I*. Ms. Aukerman has been previously appointed as class counsel in *Barry v. Lyon*, 834 F.3d 706 (6th Cir. 2016) (20,000 member class challenging disqualification from food assistance) and *Hamama v. Adducci*, 261 F. Supp. 3d 820 (E.D. Mich. 2017) (class of up to 1,400 Iraqi nationals challenging deportation). Mr. Reingold has also previously served as class counsel. *See, e.g.*, *Foster v. Booker*, 595 F.3d 353 (6th Cir. 2010); *Shabazz v. Gabry*, 123 F. 3d. 909 (6th Cir. 1997); *Green v. Mansour*, 474 U.S. 64 (1985). Ms. Oliver stepped forward to file this class action shortly after the Sixth Circuit's decision in *Does I*. She has significant class action experience and has served as class counsel in other

actions. *See, e.g.*, *Jackson v. Mastronardi Produce Limited*, No. 2:11-cv-11525 (E.D. Mich.); *Daniels v. Grenkote* IPC, No. 4:10-cv-1954 (E.D. Mich.); *Demetsenare v. Germanotta*, No. 2:11-cv-12753 (E.D. Mich.); *Jones v. Best Buy*, No. 0:12-cv-00095 (D. Minn.). The plaintiffs' lawyers have the time, resources, and expertise to appropriately prosecute the case.

III. THE CLASS AND SUBCLASS SATISFY THE REQUIREMENTS OF RULE 23(B)(2)

In addition to meeting the four prerequisites of Rule 23(a), the plaintiffs must show that this action fits into one of the categories defined in Rule 23(b). *Sprague*, 133 F.3d at 397. Under subsection (b)(2), a class action is maintainable if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

"Rule 23(b)(2) class actions are particularly effective in civil rights cases because these cases often involve classes which are difficult to enumerate but which involve allegations that a defendant's conduct affected all class members in the same way." William B. Rubenstein, *Newberg on Class Actions* § 4:40 (5th ed.). Indeed, subsection (b)(2) was added to Rule 23 "to make it clear that civil rights suits for injunctive or declaratory relief can be brought as class actions." 7A Wright, Miller and Kane, *Federal Practice & Procedure* § 1776 (3d ed. 2005). *See also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997) ("Civil rights

cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) class actions).

Accordingly, in actions primarily seeking injunctive relief, the (b)(2) requirement is "almost automatically satisfied." *Baby Neal*, 43 F.3d at 58. "What is important is that the relief sought by the named plaintiffs should benefit the entire class." *Id.* at 59. That there may be differences among class members does not render Rule 23(b)(2) any less applicable. *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012) ("All of the class members need not be aggrieved by . . . [the] defendants' conduct in order for some of them to seek relief under Rule 23(b) (2). What is necessary is that the challenged conduct or lack of conduct be premised on a ground that is applicable to the entire class.") (quoting 7A Wright, Miller, and Kane, *Federal Practice and Procedure* § 1775 (2d ed. 1996)).

IV. THE COURT SHOULD APPOINT CLASS COUNSEL PURSUANT TO RULE 23(G).

As described above in Section II.D, the undersigned counsel are qualified to handle this class-action litigation and will zealously prosecute the case for the class. Accordingly, the Court should appoint the plaintiffs' counsel as class counsel for the proposed class and subclass under Fed. R. Civ. P. 23(g).

CONCLUSION

For the above reasons, the plaintiffs meet the requirements for class certification under Rules 23(a) and 23(b)(2). The Court should grant the plaintiffs'

motion to certify a primary class and an ex post facto subclass, and should appoint Ms. Aukerman, Mr. Reingold, and Ms. Oliver as class counsel.

Respectfully submitted,

s/ Alyson L. Oliver (P55020)
OLIVER LAW GROUP P.C.
Attorneys for Plaintiff
363 W. Big Beaver Rd., Suite 200
Troy, MI 48226
(248) 327-6556
notifications@oliverlg.com

s/ Paul D. Reingold (P27594)
Michigan Clinical Law Program
Attorneys for Plaintiffs
363 Legal Research Building
801 Monroe Street
Ann Arbor, MI 48109
(734) 763-4319
pdr@umich.edu

s/ Miriam Aukerman (P63165)
American Civil Liberties Union
Fund of Michigan
Attorney for Plaintiffs
1514 Wealthy SE
Grand Rapids, MI 49506
(616) 301-0930 -
maukerman@aclumich.org

s/ Michael Steinberg (P43085)
American Civil Liberties Union
Fund of Michigan
Attorneys for Plaintiffs
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6814
msteinberg@aclumich.org

Dated: June 28, 2018

Proof of Service

On this date the plaintiffs filed the above motion and brief for class certification using the court's ECF system, which will send same-day email notice to all counsel of record.

s/ Alyson L. Oliver (P55020)
Attorneys for Plaintiff