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.

GRETCHEN WHITMER[1], Governor of the State of Michigan, and COL. JOSEPH GASPAR, 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

Statement on Concurrence

Pursuant to Local Rule 7.1, on September 23, 2019, plaintiffs sought concurrence from defendants in the relief sought. Defendants' counsel denied concurrence.

PLAINTIFFS' MOTION FOR
DECLARATORY AND INJUNCTIVE RELIEF

1. In July 2018, plaintiffs moved for partial summary judgment on their ex post facto claim. R. 40. At the request of the parties, who were pursuing a legislative solution that would bring Michigan's Sex Offenders Registration Act (SORA),

[1] Pursuant to Fed. R. Civ. Proc. 25(d), Governor Gretchen Whitmer and Michigan State Police Director Colonel Joseph Gaspar are automatically substituted for their predecessors.

M.C.L. § 28.721, *et seq.*, into compliance with the Sixth Circuit's and this Court's decisions in *Does #1-5 v. Snyder* (*Does I*), 834 F.3d 696 (6th Cir. 2016), *reh. denied* (2016), *cert. denied*, 138 S. Ct. 55 (2017), this Court repeatedly adjusted the briefing schedule.

2. In May 2019—almost one year later—the parties filed a Stipulated Order for Declaratory Judgment and for 90-Day Deferral of Decision on Injunctive Relief to Provide Opportunity for Legislative Resolution. R. 55. The Court declared the 2006 and 2011 SORA amendments unconstitutional as to the ex post facto subclasses, but deferred ruling on injunctive relief and on severability for 90 days "[i]n order to avoid interfering with the Michigan legislature's efforts to address the *Does I* decisions and their findings of constitutional deficiencies with SORA." *Id.*, Pg.ID #783. (The Court subsequently terminated the partial summary judgment motion as moot. R. 61.)

3. The legislature has failed to pass a new statute.

4. The Sixth Circuit held that SORA is punishment and the retroactive application of its 2006 and 2011 amendments must cease.

5. The 2011 amendments are deeply embedded in the statute, which is incomprehensible without them. The 2011 amendments are not severable.

6. SORA therefore cannot be applied or enforced against the ex post facto subclasses, i.e., persons whose registration is based on offenses committed before April

12, 2011.

7. The 2006 amendments cannot be applied to members of the pre-2006 ex post facto subclass.

8. Notice to class members and law enforcement is necessary to prevent ongoing constitutional violations.

WHEREFORE, pursuant to Fed. R. Civ. P. 23, 56 and 65, and 28 U.S.C. §§ 2201 and 2202, plaintiffs John Does #1-5, on behalf of themselves and the ex post facto subclasses, now ask this Court to:

A. Declare that the 2011 amendments to Michigan's Sex Offenders Registration Act (SORA) are not severable and the statute is null and void as applied to the ex post facto subclasses, i.e., people who are subject to registration based on offenses committed before April 12, 2011.

B. Enjoin the defendants, their officers, agent, servants, employees and attorneys, and all other persons who are in active concert or participation with them from applying or enforcing SORA against John Does #1-5 and members of the pre-2006 and 2006-2011 ex post facto subclasses. Should the Court believe that its severability ruling will spur the legislature into action at long last, the Court could make the injunction effective in 60 days, which is more than enough time—given the exhaustive, but so far unsuccessful legislative conversations to date—for passage of a new SORA statute.

C. In the alternative, should the Court certify the severability question to the Michigan Supreme Court, it should order interim relief for the ex post facto subclasses based on the terms of the final judgment in *Does I* in order to prevent further unconstitutional retroactive punishment of pre-2011 registrants and to ensure that they are not being required to comply with an unconstitutionally vague law while the Michigan Supreme Court considers the severability question.

D. This Court should also enjoin defendants, their officers, agent, servants, employees and attorneys, and all other persons who are in active concert or participation with them from applying or enforcing the 2006 amendments to John Does #1-3, and members of the pre-2006 ex post facto subclass. In order to comply with the requirements of Fed. R. Civ. P. 65(d)(1) that an injunction state its terms specifically and describe the acts restrained or required in reasonable detail, the injunction should bar application and enforcement of M.C.L. §§ 28.733-.736 and the second sentence of M.C.L. § 28.730(3) (governing electronic notice to members of the public who request it when registrants move into, e.g., a certain zip code). While such relief would be subsumed in an injunction barring any enforcement of SORA against all pre-2011 registrants, plaintiffs' entitlement to this relief is clear, and it should be separately ordered to ensure that plaintiffs receive this relief in the event of any further proceedings related to the severability of the 2011 amendments.

E. Pursuant to Fed. R. Civ. Proc. 23(c)(2) and 23(d)(1), the Court should order defendants within 30 days after a decision on this motion to provide notice of any relief granted here, as well as of the declaratory relief granted in this Court's prior order, R. 55, to all members of the ex post facto subclasses. The Court should order the parties jointly to prepare proposed notices, or separate notices, with any disputes to be resolved by the Court.

F. The Court should further order defendants within 30 days to provide class counsel with a class list, which should indicate which class members are also in one of the ex post facto subclasses. The Court should order the parties within 15 days to file a proposed stipulated order, or separate proposed orders, addressing what additional information should be provided to class counsel about each class member. That proposed order may include protective order protections if necessary.

G. Finally, pursuant to Fed. R. Civ. Pr. 23(d)(1) and 65(d)(2), the Court should order defendants to provide notice of any relief granted here, as well as of the declaratory relief granted in this Court's prior order, R. 55, to all prosecutors and all law enforcement personnel in this state who have responsibility for enforcing SORA.

Respectfully submitted,

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Dated: September 24, 2019

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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

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Introduction

In August 2016, the Sixth Circuit held that Michigan's Sex Offenders Registration Act (SORA), M.C.L. § 28.721 *et seq.*, imposes punishment in violation of the Ex Post Facto Clause, and that retroactive application of its 2006 and 2011 amendments must cease. *Does #1-5 v. Snyder* (*Does I*), 834 F.3d 696 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017). This Court also held various other SORA provisions violated due process and the First Amendment. *Does #1-5 v. Snyder*, 101 F. Supp. 3d 672 (E.D. Mich. 2015); 101 F. Supp. 3d 722 (E.D. Mich. 2015).

Plaintiffs and this Court have waited for three years for the state legislature to amend SORA to cure its constitutional defects. The legislature has failed to do so. Instead, SORA continues to be applied as written, and tens of thousands of people are being subjected daily to unconstitutional punishment. The legislature's abdication of responsibility means that this Court must now declare SORA null and void and enjoin its enforcement for all pre-2011 registrants. The Court should also separately enjoin retroactive enforcement of the 2006 amendments, and order notice.

Background

A. Procedural History

This class action was filed in August 2016, to ensure that the *Does I* decisions were applied to all Michigan registrants. The currently operative second amended complaint, filed in June 2018, R. 34, sought class-wide relief on four issues on which

the *Does I* plaintiffs had prevailed, either before this Court or the Sixth Circuit: (1) vagueness; (2) strict liability; (3) First Amendment; (4) Ex Post Facto Clause. *Id.* The complaint further alleged, *inter alia*, that the 2011 amendments cannot be severed, and as a result, that there is no statute in effect based on conduct occurring before April 12, 2011. *Id.*, ¶¶ 202-206, Pg.ID#386-87.

In September 2018, this Court, by stipulation, certified a primary class of all people who are or will be subject to registration under SORA, and two subclasses:

> a. The "pre-2006 ex post facto subclass" is defined as members of the primary class who committed their offense or offenses requiring registration before January 1, 2006, and who have committed no registrable offense since.
>
> b. The "2006-2011 ex post facto subclass" is defined as members of the primary class who committed their offense or offenses requiring registration on or after January 1, 2006, but before April 12, 2011, and who have committed no registrable offense since.

Class Certification Order, R. 46, Pg.ID#693.

In July 2018, plaintiffs moved for partial summary judgment for the ex post facto subclasses, seeking declaratory and injunctive relief, but deferring the severability question. R. 40. Plaintiffs then invited defendants to work together to develop proposed legislation that the parties could jointly send to the legislature. Plaintiffs argued that because the 2011 amendments are not severable, and SORA is incomprehensible in their absence, the Act must be entirely re-written. The parties agreed to focus their resources on legislative reform, rather than litigating severability first. At

the parties' joint request, the Court repeatedly adjusted the briefing schedule to permit legislative negotiations. R. 41, 44, 45, 47, 51, 54.

In May 2019, the Court granted declaratory relief through a stipulated order that declared the 2006 and 2011 amendments to be unconstitutional as to the ex post facto subclasses, but deferred rulings on injunctive relief and severability for 90 days "[i]n order to avoid interfering with the Michigan legislature's efforts to address the *Does I* decisions and their findings of constitutional deficiencies with SORA." Order for Declaratory Judgment and for 90-Day Deferral of Decision on Injunctive Relief to Provide Opportunity for Legislative Resolution. R. 55, Pg.ID#783. In August 2019, after the 90 days had passed, the Court entered a Stipulated Order Setting Briefing Schedule Pending Legislative Action to Replace or Amend Michigan's SORA, noting that "while a working group of state stakeholders has made significant progress on proposed new legislation, no replacement or amended law has yet been introduced." R. 60, Pg.ID#795.

B. Legislative Reform Efforts

Counsel can represent to the Court that there have been many meetings (with multiple state departments and stakeholders) that have produced several drafts of a revised SORA. There is broad consensus to create one basic statute for all registrants, rather than several versions that impose different restrictions based on a registrant's offense date. The current draft bill eliminates many changes made in 2006 and 2011

that the Sixth Circuit and this Court identified as unconstitutional, while retaining past ameliorative changes (e.g., the 2011 change eliminating registration for children under 14). What remains unclear is whether the legislature will reform SORA or, if it does, whether what it passes will be constitutional.

C. Litigation in the Michigan Supreme Court and Sixth Circuit

In March 2019, the Michigan Supreme Court heard argument on whether to grant leave in criminal appeals concerning SORA's retroactive application. Michigan's Attorney General filed an amicus brief adopting the appellants' position that SORA is punishment.[2] Br. of Mich. Atty. Gen., *People v. Betts*, No. 148981 (Mich.) (Feb. 8, 2019). The Attorney General did not take a position on severability, other than to say that severability "is a complex issue because [the 2011 amendments] are fairly embedded in the SORA." *Id.* at 3.

The Court granted leave in *People v. Betts*, 928 N.W.2d 699 (Mich. 2019), ordering briefing on, *inter alia*, whether SORA violates the Ex Post Facto Clause; whether SORA became punitive only upon enactment of certain provisions; whether any ex post facto violation can be cured by applying an earlier version of SORA or whether some different remedy applies; and whether SORA's remaining provisions can be given retroactive effect without applying the stricken provisions.

[2] Separate counsel from the Attorney General's office represented the county prosecutor in one of the cases, arguing the opposite.

Meanwhile, a challenge filed by an individual registrant seeking coverage under *Does I* reached the Sixth Circuit Court of Appeals. *See Lewis v. Whitmer*, No. 18-1912 (6th Cir.). That case was filed *in pro per*, and the district court adopted a report and recommendation barring application of the 2006 and 2011 amendments, but permitting the remainder of SORA to apply. *Lewis v. Snyder*, No. 17-cv-10808, R.31 (E.D. Mich., July 10, 2018) (Ludington, J.). The Sixth Circuit appointed counsel for the plaintiff, who now argues that, due the severability issue, SORA cannot be applied to him. *See Lewis*, Appellant's Brief, R.19, No. 18-1912 (6th Cir., Sept. 5, 2019). The state defendants have not yet responded.

Argument

I. Because SORA's 2011 Amendments Are Not Severable, the Court Should Declare that SORA Is Void as to Pre-2011 Registrants.

Plaintiffs ask this Court to declare that SORA's 2011 amendments are not severable, and that the statute therefore is null and void as applied to people who are subject to registration based on offenses committed before April 12, 2011.

A. The 2011 Amendments Are Not Severable.

1. The Legal Standard for Severability

When confronted with an unconstitutional statute, a court must balance two competing concerns. It must restrain itself from "rewriting state law to conform it to constitutional requirements" and must avoid "quintessentially legislative work[.]" *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006).

At the same time, a court should "try not to nullify more of a legislature's work than is necessary," severing unconstitutional provisions if possible. *Id.* Whether a court would be involved in impermissible legislative rewriting, or whether instead a law can be salvaged through severance, depends on how embedded the unconstitutional provisions are in the statutory fabric. "State law governs the question of severability." *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 466 (6th Cir. 1999).

Under Michigan law, severance requires that "the valid portion of the statute must be independent of the invalid sections, forming a complete act within itself." *Pletz v. Sec'y of State*, 336 N.W.2d 789, 808 (Mich. Ct. App. 1983). If the "unconstitutional portions are so entangled with the others that they cannot be removed without adversely affecting the operation of the act," then the whole act is unconstitutional. *Blank v. Dep't of Corrections*, 611 N.W.2d 530, 540 (Mich. 2000).

SORA does not contain a severability clause.[3] But Michigan has a general severability statute:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity

[3] M.C.L. § 28.728(8) does provide that if public availability of SORA information is unconstitutional, the website must be revised accordingly.

> shall not affect the remaining portions or application, *provided such remaining portions are not determined by the court to be inoperable*, and to this end acts are declared to be severable.

M.C.L. § 8.5 (emphasis added).

Thus, this Court must determine whether, if SORA's invalid portions are stricken, the remaining portions can function on their own. Importantly, the severability question is not whether the legislature could pass some registration statute that would pass constitutional muster, but rather whether SORA, as written today, can operate in the absence of the offending provisions without the Court engaging in statutory redrafting to make what is left of the law constitutional.

2. The 2011 Amendments Are So Deeply Embedded in SORA that the Statute Is Unintelligible Without Them.

The 2011 amendments are not severable. They entirely rewrote SORA and are completely embedded in the statute. Indeed, as a highlighted version of the law shows, the 2011 amendments make up nearly half the statute. *See* 2006 and 2011 SORA Amendments, Ex. A. Those amendments created the three-tier system. Key definitional terms, which are used throughout the statute and trigger SORA's obligations, were added or rewritten. For example, Mich. Pub. Act 17, Sec. 3 (2011), codified as M.C.L. § 28.723, specifies who must register (namely those convicted of "listed offenses"). Section (2)(k) of the Act, codified as M.C.L. § 28.722(k), defines "listed offense" to mean "a tier I, tier II, or tier III offense." Similarly, Sections 5(10)-(12), codified as M.C.L. §§ 28.725(10)-(12), key the length of registration to

tier classification, and Section 5a(3), codified as M.C.L. § 28.725a(3), keys the frequency of registration to tier classification.

If every piece of SORA that was added in 2011 is excised, the remaining statute is an incomprehensible amalgam of provisions referencing excised sections, leaving the Act inoperable within the meaning of M.C.L. § 8.5. For example, tier I registrants must report once a year, tier II registrants twice a year, and tier III registrants quarterly. M.C.L. § 28.725a. Without the tiering language, SORA does not specify how often a registrant must report. Similarly, the duration of registration is keyed to a person's tier level, with tier I registrants reporting for 15 years, tier IIs for 25 years, and tier IIIs for life. M.C.L. §§28.725(10)-(12). Without tiering, SORA does not state how long one must register. The statute is incomprehensible without the tier structure, yet that structure was added in 2011 and the Sixth Circuit found it to be punitive. *Does I*, 834 F.3d at 705.

Where, as here, unconstitutional provisions are embedded in a statute, courts regularly find that such provisions are not severable. In *Associated Builders & Contractors v. Perry*, 869 F. Supp. 1239, 1254 (E.D. Mich. 1994), *rev'd on other grounds* 115 F.3d 386 (6th Cir. 1997), this Court held that impermissible sections of a statute were so interwoven with permissible provisions that they were not severable, making the statute unenforceable in its entirety. *See also In re Apportionment*

of State Legislature-1982, 321 N.W.2d 565, 582 (Mich. 1982) (once state apportionment formula was declared illegal, "all the apportionment rules fell because they are inextricably related"). Here, excising the 2011 amendments would leave a nonsensical alphabet soup, incomprehensible to registrants and police alike. The amendments "are not like a collection of bricks, some of which may be taken away without disturbing the [provisions that existed before], but rather are like the interwoven threads constituting the warp and woof of a fabric, one set of which cannot be removed without fatal consequences to the whole." *Carter v. Carter Coal Co.*, 298 U.S. 238, 315 (1936). SORA's remaining provisions are not "otherwise complete in [themselves] and [are not] capable of being carried out without reference to the unconstitutional [sections]." *Blank*, 611 N.W.2d at 540.

3. The Court Cannot Rewrite the Statute.

Because the 2011 amendments cannot be severed, the statute "cannot be judicially enforced because doing so requires the Court to impose its own prerogative on an act of the Legislature." *Stone v. Williamson*, 753 N.W.2d 106, 115 (Mich. 2008). Given how sweeping the 2011 amendments were, it is simply impossible to know whether the legislature would have passed the law without the provisions that have been declared unconstitutional, or what the legislature will do now that those amendments cannot be retroactively enforced.

The U.S. Supreme Court has said that, "mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewrit[ing] state law to conform it to constitutional requirements even as we strive to salvage it." *Ayotte*, 546 U.S. at 329 (citation omitted). Further, "making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a far more serious invasion of the legislative domain than we ought to undertake." *Id*. Judicial deference is particularly appropriate where, as here, the legislature is already contemplating a statutory overhaul. In this situation, "a federal court, on reviewing a state statute, does not assume the task of making such choices for the state legislature." *Eubanks v. Wilkinson*, 937 F.2d 1118, 1127 (6th Cir. 1991). Rather, the court should allow the "State [to] pursue its own policy choices in fashioning new legislation," while ensuring that affected individuals "remain[] free of undue burden while the legislature redesigns its statute." *Id*.

B. "Reviving" Earlier Versions of SORA Would Make It Impossible for Registrants to Know What Their Obligations Are, and Would Contravene the Legislature's Intent.

1. A "Revived" Statute Would Be Void for Vagueness.

Defendants may argue that although the 2011 amendments cannot be severed, some earlier version of SORA could be "revived." The problem with this theory is that no one—not registrants, not police, not prosecutors, not defense counsel, and not judges—has any idea what SORA means absent the amendments.

As an initial matter, it is unclear what version of SORA would "revive": would it be the pre-2006 or pre-2011 statute? Does the prior statute "revive" only for pre-2011 registrants or for post-2011 registrants as well? If only for pre-2011 registrants, would there be two versions of SORA in effect simultaneously: one version for pre-2011 and one for post-2011 registrants? Will all pre-2011 registrants be covered by the same "revived" statute? Or will the 2005 version apply to pre-2006 registrants, the 2010 version to pre-2011 registrants, and the current version to everyone else, so that there are actually three different statutes in effect? There is no way to know. How registrants can determine what law to follow, or law enforcement can know what version of the statute to enforce, is a mystery.

The problem is compounded by the fact that old versions of SORA no longer exist in a form that can be located or consulted.[4] Without the text of a law to look at, no one will know what registrants' obligations are.

Moreover, if there are multiple versions of the law simultaneously in effect,

[4] One cannot piece together the pre-2006 law by looking at the public acts adopted in 2006. Instead, one has to work backward, consulting multiple public acts. One can find the then-operative § 8 in Mich. Pub. Act 238 (2004); §§ 4, 4a, 5a, 5b and 5c and 9 in Mich. Pub. Act 237 (2004), §§11, 13 and 14 in Mich. Pub. Act 239 (2004), and §§ 2, 4, 5, 5a, 8, 8c, 8d, and 10 in Mich. Pub. Act 240 (2004). For other sections, one must go even further back. Searching through these acts to determine which provisions were in effect at any given time is challenging, even for counsel who have spent years working with this statute. Neither registrants nor police officers will have any idea where to look, or how to read what they find.

law enforcement would not easily be able to determine what version of the statute applies in a particular registrant's case, because that would be triggered by the registrant's offense date—information that is typically buried in court files. For example, a police officer who discovers that a registrant with a 2007 conviction is living in an exclusion zone would not know if this is a crime without first determining whether the underlying registrable offense occurred before the 2006 amendments. Similarly, the fact that a registrant has a 2012 conviction does not make it a crime to fail to report a Facebook account. What matters is whether the offense itself occurred after April 12, 2011, something that an officer won't know without reviewing files—files which could be in a dusty archive in some far-off jurisdiction.

"Reviving" some unspecified past version of SORA—the text of which is not available and the applicability of which requires file research—would violate the void-for-vagueness doctrine. A statute is unconstitutionally vague if it (1) does not provide a person of ordinary intelligence notice of what conduct is prohibited, and (2) does not provide clear guidance for those who enforce its prohibitions. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). These requirements reflect the two primary goals of the void-for-vagueness doctrine: "to ensure fair notice to the citizenry" and "to provide standards of enforcement by the police, judges, and juries." *Columbia Nat. Res, Inc. v. Tatum*, 58 F.3d 1101, 1104 (6th Cir. 1995).

With respect to notice to the citizenry:

> The dividing line between what is lawful and unlawful cannot be left to conjecture….The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue.

Connally v. Gen. Constr. Co., 269 U.S. 385, 393 (1926). With respect to clear law enforcement standards, vague laws give "law enforcement officers, courts and jurors unfettered freedom to act on nothing but their own preferences and beliefs," *United States v. Salisbury*, 983 F.2d 1369, 1378 (6th Cir. 1993), allowing for "arbitrary and discriminatory application" of the law. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Without the 2011 amendments, basic requirements—like when to register—are unclear. A tier III registrant born in February would, under the current statute, be required to report in February, May, August and November. M.C.L. § 28.725a. But under a "revived" statute the registrant might be required to report in January, April, July, and October. Mich. Pub. Act 240, Sec. 5a(4) (2004). A registrant who guessed wrong about when to report—which seems inevitable when there is no copy of the law available—could go to prison. Similarly, current law requires reporting address changes within three days, M.C.L. § 28.722(g); § 28.725(1)(a), but previously SORA allowed ten days. *See* Mich. Pub. Act 132, Sec. 5(1) (2006). If a registrant reports on day seven, is that a crime?

In sum, a revival approach would require registrants to comply with and police to enforce some unknown, unfindable version of SORA, defying the core constitu-

tional command that "[n]o one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961).

2. A "Revived" Statute Would Contravene Legislative Intent.

Michigan has adopted an anti-revival approach: "Whenever a statute, or any part thereof shall be repealed by a subsequent statute, such statute, or any part thereof, so repealed, shall not be revived by the repeal of such subsequent repealing statute." M.C.L. § 8.4. Here, the 2011 amendments effectively repealed large portions of the earlier SORA. Now that *Does I* bars retroactive application of those amendments, M.C.L. § 8.4 indicates that this "judicial repeal" should not result in revival of the previous law.

Nor is there any evidence that today's legislature wants the 2005 or 2010 laws enforced as written. The legislature has repeatedly revised SORA over the past fourteen years, including removing "Romeo and Juliet" (consensual teen) offenders and children under the age of 14, making registration for older youth non-public, and altering the offenses that result in registration. *See, e.g.*, Mich. Pub. Act 239, 240 (2004); Mich. Pub. Acts 17, 18 (2011). While "reviving" an earlier statute would eliminate provisions this Court found unconstitutionally punitive, it would also "revive" some of the registry's most punitive provisions, undermining the legisla-

ture's intent and leading to further litigation and. *See also McGuire v. Strange*, 83 F. Supp. 3d 1231, 1271 (M.D. Ala. 2015) (rejecting revival approach where revisions to Alabama SORA were "so extensive and far-reaching as to relegate the prior statute to mere irrelevance").

Stakeholder discussions to date strongly suggest that the legislature wants one unified *Does I*-compliant statute for all registrants, which has the advantage of administrative simplicity and allows the legislature to cure not just the ex post facto problem, but other constitutional violations. While the Sixth Circuit's decision that the 2006 and 2011 amendments cannot be applied retroactively impacts only pre-2006 and pre-2011 registrants, this Court found other SORA provisions unconstitutional for all registrants. Reviving earlier versions of the law to cure the ex post facto problem would not address those other violations.

Moreover, while one cannot know what new statute will pass until it passes, "reviving" earlier versions would result in exactly what the legislature does not want: three different complex schemes (for pre-2006 registrants, 2006-2011 registrants, and post-2011 registrants) that are not even written down. The fact that offense dates —which would determine what rules apply—are typically buried in court files and not readily accessible to law enforcement, would make this administrative nightmare even worse. Revival contravenes legislative intent.

C. It Is Unnecessary and Inappropriate to Certify the Severability Question to the Michigan Supreme Court.

Although the Court could certify the severability question to the Michigan Supreme Court, the usual standard for certification is not met here. The Eastern District of Michigan's Local Rules provide for certification where:

> 1) the issue certified is an unsettled issue of State law, and
> 2) the issue certified will likely control the outcome of the federal suit, and
> 3) certification of the issue will not cause undue delay or prejudice.

L.R. 83.40(a). *See also* Mich. Ct. R. 7.308(A)(2)(B).

With respect to the first factor, certification is intended to "allow[] a federal court faced with a *novel* state-law question to put the question directly to the State's highest court." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75-76 (1997) (emphasis added). But the federal courts "will not trouble our sister state courts every time an arguably unsettled question of state law comes across our desks. When we see a reasonably clear and principled course, we will seek to follow it ourselves." *Pennington v. State Farm Mut. Auto. Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009); *see City of Houston, Tex. v. Hill*, 482 U.S. 451, 470-71 (1987) (inappropriate to "certify a question in a case where … there is no uncertain question of state law").

There is a well-articulated body of Michigan law on severability. While Michigan courts have not precisely addressed severability of the 2011 SORA amendments, "[t]he state court need not have addressed the exact question, so long as well-established principles exist to govern a decision." *State Auto Prop. & Cas. Ins. Co.*

v. Hargis, 785 F.3d 189, 194 (6th Cir. 2015). It is clear under Michigan law that the 2011 amendments are so embedded in SORA that they cannot be severed. And it is clear under federal law that enforcing some other unknowable, unfindable version of SORA would be unconstitutional on vagueness grounds.

With respect to the second factor—whether certification will "control the outcome of the federal suit"—severability is relevant only to the scope of relief on one of four claims. It does not control the outcome of the "suit" as a whole.

Third, certification here would cause undue delay and prejudice. For the past three years, thousands of people have been subjected to unconstitutional punishment because the legislature has failed to pass a new law. They have lived as "moral lepers" consigned to "existence on the margins" under a "byzantine code governing" their lives "in minute detail." *Does I*, 834 F.3d at 697, 705. Plaintiffs have repeatedly agreed to defer the severability issue to give the legislature time to act. They can wait no longer, and certification would likely delay a decision for many more months. Moreover, a certification order could result in staying the entire case, *see* L.R. 83.40(b), meaning that plaintiffs could not even get relief on their other claims (that do not involve severability).

Certification could delay a decision until mid-to-late 2020. L.R. 83.40; Mich. Ct. R. 7.308(A)(2)-(5). Plaintiffs should not continue to be punished for another year (not to mention that fall 2020 is an inauspicious time for legislative reform).

Plaintiffs recognize that certification is within the Court's discretion, *Hargis*, 785 F.3d at 194, and that there may be prudential reasons to certify severability, given that the Michigan Supreme Court is considering similar questions in *Betts*. If the Court does certify, plaintiffs request, at a minimum, that the Court grant interim relief to protect them during the pendency of those proceedings. *See* Part III.

II. This Court Should Enjoin Defendants from Retroactively Enforcing SORA Against the Ex Post Facto Subclasses.

Plaintiffs seek a permanent injunction to prevent the retroactive application of SORA to the ex post facto subclasses, unless or until the legislature amends SORA (to bring it into compliance with *Does I*.) Fed. R. Civ. P. 65. Plaintiffs must demonstrate (1) that they have suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate for the injury; (3) that considering the balance of hardships between the parties, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). That standard is easily met here.

First, with respect to irreparable injury, if "a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *ACLU of Kentucky v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003). Since retroactive enforcement of SORA is unconstitutional, such enforcement constitutes irreparable harm. *See Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) ("denial of an injunction will cause irreparable harm if the claim is

based upon a violation of the plaintiff's constitutional rights"). The Sixth Circuit found that SORA causes not just legal injury but actual *punishment*—the very definition of irreparable harm.

Despite the *Does I* decisions and even after this Court's declaratory judgment, R. 55, Michigan continues to apply SORA to all registrants. Defendants continue to label registrants by tiers on the public registry, to apply the retroactively lengthened registration terms, and to enable the public to subscribe to electronic notifications. 2d Am. Compl., ¶¶ 25, 34, 44, 98, R.34, Pg.ID# 349-50, 351, 353, 363; Redacted SORA Pages for Named Plaintiffs, Ex. B. Defendants continue to inform registrants that they must comply with *all* of SORA's requirements. The "Explanation of Duties" form being provided to registrants under M.C.L. § 28.725a still sets forth the registrant's tier classification and describes the length of registration based on that classification. *See* Explanation of Duties (EOD) for Named Plaintiffs, April/ May 2018, R. 34-9; Does #2-3 EODs, July & Sept. 2019, Ex. C; Lewis EOD, July 2019, filed in *Lewis v. Whitmer*, No. 18-1912 (6th Cir.), Ex. D. It also tells them that they cannot live, work or "loiter" in exclusion zones; that they must report in person within three days of certain events; and that they must report before traveling for more than seven days. *Id.* All of these provisions violate *Does I*.

In short, defendants continue to require all registrants—under threat of felony prosecution—to comply with the very provisions of SORA that the Sixth Circuit

said cannot be applied retroactively, and continue to operate the registry as if *Does I* had never been decided. And indeed, state prosecutors continue to bring criminal charges against registrants for conduct that is perfectly legal under *Does I*. *See, e.g.*, *Roe v. Snyder*, 240 F. Supp. 3d 697 (E.D. Mich. 2017) (granting preliminary injunction where plaintiff was threatened with prosecution if she continued to work near a school); Decl. of Atty. Farkas, Ex. E (describing three recent cases in one county); Decl. of Atty. VanGelderen, Ex. F (describing prosecution and conviction in last year of pre-2006 registrant who watched grandchildren's soccer game).

Absent an injunction, plaintiffs will suffer ongoing deprivation of their constitutional rights. Indeed, in *Roe* the Eastern District held that a pre-2006 registrant who was subjected to SORA suffered irreparable harm because she had to comply with the post-2006 SORA amendments and was listed on the registry as a tier III offender. *Roe*, 240 F. Supp. 3d at 711. *See also Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) (a continuing constitutional violation is irreparable harm).

Thus, unless this Court grants injunctive relief, plaintiffs and the ex post facto subclasses must continue to obey the letter of the 2006 and 2011 amendments, and will remain at risk of criminal charges or prosecution—as well as loss of jobs, home, and family relationships—if they do not conform with all aspects of SORA. All ex post facto subclass members will suffer irreparable harm until injunctive relief is granted.

Second, in order for a legal remedy to suffice, it "must not only be plain, speedy and adequate, but as adequate to meet the ends of justice as that which the restraining power of equity is competent to grant." *Harris Stanley Coal & Land Co. v. Chesapeake and O. Ry. Co.*, 154 F.2d 450, 453 (6th Cir. 1946). There are simply no such adequate legal remedies where government officials have imposed and continue to impose unconstitutional retroactive punishment.

Third, the balance of the hardships between the parties definitively tips in plaintiffs' favor. They and the subclasses are suffering not just grave harm, but actual *punishment*. In contrast, defendants have no legitimate interest in enforcement of unconstitutional laws. While the state might be harmed if the enforcement of a *constitutional* law were enjoined, the statute involved in this case has already been held to be unconstitutional. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). Moreover, three years after the Sixth Circuit decision, the state cannot argue that it should be given yet more time to come into compliance.

Fourth, it is well established that the vindication of constitutional rights serves the public interest. *See, e.g., G & V Lounge, Inc. v. Mich. Liquor Control, Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("it is always in the public interest to prevent violation of a party's constitutional rights"); *Preston*, 589 F.2d at 303 n.3 ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest."); *Caspar v. Snyder*,

77 F. Supp. 3d 616, 644 (E.D. Mich. 2015) ("the public interest is always served by robust protection of constitutional guarantees"). The fourth factor, too, therefore weighs in favor of granting injunctive relief.

III. If the Court Certifies the Severability Question to the Michigan Supreme Court, It Should Grant Interim Relief.

While it is neither necessary nor appropriate to certify the severability question to the Michigan Supreme Court, *see* Part I.C., if this Court does certify, it should ensure that in the interim: (1) registrants do not suffer continued punishment; and (2) both registrants and law enforcement have clarity on what SORA provisions will apply pending a decision on severability. In the event of certification, interim relief is required to prevent ongoing violations of the constitutional rights of all ex post facto subclass members, to comply with the constitutional requirement that no one can be required to speculate about the meaning of penal statutes, and to meet the prerequisite under L.R. 83.40 that certification not cause undue delay or prejudice.

In *Does I*, this Court never ruled on severability because a compromise judgment was entered, spelling out what SORA obligations would apply to the plaintiffs pending new legislation. *Does I*, No. 2:12-cv-11194, R. 153 (E.D. Mich. Jan. 26, 2018) (Ex. G). (At the time, the parties believed the legislature would quickly revise SORA to conform with the *Does I* decisions.) While defendants initially proposed a final judgment simply enjoining retroactive application of the 2006 and 2011 amendments to the *Does I* plaintiffs, those plaintiffs pointed out that this would

violate Rule 65, which requires injunctions to "describe in reasonable detail ... the act or acts required or restrained." Fed. R. Civ. P. 65(d)(1)(C)).

The negotiated consent judgment in *Does I* required plaintiffs to report residential addresses, name changes, and college attendance, and do so quarterly. *Does I*, No. 2:12-cv-11194, R.153, Pg.ID#6515. That was it. All plaintiffs also came off the *public* internet registry, *id.*, reflecting the Sixth Circuit's concern that labeling registrants by tier—when tiers bear no relationship to risk—was part of what made SORA punitive. *Does I*, 834 F.3d at 702. Given the existing public registry web interface, plaintiffs could not be listed without a space for tier designations.

Here, if the Court does certify severability, it should grant similar relief. Alternately, the Court could set a short time frame within which the parties could attempt to negotiate a proposed interim consent judgment, with any disputes to be resolved by the Court. What the Court should *not* do is leave tens of thousands of people with no way to know what their legal obligations are, while defendants continue to impose unconstitutional punishment upon them.

IV. This Court Should Enjoin Defendants from Retroactively Enforcing the 2006 Amendments.

As discussed above, because the 2011 are embedded in SORA, an injunction against their retroactive application necessarily involves the severability and void-for-vagueness issues, meaning that—absent legislative reform—the remedy must be to enjoin the statute as to pre-2011 registrants. The remedy with respect to the 2006

amendments is much simpler, as those provisions are separate sections of the statute whose retroactive application can easily be enjoined. The 2006 amendments barred registrants (with limited exceptions) from working, residing, or loitering within 1000 feet of school property, and imposed criminal penalties for noncompliance. Mich. Pub. Acts 121, 127 (2005), codified as M.C.L. §§ 28.733-.736. They also established a system for subscribing members of the public to be electronically notified when people register or move into a particular zip code. Mich. Pub. Act 46 (2006), codified as M.C.L. § 28.730(3).

Does #1-3 and members of the pre-2006 ex post facto subclass easily meet the requirements for a permanent injunction, for the same reasons set out in Part II, *supra*. They are suffering the irreparable injury of retroactive punishment in violation of the Ex Post Facto Clause, there are no remedies at law to compensate them, the balance of equities weighs heavily in their favor, and the public interest is served by an injunction to ensure compliance with the Constitution.

Accordingly, pursuant to Fed. R. Civ. Proc. 65, the Court should enjoin defendants, their officers, agent, servants, employees and attorneys, and all other persons who are in active concert or participation with them, from enforcing M.C.L. §§ 28.733-.736 and the second sentence of M.C.L. § 28.730(3) (governing e-notice to members of the public who request it when registrants move into, e.g., a certain

zip code). While such relief would be subsumed in an injunction barring any enforcement of SORA against pre-2011 registrants, plaintiffs' entitlement to it is clear, and it should be separately ordered to ensure that plaintiffs receive that relief in the event of any further proceedings related to the severability of the 2011 amendments.

V. The Court Should Order Notice.

Fed. R. Civ. Proc. 23(c)(2)(A) and 23(d)(1)(B) give the Court broad discretion to ensure that class members receive appropriate notice. Here, because defendants have continued to provide Explanation of Duties forms that falsely tell registrants they must comply with SORA as written, notice is essential. Class members should not have to speculate about their obligations when prison terms are at stake. The Court should further order defendants to provide class counsel with a class list, indicating which class members are in the ex post facto subclasses. Plaintiffs propose that the parties work together on a proposed stipulated order regarding what information should be provided, including any necessary protective order provisions.

Finally, pursuant to Fed. R. Civ. Pr. 23(d)(1) and 65(d)(2), the Court should order defendants to provide notice of any relief granted here, as well as of the declaratory relief granted in this Court's prior order, R. 55, to all prosecutors and all Michigan law enforcement personnel who have responsibility for enforcing SORA.

Conclusion

For the reasons set out above, the Court should grant the relief requested.

Respectfully submitted,

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Dated: September 24, 2019

Certificate of Service

On September 24, 2019, the plaintiffs filed the above motion and brief for partial summary judgment using the Court's ECF system, which will send same-day email service to all counsel of record.

s/ Miriam J. Aukerman
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