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

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

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Dated: October 22, 2019

CONCISE STATEMENT OF ISSUES PRESENTED

1. This Court should certify the severability question to the Michigan Supreme Court.

2. Contrary to Plaintiffs' position, unconstitutional portions of SORA's 2006 and 2011 amendments may be severed and the remaining constitutional portions of the statute may be applied retroactively consistent with SORNA, Mich. Comp. Laws § 8.5 and the holding of *Does #1-5*.

3. Plaintiffs are not entitled to interim injunctive relief because they cannot demonstrate a likelihood of success on the merits of their claims.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

USDC ED MI LR 83.40

Mich. Comp. Laws § 8.5

Does #1-5 v. Snyder, 834 F.3d 696 (6th Cir. 2016)

INTRODUCTION

The question at the heart of this case regards a Michigan state law – whether unconstitutional portions of Michigan's Sex Offenders Registration Act (SORA) can be severed from the rest of the Act, and the consequences to SORA of severance or non-severance going forward. But the same severability issue at the heart of this case is already pending before the Michigan Supreme Court on a full merits grant. In *People v. Betts*, Michigan Supreme Court No. 148981, the Court is considering a number of questions, including the very questions posed by the Plaintiffs in their motion in this case. (Ex. A, order granting leave to appeal, *People v. Betts*, Michigan Supreme Court No. 148981).

There can be no dispute that the Michigan Supreme Court is the final arbiter on the constitutionality of SORA. Because the Michigan Supreme Court is already considering the questions posed in Plaintiffs' motion, certification will avoid any possibility of inconsistent results. Furthermore, the ultimate decision of the Michigan Supreme Court is likely to be outcome determinative in this case and will not unduly delay or prejudice the plaintiffs. The standard for certification is easily met here.

Thus, there is no reason for this Court to reach the merits of the severability question. But even if this Court were to reach the issue, Plaintiffs' position fails because a fundamental flaw informs the entirety of Plaintiffs' analysis – that every piece of SORA that was added in 2011 is necessarily unconstitutional and must be excised from the Act. Contrary to Plaintiffs' position, unconstitutional portions of SORA's 2006 and 2011 amendments may be severed and the remaining constitutional portions of the statute may be applied retroactively consistent with the federal SORNA, Michigan's statutory law providing for severance (Mich. Comp. Laws § 8.5), and the holding of *Does #1-5*.

ARGUMENT

I. This Court should certify the severability question to the Michigan Supreme Court.

The district court local rules, Eastern District LR 83.40, provide the standard for certification. That Rule states:

> **LR 83.40 - Certification of Issues to State Courts**
>
> (a) Upon motion or after a hearing ordered by the Judge sua sponte, the Judge may certify an issue for decision to the highest Court of the State whose law governs its disposition. An order of certification shall be accompanied by written findings that:

> (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.

Such order shall also include citation to precedent, statutory or court rule authority authorizing the State Court involved to resolve certified questions.

(b) In all such cases, the order of certification shall stay federal proceedings for a fixed time which shall be subsequently enlarged only upon a showing that such additional time is required to obtain a State Court decision and is not the result of dilatory actions on the part of the litigants.

(c) In cases certified to the Michigan Supreme Court, in addition to the findings required by this Rule, the United States District Court shall approve an agreed statement of facts which shall be subsequently transmitted to the Michigan Supreme Court by the parties as an appendix to briefs filed therein.

In *People v. Betts*, the Michigan Supreme Court will consider five questions, the latter ones being the same as those raised by Plaintiffs:

> (1) whether the requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 et seq., taken as a whole, amount to "punishment" for purposes of the Ex Post Facto Clauses of the Michigan and United States Constitutions, US Const, art I, § 10; Const 1963, art 1, § 10; see *People v Earl*, 495 Mich 33 (2014), see also *Does #1-5 v Snyder*, 834 F3d 696, 703-706 (CA 6, 2016), cert den sub nom *Snyder v John Does #1-5*, 138 S Ct 55 (Oct 2, 2017);

> (2) if SORA, as a whole, constitutes punishment, whether it became punitive only upon the enactment of a certain provision or group of provisions added after the initial version of SORA was enacted;
>
> (3) if SORA only became punitive after a particular enactment, whether a resulting ex post facto violation would be remedied by applying the version of SORA in effect before it transformed into a punishment or whether a different remedy applies, see *Weaver v Graham*, 450 US 24, 36 n 22 (1981) ("the proper relief . . . is to remand to permit the state court to apply, if possible, the law in place when his crime occurred.");
>
> (4) if one or more discrete provisions of SORA, or groups of provisions, are found to be ex post facto punishments, whether the remaining provisions can be given effect retroactively without applying the ex post facto provisions, see MCL 8.5; [and]
>
> (5) what consequences would arise if the remaining provisions could not be given retroactive effect[.] [Ex A.]

Given the already pending Michigan Supreme Court matter, and the identity of issues between that case and this one, certification of the severability question is both necessary and appropriate.

A. The severability issue presents an unsettled issue of state law.

The primary question raised by Plaintiffs in their motion is whether the 2011 Amendments to SORA can be severed from the rest of

the Act, and what the consequences of severance or nonseverance will be going forward. It is obvious that the law is unsettled in this area when one considers that the issue currently pending before the Michigan Supreme Court. Indeed, the issue before that court and the issue before this Court in Plaintiffs' motion are identical. Neither Court has yet issued a substantive ruling on the merits.

Under these circumstances, the timing is appropriate for certification of the severability question. Certification to a state supreme court "is most appropriate when the question is new and state law is unsettled." *In re Amazon.com, Inc.*, 852 F.3d 601, 607 (6th Cir. 2017) (internal quotes and citation omitted). Further, the appropriate time to request certification of a state-law issue "is before, not after, the district court has resolved [it]." *State Auto Property and Cas. Ins. Co. v. Hargis*, 785 F.3d 189, 194 (6th Cir. 2015). "[O]therwise, the initial federal court decision will be nothing but a gamble with certification sought only after an adverse decision." *Id.*

Here, this Court has not resolved the issue of severability, and the severability question is already pending before the Michigan Supreme Court. This is not a situation where the Defendants are "seeking

refuge" in state court only after an unfavorable ruling in federal court. *Hotels.com*, 639 F.3d at 654 (citation and alterations omitted).

To the contrary, there is a risk of inconsistent results if this Court does not certify the question and decides the issue now. There is potential that this Court could reach one conclusion on the severability question, only to have the Michigan Supreme Court reach a different conclusion in *Betts*. Certification of the question will avoid the potential for inconsistent results all together, as the Michigan Supreme Court will be the only Court to decide the issue.

B. The severability issue to be decided by the Michigan Supreme Court controls the outcome of this action.

Again, the very severability question presented in this case is already pending before the Michigan Supreme Court on a full merits grant. And all of Plaintiffs' claims are likely to be affected by the decision in *Betts* – not just the Ex Post Facto claim. It is clear from the plain language of the Michigan Supreme Court order granting the application for leave to appeal that the Court will be considering SORA's viability as a whole. The scope and breadth of the Court's decision is likely to go directly to the entirety of the statutory scheme.

There is a high likelihood that the decision in *Betts* will reach all the provisions challenged by Plaintiffs in this action.

Moreover, the question of severability and the resultant consequences are ultimately questions of state law. There is no question that the highest court of the state is the final arbiter of such state law issues. Thus, "[w]hen it has spoken, its pronouncement is to be accepted by federal courts as defining state law." *West v. American Telephone & Telegraph Co.,* 311 U.S. 223, 236 (1940). It is appropriate that the Michigan Supreme Court be permitted to resolve the severability question, particularly where the issue is already pending before the Court and its decision will determine the outcome in this case.

C. Certification to the Michigan Supreme Court will not cause undue delay or prejudice.

Again, the Michigan Supreme Court has already granted the application for leave and the severability question is pending before the Court on a full merits grant. The Court will soon schedule a hearing on the case, and decision will likely be issued in this term. And the decision of the Court will resolve the severability question once and for all, to be accepted by the federal courts as defining *state* law.

Indeed, the Defendant in *Betts* has recently recognized the identify of issues in that case and this case. In specific, he sought to extend his deadline to correspond with the briefing schedule here "given the overlap in issues and the possible certification of questions to this Court from the federal district Court." (Ex. B, 2d motion to extend, *People v. Betts*, Mich. S. Ct. No. 148981, dated Sept. 11, 2019).

Certification of the severability issue will promote judicial efficiency and is appropriate where, as here, the question of "state law is unsettled." *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir.1995), citing *Lehman Bros. v. Schein*, 416 U.S. 386, 390–91 (1974). Certification will avoid any possibility of inconsistent results, likely be outcome determinative in this case, and will not unduly delay or prejudice the plaintiffs. This Court should therefore certify the severability question under ED MI LR 83.40.[1]

[1] The other option would be to hold this case in abeyance pending the resolution of *Betts* so that this Court may follow the resolution of the severance issue by the state's highest court.

II. Unconstitutional portions of SORA's 2006 and 2011 amendments may be severed, and the remaining constitutional portions of the statute may be applied retroactively consistent with SORNA, Mich. Comp. Laws § 8.5, and the holding of *Does #1-5*.

Plaintiffs' entire severability argument is based upon an incorrect premise: that every piece of SORA that was added in 2011 is necessarily unconstitutional and must be excised from the Act. This flawed assumption is presumably based upon an overly broad reading of the Sixth Circuit's opinion in *Does #1-5*. But this Court has previously rejected the same incorrect reasoning in a different individual challenge to SORA. In *Derrick Cain v. People of the State of Michigan, et al*, Case No. 3:19-cv-10243, this Court stated that *Does #1-5* only addressed "portions" of the 2006 and 2011 amendments:

> Plaintiff relies on *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016) for his assertion that all post-1997 SORA amendments are unconstitutional; however, Does #1-5 *addressed only* ***portions*** *of the 2006 and 2011 amendments to SORA*—it did not broadly invalidate all post-1997 amendments as Plaintiff suggests. [Ex. C, *Derrick Cain v. People of the State of Michigan, et al*, Case No. 3:19-cv-10243, opinion and order dated 6-5-19) (emphasis added).]

Contrary to Plaintiffs' position, *Does #1-5* does not require the conclusion that every part of SORA passed in 2011 is unconstitutional. Instead, those specific portions of SORA's 2006 and 2011 amendments

identified as unconstitutional by the Sixth Circuit in *Does #1-5* may be severed and the remaining constitutional portions of the statute may be applied retroactively consistent with the federal Sex Offenders Registration and Notification Act (SORNA), Mich. Comp. Laws § 8.5, and the holding of *Does #1-5*.

A. The Michigan SORA extends beyond the federal SORNA in three distinct respects.

A review of the Michigan law discloses the particular ways in which it extends beyond the federal SORNA, and the legislative intent for the 2011 amendments was to bring SORA into compliance with federal SORNA. The Legislature provided that SORA extends beyond the requirements of SORNA, which may be digested into three distinct categories, which may be severed without compromising Michigan's compliance with SORNA. The remainder of Michigan may be given effect, which is constitutional as it would then parallel the requirements of the federal SORNA.

1. The enactment of SORA and the 2006 SORA amendments

Michigan's SORA first went into effect on October 1, 1995. 1994 P.A. 295. It has since been amended 20 times.[2] The sex offender registry as it first existed in 1995 was not public and was accessible only by law enforcement. *People v. Dipiazza*, 778 N.W.2d 264, 267 (Mich. Ct. App. 2009). In 1999, the registry became available to the public through the Internet. Mich. Comp. Laws § 28.728(2), as amended by 1999 P.A. 85; *Dipiazza*, 778 N.W.2d at 267. Later amendments have added offenses requiring registration, changed the duration of required registration, and imposed additional registration requirements.

In 2005, SORA was amended by the Legislature to create "student safety zones." A student safety zone was defined as "the area that lies 1,000 feet or less from school property." Mich. Comp. Laws § 28.733(f), as added by 2005 P.A. 121. Offenders were generally precluded from residing within student safety zones. § 28.735(1).

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[2] *See* 2014 P.A. 328, 2013 P.A. 2, 2013 P.A. 149, 2011 P.A. 17, 2011 P.A. 18, 2006 P.A. 46; 2006 P.A. 402, 2005 P.A. 121, 2005 P.A. 123, 2005 P.A. 127, 2005 P.A. 132, 2005 P.A. 301; 2005 P.A. 322, 2004 P.A. 237, 2004 P.A. 238, 2004 P.A. 240, 2002 P.A. 542, 1999 P.A. 85; 1996 P.A. 494, 1995 P.A. 10.

Another amendment in 2005 precluded offenders from working or loitering within student safety zones. Mich. Comp. Laws § 28.734, as added by 2005 P.A. 127. These amendments because effective in 2006 and are commonly referred to as the 2006 SORA amendments.

2. The enactment of SORNA and SORNA's Constitutional status

On the federal side, in 2006, the United States Congress moved toward a comprehensive set of federal standards to govern state sex offender registration and notification programs by enacting SORNA, as part of the Adam Walsh Child Protection and Safety Act. Pub. L. No. 109-248, §§ 102-155, 120 Stat. 587 (codified in part as amended at 34 U.S.C. §§ 20901 *et seq*.). The goals of SORNA include making the federal and state:

> systems more uniform and effective by repealing several earlier federal laws that also (but less effectively) sought uniformity; by setting forth comprehensive registration-system standards; by making federal funding contingent on States' bringing their systems into compliance with those standards; by requiring both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current); and by creating federal criminal sanctions applicable to those who violate the Act's registration requirements.

Reynolds v. United States, 556 U.S. 432, 435 (2012).

As Spending Clause legislation, SORNA conditions full grant funding on a state's substantial implementation of certain requirements. 34 U.S.C. § 20927(a). State registries must collect specific information, such as names, residence, work, and school addresses, physical descriptions, automobile descriptions and license plate numbers, criminal history information, information on intended international travel plans, and photographs. *Id.* § 20914(a), (b). SORNA also classifiers offenders into tiers and sets minimum periods of registration based on the nature and seriousness of the sex offense and the offender's history of recidivism. *Id.* §§ 20911(2)-(4), 20915. SORNA requires that a state notify certain federal agencies regarding its registrants. *Id.* § 20923. SORNA also provides for public dissemination of certain information on Internet sites. *Id.* § 20920.

SORNA requires sex offenders to "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student" by, "not later than 3 business days after each change of name, residence, employment, or student status, appear[ing] in person in at least 1 jurisdiction involved . . . and inform[ing] that jurisdiction of all

changes in the information required for that offender in the sex offender registry." 34 U.S.C. § 20913(a), (c). The SORNA, however, does not prohibit registrants from living or working in any particular location.

The Sixth Circuit has held that "[SORNA] does not increase the punishment for the past conviction" and therefore its retroactive application does not violate the Ex Post Facto Clause. *United States v. Felts*, 674 F.3d 599, 606 (6th Cir. 2012); *see also United States v. Shannon*, 511 F. App'x 487, 492 (6th Cir. 2013) (applying reasoning of Smith and Felts to hold that SORNA's juvenile registration require-ments also did not present an ex post facto violation). In fact, this is the "unanimous consensus among the circuits." *Felts,* 674 F.3d 605–06.[3]

In 2011, Michigan's SORA underwent significant changes to bring the law into compliance with the federal SORNA. It was the manifest intention of the Michigan Legislature.[4]

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[3] *See also Am. Civil Liberties Union of Nevada v. Masto*, 670 F.3d 1046, 1053 (9th Cir. 2012) ("Many of our sister circuits, however, have considered this issue. Unanimously they have concluded that retroactive imposition of SORNA requirements is constitutional.").

[4] *See* Ex. D, House Fiscal Agency Legislative Analysis of Senate Bills 188, 189 and 206, recognizing that amendments to SORA "would revise the Sex Offenders Registration Act to conform to mandates under the federal Sex Offenders Registration and Notification Act[.]"

Under the 2011 amendments to SORA, sex offenders were classified into three tiers according to the offenses of which they were convicted. Mich. Comp. Laws § 28.722(r) to (w), as added by 2011 P.A. 17 (taking effect on April 12, 2011). Tier I offenders were required to register for 15 years, Tier II offenders for 25 years, and Tier III offenders for life. § 28.725(10) to (12), as amended by 2011 P.A. 17. Offenders were also required to report in person when they changed residences, changed places of employment, discontinued employment, enrolled as a student with institutions of higher education, discontinued such enrollment, changed their names, temporarily resided at any place other than their residence for more than seven days, established an e-mail or instant message address or "any other [internet] designations," purchased or began regularly operating a vehicle, or discontinued such ownership or operation. § 28.725 (1), as amended by 2011 P.A. 17.

3. Differences between SORNA and SORA and the holding of *Does #1-5*

Michigan's SORA goes beyond the baseline requirements of SORNA in three significant ways that are particularly germane to the Sixth Circuit's ruling in *Does #1-5*.

First, although SORNA (through its implementation guidelines, 73 Fed. Reg. at 38,059 (July 2, 2008)) requires a jurisdiction to make public the sex offense for which an offender is registered, SORNA does not require a State to make the tier classification viewable on the public website as is provided in SORA. Mich. Comp. Laws § 28.728(2)(l).

Second, SORA goes beyond SORNA's in-person reporting requirements. SORNA requires jurisdictions to require periodic in-person appearances to verify registration information and take a photograph, and also specifies that such in-person appearances occur at least annually to low-tier offenders and quarterly for higher-tier offenders. 42 U.S.C. § 16916. SORNA further requires an offender to appear in person to update a registration within three business days after any change of name, residence, employment, or student status. 42 U.S.C. § 16913(c). SORA, in contrast, requires an offender to appear in person to update when the offender intends to temporarily reside at any place other than his or her residence for more than seven days, when the offender establishes any electronic mail or instant message address, or any other designations used in internet communications or postings, and when the offender purchases or begins to regularly operate any

vehicle, and when ownership or operation of the vehicle is discontinued. Compare Mich. Comp. Laws § 28.725(1)(e)-(g) with 42 U.S.C. § 16914(a), 16915a(a).

Third, and finally, SORNA does not require a jurisdiction to create any geographic exclusions or "student safety zones." Michigan, on the other hand, has done exactly that by enactment its statutory scheme, *see* Mich. Comp. Laws §§ 28.734 to 28.736.

The specific areas where SORA has gone further than SORNA was the focus of the Sixth Circuit's decision in *Does #1-5*. Indeed, the Sixth Circuit explained that SORA is punitive because of the *aggregate effect* of these aspects of the law – all of which are the areas identified above where SORA differs from SORNA. Specifically, the Court reviewed these three statutory features that rendered the statute punitive: (1) the student safety zones where an offender is not permitted to live, work or loiter; (2) the public classification of a offenders into tiers without an individualized assessment; and (3) the requirements on offenders to appear in person to report even minor changes to certain information. *See Does #1-5*, 834 F.3d at 702, 702–03, 705. The Court summed up this point based on these three attributes:

> A regulatory regime [1] that severely restricts where people can live, work, and "loiter," [2] that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and [3] that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska's first-generation registry law.
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> * * *
>
> We conclude that Michigan's SORA imposes punishment. *Id.* at 705 (brackets added).

While *Does #1-5* explained that "the retroactive application of SORA's 2006 and 2011 amendments to Plaintiffs is unconstitutional, and it must therefore cease," 834 F.3d at 706, it was the cumulative effect of these three specific provisions that compelled the Sixth Circuit's determination that the current SORA has "much in common with banishment and public shaming," "and has a number of similarities to parole/probation." *Id.* at 701, 703.[5] If these three problematic provisions of SORA may be severed, it would leave a constitutionally valid Act that does not run afoul of Ex Post Facto.

[5] For additional discussion regarding the differences between SORA and SORNA, and how the provisions of SORA went beyond SORNA violated the Ex Post Facto clause, *see* Ex E, Brief for United States as Amicus Curiae, *Snyder v. Does #1-5*, U.S. S. Ct. No. 16-768, pp. 14–20.

B. The provisions of SORA that differ from SORNA and were identified as problematic by the Sixth Circuit may be severed, and the remaining constitutional portions may be applied retroactively.

Federal law favors severability. *See INS v. Chadha*, 462 U.S. 919, 934 (1983). It is also well settled under Michigan law that, although a statute may be invalid or unconstitutional in part, the part that is valid will be sustained where it can be separated from that part which is void. *Mathias v. Cramer,* 40 N.W. 926, 927 (Mich. 1888). The statute enforced after the invalid portion of the act is severed must, however, be reasonable in light of the act as originally drafted. *Caterpillar, Inc. v. Dep't of Treasury,* 470 N.W.2d 80, 85 (Mich. Ct. App. 1991) *rev'd on other grounds,* 488 N.W. 182 (Mich. 1991).

The Michigan Legislature has provided a general severability clause that applies to all its enactments. The clause provides:

> 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 shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application . . . , and to this end acts are declared to be severable.

Mich. Comp. Laws § 8.5.

At the outset, the Defendants concede that Sixth's Circuits ruling in *Does #1-5* precludes the retroactive application of the 2006 amendments, Mich. Comp. Laws §§ 28.734 through 28.736, which are SORA's "student safety zone" provisions. These statutory provisions are not required by SORNA. The remaining provisions of SORA can be given effect without the 2006 amendments. The 2006 amendments are separate provisions that operate independently from the rest of SORA.

The remaining question, accordingly, is whether the bulk of the 2011 amendments to SORA may be enforced without reference to the problematic provisions identified by the Sixth Circuit in *Does #1-5*. Applying the principles of severability as stated above, the answer is yes, relying on the Legislature's clear intent to make Michigan's law SORNA compliant. Like the 2006 amendments, the problematic 2011 provisions can be severed from the rest of SORA.

To begin, the requirement of Michigan law, Mich. Comp. Laws § 28.728(l), that an offender's tier classification be made public can be severed from the Act without compromising the effectiveness of the law. Offenders will still be classified into tiers, but the tiers will not be made public. SORNA does not require this information to be public.

Further, SORA's in-person reporting requirements, § 28.725(1)(e)-(g), mandating that an offender appear in person to update certain information may also be severed without compromising the Act:

> when the offender intends to temporarily reside at any place other than his or her residence for more than seven days;
>
> when the offender establishes any electronic mail or instant message address, or any other designations used in internet communications or postings; and
>
> when the offender purchases or begins to regularly operate any vehicle, and when ownership or operation of the vehicle is discontinued.

SORNA does not require this in-person reporting. Offenders would still be required to appear in person to update a registration within three business days after any change of name, residence, employment, or student status. Mich. Comp. Laws § 28.725(1)(a)-(d). The reporting requirements of Mich. Comp. Laws § 28.725(1)(e)-(g) are not "so essential, and [] so interwoven with others, that it cannot be presumed that the legislature intended the statute to operate otherwise than as a whole." *Moore v. Fowinkle*, 512 F.2d 629, 632 (6th Cir. 1975).

Severing the problematic provisions of SORA will not require this Court to "re-write" the statute. The fact that they are not in separate sections is not significant. *Mich. State AFL-CIO v. Mich. Emp. Rel.*

Com'n, 538 N.W.2d 433, 447 (Mich. Ct. App. 1995). Indeed, the provisions to be excised are discrete and easily removed, and line drawing is not inherently complex. (*See* Ex. F, redlined version of SORA excising problematic provisions identified by Court in *Does #1-5* for offenders committed their offenses on or before April 12, 2011).

Here, SORA remains a constitutionally valid and enforceable law, even retroactively, when the problematic provisions of the 2006 and 2011 amendments are severed, which gives effect to the clear legislative intent to make Michigan law SORNA compliant. This approach is consistent with the requirements Michigan law, Mich. Comp. Laws § 8.5, and the holding of *Does #1-5.*[6]

[6] It should also be noted that Plaintiffs' position regarding revival of previous SORA versions is incorrect if somehow the entirety of the 2011 SORA amendments was found unconstitutional. Under Michigan law, it has long been held that where a court has held a law invalid, it leaves all preceding laws on that subject in force. *McClellan v Recorder's Court,* 201 N.W. 209, 212 (Mich. 1924). *See also* 1A Singer, Sutherland Statutory Construction (6th ed), § 23:25, p 544 ("An unconstitutional statute which purports to repeal a prior statute by specific provision does not do so where, under standard rules governing separability, a hiatus in the law would result from the impossibility of substituting the invalid provisions for the legislation that was to be repealed ..."). And Mich. Comp. Laws § 8.4 has no application here because the 2011 amendments to SORA were not repealed. This means that if the entirety of the 2011 amendments of SORA were struck, prior versions of SORA remain in force so long as they are not held unconstitutional.

III. Plaintiffs are not entitled to interim injunctive relief because they cannot demonstrate a likelihood of success on the merits of their claims.

Plaintiffs' remaining claim asking for interim relief is based upon the same flawed assumption as their severability analysis. Contrary to Plaintiffs' position, not every piece of SORA that was added in 2011 is necessarily unconstitutional and must be excised from the Act. Thus, Plaintiffs are not entitled to interim relief.

In determining whether to grant a preliminary injunction, the following four factors are considered:

- whether the movant has demonstrated a strong likelihood of success on the merits;
- whether he would suffer irreparable injury without the injunction;
- whether the injunction would cause substantial harm to others; and
- whether issuing the injunction would serve the public interest.

Doe v. Univ. of Cincinnati, 872 F.3d 393, 399 (6th Cir. 2017).

Although the four factors "are factors to be balanced" and "not prerequisites to be met," a preliminary injunction cannot issue where "there is simply no likelihood of success on the merits…." *Id.* (internal quotation marks omitted). "When a party seeks a preliminary injunction on the basis of a potential constitutional violation, the

likelihood of success on the merits often will be the determinative factor." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012).

Importantly, "[t]he party seeking the preliminary injunction bears the burden of justifying such relief, including showing irreparable harm and likelihood of success," and he faces a "much more stringent [standard] than the proof required to survive a summary judgment motion" because a preliminary injunction is "an extraordinary remedy." *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012). It is "reserved only for cases where it is necessary to preserve the status quo until trial." *Hall v. Edgewood Partners*, 878 F.3d 524, 526 (6th Cir. 2017).

Here, Plaintiffs are not entitled to broad injunctive relief because they cannot demonstrate a likelihood of success on the merits of their claims. For the reasons stated in Section II, the retroactive application of portions of SORA's 2011 amendments is constitutional.

Indeed, continued retroactive enforcement of portions of the 2011 amendments is consistent with the requirements of the federal SORNA, and federal courts have consistently and universally held that SORNA passes constitutional muster. The unconstitutional portions of SORA's 2006 and 2011 amendments that are inconsistent with SORNA may be

severed from the rest of the Act, and the remaining constitutional portions may be applied retroactively.[7] Under these circumstances, Plaintiffs are not entitled to interim relief.

CONCLUSION AND RELIEF SOUGHT

Defendants respectfully request that this Court certify the severability question to the Michigan Supreme Court, or, alternatively, Defendants request that this Court hold that unconstitutional portions of SORA's 2011 amendments that are inconsistent with SORNA may be severed from the rest of the Act, and the remaining constitutional portions may be applied retroactively.

[7] Plaintiffs provide no authority for their contention that Defendants, and not Plaintiffs, should bear the burden of providing notice to class members. Further, Plaintiffs have not established that "all prosecutors and all Michigan law enforcement personnel who have responsibility for enforcing SORA" are those "in active concert or participation" with the Defendants such that Defendants are required to provide notice to them under Fed. R. Civ. P. 65.

Respectfully submitted,

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Dated: October 22, 2019

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on October 22, 2019, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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