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, 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

PLAINTIFFS' REPLY BRIEF ON MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

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I. Introduction

Defendants argue that a preliminary injunction is improper because Plaintiffs are not likely to succeed on the merits. In fact, Plaintiffs seek a permanent injunction, and have already succeeded: this Court, consistent with *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (*Does I*), held that the Sex Offenders Registration Act (SORA), M.C.L. § 28.721 *et seq.*, is punishment and that retroactive application of the 2006 and 2011 amendments is unconstitutional. Stip. Order, ECF 55.

Of the other injunction factors—none of which Defendants contest—the most important is irreparable injury. Plaintiffs suffer under SORA every day, despite the Sixth Circuit's decision three years ago that SORA is punishment, and despite this Court's declaratory ruling in May. Indeed, even where registrants, relying on that ruling, have sought clarification that SORA's unconstitutional provisions do not apply to them, Defendants have refused to lift the unconstitutional conditions "in the absence of further direction from Judge Cleland as to the entire class." Exh. A, Fabian/Michigan State Police Letters. Thus, the question is not whether injunctive relief should be granted, but only what its scope should be.

II. Defendants Do Not Dispute Injunctive Relief on the 2006 Amendments.

Defendants concede that the Sixth Circuit's decision "precludes the retroactive application of the 2006 amendments." ECF 66, Pg.ID#970. They offer no reason why this Court should not enjoin the enforcement of M.C.L. §§ 28.733-736

and the second sentence of M.C.L. § 28.730(3), as applied to Does #1-3 and the pre-2006 ex post facto subclass.[1] The Court should grant that relief.

III. Defendants' Revisionist Reading of *Does I* Is Untethered from the Actual Sixth Circuit Decision.

Defendants argue that when the Sixth Circuit held that the retroactive application of SORA's 2006 and 2011 amendments must cease, what the Sixth Circuit really meant to say was that retroactive application of M.C.L. §§ 28.725(1)(e)-(g), 28.728(2)(l), and 28.733-736—which exceed the Sex Offenders Registration and Notification Act (SORNA)—must cease. Though certainly creative, this position is entirely untethered from the Sixth Circuit's actual decision,[2] and assumes that the Court of Appeals is not capable of saying what it means. If the Sixth Circuit only cared about provisions that differ from SORNA, why did it never once mention SORNA? And if the Sixth Circuit was only concerned about a few provisions, why did it not remand with instructions simply to enjoin those specific subsections?

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[1] Defendants address only the exclusion zones, but M.C.L. § 28.730(3), which provides for e-notice to the public, was also added in 2006, and must be enjoined.

[2] Defendants' revisionist reading also contradicts the state's own prior interpretation of *Does I*. When seeking *cert*, the state argued that "the Sixth Circuit's decision prevents Michigan wholesale from applying SORA's 2006 and 2011 amendments retroactively," rather than allowing specific provisions to be severed. Cert Pet., *Snyder v. Does*, U.S. S. Ct. 16-768, at 15. The state identified the Sixth Circuit's central concerns as lifetime registration, classification without individualized assessments, geographic exclusion zones, and frequent in-person reporting—a different and longer list than Defendants argue now. *Id.* at 16-24.

The simple reason is that *Does I* was based on the *cumulative impact* of a "byzantine code governing in minute detail the lives of the state's sex offenders." *Does I*, 834 F.3d at 697. Under *Smith v. Doe*, 538 U.S. 84 (2003), the ex post facto analysis requires courts to consider the statute as a whole, asking whether "the statutory scheme," the "regulatory scheme," or "the Act" imposes punishment, *in toto*. *Id.* at 92, 94, 96-97, 99, 104-05. This makes sense, because even if a single obligation, standing alone, might not be punishment, the combined effect of many obligations can make a statute punitive. Whether a law's cumulative burdens are punishment will depend on how many restrictions the law imposes, the duration, magnitude, and interplay of the restraints, the penalties for violations, and the relationship between the restrictions and the state's public safety goals. For example, whether in-person reporting is punitive may depend on whether one must verify basic information infrequently for a limited time or whether one must report a vast array of information often, immediately, and for life, with even inadvertent noncompliance leading to felony charges and the risk of imprisonment.

Consistent with *Smith*, the Sixth Circuit in *Does I* analyzed SORA as whole, applying the factors of *Kennedy v. Mendoza-Martinez*, 372 U.S. 114 (1963), with different SORA provisions being relevant to different factors. For example, in finding SORA similar to historical punishments, the Court likened the exclusion zones to banishment, the unappealable public tier classifications and registration of

people without sex convictions to public shaming, and the in-person reporting requirements, exclusion zones, and risk of imprisonment (for noncompliance) to probation and parole. *Does I*, 834 F.3d at 702-03. In finding that SORA is not rationally related to a non-punitive purpose, the Court considered SORA's overall impact, citing the lack of individualized assessment and ineffective nature of offense-based registration. *Id.* at 704-05. And the Court repeatedly emphasized that for Tier III registrants, SORA's burdens last for life. *Id.*, at 703, 705. Defendants would let most of these burdens stand, even though *Does I*'s core holding is that the cumulative impact of the 2006 and 2011 changes made SORA punitive, and that therefore the retroactive enforcement of those amendments must cease.

Defendants try to recast *Does I* as limiting only (1) publication of tier information, (2) in-person reporting on travel, electronic identifiers and vehicles; and (3) exclusion zones. But the Sixth Circuit identified many other aspects of SORA as punitive, including its lifetime reach, its lack of individualized assessments, its application to registrants without convictions for sex offenses, the serious sanctions for even inadvertent violations, and the lack of relationship to public safety. Moreover, the Court did not just question publication of tier information, but also the fact that tier classifications are both unappealable and offense-based rather than risk-based. *Id.* at 698, 702, 704-05. Nor were the Court's concerns about reporting limited to the in-person requirement for travel, electronic identifiers, and vehicle

reporting.[3] Rather the Court found it punitive that registrants must frequently and immediately report a vast array of trivial information. *Id.* at 698, 703, 705.

Defendants argue that under *United States v. Felts*, 674 F.3d 599 (6th Cir. 2012), any SORA provision that derives from SORNA must be permissible. Not so. *Does I*, without mentioning *Felts*, found many SORNA-derived provisions of SORA—like lifetime registration, immediate in-person reporting, and unappealable tier classifications without individualized assessments—to be punitive. The questions in *Felts* and *Does I* were different. Mr. Felts was convicted under SORNA for not registering after moving from one state to another. The issue was whether Felts' two-year sentence was retroactive punishment for his original sex offense. The Court said it was not: "SORNA provides for a conviction for failing to register; it does not increase the punishment for the past conviction." *Id.* at 606. The Court rejected Felts' argument that he was being sent to prison twice for the same offense, viewing his failure to register as "entirely separate" from the earlier crime. *Id.* Thus, *Felts* addressed the question of whether a prison sentence for failure to comply with SORNA's basic registration requirement[4] punishes a new or old

[3] SORNA in fact requires immediate reporting of this information; the only difference from SORA is that reporting need not be in person. *See* Department of Justice, National Guidelines for Sex Offender Registration and Notification, at 52, *available at* https://www.smart.gov/pdfs/final_sornaguidelines.pdf.

[4] Because the constitutionality of a basic, initial registration requirement had been addressed by the Supreme Court in *Smith*, it is unsurprising that the Sixth Circuit upheld Felts' imprisonment for his failure to meet that requirement.

offense. Imprisonment is indisputably punishment, so the *Felts* Court never considered whether SORNA's burdens are punishment. In *Does I*, the Sixth Circuit did consider those burdens (to the extent they are mirrored in SORA) and found them to be punitive.[5] Plaintiffs here are not challenging prison sentences imposed for failure-to-register convictions, but are bringing an affirmative civil challenge to SORA's cumulative burdens. *Does I* is controlling; *Felts* is inapposite.

Finally, Defendants' revisionist account contradicts the Sixth Circuit's holding that its ex post facto ruling mooted the other claims "because none of the contested provisions may now be applied to the plaintiffs." *Does I*, 834 F.3d at 706. The *Does I* plaintiffs had challenged retroactive lifetime registration as violating due process; the vagueness of various reporting requirements; restrictions on registrants' fundamental rights to speak, parent, travel and work; registration of people who were never convicted, or did not commit sex offenses; and SORA's

[5] There is no reason to believe Michigan will lose federal funding if it amends SORA to comply with *Does I*. SORNA requires only "substantial" compliance and it excepts a state's inability to comply due to court rulings. 34 U.S.C. § 20927(b). In determining "substantial compliance" for funding purposes, DOJ has considered both state and federal court rulings of unconstitutionality requiring states to deviate from SORNA. *See e.g.*, Department of Justice, SORNA Substantial Implementation Review State of Kansas, at 3 (July 19, 2011), https://smart.gov/pdfs/sorna/Kansas.pdf; and SORNA Implementation Review State of Nevada, at 1 (Feb. 2011), https://smart.gov/pdfs/sorna/Nevada%20.pdf. Under the National Guidelines for Sex Offender Registration and Notification, 11 (July 2008) the federal government "will consider on a case-by-case basis whether jurisdictions' rules or procedures that do not exactly follow the provisions of SORNA or these Guidelines 'substantially' implement SORNA." *See* www.smart.gov/guidelines.htm.

strict liability provisions. Pls' 1st Brf, *Does #1-5 v. Snyder*, 15-cv-2346/2486. Those other challenges would not have been moot if the Sixth Circuit's decision only voided M.C.L. §§ 28.725(1)(e)-(g), 28.728(2)(l), and 28.733-.736.

IV. The 2011 Amendments Are Not Severable.

Severability focuses on whether unconstitutional provisions are so entangled with valid portions of a statute that they cannot be cleanly cut out. *Blank v. Dep't of Corrections*, 611 N.W.2d 530, 540 (Mich. 2000). Here, because the Sixth Circuit was focused on the cumulative impact of the amendments, one cannot simply excise a couple subsections and be done. Rather, this Court would need to engage in "quintessentially legislative work" to "rewrit[e] state law to confirm it to constitutional requirements." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006). The point is not that every word added in 2011 is unconstitutional[6]—there may be provisions that the legislature could retain without their cumulative impact being punitive. But it is up to the *legislature* to decide whether, in making SORA less punitive, it wants shorter non-public registration or longer public registration based on individual assessments. Similarly, reporting could be made less punitive by decreasing its frequency or by substituting on-line/mail

[6] For example, the 2006 amendments define a minor as a person younger than eighteen. M.C.L. § 28.733(c). Although that is perfectly constitutional, Defendants acknowledge that § 28.733(c) must be stricken because it makes no sense standing alone. The same analysis applies to the 2011 amendments.

reporting for in-person reporting. But those are legislative, not judicial, choices.[7]

The responsibilities of the judicial and legislative branches do not change just because the legislature fails to act. Plaintiffs do not dispute that enjoining SORA for pre-2011 registrants is strong medicine. But after more than three years of legislative inaction, strong medicine is needed. The Court can always delay the injunction's effective date for 60 days, which is plenty of time to pass a new law.

V. Certification Is Unnecessary, and Is Impermissible so Long as the Punishment of Plaintiffs Continues.

Not one of L.R. 83.40's requirements for certification is met here. First, Michigan's severability law is not "unsettled." L.R. 83.40(a)(1). Federal courts regularly engage in severability analyses of Michigan statutes.[8] Here, Michigan severability law compels a finding that the 2011 amendments are not severable. Defendants' arguments to the contrary do not make this a novel question. *See Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) ("mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit"); *Duryee v. U.S. Department of Treasury*, 6 F. Supp. 2d

[7] Defendants argue that the 2011 amendments reflect the legislature's desire to make Michigan's law SORNA-compliant. But the question is not what the legislature wanted in 2011, but what the legislature wants now that the 2011 amendments cannot be retroactively applied. A unified statute for all registrants would be very different than one where registration requirements depend on the offense date.

[8] *See, e.g.*, *Int'l Outdoor, Inc. v. City of Troy*, 361 F.Supp.3d 713, 718 (E.D. Mich. 2019); *Larkin v. State of Mich.*, 883 F. Supp. 172, 180 (E.D. Mich. 1994).

700, 704 (S.D. Ohio 1995) (denying certification because parties' analysis of how Ohio severability law should apply demonstrated that the question was not novel).

Defendants argue that the question must be novel, because the Michigan Supreme Court has granted leave on the allegedly "identical" issue in *People v. Betts*, 928 N.W.2d 699 (Mich. 2019). But the issues are not identical. The Sixth Circuit has already decided as a matter of federal law that retroactive application of the 2011 amendments is unconstitutional. Thus the severability issue here is whether those deeply embedded amendments can be severed. By contrast, the Michigan Supreme Court, which unlike this Court is not bound by the Sixth Circuit, will first address the threshold questions of whether SORA is punishment, and if it became punitive only upon the enactment of certain amendments. Were the Court to decide, for example, that SORA became punitive after the 1997 amendments, then the question would be whether *those* amendments are severable.

With respect to the second requirement for certification, Defendants claim that "[t]here is a high likelihood that the decision in *Betts* will reach all the provisions challenged by Plaintiffs," ECF 66, Pg.ID#957, and that therefore "the issue certified will likely control the outcome of the federal suit." L.R. 83.40(a)(2). That is simply not true. Certifying a question on severability of the 2011 amendments affects only the ex post facto subclasses. The *Betts*' leave grant does not address any of the claims of the primary class (which comprises both pre- and post-2011

registrants), namely whether SORA is unconstitutionally vague, imposes strict liability without due process, and violates Plaintiffs' First Amendment rights. 1st Am. Compl., ECF 34, Pg.ID# 384-86. *See Warren Prescriptions, Inc. v. Walgreen Co.*, 2018 WL 287951, at *3 (E.D. Mich., Jan. 4, 2018) (denying certification because multiple other claims would survive regardless).

Because L.R. 83.40(a)(2) must be read in tandem with subsection (b), which provides that "certification shall stay federal proceedings," Plaintiffs believe the best reading of the rule is that its requirements relate only to the claim on which the issue is certified. Any other reading would either prevent certification of dispositive questions that are *not* the sole question in the litigation, or stall federal litigation whenever there is certification on a question relevant to only one claim. Here, there is no plausible argument that certification on severability will control the outcome of the entire case. Therefore, certification is clearly impermissible unless Plaintiffs can proceed on their other claims if the case is certified.

Finally, L.R. 83.40(a)(3) permits certification only if it "will not cause undue delay or prejudice." Defendants have failed to comply for more than three years with a binding Sixth Circuit decision, and have failed to take any curative action to comply with this Court's declaratory ruling. ECF 55. Yet now they ask this Court to allow the unconstitutional punishment of tens of thousands of people to continue for however long certification takes. Another year could easily pass before (a) this

Court rules on certification, (b) the statement required by L.R. 83.40(c) is negotiated and approved, (c) the parties brief the issue and the Michigan Supreme Court decides whether to accept the certified question, Mich. Ct. R. 7.308(A)(2) if the Michigan Supreme Court does accept certification, it decides the question and issues a merits opinion. Without doubt certification severely prejudices Plaintiffs.

Accordingly, certification is not just unnecessary, it is also impermissible. Defendants raise the specter of inconsistent state and federal results, but severability law in Michigan is clear. Moreover, in the unlikely event that the Michigan Supreme Court rules differently (assuming it even reaches the question of the 2011 amendments' severability), this Court can always modify its injunction. Fed. R. Civ. Proc. 60(b). The Court should therefore grant a permanent injunction.

Because L.R. 83.40 permits certification only in the absence of undue delay or prejudice, the Court cannot certify absent interim relief. Such relief could be modeled on the final judgment in *Does I*. *See* Pls' Opening Brf., ECF 62, Pg.ID# 834-35. Alternately, the Court could grant a preliminary rather than a permanent injunction enjoining application of SORA to the ex post facto subclasses, while certifying severability. That would ensure that registrants are not prejudiced by ongoing punishment while the certification process plays out, and would mean there is zero risk of inconsistent state and federal results.

VI. Defendants Should Be Responsible for Notice.

The state has a statutory responsibility to inform registrants of their SORA obligations. M.C.L. § 28.725a. But even after entry of this Court's declaratory judgment, ECF 55, the state has continued to inform registrants falsely that they must comply with SORA as written. *See* ECF 62-4, 62-5. Pursuant to Fed. R. Civ. P. 23(c)(2)(A), the Court should (1) order Defendants to notify registrants that liability has been decided and that parts of SORA cannot be applied retroactively; (2) order the Michigan State Police to provide notice (because it is in the best position to do so given that it administers the registry and regularly provides information to registrants); and (3) order the parties to present a joint notice, or proposed separate notices, to the Court for approval. *See Hunt v. Imperial Merch. Servs., Inc.*, 560 F.3d 1137, 1143-44 (9th Cir. 2009); *Barry v. Lyon*, 13-cv-13185, Dkt. 114 (E.D. Mich., March 31, 2015) (state to provide notice to (b)(2) class) (Exh. B).

In addition, pursuant to Rule 65(d)(2), the Court should order Defendants to provide notice to prosecutors and law enforcement, so that they will be bound by any injunction. *Platinum Sports Ltd. v. Snyder*, 715 F.3d 615, 619 (6th Cir. 2013) (prosecutors are bound by injunctions against the governor); *Cady v. Arenac Co.*, 574 F.3d 334, 343 (6th Cir. 2009) (prosecutors act as agents of the state); *Pusey v. City of Youngstown*, 11 F.3d 652, 657-658 (6th Cir. 1993). Local law enforcement agencies have responsibility for enforcing SORA, M.C.L. § 28.722(n), and are "in active concert or participation" with Defendants. Fed. R. Civ. Proc. 65(d)(2)(C).

Respectfully submitted,

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Dated: November 12, 2019

Certificate of Service

On November 12, 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.

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