UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JOHN DOE #1-6,

Plaintiffs,

v

RICHARD SNYDER, Governor of the State of Michigan; KRISTE ETUE, Col, Director of the Michigan State Police,

Defendants.

No. 2:16-cv-13137

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DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON BEHALF OF THE PRIMARY CLASS

CONCISE STATEMENT OF ISSUES PRESENTED

1. Defendants do not present new arguments contesting the conclusions of this Court's 2015 decisions in *Does I*. Defendants recognize that these rulings require that the provisions of SORA challenged in Counts I and III be severed, but that the remaining constitutional portions of the statute may be applied.

2. As to ex post facto claim in Count IV, this Court should certify the severability question to the Michigan Supreme Court.

3. In the alternative to certification, this Court should determine that the 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 Sixth Circuit's holding in *Does #1-5*.

4. While the Defendants do not ask this Court to revisit its prior rulings here, Defendants do raise arguments to preserve the right to challenge the Court's decision on appeal. In short, Defendants argue that several of the Court's 2015 rulings were mistaken, including its decisions with respect to SORA's knowledge requirement, and the Student Safety zones.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Does #1-5 v. Snyder, 101 F. Supp. 3d 672 (E.D. Mich. 2015).

Does #1-5 v. Snyder, 101 F. Supp. 3d 722 (E.D. Mich. 2015).

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

USDC ED MI LR 83.40

Mich. Comp. Laws § 8.5

INTRODUCTION

Defendants acknowledge that in 2015, this Court ruled in Plaintiffs' favor on the substance of the exact constitutional challenges to SORA that are raised in the present motion. *See Does #1-5 v. Snyder*, 101 F. Supp. 3d 672 (E.D. Mich. 2015) and *Does #1-5 v. Snyder*, 101 F. Supp. 3d 722 (E.D. Mich. 2015). While Defendants contend that the 2015 rulings of this Court are not presently in effect, Defendants concede that nothing has occurred in the intervening time that would compel the Court to reach a different result from those rulings here.

But the question at the heart of this motion is not whether the prior decision is of legal effect, or whether the Court should reach the same or a different conclusion. Instead, the question at the heart of this case is one of remedy. Remedy not only as to the SORA provisions challenged in Counts I and III of the Second Amended Complaint, but also the remedy as to those challenged in Count IV – the provisions identified as an ex post facto violation by the Sixth Circuit in *Does #1-5*.

Stated another way – we already know that this Court has held that the exact SORA provisions challenged by Plaintiffs in Counts I and III were determined by this Court to be unconstitutional for vagueness

or for violation of the First Amendment. And we already know that the Sixth Circuit has held that certain of the same provisions of SORA (and a few other provisions) run afoul of the constitutional prohibition on ex post facto punishment. The question to be decided now is what the consequences to SORA should be considering what we already know. The question is what should be done with SORA going forward. The question is one of remedy.

On the question of remedy, Plaintiffs take the position that as to Count IV, this Court should completely enjoin the enforcement of SORA as to all pre-2011 registrants and as to Counts I and III, this Court should enjoin the enforcement of the provisions challenged in this motion. In other words, setting aside the issue of ex post facto relief in Count IV, Plaintiffs maintain that the provisions challenged in this motion are severable from the rest of the Act, and that absent those provisions, SORA would remain operating and enforceable. Defendants agree that the unconstitutional portions of SORA that this Court found void for vagueness and those that run afoul of the First Amendment may be severed from the rest of the Act, and the remaining constitutional portions of the statute may be applied.

But where the parties' positions on remedy diverge is on to the question of severance and the appropriate remedy regarding Count IV – ex post facto relief. And that question is also, ultimately, a question of severability. Because the Michigan Supreme Court is already considering the severability question posed by Count IV of Plaintiffs' Second Amended Complaint, certification will avoid any possibility of inconsistent results. There is the potential that this Court could reach one conclusion on the severance question regarding ex post facto relief, only to have the Michigan Supreme Court reach a different conclusion. Certification of the ex post facto remedy question will avoid the potential for inconsistent results all together.[1]

[1] While the Defendants do not ask this Court to revisit its prior rulings, Defendants do raise arguments to preserve the right to challenge the Court's decision on appeal, see Section IV below. In short, Defendants argue that several of the Court's 2015 rulings were mistaken, including its decisions with respect to SORA's knowledge requirement, and the Student Safety zones.

ARGUMENT

I. Defendants do not present any new arguments contesting the conclusions of this Court's 2015 decisions in *Does I*. Defendants agree that the provisions of SORA challenged in Counts I and III may be severed, and the remaining constitutional portions of the statute may be applied.

A. Defendants recognize that nothing has changed since this Court's 2015 decisions in *Does I* to warrant a new result.

In 2015, in two separate decisions, this Court held that the same SORA provisions presently challenged by Plaintiffs were unconstitutional. *See Does #1-5 v. Snyder*, 101 F. Supp. 3d 672 (E.D. Mich. 2015) and *Does #1-5 v. Snyder*, 101 F. Supp. 3d 722 (E.D. Mich. 2015). Specifically, in March of 2015, this Court held the following SORA provisions were unconstitutionally vague:

- SORA's geographic exclusion zones provisions, Mich. Comp. Laws §§ 28.733, 28.734, 28.735;
- the requirement "to report in person and notify the registering authority ... immediately after ... [t]he individual ... begins to regularly operate any vehicle," Mich. Comp. Laws § 28.725(1)(g);
- the requirement to report "[a]ll telephone numbers ... routinely used by the individual," Mich. Comp. Laws § 28.727(1)(h);
- the requirement to report "[a]ll electronic mail addresses and instant message addresses ... routinely used by the individual," Mich. Comp. Laws § 28.727(1)(i);

- the requirement to report "[t]he license plate number, registration number, and description of any motor vehicle, aircraft, or vessel ... regularly operated by the individual," Mich. Comp. Laws § 28.727(1)(j).

Does #1-5, 101 F. Supp. 3d at 680–91.

This Court also held that the SORA requirement "to report in person and notify the registering authority . . . immediately after . . . [t]he individual establishes any electronic mail or instant message address, or any other designations used in internet communications or postings," Mich. Comp. Laws § 28.725(1)(f), was not narrowly tailored in violation of the First Amendment. *Id.* at 699–04. This Court further held in March of 2015 that only knowing violations of SORA may be prosecuted. *Id.* at 693–94. In a subsequent opinion and order of September 2015, this Court held that the retroactive incorporation of the lifetime registration requirement's incorporation of the requirement to report "[a]ll electronic mail addresses and instant message addresses assigned to the individual . . . and all login names or other identifiers used by the individual when using any electronic mail address or instant messaging system," Mich. Comp. Laws § 28.727(1)(i), was not narrowly tailored in violation of the First Amendment. *Does #1-5 v. Snyder*, 101 F. Supp. 3d 722, 725–29 (E.D. Mich. 2015).

Following this Court's 2015 decisions, the matter was heard by the Sixth Circuit. *Does #1-5 v. Snyder*, 834 F.3d 696 (CA 6, 2016), cert. denied, 138 S. Ct. 55 (2017). The Sixth Circuit's decision in *Does #1-5* specifically stated that the other issues raised by the Plaintiffs (including all of this Court's rulings described above), "will have to wait for another day because none of the contested provisions may now be applied to the plaintiffs in this lawsuit," and the matter was remanded to the this Court for "entry of judgment consistent with [the] opinion." 834 F.3d at 706. The Sixth Circuit's decision rendered this Court's 2015 decisions of no legal effect, because it ruled that this Court's decisions no longer applied to any of the named Plaintiffs in that case.

Even so, in the present case, Defendants do not present any new arguments to oppose the substance of the Court's 2015 rulings, recognizing that there have been no intervening U.S. Supreme Court decisions to contest the Plaintiffs' arguments that the SORA provisions they challenged in Counts I and III are unconstitutionally vague or violate the First Amendment. Likewise, regarding Count II, Defendants do not present any new arguments opposing this Court's conclusion that only knowing violations of SORA may be prosecuted.

As stated in a footnote in the introduction, however, the Defendants do reserve their right to challenge the legal basis for these rulings on appeal from this Court's decision. While the Defendants do not ask this Court here to revisit its prior rulings, Defendants do raise arguments to preserve the right to challenge the Court's decision on appeal in Section IV below. In short, Defendants argue that several of the Court's 2015 rulings were mistaken, including its decisions with respect to SORA's knowledge requirement, and the Student Safety zones.

B. Defendants agree with Plaintiffs' position that unconstitutional portions of SORA may be severed, and the remaining constitutional portions of the statute may be applied.

Plaintiffs request that this Court enjoin the enforcement of SORA entirely as to all pre-2011 registrants and enjoin the enforcement of the provisions challenged in this motion for all registrants. Stated another way, Plaintiffs agree that if the provisions challenged in Counts I and III are severed from the rest of the Act, SORA will remain operative and enforceable as to post-2011 registrants. Defendants agree with regard to the post-2011 registrants.

As Defendants have briefed previously, 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 considering 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 remaining question, then, is regarding Count IV – whether 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. But as already briefed in response to Plaintiff's previous motion regarding relief on the ex post facto claim in Count IV, this Court should certify that question to the Michigan Supreme Court.

II. As to the question of injunctive relief regarding Count IV, this Court should certify the severability question to the Michigan Supreme Court.

As explained in Section I of Defendants' Response to Plaintiffs' Motion for Declaratory and Injunctive Relief (R. 66, Page ID # 952–958), in *People v. Betts*, Michigan Supreme Court No. 148981, the Michigan Supreme Court will consider five questions, the latter ones being the same as those raised by Plaintiffs in Count IV regarding remedy on their ex post facto claim. Given the already pending Michigan Supreme Court matter, and the identity of issues between that case and this one, certification of the severability question on ex post facto relief is both necessary and appropriate. And there is nothing raised in Plaintiffs' present motion regarding Counts I, II, and III that changes this conclusion.

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

The primary question in Count IV remains 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. The fact that Plaintiffs have challenged some of the 2011 provisions in Counts I and III under alternative theories of unconstitutional

vagueness and First Amendment violation does not change the analysis. In other words, Plaintiffs' vagueness and First Amendment challenges in Counts I and III do not alter the fact that the consequences of severance or nonseverance on the ex post facto claim in Count IV present an unsettled question of state law.

Indeed, the exact issue of ex post facto severability presented by Count IV is already pending before the Michigan Supreme Court in *Betts*. And there is a risk of inconsistent results if this Court does not certify the question. 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 of severance as it relates to the ex post facto claim in Count IV.

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

Defendants' position that there are no new argument to advance in response to Plaintiffs' legal position on the Plaintiffs' vagueness, First Amendment, and strict liability challenges in Counts I, II and III

cements the fact that the Michigan Supreme Court decision in *Betts* will control the outcome of Count IV, and by extension, the total outcome of this case. Defendants do not present new arguments that the provisions challenged in Counts I and III are unconstitutional and agree that the challenged provisions may be severed from the rest of the Act. Defendants also present no new arguments the claim raised in Count II – that only knowing violations of SORA may be prosecuted.

As a result, the only remaining question now will be on Count IV – the question of remedy on the ex post facto claim. That question is certain to be resolved by the Michigan Supreme Court in *Betts*. 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 the Court's decision will be outcome determinative in this case.

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

Again, Defendants do not present new arguments that the provisions challenged in Counts I and III are unconstitutional and agree that the challenged provisions may be enjoined and severed from the rest of the Act. As to Count IV, the Michigan Supreme Court has

already granted the application for leave and the ex post facto severability question is pending before the Court on a full merits grant. The Court will soon schedule a hearing on the case, and by court rule that decision will 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.

Under these circumstances, there is no imaginable undue delay or prejudice to the Plaintiffs. 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 on the ex post facto question under ED MI LR 83.40.[2]

[2] The other option would be to enter the injunctive relief as to the provisions challenged in the current motion and then 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. No one disputes that the Michigan Supreme Court is the ultimate arbiter of Michigan law. *See Montana v. Wyoming,* 563 U.S. 368, 377 n.5 (2011) ("The highest court of each State, of course, remains 'the final arbiter of what is state law.'")

III. In the alternative to certification, this Court should determine that the 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 Sixth Circuit's holding in *Does #1-5*.

There is no reason for this Court to reach the merits of the severability question regarding the ex post facto claim in Count IV. 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. If this Court declines to certify the severability question to the Michigan Supreme Court regarding the ex post facto claim, this Court should hold that unconstitutional portions of SORA's 2006 and 2011 amendments may be severed and the remaining constitutional portions of the statute may be applied retroactively.

Defendants have already briefed this position at length and will not restate those arguments here. Pursuant to Fed. R. Civ. P. 10(c), and for purposes of economy, Defendants incorporate by reference the arguments made in Section II of their response to Response to Plaintiffs' Motion for Declaratory and Injunctive Relief (R. 66, Page ID #

959–975). In short, 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 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.

IV. While the Defendants do not ask this Court to revisit its prior rulings, Defendants do raise arguments to preserve the right to challenge the Court's decision on appeal. In short, Defendants argue that several of the Court's 2015 rulings were mistaken, including its decisions with respect to SORA's knowledge requirement, and the Student Safety zones.

A. Michigan's SORA imposes strict liability for a violation of its provision, a concept that does not offend constitutional strictures and is within a state legislature's authority to apply.

To comply with SORA, the Department of State Police is required to mail a notice to each offender who is not in a correctional facility explaining their duties under SORA. Mich. Comp. Laws § 28.725a(1). And the State's Department of Corrections is required to provide registered offenders with a written notice explaining their duties and the procedure for registration, notification, verification, and payment of

the registration fee upon their release from a state correctional facility. Mich. Comp. Laws § 28.725a(2). Upon their release from a correctional facility, offenders must sign the notice, and a copy of the signed notice will be maintained in the individual's file by the State Police or Corrections. Mich. Comp. Laws § 28.725a(2).

Moreover, in addition to statutory notification of registration requirements and a signed acknowledgment of those duties by the offenders, there is no evidence that offenders are being arrested or prosecuted for first-time offenses or simple lapses—only supposition and hypotheticals by Plaintiffs. As a result, not only are offenders actually provided with notice of their requirements, but they have not been held to unreasonably harsh enforcement of those requirements.

Requiring a knowledge requirement for a SORA violation places a new burden on law enforcement and prosecutors—to establish probable cause as to an offender's knowledge and effectively his or her subjective intention—before they can arrest or prosecute. Instead of strict liability for a violation of the registration obligations, prosecutors must prove beyond a reasonable doubt that an offender knew a particular action would violate his or her duties under the SORA. Every offender can

now raise the "I didn't know the law" defense—regardless of the egregiousness of the particular violation.

Such a requirement would change Michigan law, which distinguishes between a "willful" violation in subsection (1) of the penalty provision and a "failure to comply" in subsection (2), making the former a felony and the latter a misdemeanor:

> (1) Except as provided in subsections (2), (3), and (4), an individual required to be registered under this act who willfully violates this act is guilty of a felony punishable as follows . . .
>
> (2) An individual who fails to comply with [MCL 28.725a] other than payment of the fee required under [MCL 28.725a(6)], is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

Mich. Comp. Laws § 28.729.[3]

[3] Noting that the Legislature excluded the language of "willful" from subsection (2), the Michigan Court of Appeals determined that the misdemeanor punishment was a strict liability offense. *People v. McFall,* 873 N.W.2d 112 (Mich. Ct. App. 2015) ("the plain language of the statute indicates that Mich. Comp. Laws 28.729(2) is a strict liability offense that does not require a 'willful' mental state—or any other mental state—for violation (as opposed to other provisions of the statute not exempted by Mich. Comp. Laws 28.729(1), which specifically mention the word 'willfully' multiple times").

The Supreme Court of the United States has never held that the Due Process Clause forbids state legislatures from creating strict liability criminal offenses. *Morissette v. United States*, 342 U.S. 246, 274 (1952), discussed the relationship between guilt and criminal intention, but did not set forth any constitutional principle. Indeed, the Supreme Court expressly noted that there was no rule against creating criminal offenses without requiring criminal intent. *Id.* at 260 (recognizing that there are two classes of crimes: "crimes that require a mental element and crimes that do not"). *Morissette* was later cited by the Supreme Court in *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 71-72 (1994), as standing for the proposition that when interpreting federal statutes, courts should "presume a *scienter* requirement in the absence of express contrary intent." (emphasis added). Neither *Morissette* nor *X-Citement Video*, however, applies that rule to the states.

Moreover, in *Lambert v. California*, 355 U.S. 225 (1957), the Court was careful to avoid espousing a blanket constitutional rule requiring *mens rea* for every offense. *Id.* at 228. And slightly more than a decade later, the Supreme Court observed in *Powell v. Texas,* 392 U.S. 514, 535

(1968) that the Court had "never articulated a general constitutional doctrine of *mens rea*."

Significantly, the Supreme Court in *Powell* discussed *Lambert* in a footnote, describing that holding as "a person could not be punished for a 'crime' of omission, if that person did not know, *and the State had taken no reasonable steps to inform him*, of his duty to act and of the criminal penalty for failure to do so." *Powell*, 392 U.S. at 535, n. 27. (emphasis added). But in SORA, the State of Michigan has taken reasonable steps to inform registrants of their duties.

Thus, despite the initial lure of comparing the registration-based offenses in *Lambert* to SORA, there is a crucial difference. The offenders in *Lambert* were not given notice, while offenders under SORA are given written notice by the state of their obligations and imposition of penalties should they fail to meet their obligations. Michigan's Legislature may impose strict liability for violation of the SORA's registration requirements which is constitutionally firm where,

as here the statute also imposes specific notification requirements—requirements that also distinguish it from *Lambert*.[4]

B. The measurement of Student Safety Zones in Michigan's SORA is not unconstitutionally vague.

Courts apply a two-part test to determine whether a law is unconstitutionally vague: first, the law must give a person of "ordinary intelligence a reasonable opportunity to know what is prohibited, so

[4] The State of Michigan does not stand alone in imposing strict liability for violation of its sex offender registration laws; other states similarly impose strict liability for such violations. *See, e.g., State v. T.R.D.,* 942 A.2d 1000, 1020 (Conn. 2008) ("Given the legislative purpose of the sex offender registry as a whole, we conclude that the crime of failing to comply with the sex offender registry requirements is a strict liability offense"); *Adkins v. State,* 264 S.W.3d 523, 527 (Ark. 2007) ("it is obvious that the registration requirements are mandatory, and that failure to comply with those duties is a strict liability offense"); *People v. Molnar,* 857 N.E.2d 209, 224 (Ill. 2006) ("we find the legislature intended to create an absolute liability offense for violating the Registration Act"); *People v. Patterson,* 185 Misc.2d 519, 530 (NY Crim. Ct. 2000) ("its terms instead applies to a Sex Offender who merely 'fails' to register—without any express requirement of knowledge or intent—it is clear that the Legislature intended to create and did create a strict liability crime"); *State v. Reynolds*, 2015 ME 55, P13 (2015)) ("Failure to comply with SORNA of 1999 is a strict liability crime . . . meaning the state is not required to prove a culpable state of mind"); *see also* Kansas Criminal Code, K.S.A. 21-5203). Notably, the Illinois statute in Molnar made a registration violation a felony, which is more severe than the misdemeanor for failing to register under Michigan's SORA. Mich. Comp. Laws § 28.729.

that [they] may act accordingly[;]" and second, the standards of enforcement must be precise enough to avoid "involving so many factors of varying effect that neither the person to decide in advance nor the jury after the fact can safely and certainly judge the result." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (internal citation omitted); *Cline v. Frink Dairy Co.,* 274 U.S. 445, 465 (1927), *Columbia Natural Resources v. Tatum,* 58 F.3d 1101, 1105 (6th Cir. 1995), quoting *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465 (1927). In *United States v. Lanier*, the Supreme Court also observed that, "the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered[.]" *United States v. Lanier*, 520 U.S. 259, 266 (1997). Also, any words not expressly defined in the statute will be interpreted according to their ordinary, contemporary, and common meaning. *Deutsche Bank National Trust Co. v. Tucker*, 621 F.3d 460, 463 (6th Cir. 2010).

Here, Mich. Comp. Laws § 28.734(1) and Mich. Comp. Laws § 28.735(1) prohibit registered sex offenders from working, loitering, or residing in a Student Safety Zone. Mich. Comp. Laws § 28.733(f) defines

a Student Safety Zone as "the area that lies 1,000 feet or less from school property." School property, in turn, is defined as:

> [A] building, facility, structure, or real property owned, leased, or otherwise controlled by a school, other than a building, facility, structure, or real property that is no longer in use on a permanent or continuous basis, to which either of the following applies:
>
> (i) It is used to impart educational instruction.
>
> (ii) It is for use by students not more than 19 years of age for sports or other recreational activities.

Mich. Comp. Laws § 28.733(e). Finally, a "school" for purposes of the above definition means only "a public, private, denominational, or parochial school offering developmental kindergarten, kindergarten, or any grade from 1 through 12[,]" and does not include home schools. Mich. Comp. Laws § 28.733(d).

The vagueness challenge raised by Plaintiffs regards how the Zones are measured. To date, there are no Michigan appellate cases testing the measurement of the student safety zones. But the plain language of the statute states nothing about "travel distance" but merely refers to the "area that lies 1000 feet or less from school property." Mich. Comp. Laws § 28.733(f). This standard

unambiguously provides for a straight line—i.e., property line to property line—measurement.

Plaintiffs' also argue that the description of the Zones is vague because registrants are not provided a map or a list of school properties to determine each specific Zone. But that conclusion is flawed and inconsistent with the standard for vagueness.

To begin with, it bears notice that law enforcement itself does not have a map or list of property demanded, and so lacks the capacity to determine violations on that basis. Simply put, offenders have not been determined to be in violation based upon a strict measurement using a 1,000-foot tape from one intangible property line to another. Instead, in order to determine whether an offender is within a Zone, offenders and law enforcement can generally rely upon commonly available tools such as Google Maps or similar website.

A person of ordinary intelligence can find the addresses of schools in their area using—if nothing else—a telephone directory. Then, using a road map, they may measure a radius of 1,000 feet around that address, thus obtaining a practical and effective determination of the area they must avoid. Even more easily, they may use Google Maps or

similar service, enter the address of the school and then measure the distance address- to any residence or employer address. That distance would be no different than the information available to law enforcement.

Inch-by-inch precision is unnecessary in order to comply with the Student Safety Zone requirements of SORA. This is especially considering the standards for lenity required in interpreting the statute. Ambiguity in a criminal statute is resolved to apply the statute only to conduct clearly covered. *Lanier*, 520 U.S. at 266. The conduct "clearly covered" is to avoid the Zones as defined by the tools and understanding available to law enforcement, and the general public alike.

C. The general term "loitering" is easily understood by a person of ordinary intelligence.

As discussed above, the standards for vagueness require that the law must give a person of "ordinary intelligence a reasonable opportunity to know what is prohibited, so that [they] may act accordingly" and the standards of enforcement must be, precise enough to avoid "involving so many factors of varying effect that neither the

person to decide in advance nor the jury after the fact can safely and certainly judge the result." *Grayned*, 408 U.S. at 108; *Cline* 274 U.S. at 465. *Columbia Natural Resources,* 58 F.3d at 1105. And any words not expressly defined in the statute will be interpreted according to their ordinary, contemporary, and common meaning. *Tucker*, 621 F.3d at 463.

Mich. Comp. Laws § 28.734 prohibits a registered sex offender from loitering within a student safety zone. "Loiter" is defined in the statute as, "to remain for a period of time and under circumstances that a reasonable person would determine is for the primary purpose of observing or contacting minors." Mich. Comp. Laws § 28.733(b). In *City of Chicago v. Morales,* 527 U.S. 41, 57 (1999), the Supreme Court held that a statute defining "loitering" as "to remain in any one place with no apparent purpose" was unconstitutionally vague because a person could not know if they had "an apparent purpose."

But *Morales* is not as apt a precedent as it might initially seem. While *Morales* addressed a loitering statute, the definitions involved are distinguishable. Where *Morales* found constitutional infirmity in its required "apparent purpose," Michigan's SORA offers greater specificity

by describing the "primary purpose of observing or contacting minors." SORA provides "fair notice" of what is prohibited—activities in which their primary purpose is to contact or observe minors which is not the primary purpose, for example, of a parent-teacher conference. *Morales*, 527 U.S. at 57. The statute in *Morales* called upon subjects to speculate as to what others might perceive as their having an "apparent purpose." SORA prohibits a "primary purpose" involving specified prohibited conduct: contacting or observing minors. So there is no need to speculate—if a registrant's activities within a Student Safety Zone would primarily to contact or watch minors, then that conduct is prohibited.

A person of ordinary intelligence can determine whether the primary purpose of any given conduct is to contact or observe minors. Registrants can anticipate whether their conduct will result in a violation, and juries are able to determine after-the-fact whether a registrant was in violation. SORA's prohibition against loitering in a Student Safety Zone is not unconstitutionally vague.

CONCLUSION AND RELIEF REQUESTED

Regarding Counts I and III of Plaintiffs' Second Amended Complaint, based on this Court's prior rulings that resolve this motion and apply here, Defendants acknowledge that these rulings require the following provisions to be severed from the rest of the Act and the enforcement of the provisions enjoined as to all SORA registrants:

- SORA's geographic exclusion zones provisions, Mich. Comp. Laws §§ 28.733, 28.734, 28.735;
- the requirement "to report in person and notify the registering authority ... immediately after ... [t]he individual establishes any electronic mail or instant message address, or any other designations used in internet communications or postings," Mich. Comp. Laws § 28.725(1)(f)
- the requirement "to report in person and notify the registering authority ... immediately after ... [t]he individual ... begins to regularly operate any vehicle," Mich. Comp. Laws § 28.725(1)(g);
- the requirement to report "[a]ll telephone numbers ... routinely used by the individual," Mich. Comp. Laws § 28.727(1)(h);
- the requirement to report "[a]ll electronic mail addresses and instant message addresses ... routinely used by the individual," Mich. Comp. Laws § 28.727(1)(i);
- the requirement to report "[t]he license plate number, registration number, and description of any motor vehicle, aircraft, or vessel ... regularly operated by the individual," Mich. Comp. Laws § 28.727(1)(j).

Regarding Count II, Defendants do not present new arguments that this Court's conclusion that only knowing violations of SORA may be prosecuted.

Regarding Count IV of Plaintiff's Second Amended Complaint, 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.

Respectfully submitted,

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Dated: January 13, 2020

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on January 13, 2020, 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.

s/Joseph T. Froehlich
Joseph T. Froehlich
Assistant Attorney General
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