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

Statement on Concurrence

Pursuant to Local Rule 7.1, on December 12, 2019, plaintiffs informed defendants of this motion, which was thereafter also discussed at the status conference held on December 17, 2019. On December 22, 2019, plaintiffs formally sought concurrence from defendants in the relief sought. No response was received by the time this motion was filed.

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

1. Plaintiffs' Second Amended Verified Class Action Complaint, R.34, sets out four claims: I. Vagueness (Due Process Clause); II. Strict Liability (Due Process Clause); III. First Amendment; and IV. Ex Post Facto Clause. Each of these claims seeks class-wide relief on an issue where either this Court or the Sixth Circuit Court of Appeals found Michigan's Sex Offenders Registration Act (SORA), M.C.L. §

28.721, *et seq.*, to be unconstitutional. *See Does #1-5 v. Snyder* (*Does I*), 101 F. Supp. 3d 672 and 101 F. Supp. 3d 722 (2015) and 834 F.3d 696 (6th Cir. 2016).

2. In September 2018, defendants stipulated to class certification, and this Court certified a primary class, defined as all people who are or will be subject to registration under SORA, and two ex post facto subclasses composed of registrants whose offenses predate the 2006 and 2011 SORA amendments. *See* Stipulated Class Certification Order, R.46. Counts I, II, and III are brought by the primary class. Only the ex post facto subclasses are bringing Count IV.

3. In July 2018, the ex post facto subclasses moved for partial summary judgment on their ex post facto claim, seeking declaratory and injunctive relief. Motion, R.40. Briefing was initially held in abeyance to allow for legislative action. In May 2019, defendants stipulated to entry of an order granting declaratory relief as to that claim. *See* Decl. Judgment and Order for 90-Day Deferral, R.55. The parties deferred injunctive relief for 90 days, however, to enable the legislature to bring the statute into compliance with the constitutional requirements set out in *Does I*. *Id*. The legislature failed to do so. In September 2019, more than a year after the ex post facto classes first sought relief on the ex post facto claim, they again moved for injunctive relief, as well as further declaratory relief. *See* Motion, R.62. The parties have now briefed the issues of severability, certification, and the scope of injunctive relief as to the ex post facto claim. *See* Motion, R.62; Response, R.66, and Reply, R.69.

4. To date, no relief has been granted to the primary class on Counts I, II, and III. Plaintiffs previously believed, based on stakeholder conversations, that the legislature, when passing a new statute to bring SORA into compliance with the Sixth Circuit's decision in *Does I*, 834 F.3d 696, would address the constitutional defects in the statute identified by this Court in *Does I*, 101 F. Supp. 3d 672 and 101 F. Supp. 3d 722, at the same time. In other words, comprehensive legislative reform would address not just the claims of the ex post facto subclasses, but also those of the primary class.

5. In light of the fact that defendants have withdrawn from, or at least have stalled, what had been productive legislative negotiations, plaintiffs feel they now have no choice but to seek partial summary judgment on the claims of the primary class. Indeed, state prosecutors continue to bring or threaten prosecutions under SORA provisions that this Court held unconstitutional in *Does I. See, e.g. Roe v. Snyder*, 240 F. Supp. 3d 697 (E.D. Mich. 2017); *Does v. Curran, et al.*, File No. 3:18-cv-11935 (E.D. Mich.); Farkas Decl., R.62-6; Van Gelderen Decl., R.62-7.

6. With respect to the vagueness claim (Count I), this Court held in *Does I* that SORA's geographic exclusion zones, SORA's ban on loitering within exclusion zones, and certain SORA reporting requirements, are unconstitutionally vague. *Does I*, 101 F. Supp. 3d at 684-90. With respect to the strict liability claim (Count II), this Court held that violations of SORA cannot be enforced as matter of strict liability,

but instead the law must be read to punish only knowing or willful violations of SORA, to avoid making it unconstitutional under the Due Process Clause. *Id.* at 693-94. Finally, with respect to the First Amendment claim (Count III), this Court held that SORA's immediate, in-person reporting requirements for internet identifiers are not narrowly tailored and therefore fail under the First Amendment; that vagueness in the term "routinely used" makes the internet and telephone reporting requirements overbroad; and that extending SORA's internet reporting requirements from 25 years to life violates the First Amendment as applied retroactively because the provision is not narrowly tailored. *Does I*, 101 F. Supp. 3d 672, 686-90, 704, 713 and 101 F. Supp. 3d 722, at 728-30.

7. In *Does I*, this Court issued declaratory and injunctive relief consistent with the rulings described above. *See Does I*, 101 F. Supp. 3d at 713-714, and 101 F. Supp. 3d. at 730.

8. The legislature has failed to pass a new statute that cures the constitutional defects, despite the passage of more than four-and-a-half years since the first of this Court's two decisions was issued, and more than four years since the second opinion was issued.

9. Throughout that time plaintiffs and the primary class have continued to be subject to the provisions of SORA that this Court held to be unconstitutional under the Due Process Clause and the First Amendment.

10. Notice to the primary class members, prosecutors and law enforcement is necessary to prevent the ongoing constitutional violations and to correct misinformation provided by defendants to class members about their obligations under SORA.

WHEREFORE, pursuant to Fed. R. Civ. P. 23, 56, and 65, and 28 U.S.C. §§ 2201 and 2202, plaintiffs John Does #1-6, on behalf of themselves and the primary class, now ask this Court to:

A. Declare, consistent with *Does I*, 101 F. Supp. 3d 672, that the following provisions of SORA are unconstitutionally vague, and permanently enjoin defendants, their officers, agents, servants, employees and attorneys, and all other persons who are in active concert or participation with them, from enforcing them against plaintiffs and members of the primary class:

1. the prohibition on working within a student safety zone, M.C.L. §§ 28.733-734;

2. the prohibition on loitering within a student safety zone, M.C.L. §§ 28.733-734;

3. the prohibition on residing within a student safety zone, M.C.L. § 28.733 and § 28.735;

4. the requirement to report "[a]ll telephone numbers ... routinely used by the individual, M.C.L. § 28.727(1)(h);

5. the requirement to report "[a]ll electronic mail addresses and instant message addresses ... routinely used by the individual, M.C.L. § 28.727(1)(l); and

6. 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," M.C.L. § 28.727(1)(j).

B. Declare, consistent with *Does I*, 101 F. Supp. 3d 672, that under the Due Process Clause of the U.S. Constitution, SORA must be interpreted as incorporating a knowledge requirement, and permanently enjoin defendants their officers, agents, servants, employees and attorneys, and all other persons who are in active concert or participation with them, from holding plaintiffs or members of the primary class strictly liable for SORA violations.

C. Declare, consistent with *Does I,* 101 F. Supp. 3d 672, and 101 F. Supp. 3d 722, that the following provisions of SORA violate the First Amendment of the U.S. Constitution, and permanently enjoin defendants, their officers, agents, servants, employees and attorneys, and all other persons who are in active concert or participation with them, from enforcing these provisions against plaintiffs and members of the primary class:

1. 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," M.C.L. § 28.725(1)(f);

2. the requirement to report "[a]ll telephone numbers ... routinely used by the individual, M.C.L. § 28.727(1)(h);

3. the requirement to report "[a]ll electronic mail addresses and instant message addresses ... routinely used by the individual, M.C.L. § 28.727(1)(l);

4. 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," M.C.L. § 28.727(1)(i).

D. In the alternative, grant the declaratory relief and the corresponding injunctive relief requested in paragraphs A-C above, but delay the effective date of the injunctive relief for 60 days, to give the legislature one last chance to pass a new SORA;

E. Pursuant to Fed. R. Civ. Proc. 23(c)(2) and 23(d)(1), order the parties to draft a mutually agreeable notice or notices regarding any relief granted here, with any disputes about the content to be resolved by the Court;

F. Order prompt notice of any relief granted here to all plaintiffs and members of the primary class, and to all prosecutors and law enforcement personnel in this state who have responsibility for enforcing SORA; require the Michigan State Police to handle providing notice; and set prompt deadlines for the parties to present for the Court's approval a proposed plan and schedule for distribution of the notice or notices to class members, prosecutors, and law enforcement.

G. Order the Michigan State Police to correct the Explanation of Duties form, which is provided to registrants whenever they report, so that it accurately reflects registrants' obligations under SORA.

H. Grant such further declaratory and injunctive relief as appropriate.

Respectfully submitted,

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Dated: December 23, 2019

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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON BEHALF OF THE PRIMARY CLASS

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INTRODUCTION

In 2015, this Court found numerous aspects of Michigan's Sex Offenders Registration Act (SORA), M.C.L. § 28.721 *et seq.*, to violate due process and the First Amendment. *Does #1-5 v. Snyder* (*Does I*), 101 F. Supp. 3d 672 (E.D. Mich. 2015); 101 F. Supp. 3d 722 (E.D. Mich. 2015). More than four years later, defendants continue to apply those same unconstitutional provisions to tens of thousands of registrants as if this Court had never ruled.

Because Michigan's legislature has failed to bring SORA into compliance with the Constitution, plaintiffs ask this Court to apply its *Does I* decisions class-wide. Specifically, the Court should declare unconstitutional the same provisions it found to be unconstitutional in *Does I*, permanently enjoin their enforcement, and require notice to class members, prosecutors, and law enforcement.

PROCEEDINGS TO DATE

This case was filed in August 2016, to ensure that the *Does I* decisions were applied to all Michigan registrants. The second amended complaint, filed in June 2018, and which is verified, R.34, seeks class-wide relief on four issues on which the *Does I* plaintiffs had prevailed, either before this Court or the Sixth Circuit: (1) vagueness; (2) strict liability; (3) First Amendment; (4) Ex Post Facto Clause. *Id.*

In June 2018, plaintiffs moved for class certification. R.35. In September 2018, the Court certified a primary class of all people who are or will be subject to

registration under SORA, and two ex post facto subclasses (one for pre-2006 registrants and one for pre-2011 registrants). Stip. Class Cert. Order, R.46.

In the meantime, plaintiffs moved for partial summary judgment as to the ex post facto subclasses, seeking declaratory and injunctive relief. Motion, R.40. Plaintiffs then invited defendants to work together to develop legislation that the parties could jointly send to the legislature—legislation which the parties believed would address not only the ex post facto issues, but also the other constitutional infirmities in SORA identified by this Court. The Court postponed briefing repeatedly to permit legislative negotiations. Sched. Orders, R.41, 44, 45, 47, 51, 54.

In May 2019, the Court entered a stipulated order declaring the 2006 and 2011 amendments to be unconstitutional as to the ex post facto subclasses. The Court deferred rulings on injunctive relief "to avoid interfering with the Michigan legislature's efforts to address the *Does I* decisions." Decl. Judgment and Order for 90-Day Deferral. R.55, Pg.ID#783. But the state again failed to take advantage of the opportunity provided by this Court to address SORA's constitutional problems through legislation, and in August 2019 this Court set a new briefing schedule. Stipulated Order, R.60, Pg.ID#795. The parties have now briefed the issues that relate to the ex post facto subclasses, and the Court has set argument on that motion for February 5, 2020. Briefs and Scheduling Notice, R.62, 66, 69, and 71.

What remains to be decided are the three claims (vagueness, strict liability, and First Amendment) that relate to the primary class (comprising all registrants).

LEGAL STANDARD

Summary judgment is proper if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A statute's constitutionality is a question of law. *See United States v. Suarez*, 263 F.3d 468, 476 (6th Cir. 2001).

Summary judgment is proper because plaintiffs' complaint is verified and there are no facts in dispute. Defendants continue to enforce SORA against plaintiffs and primary class members even though the challenged provisions violate the Due Process Clause and the First Amendment under this Court's holdings in *Does I*. Accordingly, plaintiffs ask the Court to declare those provisions to be unconstitutional and enjoin their enforcement against plaintiffs and the primary class.

ARGUMENT

This Court has already found all of the challenged provisions to be unconstitutional in *Does I*. Those provisions are unconstitutional here for the same reasons. This Court should extend its *Does I* rulings to apply class-wide. The parties have stipulated that "the claims … of the representative parties are typical of the claims … of the classes and subclasses." Class Cert Order, R.46, Pg.ID#694. And defendants have argued in the numerous actions brought by individual registrants that any injunctive relief must come through this class action. *See, e.g., Does #1-2 v.*

Curran, 1:18-cv-11935 (E.D. Mich.), R.76, Pg.ID#883 (arguing that registrants' vagueness and strict liability challenges should be decided in the class action).

The relevant facts are set out in plaintiffs' Verified Second Amended Complaint and accompanying exhibits, R.34 to 34-9; the exhibits to plaintiffs' prior motion on the ex post facto issues, R.62-1 to 62-8, 65, and the stipulated Joint Statement of Facts (JSOF) in *Does I*. (Exhibit A.[1]) As this Court is fully familiar with the legal issues from *Does I*, plaintiffs will not reiterate all of those arguments, but instead point the Court to its own analysis in its two prior opinions. That analysis applies with equal force to the plaintiffs in this case.

I. SORA Violates Plaintiffs' Due Process and First Amendment Rights.

A. SORA Is Unconstitutionally Vague.

In *Does I*, this Court began by setting out the primary goals of the vagueness doctrine: "'to ensure fair notice to the citizenry' and … 'to provide standards for enforcement by the police, judges, and juries.' *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1104 (6th Cir. 1995)." *Does I*, 101 F. Supp. 3d at 681. The Court explained that there is a two-part test to determine vagueness:

[1] The JSOF summarizes a voluminous record. Because those facts were stipulated to by defendants—who, as here, were the governor and state police director—plaintiffs are not resubmitting the entire underlying record, but rather incorporate it by reference. Plaintiffs do resubmit the expert reports and declarations regarding the results of surveys of law enforcement agencies and prosecutors' offices, so that they are easily available to the Court in their entirety. *See* Exh. B-J. Plaintiffs are prepared to refile the entire *Does I* record should the Court find it necessary.

> First, the court must determine whether the law gives a person "of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." . . . Second, the court must evaluate whether the statute provides sufficiently "explicit standards for those who apply them" or whether, due to a statute's vagueness, it impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis.

Id. (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

The Court next discussed three factors that affect the degree of vagueness that the Constitution tolerates.[2] First, "'[t]he [Supreme] Court has expressed greater tolerance of enactments with civil rather than criminal penalties.'" *Id.* (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982)). *See id.* ("consequences of imprecision" more severe for criminal laws); *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 252 (6th Cir. 1994) ("When criminal penalties are at stake…a relatively strict test is warranted."). Second, laws based on strict liability must meet a higher threshold for clarity. *Does I*, 101 F. Supp. 3d at 681. *See also Peoples Rights Org. v. City of Columbus*, 152 F.3d 522, 534 (6th Cir. 1998) ("in the absence of a scienter requirement…a statute is little more than a trap for those who act in good faith"). Finally, "'perhaps the most important factor affecting the clarity that the Constitution demands of a law is

[2] Plaintiffs note that an additional factor pointing towards exacting review of their claim is that a statute which is unclear in multiple respects must be reviewed more stringently than one with a single defect: "Each of the uncertainties in the [statute] may be tolerable in isolation, but their sum makes a task for us which at best could be only guesswork." *Johnson v. United States*, 135 S.Ct. 2551, 2560 (2015).

whether it threatens to inhibit the exercise of constitutionally protected rights.'" *Does I*, 101 F. Supp. 3d at 681 (quoting *Hoffman Estates*, 455 U.S. at 498-99).

This Court found all three factors present under SORA. The challenged provisions impose criminal sanctions for non-compliance, M.C.L. §§ 28.729, 734(2), 735(2); make plaintiffs strictly liable for failure to comply with certain requirements and prohibitions, M.C.L. §§ 28.725a, 729(2), 734–.735; and implicate plaintiffs' fundamental rights. *Does I*, 101 F. Supp. 3d at 681. The Court concluded that it would therefore use an "exacting" standard for vagueness, but tempered by the rule of lenity, which requires "strict construction" of criminal laws so that if there is any "ambiguity," courts will interpret the law to apply "only to conduct clearly covered." *Does I*, 101 F. Supp. 3d at 681-82 (citing *United States v. Lanier*, 520 U.S. 259, 266 (1997)). The Court then concluded that SORA's exclusion zones, loitering provisions, and certain reporting requirements were unconstitutionally vague. *Id.* at 682-90. Plaintiffs here challenge the exact same provisions that this Court found to be unconstitutionally vague in *Does I.*

1. SORA Does Not Provide Clear Notice to Registrants or Adequate Guidance to Law Enforcement About How to Determine the Location of Exclusion Zones.

SORA criminalizes a wide range of otherwise innocent conduct (*e.g.*, working, living, watching one's children) if registrants engage in that activity within the exclusion zones. M.C.L. §§ 28.734-28.735. Because such conduct is entirely legal

outside the zones, both registrants and law enforcement must know where the zones are to know if the conduct is a crime.

In *Does I*, this Court held that SORA's exclusion zones are unconstitutionally vague in multiple ways: (1) "SORA does not provide sufficiently definite guidelines for registrants and law enforcement to determine from where to measure the 1,000 feet distance used to determine the exclusion zones"; (2) "neither the registrants nor law enforcement have the necessary data to determine the zones even if there were a consensus about how they should be measured"; and (3) "[i]t is unclear whether SORA's exclusion zone should be measured only from the real property on which educational instruction, sports or other recreational activities take place" or whether the zones include school properties "not used for one of the stated purposes." *Does I*, 101 F. Supp. 3d at 683-84. In other words, registrants do not know what school properties trigger exclusion zones, do not know from which boundaries the 1,000-foot distance is measured, and cannot discern those boundaries in real space. This Court concluded that "due to SORA's vagueness, registrants are forced to choose between limiting where they reside, work, and loiter to a greater extent than is required by law or risk violating SORA." *Id.* at 684-85.

In the instant case, the named plaintiffs and primary class they represent, must comply with the same unconstitutionally vague SORA provisions as the *Does I* plaintiffs. As in *Does I*, plaintiffs here have found it impossible to determine

where they may legally live, work, and spend time. In order to comply with SORA, they must continuously know where the zones are as they move about their daily lives: every time they apply for a job, get sent to a new job site, search for an apartment, or take their children to a playground, they must first determine if their activities will potentially take place in an exclusion zone. For example, when Doe #3's employer assigns him to different job locations, he does not know whether those locations are in exclusion zones. 2d Am. Verified Compl., R.34, ¶118. Similarly, Doe #4, who works construction, will often travel several hours to a job site, only to find that the job is close to a school; he cannot learn in advance whether these sites are within exclusion zones. *Id.*, ¶121. Moreover, when he was looking for a home, he was unable to determine, despite internet research, whether he would be committing a crime if he moved into a home that was within 1,000 feet of a school bus yard. *Id.*, ¶122. *See also id.* ¶¶105-126; JSOF ¶¶372-478, 497-507; Exhs. E, F, H, I, J, 1st and 2d Wagner Rep., Stapleton Rep; Poxson Decl.; Granzotto Decl.

In accord with *Does I*, this Court should declare that the exclusion zone restrictions, which prohibit residing, working, or loitering within a zone, M.C.L. §§ 28.733-28.735, are unconstitutionally vague, and should permanently enjoin their enforcement against plaintiffs and the primary class.

2. SORA Does Not Provide Clear Notice to Registrants or Adequate Guidance to Law Enforcement About What Constitutes "Loitering."

SORA defines "loiter" 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." M.C.L. §28.733(b). In *Does I*, this Court found that the first phrase ("remain for a period of time") was sufficiently clear, but that the second phrase ("under circumstances that a reasonable person would determine is for the primary purpose of observing or contacting minors") is not.[3] *Does I*, 101 F. Supp. 3d at 685-86 (citing *City of Chicago v. Morales*, 527 U.S. 41, 56-67 (1999) (holding that an anti-gang ordinance prohibiting "loitering" was unconstitutionally vague, where that term was defined as remaining in a place "with no apparent purpose")). One cannot know, this Court said, "whether a registrant may attend a school movie night where he intends only to watch the screen, or a parent-teacher conference where students may be present." *Id.* at 686. The law's ambiguity had led the *Does I* plaintiffs to extensively curtail their conduct, even avoiding activities like waiting for their children, or talking to a niece or nephew, at school. *Id.* at 685. Indeed, because it is so unclear what the "loitering" ban prohibits, this

[3] This Court's decision is supported by the Supreme Court's subsequent decision in *Elonis v. United States*, 135 S.Ct. 2001, 2011 (2015), which emphasized that criminal liability cannot be defined under a "reasonable person" standard: "Such a 'reasonable person' standard is a familiar feature of civil liability in tort law, but is inconsistent with the conventional requirement for criminal conduct – *awareness* of some wrongdoing." *Id.* (original emphasis).

Court found that it was "unable to determine to what extent SORA infringes on Plaintiffs' right to participate in the upbringing and education of their children." *Id.* at 698. This Court concluded that the definition of "loiter" "is sufficiently vague as to prevent ordinary people using common sense from being able to determine whether Plaintiffs are, in fact, prohibited from engaging in the conduct from which Plaintiffs have refrained." *Id.* at 686.

Plaintiffs and primary class members here are in the exact same position as the *Does I* plaintiffs. For example, Doe #1 does not attend his son's sporting events because he does not know if that is a crime; he contacted both his local prosecutor and the Michigan State Police for clarification, and both refused to provide an answer about whether such conduct is illegal. 2d Am. Verified Compl. ¶132. Doe #4 would like to attend church, but does not for fear that, because the church has a Sunday school, attendance might constitute loitering. *Id.* at ¶135. Doe #5 refrains from walking in unfamiliar neighborhoods because he fears that he might inadvertently enter an exclusion zone. *Id.* at ¶139. Doe #6 cannot stay with his wife and children, as they live in an apartment above the family restaurant, which may be in an exclusion zone. *Id.* at ¶124-26. He is uncertain how much time he can spend with his family in their home without violating SORA. *Id.* He also does not attend his children's parent-teacher conferences or band concerts for fear that this would be considered "loitering." *Id.* at ¶140. *See also* JSOF ¶¶509-600.

3. SORA Does Not Provide Clear Notice to Registrants or Adequate Guidance to Law Enforcement About Reporting Requirements.

In *Does I*, this Court enjoined reporting and "immediate" reporting requirements triggered by:

- "regularly" operating a vehicle, M.C.L. §§28.725(1)(g), 28.727(1)(j);
- "routinely" using a telephone, M.C.L. §28.727(1)(h); and
- "routinely" using or establishing electronic accounts or designations, M.C.L. §§28.727(1)(f), (i).

Does I, 101 F. Supp. 3d at 686-90; 704. This Court found that neither the MSP nor local police know what "regularly" and "routinely" mean, and these provisions are "not sufficiently concrete (1) 'to ensure fair notice to the citizenry' or (2) 'to provide standards for enforcement by the police, judges, and juries.'" *Id.* at 688 (quoting *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1104 (6th Cir. 1995)).

Here too, plaintiffs and class members face the same problems as the *Does I* plaintiffs. For example, Doe #4 drives many company vehicles and construction equipment, and does not know whether he must report them. 2d Am. Verified Compl. ¶¶151-52. He also does not serve as a designated driver or drive friends in bad weather, fearing that driving others' cars could be a crime. *Id.* ¶153. Doe #6 limits his use of the internet because he does not know what he must report. *Id.* ¶165. *See also id.* ¶¶141-65; JSOF, ¶¶851-83. Thus, just as in *Does I*:

> Here, SORA subjects registrants to criminal sanctions if they do not comply with the registration requirements, but SORA's vagueness leaves law enforcement without adequate guidance to enforce the law and leaves registrants of ordinary intelligence unable to determine when the reporting requirements are triggered.

Does I, 101 F.Supp.3d at 689-90.

B. SORA's Strict Liability Provisions Violate Due Process Because They Impose Harsh Penalties for Innocent Conduct.

"While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements…, [t]he existence of a *mens rea* is the rule [], rather than the exception." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 435, 437 (1978) (citations omitted). Without a scienter requirement, laws —particularly vague laws—may be "little more than a trap for those who act in good faith." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). Strict liability is least permissible where it affects constitutionally-protected rights. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71 (1994) (scienter required because of law's impact on constitutionally protected rights); *Smith v. California*, 361 U.S. 147 (1959) (strict liability unconstitutional where "timidity in the face of [] absolute criminal liability" keeps people from exercising constitutionally protected rights).

To determine whether strict liability violates due process, courts should first consider whether "the offense involves conduct for which one would not ordinarily be blamed." *Stanley v. Turner*, 6 F.3d 399, 404 (6th Cir. 1993). While "strict liability" is sometimes permissible when regulating conduct that inherently presents a serious risk to public safety, the state cannot dispense with *mens rea* when criminalizing otherwise innocent behavior. *Compare, e.g.*, *United States v. Freed*, 401

U.S. 601, 609 (1971), *with Liparota v. United States*, 471 U.S. 419, 426, 431 (1985).[4] Thus in *Lambert v. California*, 355 U.S. 225 (1957), the Court held that a law requiring felons to register violated due process. Strict liability was unconstitutional because the law "punished conduct which would not be blameworthy in the average member of the community." *Id*. at 229. Because the defendant received no notice, she could not and did not know that the otherwise innocent act of being in Los Angeles was a crime, and she was given no opportunity to comply upon learning of the registration requirement. *Id.* at 227-29.

Second, courts ask whether the penalty is "relatively small." *United States v. Wulff*, 758 F.2d 1121, 1124 (6th Cir. 1985).[5] "'Crimes punishable with prison sentences...ordinarily require proof of guilty intent.'" *Staples*, 511 U.S. at 616-17 (quoting Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 70 (1933)).

In *Does I*, this Court accordingly found strict liability impermissible and

[4] *See Stanley*, 6 F.3d at 404 ("[W]here a criminal statute prohibits and punishes seemingly innocent and innocuous conduct that does not in itself furnish grounds to allow the presumption that the defendant knew his actions must be wrongful, conviction without some other, extraneous proof of blameworthiness or culpable mental state is forbidden by the Due Process Clause"); *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 687 (10th Cir. 2010) (strict liability "constitutionally suspect" when applied to conduct that is "commonly and ordinarily not criminal").

[5] In *Wulff*, the Sixth Circuit held that the defendant could not be strictly liable for selling bird parts because the penalty—two years' imprisonment or $2,000—"is not, in this Court's mind, a relatively small penalty." 758 F.2d at 1125. SORA imposes the very same penalty. *See* M.C.L. § 28.729(2) (two years or $2,000); §§ 28.734(2), 735(2) (second offense is felony, two years or $2,000).

read a "knowledge requirement" into SORA: activities like "taking one's children to a park … or failing to report a new e-mail account, are … not inherently blameworthy," nor are they "'so obviously against the public interest that a reasonable person should be expected to know'" they are regulated. 101 F. Supp. 3d at 693 (*quoting Liparota*, 471 U.S. at 433). This Court explained:

> SORA imposes myriad restrictions and reporting requirements that affect many aspects of registrants' lives. Ambiguity in the Act, combined with the numerosity and length of the Act's provisions, make it difficult for a well-intentioned registrant to understand all of his or her obligations… The frequency with which SORA is amended, as well as today's highly mobile population, make a knowledge requirement even more important to ensure due process of law.

Does I, 101 F. Supp. 3d at 693.

Here, just as in *Does I*, plaintiffs "fear that despite their best efforts to understand and comply with the law, they will be held liable for unintentional violations of SORA." 2d Am. Verified Compl., R.34, ¶168. *See id.* ¶¶166-174; Exh. A, JSOF, ¶¶884-909. Their fear is well-justified because SORA imposes lengthy prison sentences for even inadvertent violations. M.C.L. §§ 28.729(1); 28.734(2); 28.735(2). SORA continues to criminalizes entirely innocent activities through provisions that are extraordinarily vague.[6] And that is just as unconstitutional today

[6] For example, registrants are strictly liable for being employed, living with their families, or attending a child's graduation in an exclusion zone. M.C.L. §§ 28.734, 28.735. Registrants are also strictly liable if they fail to report (often immediately and in person) an enormous range of ordinary activities—borrowing a phone, joining a fantasy football league, establishing an on-line account for a child's

as it was four years ago.

C. SORA's Provisions on Internet Reporting Violate the First Amendment, Both Directly and by Incorporating Lifetime Reporting.

In *Does I*, this Court held that SORA's 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," M.C.L. § 28.725(1)(f), facially violates the First Amendment. The Court said the "in person" reporting requirement was "not narrowly tailored, and, therefore, unconstitutional," and the Court issued a blanket injunction against its enforcement. *Does I*, 101 F. Supp. 3d 672, 701-02, 704, 713.

This Court also held that "[a]mbiguity as to the meaning of 'routinely used' would likely result in both overreporting and under use of permissible speech activities." *Does I*, 101 F. Supp. 3d 672, 704. On both First Amendment and vagueness grounds, the Court facially enjoined SORA's requirements to report "[a]ll electronic mail addresses and instant message addresses … routinely used by the individual," and "[a]ll telephone numbers … routinely used by the individual." M.C.L. § 28.725(1)(h)-(i). *See Does I*, 101 F. Supp. 3d 672, 686-90, 704, 713.

Finally, to the extent that reporting requirements incorporate SORA's

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homework, or traveling for more than seven days. M.C.L. §§ 28.724a, 28.725, 28.725a, 28.727, 28.729(2); *see* Obligations, Disabilities, and Restraints Imposed by SORA, Exh. K.

retroactive lifelong registration, this Court found that lifetime reporting of internet identifiers "was not narrowly tailored" because "sex offenders who have not re-offended in twenty-five years" do not "pose an enhanced risk of committing sex offenses." *Does I*, 101 F. Supp. 3d 722, 730. The Court issued a similar blanket injunction against retroactive lifetime enforcement of M.C.L. § 28.727(1)(i). *Id.*

When this Court granted relief on the First Amendment claims in *Does I*, it found the above provisions facially invalid, and its injunctions were not limited to the *Does I* plaintiffs. *Id.* at 713. For the past four years, defendants have ignored those existing injunctions. This Court should make clear that the *Does I* injunctions prohibit enforcement of these provisions and enter identical injunctions in *Does II*.

II. A Permanent Injunction Is Warranted.

A. The Court Should Grant a Permanent Injunction Barring Enforcement of the SORA Provisions that Violate Due Process and the First Amendment.

Plaintiffs seek a permanent injunction barring enforcement of the vague provisions, strict liability enforcement, and enforcement of the challenged internet reporting requirements. "A party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer continuing irreparable injury for which there is no adequate remedy at law." *Lee v. City of Columbus*, 636 F.3d 245, 249 (6th Cir. 2011). That standard is easily met here.

First, as set out above, plaintiffs and primary class members have suffered a

violation of their constitutional rights under the Due Process Clause and First Amendment. And that violation is ongoing. Despite this Court's holding that the zones are unconstitutionally vague, defendants continue to inform all registrants that they cannot live, work, or loiter in the undefined zones. 2d Am. Verified Compl., ¶107; Explanation of Duties, R. 62-4, ¶¶12-13. And registrants who cannot determine where the zones are continue to face criminal prosecution and incarceration. *See e.g. Roe v. Snyder*, 240 F. Supp. 3d 697, 711-12 (E.D. Mich. 2017) (enjoining prosecution of registrant after police informed her she would face criminal charges if she did not quit the job she had held for eight years); *Curran*, 3:18-cv-11935, R.27 (granting injunction against prosecution of plaintiff who relied on advice of local police before purchasing home, but was then threatened with prosecution); Farkas Decl., R.62-6 (describing strict liability prosecutions of registrants under vague SORA reporting provisions); Van Gelderen Decl., R.62-7 (describing prosecution and conviction for "loitering" of grandfather who attended child's soccer game, despite counsel's reliance on *Does I*'s vagueness ruling).

Moreover, defendants' "Explanation of Duties" form continues to tell registrants that they must comply with the reporting requirements that were enjoined by this Court in *Does I*. Explanation of Duties, R.62-4, ¶¶4(h)-(i), 6(f), 12. In short, defendants continue to require all registrants—under threat of felony prosecution—to comply with the very provisions of SORA that this Court has already found to

be unconstitutional, and defendants continue to operate the registry as if *Does I* had never been decided.

Second, plaintiffs and primary class members will continue to suffer irreparable harm unless injunctive relief is granted. Indeed, "if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *ACLU of Kentucky v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003). Since this Court has already held that the challenged provisions are unconstitutional, this Court must find that such enforcement constitutes irreparable harm. *See Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (explaining that "a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights"); *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("the existence of a continuing constitutional violation constitutes proof of an irreparable harm").

Nor are there adequate remedies at law. In order for a legal remedy to suffice, it "must not only be plain, speedy and adequate, but as adequate to meet the ends of justice as that which the restraining power of equity is competent to grant." *Harris Stanley Coal & Land Co. v. Chesapeake and O. Ry. Co.*, 154 F.2d 450, 453 (6th Cir. 1946). There are simply no such adequate legal remedies where plaintiffs continue to face prosecution and incarceration based on SORA's unconstitutional provisions. A permanent injunction is warranted.

B. In the Alternative, the Court Should Grant a Preliminary Injunction.

Partial summary judgment is proper because no facts are in dispute and this Court need only apply its prior decisions in *Does I*. If, however, the Court were to identify issues that make summary judgment premature at this time, then plaintiffs ask the Court to issue a preliminary injunction instead.

In ruling on a motion for a preliminary injunction, courts must consider whether: (1) the movant is likely to prevail on the merits; (2) the movant would suffer an irreparable injury absent the injunction; (3) an injunction would cause substantial harm to others; and (4) an injunction would be in the public interest. *G & V Lounge, Inc. v. Mich. Liquor Control, Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994). A preliminary injunction is warranted for the same reasons as a permanent one.

With respect to the likelihood of success—which is the most important factor, *see McCreary County*, 354 F.3d at 445—plaintiffs have already prevailed on exactly the same questions in *Does I*.

On the second factor, plaintiffs will continue to suffer irreparable injury, as set out above.

Third, the balance of hardship tips strongly in plaintiffs' favor. Approximately 44,000 people are suffering grave harm under SORA provisions this Court held to be unconstitutional more than four years ago. In contrast, defendants have

no legitimate interest in enforcing unconstitutional laws. As a matter of law, a party cannot claim that it will be harmed by an injunction if the conduct to be enjoined violates the Constitution. *See Tyson Foods v. McReynolds*, 865 F.2d 99, 103 (6th Cir. 1989) (holding defendant "has suffered no injury … [from injunction because it] has no right to the unconstitutional application of state laws"); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (same).

Fourth, it is well established that the vindication of constitutional rights serves the public interest. *See, e.g.*, *G & V Lounge*, 23 F.3d at 1079 ("it is always in the public interest to prevent violation of a party's constitutional rights"); *Preston*, 589 F.2d at 303 n.3 (remedying a constitutional violation "certainly would serve the public interest"); *Caspar v. Snyder*, 77 F. Supp. 3d 616, 644 (E.D. Mich. 2015) ("the public interest is always served by robust protection of constitutional guarantees"). The fourth factor, too, therefore weighs in favor of granting injunctive relief.

C. Questions Involving Relief for the Ex Post Facto Subclasses Should Not Stall Relief for the Primary Class.

This Court plans to hear the instant motion concurrently with plaintiffs' pending motion on behalf of the ex post facto subclasses. Order, R.74. This Court has already decided liability on the ex post facto claims, *see* Decl. Judgment and Order for 90-Day Deferral, R.55, leaving only the question of what injunctive relief is proper if the 2011 amendments cannot be severed because they are so

deeply embedded in the statute. Defendants have asked this Court to certify the severability issue to the Michigan Supreme Court. *See* Response, R.66. But the Court can only do so if certification "will not cause undue delay or prejudice." L.R. 83.40 (a)(3). Certification absent interim ex post facto relief would be impermissible because it would severely prejudice the ex post facto subclasses. *See* Plaintiffs' Reply Brf., R.69, Pg.ID#1069-72.

In the instant motion plaintiffs seek relief for the primary class on the vagueness, strict liability, and First Amendment claims—claims that are entirely separate from the ex post facto claim of the ex post facto subclasses. But the interplay of the Court's decisions on the two motions is important. Certification of the severability question prior to a decision on the instant motion would be highly prejudicial to the primary class *if* this Court were to interpret L.R. 83.40(b) as requiring a complete stay of federal proceedings. (As explained in plaintiffs' Reply, R.69, Pg.ID#1071, the best reading of L.R. 83.40(a)(2) is that it requires a stay only as to the claim on which an issue is certified.) Absent a class-wide injunction, primary class members face prosecution under provisions of SORA that this Court has already found unconstitutional. *See Roe*, 240 F. Supp. 3d at 711-12; *Curran*, 3:18-cv-11935; Farkas Decl., R.62-6; Van Gelderen Decl., R.62-7. Yet class members are severely constrained in protecting their rights individually, because defendants have insisted that relief must come in the class action. Staying the

entire case would thus severely prejudice primary class members, and therefore make certification of the severability question impermissible under L.R. 83.40.

As set out in plaintiffs' Joint Status Conference Request, R.73, if this Court broadly enjoins the application of SORA for pre-2011 registrants because the 2011 amendments are not severable, that could at long last lead to legislative reform because it will effectively force the parties back to the bargaining table. It has become clear that the legislature will not act to remedy the aspects of SORA that the Sixth Circuit and this Court have held unconstitutional absent an express judicial requirement to do so. Indeed, Lt. Christopher Hawkins, the Commander for the MSP Legislative and Legal Resources Section, has testified as much.[7] This Court cannot rewrite the statute—that is a legislative task—but it can and should make clear through its injunctions what the scope of that legislative task is. And that task includes not just addressing the unconstitutionality of retroactive application of the 2006 and 2011 amendments, but also SORA's infirmities with respect

[7] Lt. Hawkins testified at a deposition in *Compaan v. Snyder*, 15-cv-01140 (W.D. Mich.) at 42 (Exh. L) as follows:

> Q. Did anyone in the meeting suggest it might be more politically expedient to wait until the court essentially required changes to SORA before attempting to make those changes in the legislature?
> A. I suppose that was part of my argument as to why to wait, yeah.
> Q. It might be more palatable to an individual member of the Senate or House's constituents to make changes to the Sex Offender Registry because the court is requiring the state to do so?
> A. Yes.

to vagueness, strict liability, and the First Amendment.

Accordingly, the Court should set forth that legislative task by enjoining both the enforcement of SORA entirely for pre-2011 registrants (for the reasons set out in plaintiffs' prior motion, R.62) and the enforcement of the provisions challenged here for all registrants. Deciding both issues simultaneously will also allow the legislature to remedy the constitutional defects in a single, unified statute.

As the Supreme Court has said, courts should be "wary of legislatures who would rely on our intervention." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 330 (2006). Courts' "mandate and institutional competence are limited," and they cannot "rewrit[e] state law to conform it to constitutional requirements." *Id.* at 329. Moreover, "where line-drawing is inherently complex," efforts to craft a judicial remedy for an unconstitutional statute "may call for a far more serious invasion of the legislative domain than [courts] ought to undertake." *Id.* at 330 (citation omitted). Here there is simply no way for this Court to divine exactly what the legislature wants. And even if this Court could, there is no way to judicially rewrite the statute to achieve that goal.[8]

[8] For example, legislative negotiations to date have made clear that all stakeholders prefer a single statute for all registrants, rather than a regime that is even more confusing than the current law because different offense dates would trigger different SORA requirements. Adopting a single registration regime effectively means that certain requirements that are unconstitutional for pe-2006 and pre-2011 registrants would also not be imposed on post-2011 registrants.

There is little doubt that the legislature will want some form of registration statute. But the requested injunctions do not prevent that. If this Court grants the relief requested but makes the injunctions effective 60 days out, that will put the task of rewriting the statute to make it constitutional back where it belongs—with the legislature. The requested injunctions are not designed to nullify the work of the legislature. They are designed to make the legislature get to work.

III. The Court Should Order Notice.

The Court should order notice of any relief granted here to all registrants, and to all prosecutors and law enforcement personnel who have responsibility for enforcing SORA, with the Michigan State Police to provide the notice. Rules 23(c)(2)(A) and 23(d)(1)(B) give the Court broad discretion to ensure that class members get appropriate notice. Moreover, the state has a statutory responsibility to inform registrants of their SORA obligations. M.C.L. § 28.725a. And, as this Court has held, notice is essential so that registrants can understand and comply with the law—a problem made all the more acute by the byzantine nature of the statute. *Does I*, 834 F.3d at 698. The Court should also order defendants to provide notice to prosecutors and law enforcement who are responsible for SORA enforcement, to ensure that they are fully aware of any relief that this Court orders.

The Michigan State Police SOR Unit is best placed to handle notice, as it maintains the records for all registrants and has prior experience with notice to

both registrants and law enforcement. For example, after implementation of the 2011 amendments, the MSP mailed notice regarding the statutory changes to all registrants. *See* Exh. A, JSOF, ¶¶ 783-86. Similarly, after the Sixth Circuit's decision in *Does I* in 2016, the MSP sent out a notice to law enforcement about the decision. *See* Exh. M, MSP Bulletin Re *Does I*. Finally, the Court should order the parties jointly to develop a notice or notices, with any disputes to be resolved by the Court. The Court should also set a deadline for the parties to present for the Court's approval a proposed plan and schedule for distribution of the notices.

Defendants should, in addition, be required to update the Explanation of Duties form to accurately reflect the law. The form is provided to registrants each time they report, and summarizes registrants' obligations under SORA. Despite the Sixth Circuit's and this Court's rulings in *Does I*, the MSP has continued to inform registrants that they must comply with SORA as written. *See* Form, ECF 62-4, 62-5. Given that registrants face prison time if they misunderstand their SORA obligations, they should be given accurate information about what their obligations are. Note, however, that updating the Explanation of Duties is not a substitute for class notice because it is only provided when registrants report. Thus, registrants who only report annually might not get notice for another year. M.C.L. § 28.725a(3)(a).

CONCLUSION

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

Respectfully submitted,

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Dated: December 23, 2019

Certificate of Service

On December 23, 2019, 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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