United States Court of Appeals

for the

Fifth Circuit

Case No. 18-11620

JOHN DOES 1-7, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

– v. –

GREG ABBOTT, Governor of the State of Texas; STEVEN MCCRAW, Colonel, Director of the Texas Department of Public Safety,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS IN CASE NO. 3:18-CV-629
HONORABLE JANE J. BOYLE, U.S. DISTRICT JUDGE

BRIEF FOR PLAINTIFF-APPELLANT

ESTES-HIGHTOWER, PLLC
Attorneys for Plaintiff-Appellant
16770 Imperial Valley Drive, Suite 235
Houston, Texas 77060
(214) 334-2260

I. CERTIFICATE OF INTERESTED PERSONS

CASE NO. 18-11620

(1) No. 6:18-cv-629, John Does #1-7, *individually and on behalf of all others similarly situated* v. Colonel Steven McGraw

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Terence Estes-Hightower
Estes-Hightower PLLC
Attorneys and Counselors
16770 Imperial Valley Drive, Suite 235
Houston, TX 77060
214-334-2260 - Office
832-218-1447 - Fax
Attorney for Plaintiffs-Appellants

Respectfully Submitted,

Estes-Hightower PLLC
Attorneys and Counselors

By: /s/ Terence Estes-Hightower
Terence Estes-Hightower
State Bar No. 24028746
16770 Imperial Valley Drive,
Suite 235
Houston, TX 77060
214-334-2260 - Office
832-218-1447 – Fax
teri.ehpllc@gmail.com
Attorney for Plaintiffs-Appellants

II. STATEMENT REGARDING ORAL ARGUMENT

The underlying issue in the case at bar has its foundation in a complex statute, Chapter 62 of Texas's Code of Criminal Procedure. Therefore, Plaintiffs respectfully suggest that the Court would benefit from hearing counsel explain certain aspects of the case that will, hopefully, shed light on the matter at hand.

III. TABLE OF CONTENTS

Page

IV. TABLE OF AUTHORITIES

Page

Cases

Federal Statutes

State Statutes

Federal Rules

State Rules

Treatises

V. JURISDICTIONAL STATEMENT

A. District Court's Jurisdiction

The district court had subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§1331 and 1343 because the civil action arises under the Constitution or laws of the United States and was brought to redress the deprivation, under color of Texas law, of one or more rights or privileges secured by the Constitution. Plaintiffs' federal claims are thus brought under 42 U.S.C.S §§ 1983 and 1988.

B. Court of Appeals' Jurisdiction and Timeliness of Appeal

Due to the finality of the Memorandum Opinion and Order (the "Order" or the "Decision") of the district court entered November 19, 2018, ROA.421-49, Record Excerpts ("RE")-6-34, *Does #1-7 v. Abbott*, 345 F. Supp. 3d 763 (N.D. Tex. 2018), this Court has jurisdiction over this appeal from the Order under 28 U.S.C. § 1291.

C. Timeliness of Appeal

Plaintiffs filed a Notice and Amended Notice of Appeal from the Order on December 18, 2018, ROA.451-54, RE-36-39, which was within 30 days of the entry date of the Order making this appeal timely under Fed.R.App.P. 4(a)(1).

D. Finality of Order

This appeal is from the Order, which dismissed all of Plaintiffs' claims with prejudice, and is therefore from a final order. (The district court also issued a Final

Judgment entered November 19, 2018 implementing the Order. ROA.450, RE-35.)

VI. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err when it dismissed Plaintiffs' procedural due process claim with prejudice pursuant to Fed.R.Civ.P. 12(b)(6), notwithstanding (a) that the Texas sex offender registration and community notification statute does not afford them an individualized assessment or a hearing before publicly classifying them as to their present level of dangerousness; and (b) expert empirical evidence that rather than reducing recidivism, Texas registration and notification laws have *increased* the frequency of sex crimes committed by convicted sex offenders.

2. Did the district court err when it dismissed Plaintiffs' Ex Post Facto, cruel and unusual punishment, and Double Jeopardy claims with prejudice pursuant to Rule 12(b)(6), notwithstanding that (a) certain Plaintiffs also mounted as-applied ex post facto challenges to the statute; (b) the cumulative effect of the foregoing laws, retroactively imposed, qualifies as punishment for ex post facto purposes; and (c) those laws do not have a rational relation to a non-punitive purpose and are excessive, because they actually increase the risk of recidivism.

VII. STATEMENT OF THE CASE

A. Nature of the Action

This putative class action challenges the constitutionality of portions of Chapter 62 of the Texas Code of Criminal Procedure ("Chapter 62"), which establishes the Texas Sex Offender Registration Program ("TSORP"), i.e., certain provisions in the most recent amendment to the statute made in 2017 ("TSORP 2017"). The action is brought by 152 individual Plaintiff John Does on their own behalves ("Plaintiffs") and on behalf of all others similarly situated and seeks declaratory and injunctive relief. ROA.41, 422, RE-7, Decision at 2, Am. Compl. ¶ 7.

B. The Parties

Plaintiffs are Texas residents and persons either charged with or convicted of sexual offenses covered by Chapter 62 prior to TSORP 2017 going into effect and are currently subject to the statute's requirements. They are all on the Texas Sex Offender Registry (the "Registry") established under the statute, and they all have been retroactively required to comply with TSORP for the rest of their lives (other than in a few instances not relevant here). There are nearly 88,000 people on the Registry. Plaintiffs' Amended Complaint contains individualized factual allegations about their circumstances. ROA.40, 42-70, 75-88, 91-92, 422, RE-7, Decision at 2, Am. Compl. ¶¶ 1-2, 11-89, 132-258, 264, 299-307.

Under Chapter 62, Plaintiffs have been and will be subjected to inter alia artificial categorization into levels of present dangerousness while imposing varying levels of restraints and disabilities based on those categories without pre- or post-deprivation safeguards (the former in all instances and the latter in nearly all instances); constant supervision; required to report frequently in person; effectively limited in access to housing; effectively prohibited from engaging in many common occupations of life; limited in their rights to free speech; effectively limited in higher education opportunities; subjected to limited or no access to their children; subjected to negative impact on their children; identified publicly and falsely as dangerous; subjected to harassment and stigma; as well as subjected to a vast array of state-imposed restrictions that encompass virtually every facet of their lives. Plaintiffs must comply with these extensive restrictions and obligations for as long as they live (other than as noted above) or face criminal sanctions of up to 10 or 20 years of imprisonment, as the case may be. ROA.40-41, 72-79, 81-83, 85-87, Am. Compl. ¶¶ 1, 3-4, 105-08, 114-120, 122, 125-26, 132-79, 196-221, 240-58.

Defendant Colonel Steven McGraw ("McGraw"), as the Director of the Texas Department of Public Safety (the "TDPS"), is responsible for the maintenance of the Registry. It is undisputed that due to the scope of his employment as Director, McGraw is the appropriate defendant in a case that is

challenging the constitutionality of portions of Chapter 62.[1] ROA.70, 429-30, RE-14-15, Am. Compl. ¶¶ 90, 93-95, Decision at 9 n. 4, 10.

C. Rulings Presented for Review

Plaintiffs originally challenged the constitutionality of large portions of Chapter 62 on 10 separate grounds, all of which the district court rejected. ROA. 89-93, 431-49, RE-16-34, Am. Compl. ¶¶ 273-310, Decision at 11-29. They limit their appeal to addressing the district court's rejection of four of those grounds: (Count I) the risk level ranking system employed by the statute violates the Due Process Clause by stigmatizing Plaintiffs without affording them an individualized assessment or a hearing, ROA.89, Am. Compl. ¶¶ 273–81; (Count VII) the statute violates the Ex Post Facto Clause by retroactively punishing Plaintiffs for offenses committed before the 2017 version was enacted, ROA.91-92, Am. Compl. ¶¶ 305–07; (Count VIII) the statute violates the Eighth Amendment's protection against excessive and arbitrary punishment, ROA.92, Am. Compl. ¶ 308; and (Count IX) the statute violates Double Jeopardy by imposing additional punishments for the same offense, ROA.92, Am. Compl. ¶ 309. ROA.431-38, RE-16-23, Decision at 11-18.

[1] Defendant Greg Abbott ("Abbott") is the Governor of the State of Texas; the district court dismissed with prejudice all of Plaintiffs' claims against him for lack of standing; Plaintiffs do not appeal from that ruling.

D. Relevant Procedural History

On March 16, 2018, Plaintiffs filed their Original Complaint and on June 6, 2018, an Amended Complaint. ROA.6-32, 40-221. On July 31, 2018, Defendants filed a Motion to Dismiss the Amended Complaint and brief under Fed.R.Civ.P. 12(b)(1) asserting inter alia lack of standing as to Abbott and 12(b)(6) arguing that Plaintiffs' claims are either barred by Supreme Court precedent or "fail to overcome the State's regulatory interest in notifying the public of individuals with reportable convictions or adjudications for sex offenses." ROA.263-66, 268-310, Motion at 1. On September 12, 2018, Plaintiffs filed a response and brief to Defendants' Motion. ROA.347-51, 355-86. On November 19, 2018, the district court issued its Decision, which granted (i) Defendants' Motion under Rule 12(b)(1) and dismissed with prejudice Plaintiffs' claims against Abbott (as noted, Plaintiffs do not appeal from such ruling); and (ii) Defendants' Motion under 12(b)(6), and dismissed with prejudice all of Plaintiffs' claims (as noted, Plaintiffs are appealing such ruling with respect to Counts I and VII-IX only). ROA.421-49, RE-6-34.

E. Relevant Provisions of TSORNA[2]

The first sex offender registration laws in Texas took effect in 1991[3] and have been amended in every subsequent legislative session, with each amendment imposing a stricter regime with new burdens on registrants and covering more people and conduct. The statute tasks the TDPS with enforcement and implementation of Chapter 62.[4] Prior to 1997, Chapter 62's requirements applied only to those persons convicted of a sex offense after 1991. But, in 1997, the Texas Legislature made the registration requirement retroactively applicable to any person who had a reportable conviction or adjudication occurring on or after September 1, 1970, but only if the person was in the Texas criminal justice system for that offense on or after September 1, 1997.[5]

In 1999, the lifetime registration requirement for certain offenses came into effect under Subchapter C of Chapter 62, Expiration of Duty to Register, stating

---

[2] This section is drawn from pages 6-7 of the Decision, ROA.426-27, RE-11-12, unless otherwise indicated.

[3] *See* Act of May 25, 1991, 72nd Leg., R.S., ch. 572, § 1, 1991 Tex. Gen. Laws 2029-32.

[4] *See* Tex. Code Crim. Proc. arts. 62.001(1), 62.005(a).

[5] *See* Act of June 1, 1997, 75th Leg., R.S., ch. 668, §§ 1, 1997 Tex. Gen. Laws 2253, 2269.

that the duty to register expires at the death of that person.[6] This lifetime registration applies for those who have a reportable conviction or adjudication for a (1) "sexually violent offense;" (2) prohibited sexual conduct, compelling prostitution by a child under 18, or possession or promotion of child pornography; (3) indecency with a child; (4) unlawful restraint, kidnapping, or aggravated kidnapping; (5) or obscenity.[7] Plaintiffs are subject to lifetime registration (as noted, other than in a few instances not relevant here). The failure to comply with registration requirements can result in criminal sanctions of up to 10 or 20 years of imprisonment, as the case may be.[8] ROA.40, 71-72, Am. Compl. ¶¶ 1, 104.

In 2005, amendments to the statute were made to dispense with the confidentiality protections contained in earlier versions of the statute and allowed for registry information to become available to the public on the Internet.[9] New in-person reporting requirements were imposed, with certain registrants being required

[6] *See* Acts 1999, 76th Leg., 444, § 5(c), *re-enacted by* Acts 2005, 79th Leg., ch. 1008, § 1.01, 2005 Tex. Gen. Laws, *amended by* Acts 2011, 82nd Leg., R.S., ch. 1, § 2.11, 2011 Tex. Gen. Laws, *and in* Acts 2017, 85th Leg., R.S., ch. 685, § 18, 2017 Tex. Gen. Laws.

[7] *See id*.; Tex. Code Crim. Proc. art. 62.101(a).

[8] *See* Tex. Code Crim. Proc. art. 62.101(a), 62.102(a), (b)(2-3); Tex. Penal Code §§ 12.33, 12.34.

[9] *See* Act of May 26, 2005, 79th Leg., R.S., ch. 1008, 2005 Tex. Gen. Laws 3385, 3387.

to report quarterly rather than yearly.[10] In addition, the 2005 amendments inter alia expanded the list of offenses for which registration was required as well as the categories of individuals required to register for life; categorized registrants based on levels of present dangerousness; and lengthened the penalties for registration-related offenses.[11] Further, those amendments require registrants to report (in-person) all locations they visited on at least three occasions in a month for 48 hours or more[12] and impose an in-person reporting requirement when a registrant enrolled, dis-enrolled, worked or volunteered at institutions of higher learning.[13] ROA.72, Am. Compl. ¶¶ 105-08.

Since 2005, the registration requirement applies retroactively to every person whose "reportable conviction or adjudication" occurred on or after September 1, 1970.[14] Those Plaintiffs whose offenses pre-date the establishment of the Registry on September 1, 1991 are forced to comply with TSORP when they

---

[10] *See* Tex. Code Crim. Proc. art. 62.058 *amended by* Acts 2005, 79th Leg., ch. 1008, § 1.01, 2005 Tex. Gen. Laws.

[11] *See* Acts 2005, 79th Leg., ch. 1008, 2005 Tex. Gen. Laws.

[12] *See id*.

[13] *See id*.

[14] *See* Tex. Code Crim. Proc. art. 62.002(a).

already completed their sentences.[15] Then there are those Plaintiffs who were to be on the Registry for 10 years post discharge but who now have to register on TSORP for life because of the amendments made to the statute in 1999.[16]

Chapter 62 requires that any person: (1) who has a "reportable conviction or adjudication" (including deferred adjudication); (2) "who is required to register as a condition of parole, release to mandatory supervision, or community supervision;" or (3) who is an "extrajurisdictional registrant" must register as a sex offender in Texas.[17] Those persons must register promptly with the local law enforcement authority of the municipality (or county) where the registrant resides or intends to reside for more than seven days.[18] Registrants must provide inter alia their full name, date of birth, sex, race, physical description, social security number, driver's license number, home address, photograph, fingerprints, "online identifier[s],"

[15] John Does #1-2, 10, 38, 72, 77, 106, 115, 127, 129, 137, 139, 144, and 152 as well as Jane Doe #136 all had a disposition date from the 1970s, 80s and early 90s. ROA.92, Am. Compl. ¶ 306.

[16]John Does #3, 5, 7, 9, 11, 15, 28, 39, 43, 62, 64, 68-69, 83, 87, 92-93, 96, 104-105, 112, 124-125, 132-133, 140, 143, 145, and 150-151 all had been told to register for 10 years after being discharged at their criminal sentencing only to find out they now need to register for life. Each one of them has a disposition prior to the year 1999 or earlier that year itself. ROA.92, Am. Compl. ¶ 307.

[17] *See* Tex. Code Crim. Proc. arts. 62.051(a), 62.052(a).

[18] *See id*. 62.004, 62.051(a)(1)-(2), 62.055(a).

employment status, and vehicle information.[19] A person's sex-offender status, numeric risk-level classification (discussed below) and housing location is made public, as is a photograph that is on a personal identification certificate or driver's license.[20]

Significantly here, all registrants must periodically report in person – either once every 30 days, 90 days or year, depending on the type and number of offenses committed – to the registrant's primary registration authority to verify his or her registration information.[21] In addition to reporting in person at regular intervals, registrants must report in person within seven days whenever certain information changes, including inter alia changing residence;[22] beginning, changing or discontinuing employment;[23] and establishing or changing an email address, instant message address or other Internet username.[24] There are no good cause exceptions to such seven-day notification requirements (or to other reporting requirements).

---

[19] *See id*. 62.051(c).

[20] *See id*. 62.005(b-c), 62.007(g).

[21] *See id*. 62.058(a), 62.202.

[22] *See id*. 62.055.

[23] *See id*. 62.051(c)(6), 62.051(i), 62.152(d).

[24] *See id*. 62.0551.

Regardless of illness, injury, transportation problems or other emergencies, Plaintiffs must report in person within seven days or face criminal charges.[25] ROA.75, Am. Compl. ¶¶ 125-26.

Chapter 62 classifies registrants into numeric risk levels.[26] A registrant's risk-level classification is based on his present level of dangerousness.[27] Level One registrants are classified as low risk offenders.[28] Level Two registrants are classified as moderate risk offenders.[29] Level Three registrants are classified as high risk offenders.[30] ROA.73-74, Am. Compl. ¶¶ 114-15.

Risk-level classifications are determined based on a registrant's prior conviction records[31] using a "sex offender screening tool" employing "various

---

[25] *See id*. 62.101(a), 62.102(a), (b)(2-3); Tex. Penal Code §§ 12.33, 12.34.

[26] *See* Tex. Code Crim. Proc. art. 62.007(c).

[27] *See id*.

[28] *See id*. 62.007(c)(1).

[29] *See id*. 62.007(c)(2).

[30] *See id*. 62.007(c)(3).

[31] *See id*. 62.007(e) ("Records and files…relating to a person for whom a court, the Texas Department of Criminal Justice, or the Texas Juvenile Justice Department is required under this article to determine a level of risk shall be released to the court, the Texas Department of Criminal Justice, or the Texas Juvenile Justice Department, as appropriate, for the purpose of determining the person's risk level.").

factors"[32] that are left unspecified in the statute[33] – without regard for a person's individual, current circumstances. Even then, the screening tool is not applied to all registrants as many have risk levels as "not reported." Risk-level classifications are not based on and do not correspond to a registrant's actual risk of re-offending or the true danger any registrant poses to the public. They stigmatize as well as publicly and falsely identify Plaintiffs as dangerous sex offenders without empirical support. Importantly, there is no individualized assessment – social, psychological or otherwise – or hearing leading to their risk-level classification, especially considering the actual risk of re-offending or true danger to the public, or whether the span of their registration is warranted. Although Plaintiffs John Does #1, 5-7 are each classified as low risk to reoffend, the state of Texas requires each of them to register until they die. ROA.74, 89, Am. Compl. ¶¶ 117-18, 274, 277, 280.

Further, under Chapter 62, even upon the clearest proof that Plaintiffs are not dangerous, there is no mechanism in the statute that would allow them (in all but two instances) to have their registration obligations eliminated or reduced.

---

[32] Accordingly, the allegation in paragraph 116 of the Amended Complaint that "[t]ier classifications are based solely on the offense(s) of conviction," ROA.74, was in error.

[33] *See id*. 62.007(b-c).

Among Plaintiffs, only "Romeos," i.e., persons convicted of an offense involving consensual sexual conduct where the victim was at least 13 and less than 18 and the offender was no more than four years older than the victim,[34] are eligible to request and receive an individual risk assessment following the assignment of a risk level,[35] which is a necessary predicate for a court application for deregistration ("early termination").[36] Only John Does #55 and #135 fall within the "Romeo" category. In addition, Chapter 62 is not limited to convicted individuals but requires registration and reporting by individuals like John Does #3 and #5 who were never convicted of a crime. ROA.55, 66, 74, Am. Compl. ¶¶ 41, 79, 119-20.

In sum, TSORP, which began as a private law enforcement database in 1991, has changed radically in the last 20 years, especially by categorizing registrants into risk levels without individualized assessments; requiring in-person reporting of vast amounts of personal information; retroactively lengthening the registration for most registrants; and effectively prohibiting registrants from engaging in broad areas of employment. ROA.73, Am. Compl. ¶¶ 112-13.

---

[34] *See* 42 U.S.C. § 16911(5)(C); e.g., Tex. Penal Code §§ 21.11(a)(1-2), 22.011, 22.021.

[35] *See* Tex. Code Crim. Proc. arts. 62.402, 62.403.

[36] *See id*. 62.404, 62.405.

F. Plaintiffs' Expert Declarations

The Amended Complaint includes as Exhibit B the Expert Declarations of James J. Prescott ("Prescott"), J.D., Ph.D., and Wayne A. Logan ("Logan"), J.D., dated May 25, 2018, and their c.v.'s. ROA.87, 173-221, RE-40-61, Am. Compl. ¶ 259 & Ex. B. Significantly, the Decision failed to address those Declarations.

Prescott

Prescott is a *magna cum laude* graduate of Harvard Law School and a graduate of Stanford University; he received a Ph.D. in Economics from MIT; and he is a professor of law at the University of Michigan Law School. In addition, he co-directs the Empirical Legal Studies Center and the Program in Law and Economics. Much of Prescott's work in the last decade (which is primarily empirical) centers on the effects that sex offender registration and community notification laws have on sex offense rates. ROA. 174, RE-41, Prescott Decl. at 1.

Eight years ago, Prescott – a leading academic authority in this area – published a seminal article with Jonah Rockoff of Columbia University that offers comprehensive evidence on the relationship between sex offender notification laws (i.e., *public* registries) and the frequency and nature of sex offenses.[37] This study,

[37] *See* J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J. Law & Econ. 161 (2011), *available at* http://papers.ssm.com/sol3/papers.cfm?abstract id=1100663 ("2011 Prescott & Rockoff article").

which analyzed data from 15 states, including Texas, over about 10 years, provides cogent evidence that rather than reducing recidivism, such laws may well have *increased* (and almost certainly have *not* reduced) the frequency of sex crimes committed by convicted sex offenders. ROA.175, RE-42, Prescott Decl. at 2.[38]

Initially, Prescott notes that proponents of sex offender registration and notification laws have always (and have almost exclusively) justified them on the grounds that they can reduce recidivism. However, with respect to reducing the recidivism of convicted sex offenders, the results of Prescott and Rockoff's empirical research do *not* support the use of notification (i.e., public registries). *Id*.

Such research finds that the more people a state subjects to notification, the higher the relative frequency of sex offenses in that state. These results are highly statistically significant: Prescott and Rockoff's estimates indicate that it is very unlikely that these laws are reducing recidivism by registrants, and that *it is likely that these laws are actually increasing recidivism*. Indeed, if Texas had a public registry that was merely average in size in today's terms, their research indicates

[38] In his Declaration, Prescott describes this research in three parts. First, he reports the empirical results of his research with Rockoff and explains their implications for evaluating Texas's sex offender registration and notification laws. Second, he describes their study's data and empirical methodology. Third, he explains how and why public registries (and, by implication, potentially other post-release laws that share similar characteristics), although intended to make people safer, may actually put people at greater risk of becoming victims.

that the registry would nevertheless be the cause of many hundreds or thousands of additional sex crimes each year in the state. Unfortunately, Texas's number of offenders per capita on its public sex offender registry (relative to the rest of the country) is well above average – about 30% higher than the rest of the country. In absolute terms, Texas ranks first or second with respect to the total number of sex offenders it lists publicly on its registry. ROA.176-77, RE-43-44, Prescott Decl. at 3-4.

Given the size of Texas's public registry, notification-generated increases in recidivism are very likely to dwarf any deterrence gains, generating sex offense rates that could be significantly higher (conservatively 5% to 10%) than they would otherwise be. Prescott and Rockoff's study provides evidence that can be used to show, strikingly, that Texas's notification regime is very unlikely to be *reducing* recidivism; to the contrary, their research suggests it accounts for at least hundreds of extra sex offenses each year. ROA.177, RE-44, Prescott Decl. at 4.[39]

[39] Prescott and Rockoff find evidence in their study that notification does *not*, in fact, make it much more difficult for registered offenders to commit new crimes. This result contradicts the underlying theory that publicly identifying past offenders will alert potential victims to the presence of "nearby" offenders and allow these potential victims to protect themselves. Specifically, Prescott and Rockoff find that notification laws generate similar increases in the frequencies of sex offenses against each type of victim, i.e., against family members, neighbors, acquaintances *and strangers*. Therefore, it does not appear that neighbors and acquaintances have benefited from the enactment of notification laws. ROA.178, RE-45, Prescott Decl. at 5.

In the third part of his Declaration, Prescott notes that even if notification were to succeed at making it harder for sex offenders to reoffend, recidivism might still increase under notification regimes: after all, the difficulty of committing a crime is only one factor among many affecting an offender's likelihood of recidivating. Publicly identifying a person as a sex offender as well as imposing other significant burdens, as Texas does – residency and employment restrictions, frequent reporting requirements, etc. – on the other hand, influences *many* of these factors by dramatically changing a sex offender's daily life, future prospects, and psychological and financial burdens. ROA.182, RE-49, Prescott Decl. at 9.

Notification regimes, with their attendant registration burdens, appear much more likely to *increase* the likelihood that affected individuals return to crime, all else equal. These laws and their application exacerbate recidivism risk factors. By making the world outside of prison more like being in prison, sex offender post-release laws reduce the value of any threat to return someone to prison should he commit another sex crime. Put another way, the more difficult, lonely and unstable a registered sex offender's life is, the more likely he is to return to crime – and the less he has to lose by committing new crimes. *Id*.

Logan

Logan is a graduate of University of Wisconsin Law School and Wesleyan University; he has a master's degree in Criminology from SUNY Albany; and he is

the Gary and Sallyn Pajcic Professor of Law at Florida State University College of Law. Logan is a leading legal academic authority on sex offender registration and notification laws and policies. He is the author of inter alia *Knowledge as Power: Criminal Registration and Community Notification Laws in America* (Stanford University Press, 2009), which is widely considered the most authoritative work on the subject and was cited by the Supreme Court in *U.S. v. Kebodeaux*, 570 U.S. 387, 397 (2013).[40] ROA.199-200, RE-54-55, Logan Decl. at 1-2 ¶¶ 1-6.

Logan states that he has reviewed the Class Action Complaint files in this action, including the several legal claims made therein. Logan indicates that the focus of his Declaration is limited to those alleging violation of procedural due process, guaranteed by the Fourteenth Amendment, and the prohibitions contained in the Ex Post Facto Clause. ROA.200, RE-55, Logan Decl. at 2 ¶¶ 7-8.

Logan then engages in an extensive legal analysis of those claims, which is discussed below. With respect to procedural due process, he concludes that Plaintiffs satisfy the "stigma-plus" applied by the Supreme Court in *Paul v. Davis*, 424 U.S. 693, 711 (1976), so as to entitle them to a hearing (or an individualized assessment) prior to assignment of a risk level. With respect to Ex Post Facto,

[40] Logan is the author of over two dozen journal articles and book chapters regarding sex offender registration and community notification laws and policies. He is also an authority on the constitutional history and purposes of the Ex Post Facto Clause.

Logan concludes that (i) based on the allegations contained in the Complaint, the cumulative effect of TSORP and the Registry, retroactively imposed, qualify as punishment for ex post facto purposes; and (ii) Texas's registration and notification laws do not have a rational relation to a non-punitive purpose and are excessive, because they actually increase the risk of recidivism. ROA.200-04, RE-55-59, Logan Decl. at 2-6 ¶¶ 9-32.

VIII. SUMMARY OF THE ARGUMENT

The district court erred when it dismissed Plaintiffs' procedural due process claim, notwithstanding (a) that Chapter 62 does not afford them an individualized assessment or a hearing before publicly classifying them as to their present level of dangerousness; and (b) expert empirical evidence that rather than reducing recidivism, Texas registration and notification laws have *increased* the frequency of sex crimes committed by convicted sex offenders.

Likewise, the district court erred when it dismissed Plaintiffs' Ex Post Facto, cruel and unusual punishment, and Double Jeopardy claims with prejudice pursuant to Rule 12(b)(6), notwithstanding that (a) certain Plaintiffs mounted as-applied ex post facto challenges to the statute in addition to facial challenges; (b) the cumulative effect of the foregoing laws, retroactively imposed, qualifies as punishment for ex post facto purposes; and (c) those laws do not have a rational

relation to a non-punitive purpose and are excessive, because they actually increase the risk of recidivism.

IX. ARGUMENT

The District Court Erred When It Dismissed Plaintiffs' Procedural Due Process, Ex Post Facto, Cruel and Unusual Punishment, and Double Jeopardy Claims with Prejudice

A. Standard of Review

This Court reviews the district court's dismissal under Fed.R.Civ.P. 12(b)(6) de novo, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to Plaintiffs.[41] *Littell v. Hous. Indep. Sch. Dist.*, 894 F.3d 616, 622 (5th Cir. 2018) (citations and quotations omitted). Under Fed.R.Civ.P. 8(a), Plaintiffs must only provide a short, plain statement of each claim showing that they are entitled to relief.[42]

To survive a motion to dismiss, a complaint need not contain "'[d]etailed factual allegations'"; rather, it need only allege facts sufficient to "'state a claim

[41] Such acceptance extends to inter alia documents attached to the complaint, such as the expert declarations that are Exhibit B to the Amended Complaint. *See Innova Hosp. San Antonio, Ltd. v. Blue Cross & Blue Shield of Ga, Inc.*, 892 F. 3d 719, 726 (5th Cir. 2018).

[42] No heightened pleading standard applies in section 1983 cases, such as this one. *See Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167-68 (1993) (no heightened pleading standard for municipal § 1983 liability).

for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). A complaint may proceed even if it appears "that actual proof of [its alleged] facts is improbable and that a recovery is very remote and unlikely," so long as the alleged facts "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555–56 (citations and quotation omitted). To state a claim for relief based on 42 U. S. C. § 1983, Plaintiffs must allege facts plausibly establishing that McGraw, acting under color of state law, caused the deprivation of plaintiffs' rights under the Constitution or laws of the United States. *See Rehberg v. Paulk*, 566 U. S. 356, 361 (2012).

The district court acknowledged these principles but failed to apply them properly.

B. Procedural Due Process[43]

The Fourteenth Amendment guarantees that individuals be afforded procedural due process before being deprived of a liberty interest. *Meza v.*

[43] This section is partly drawn from pages 2-5 of the Logan Decision, ROA.200-03, RE-55-58.

Livingston, 607 F.3d 392, 399 (5th Cir. 2010). Plaintiffs' procedural due process claim asserts that Chapter 62 does not afford them an individualized assessment or a hearing before classifying their supposedly present level of dangerousness. The Supreme Court in *Conn. Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 7-8 (2003) (hereinafter "*CDPS"*), held that subjecting individuals to registration and community notification by means of a publicly accessible internet website does not violate procedural due process.

The Facts of This Case Are Greatly Different From *CDPS*

However, the requirements of and burdens imposed by TSORP and the Registry materially differ from those associated with the Connecticut regime upheld in *CDPS.* In *CDPS,* the Court concluded that, assuming arguendo a liberty interest existed with respect to being subject to registration and public notification, the Connecticut law challenged did not entitle the petitioner to a hearing. 538 U.S. at 7. The Connecticut website registry at issue simply disclosed that a registrant was convicted of a registration-eligible offense and made no representation that any individual posed a public safety danger. *Id.* Accordingly, the Court concluded that affording the petitioner in *CDPS* a hearing to assess his dangerousness would be a "bootless exercise." *Id*. at 7-8. Connecticut already afforded the petitioner due process regarding the sole material fact in issue: his conviction. *Id*. at 7.

TSORP and the Registry take a very different approach. In Texas, as noted, registrants are publicly designated in terms of "risk level": "low," "moderate" and "high" (with risk level for some registrants "not reported"). Moreover, the Registry, unlike that of Connecticut, provides no disclaimer that registrants have not been individually assessed for risk; nor can the Registry do so because it in fact does expressly classify registrants in terms of risk.

And, unlike in *CDPS*, the fact at issue is not simply whether Plaintiffs were lawfully convicted. *See id*. at 4 ("Connecticut, however, has decided that the registry requirement shall be based on the fact of previous conviction, not the fact of current dangerousness."). It is the distinct question of the "risk level" they purportedly present. The fact that Texas draws distinctions among individuals' risk levels itself makes clear that this is a contestable discretionary decision. (A fact highlighted by the "not reported" risk designation.) It is well-established that persons convicted of sex offenses are not uniform in terms of re-offense risk, but rather vary quite considerably.[44] In addition, as noted, under Chapter 62, even upon the clearest proof that Plaintiffs are not dangerous, there is no mechanism in the statute that would allow them (in all but two instances) to have their

[44] *See, e.g.,* R. Karl Hanson *et al., Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender,* 24 Psychology, Pub. Pol' y, and Law 48 (2018) (the "Hanson article").

registration obligations eliminated or reduced – even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation.

It is also well-established that registration and notification laws, such as that of Texas, are predicated upon a basic misunderstanding of the recidivism risk posed by sex offenders. As set forth in the Prescott Declaration, ROA.174-86, RE-41-53, rather than reducing recidivism, Texas registration and notification laws have *increased* the frequency of sex crimes committed by convicted sex offenders. Moreover, while certain subgroups of the population do recidivate at relatively higher rates, compared to other convicted offender sub-populations, as a group sex offenders recidivate at considerably lower rates.[45] There is no basis to conclude that the TSORP and Texas Registry are informed by these findings.

Plaintiffs Satisfy the "Stigma Plus" test of *Paul v. Davis*

In the case at bar, TSORP and the Registry negatively affect a liberty interest of Plaintiffs, based on the "stigma plus" test applied by the Supreme Court in *Paul v. Davis*, 424 U.S. 693, 711 (1976). First, this Circuit has acknowledged that being publicly designated as a registered sex offender, and certainly a "high risk" sex offender, has stigmatizing effect. *See, e.g., Meza*, 607 F.3d at 399, 402; *U.S. v. Jimenez,* 275 Fed. Appx. 433, 442 (5th Cir. 2008), *cert. denied*, 555 U.S.

[45] *See* Ira M. Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 508 (2015) (the "Ellman article").

1103 (2009); *Coleman v. Dretke*, 409 F.3d 665, 668 (5th Cir.), *cert. denied*, 564 U.S. 938 (2005). Second, based on the allegations contained in the Amended Complaint, Plaintiffs have been subject to a variety of hardships that satisfy the "plus" required by *Paul v. Davis.*

Besides facing the specter of felony prosecution for failing to satisfy the in-person updating, verification and reporting requirements of TSORP, the Amended Complaint alleges that Plaintiffs have suffered inter alia loss of housing and employment, including a career in the U.S. Air Force (resulting in a general rather than honorable discharge). *See, e.g.*, ROA.42-45, Am. Compl. ¶¶ 12, 15, 16. Public display on the Registry has also resulted in denial of access to a small business loan and precluded participation in parent-teacher conferences. *See* ROA.46-47, Am. Compl. ¶ 19.

The harms experienced by Plaintiffs do not result from the fact of their criminal convictions, as the Supreme Court concluded in *Smith v. Doe*, 538 U.S. 84, 98, 101 (2003). It is alleged that John Doe #3, for instance, pled guilty under the Texas provision allowing for deferred adjudication, and thereafter satisfied all court-ordered requirements, purportedly resulting in the sealing and dismissal of his case. *See* ROA.43-44, Am. Compl. ¶ 14. Public knowledge of his criminal history, and the resulting stigmatization he is alleged to have experienced, stem from the State's insistence that he be placed on the Registry. More problematic, it

is alleged that Doe #3 is subject to the public stigmatization and harm he has suffered as the result of a technical error, admitted by the State, which it has refused to rectify. *See* ROA.44, Am Compl. ¶ 15.

Furthermore, the significant adverse consequences that the Amended Complaint alleges have been experienced by Plaintiffs, as a result of the increasingly onerous requirements of TSORP and the Registry imposed over time, are not a matter of "conjecture," as they were to the Supreme Court in 2003. *See Smith*, 538 U.S. at 100. The stigmatizing effect of being publicly designated as a sex offender with a certain risk-level classification and the many serious negative consequences that Plaintiffs have allegedly experienced as a result of their public designations and being subject to TSORP, satisfy the stigma-plus test. *See Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (designating purportedly excessive drinker as danger to community without notice or hearing was unconstitutional as constituting denial of procedural due process); *State v. Samples*, 198 P.3d 803, 808 (Montana 2004) ("We agree with those jurisdictions that have concluded there is a liberty interest at stake when a person is designated as a particular risk level under the [Montana] Act.").

The District Court's Reasoning in Applying CDPS Was Flawed

The district court mechanically applied *CDPS*, *Meza* (which followed *CDPS*) and *King v. McCraw*, 559 Fed. Appx. 278, 282 (5th Cir. 2014) (following

CDPS and *Meza*; classification as a sex offender was based only on prior conviction where he received the requisite due process), and did not account for the risk-level classifications at bar in ruling that no further due process was required. ROA.437-38, RE-22-23, Decision at 17-18. In doing so, the district court seized on the allegation in paragraph 116 of the Amended Complaint, ROA.74, that "[t]ier classifications are based solely on the offense(s) of conviction," ROA.437, RE-22, Decision at 17. However, as noted above, such allegation was made in error; after all, as also noted above, risk-level classifications are determined based on a registrant's prior conviction records using a "sex offender screening tool" employing "various factors" (albeit left unspecified in the statute) – without regard for a person's individual, current circumstances.

For these reasons, Plaintiffs' procedural due process claim is meritorious and they are entitled to an individualized assessment or a hearing before classification of their supposedly present level of dangerousness.

C. Ex Post Facto, Cruel and Unusual Punishment, and Double Jeopardy[46]

In Count VII of the Amended Complaint, Plaintiffs assert that TSORNA violates the Ex Post Facto Clause by retroactively punishing them for offenses

[46] This section is partly drawn from pages 5-6 of the Logan Declaration, ROA.203-04, RE-58-59.

committed before the 2017 version was enacted. ROA.91-92, Am. Compl. ¶¶ 305–07. In Count VIII, Plaintiffs state that the statute violates the Eighth Amendment's protection against excessive and arbitrary punishment. ROA.92, Am. Compl. ¶ 308. In, Count IX, Plaintiffs allege that the statute violates Double Jeopardy by imposing additional punishments for the same offense. ROA.92, Am. Compl. ¶ 309. These claims will be treated together as all three revolve around whether Chapter 62's scheme is punitive in nature.

Certain Plaintiffs Made As-Applied Challenges

Preliminarily, the district court erroneously interpreted Plaintiffs' ex post facto claims as strictly facial challenges. ROA.430, RE-15, Decision at 10. In addition to the facial ex post facto challenges mounted by all Plaintiffs, as noted above at pages 9-10 and footnotes 15 and 16, certain Plaintiffs mounted as-applied ex post facto challenges to the statute: (i) those Plaintiffs whose offenses pre-date the establishment of the Registry on September 1, 1991 are forced to comply with TSORP when they already completed their sentences; and (ii) those Plaintiffs who were to be on the Registry for 10 years post discharge now have to register on TSORP for life because of the amendments made to the statute in 1999. These are explicit, or at least implicit, as-applied challenges.

In each instance, those Plaintiffs challenge the combined effects of the in-person reporting provisions found in the statute;[47] the failure to comply provision that results in a felony prosecution;[48] and the provision that provides for risk-level classifications.[49] Finding these provisions to be unconstitutional as applied to those Plaintiffs falling within category (i) above is a narrower pursuit and would not invalidate the rest of Chapter 62's purpose. For those Plaintiffs falling within category (ii) above, narrowing relief to the statute in effect at the time of their sentencing would not invalid the purpose of the Registry. Contrary to the finding of the district court, ROA.430, RE-15, Decision at 10, Plaintiffs have supplied evidence of the specific manner in which the statute is administered unconstitutionally as to them. Both facial and as-applied challenges to a statute may be mounted simultaneously. *See Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 367 (210).

The "Intent-Effects Test and the *Smith v. Doe* Factors

The Ex Post Facto Clause prohibits States from retroactively increasing the punishment imposed on an individual convicted of a crime. *Calder v. Bull,* 3 U.S.

[47] *See* Tex. Code Crim. Proc. arts. 62.055-62.0551, 62.057, 62.058, 62.059, and 62.060.

[48] *See id*. 62.102.

[49] *See id*. 62.102.

(Dall.) 386, 390 (1798). In order for the Clause to apply, a reviewing court must first establish that a law challenged, either by intent evidenced by the legislature or the effects the law imposes, qualifies as "punishment." *Smith*, 538 U.S. at 92 ("If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention' to deem it "civil.") (citation and quotations omitted).[50]

In *Smith*, the Supreme Court cited its prior decision in *Kennedy v. Martinez-Mendoza*, 361 U. S. 144 (1963), as containing a list of appropriate factors – which it termed non-dispositive "guideposts" – to consider in determining whether a statute nominally denominated as civil and non-punitive in intent was in effect, as felt by those within its scope, punishment. 538 U. S. at 97. *Smith* identified five of those factors as relevant in this type of case: whether the statute as established (1) had been labeled punishment historically, (2) imposed an affirmative disability or restraint, (3) promoted traditional aims of punishment such as deterrence and/or retribution, (4) was rationally connected to a non-punitive purpose, and (5) was

[50] The district court cited *Moore v. Avoyelles Corr. Ctr.*, 253 F.3d 870, 872 (5th Cir. 2001), ROA.432, RE-17, Decision at 12, for the "intent-effects" test; that nearly 20-year-old case dealt with Louisiana's sex offender neighborhood notification law, but there is no similar statute involved here.

excessive via-a-vis that purpose. *Id.* A careful analysis of the *Smith* factors as applied to Chapter 62 is set forth below.

Recent Decisions from Across the Country Deem Similar Laws Punitive

Based on the allegations of the Amended Complaint, the cumulative effects of TSORP and the Registry, retroactively imposed, qualify as punishment for ex post facto purposes. The requirements and conditions of TSORP and the Registry are similar to those deemed punitive by a growing number of federal and state courts, which have distinguished challenged laws from the "first generation" registration and notification Alaska law deemed non-punitive 16 years ago by the Supreme Court in *Smith v. Doe*. *See, e.g., Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017); *Millard v. Rankin*, 265 F. Supp. 3d 1211 (D. Colo. 2017), app. filed, Sept. 21, 2017 (emphasizing in-person reporting requirements and absence of individualized assessment requirement in the Colorado statute, 265 F. Supp. 3d at 1229-30); *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), *cert. denied*, 138 S. Ct. 925 (2018) (emphasizing in-person reporting requirements and the fact that "*Smith* was decided in an earlier technological environment," unlike the current worldwide dissemination of registrants' information via the Internet, 164 A.3d at 1210-12); *Doe v. State*, 111 A.3d 1077 (N.H. 2015) (emphasizing all of the foregoing three circumstances, 111 A.3d at 1094-96, 1098); *Starkey v. Okla.*

Dept. of Corr., 305 P.3d 1004 (Okla. 2013) (same, 305 P.3d at 1022-24, 1028); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009) (emphasizing absence of individualized assessment requirement in the Indiana statute, 905 N.E.2d at 383-84). This Court should follow the lead of those courts.

The Sixth Circuit's Analysis of the *Smith* Factors in Determining Whether a Similar Statute Violates the Ex Post Facto Clause Is Particularly Instructive

In *Does #1-5 v. Snyder*, the Sixth Circuit first determined that the Michigan Sex Offenders Registration Act (SORA) inflicted what has historically and traditionally been regarded as punishment because inter alia "[u]nlike the law in *Smith*, which republished information that was already public[ly] available, SORA ascribes and publishes tier classifications corresponding to the state's estimation of present dangerousness without providing for any individualized assessment. These designations are unappealable…." 834 F.3d at 702. So too precisely here. The Tenth Circuit has also stressed the importance of individualized assessment, treating laws containing across-the-board restrictions with skepticism. *Doe v. Miami-Dade Cty., Fla.*, 846 F.3d 1180, 1185 (11th Cir. 2017). Also, as with TSORNA and John Doe #3 discussed above, whose criminal history would not be public knowledge if not for TSORP and the Registry, SORA discloses otherwise non-public information in certain instances. *Snyder*, 834 F.3d at 703. "Thus, unlike the statute in *Smith*, the ignominy under

SORA [and TSORNA] flows not only from the past offense, but also from the statute itself." *Id*.

Also, like the Michigan law unanimously struck down by *Snyder*, TSORP requires that subject individuals report, update and verify their personal information in person. *See id*. at 698, 703. In *Smith v. Doe*, the only instance when the Supreme Court has addressed an ex post facto challenge to a sex offender registration and notification law, the Court was at pains to acknowledge the absence of an in-person reporting requirement in the Alaska law challenged. *See Smith*, 538 U.S. at 101, and the district court and state court cases cited above along with *Snyder*, attaching importance to in-person reporting requirements; *State v. Letalien*, 985 A.2d 4, 18, 24-25 (Maine 2009) (same).

Next, the court in *Snyder* found that SORA's in-person reporting requirement, with the threat of imprisonment for noncompliance, is a "direct restraint[] on personal conduct." 834 F.3d at 703. So too with TSORNA. Finally, after giving little weight to the factor concerning the traditional aims of punishment, *Snyder* assessed whether the Michigan law has a rational relation to a non-punitive purpose, "a [m]ost significant factor" in the determination whether the statute's effects are punitive, *Smith*, 538 U.S. at 102 (citation and quotation marks omitted), and is excessive.

As noted by the Sixth Circuit, registration and notification laws, such as those of Texas, not only lack social science evidence supporting their efficacy, but rather "actually *increase* the risk of recidivism…by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities" – underscoring their lack of such a rational relation and their excessiveness. *Snyder*, 834 F.3d at 704-05 (emphasis in original) (citing the 2011 Prescott & Rockoff article); *see also id.* at 705 ("The requirement that registrants make frequent, in-person appearances...appears to have no relationship to public safety at all."); *see generally* the Prescott Declaration, ROA.174-86, RE-41-53, particularly its discussion of empirical evidence of sex offender increasing rather than decreasing recidivism as respects Texas.

Also, as noted earlier, *see* the Hanson and Ellman articles, it is known that risk of re-offense significantly declines in tandem with the number of years a person remains law-abiding, further highlighting the excessiveness of TSORP, which requires registration for 10 years or life, based on the offense of conviction. All in all, *Snyder*, 834 F.3d at 704, emphasized "the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that '[t]he risk of recidivism posed by sex offenders is frightening and high.' 538 U.S. at 103."

Other effects of complying with TSORP and being placed on a public registry have likewise been deemed punitive in nature, resembling, and indeed in

several respects exceeding, incidents of probation and parole, historically regarded as punishment. *See Snyder*, 834 F.3d at 703. In *Snyder,* the Sixth Circuit concluded that inter alia the consequences flowing from posting registrants' photos and personal information had punitive effect. *Id*. at 700, 705. In the instant case, not only is such information publicly posted on the Registry, but Plaintiffs are designated as particular public safety risks, which should generate corresponding greater constitutional concern. Such other effects in addition to an in-person registration requirement distinguish *Creekmore v. Attorney Gen. of Texas*, 341 F. Supp. 2d 648, 661 (E.D. Tex. 2004); *Doe v. Pataki*, 120 F.3d 1263, 1285 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998); and *Shaw v. Patton*, 823 F.3d 556, 568 (10th Cir. 2016), cases relied upon by the district court. ROA.435-36, RE-20-21, Decision at 15-16.

The summation in *Snyder*, 834 F.3d at 705, why the Michigan statute's actual effect was punitive is worth repeating:

> A regulatory regime…that categorizes [people] into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska's first-generation registry law. SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families….It…compels them to interrupt [their

> daily] lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information.

Chapter 62's Risk-Level Classification System Violates Double Jeopardy and Is Excessive and Arbitrary Punishment

Even apart from the *Snyder* analysis, Chapter 62 punishes registrants who have already served, in full, their previously imposed criminal sentences rendering the obligations of Chapter 62 as a second punishment that violates the Fifth Amendment's Double Jeopardy Clause. *See Crow v. Quarterman*, No. CIV.A. G-07-0096, 2008 WL 3539738, at *9 (S. D. Tex. Aug. 13, 2008) (double jeopardy prohibits multiple punishment for the same offense).

Additionally, Chapter 62 constitutes punishment that is imposed arbitrarily and capriciously by private citizens who want to deny Plaintiffs jobs and housing due to the State labeling them as dangerous without evidence based on individual assessments by trained experts. *See U.S. v. Smith*, 895 F. 3d 410, 419 (5th Cir.), *cert. denied*, 139 S. Ct. 495 (2018) (Eighth Amendment precludes as cruel and unusual "greatly disproportionate" sentences); *see also* Note, *Does Community Notification for Sex Offenders Violate the Eight Amendment's Prohibition Against Cruel and Unusual Punishment? A Focus on Vigilantism resulting from "Megan's Law,"* Alex B. Eyssen, 33 St. Mary's L. J. 101, 118-119, 131, 134-135 (2001); *Millard*, 265 F. Supp. 3d at 1228 (plaintiffs made out Eighth Amendment claim

against Colorado sex offender registration statute where private citizens committed criminal acts of physical violence against registrants).

The district court in *Millard* eloquently spelled out the realities of sex offender registration as punishment of a most cruel variety as well as its mechanism, which is fully applicable to Chapter 62:

> The [Legislature's] disavowal of any punitive intent is an avoidance of any responsibility for the result of warning the public of the dangers to be expected from registered sex offenders. The register is telling the public – DANGER – STAY AWAY. How is the public to react to this warning? What is expected to be the means by which people are to protect themselves and their children?
>
> . . . the effect of publication of the information required to be provided by registration is to expose the registrants to punishment inflicted not by the state but by their fellow citizens.
>
> The fear that pervades the public reaction to sex offenses – particularly as to children – generates reactions that are cruel and are in disregard of any objective assessment of the individual's actual proclivity to commit new sex offenses. The failure to make any individual assessment is a fundamental flaw in the system.

Id. at 1226. Plaintiffs allege in paragraphs 208-221 of the Amended Complaint, ROA.82-83, that they have been victimized by numerous private citizens who have taken to heart the State of Texas's empirically false description of them as a danger to others to inflict arbitrary and disproportionate additional punishments upon Plaintiffs, which violates both the Fifth and Eighth Amendments.

The District Court Admittedly Relied on Cases That Are Not Controlling

The district court "acknowledged that some of Chapter 62's requirements are more burdensome than the Alaska statute in *Smith v. Doe*," but stated "they do not rise to the level of harshness to constitute punishment" and chose to follow unpublished opinions of this Circuit that largely predate recent case law across the country; that predate TSORNA 2017; and that are not controlling precedent, as the district court recognized. ROA.434-35, RE-19-20, Decision at 14-15. Moreover, those cases are distinguishable. The plaintiff in *King*, 559 Fed. Appx. at 282, merely argued that yearly registration under the statute was excessive as to him, a claim foreclosed by *Smith v. Doe*; no other grounds for a finding that Chapter 62 constituted punishment were presented in that case. *Hollier v. Watson*, 605 Fed. Appx. 255, 259 (5th Cir.) *cert. denied,* 136 S. Ct. 332 (2015); *Hayes v. Texas,* 370 Fed. Appx. 508, 509 (5th Cir. 2010); *Hall v. Attorney Gen. of Tex.*, 266 Fed. Appx. 355, 356 (5th Cir. 2008); and *Herron v. Cockrell*, 78 Fed. Appx. 429, 430 (5th Cir. 2003), do not contain any critical ex post facto analysis at all, but rather perfunctory citation to one of those cases or to *Smith v. Doe*.

For these reasons, the district court was wrong in its analysis of the *Mendoza-Martinez* factors – particularly with respect to the in-person reporting requirement given the aforementioned other effects of complying with TSORP and being placed on a public registry – and in concluding that Plaintiffs did not put

forth the "clearest proof" that the effects of Chapter 62 constitute punishment. ROA.432, 436, RE-17, 21, Decision at 12, 16.

X. CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons, the District Court erred in dismissing with prejudice Plaintiffs' procedural due process, Ex Post Facto, cruel and unusual punishment, and Double Jeopardy claims. Plaintiffs pray that this Court reverse the dismissal of those claims and remand to the lower court for the case to be decided on the merits.

Dated: March 16, 2019

Respectfully submitted,

By:/s/Terence Estes-Hightower
Terence Estes-Hightower
Estes-Hightower PLLC
Attorneys and Counselors
6770 Imperial Valley Drive,
Suite 235
Houston, TX 77060
214-334-2260 - Office
832-218-1447 – Fax
teri.ehpllc@gmail.com
State Bar No. 24028746
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2019, a true and correct copy of the foregoing Brief for Plaintiff-Appellant were served via electronic filing with the Clerk of Court and all registered ECF users.

Dated: March 18, 2019

By:/s/Terence Estes-Hightower

Terence Estes-Hightower

CERTIFICATE OF COMPLIANCE

This brief has been prepared using 14-point, proportionately spaced, serif typeface, in Microsoft Word. Excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 8,871 words.

By:/s/Terence Estes-Hightower
Terence Estes-Hightower

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

March 19, 2019

Mr. Terence Estes-Hightower
Estes-Hightower, P.L.L.C.
16770 Imperial Valley Drive
Suite 235
Houston, TX 77060

No. 18-11620 John Does 1-7 v. Greg Abbott, et al
USDC No. 3:18-CV-629

Dear Mr. Estes-Hightower,

You must submit the 7 paper copies of your brief required by 5th Cir. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1. Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5th Cir. R. 42.3. Exception: As of July 2, 2018, Anders briefs only require 2 paper copies.

The paper copies of your brief must **not** contain a header noting "RESTRICTED". Therefore, please be sure that you print your paper copies **from this notice of docket activity** and not the proposed sufficient brief filed event so that it will contain the proper filing header. Alternatively, you may print the sufficient brief directly from your original file without any header.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Gardner

By: _____
Christina A. Gardner, Deputy Clerk
504-310-7684

cc: Mr. Michael Abrams
Mr. Rance Craft