

Multiple Documents

Part	Description
1	16 pages
2	Exhibit A: Plaintiffs' Second Amended Proposed Judgment

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 WHITMER¹, 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 January 28, 2021 plaintiffs sought concurrence from defendants in the relief sought. Defendants' counsel denied concurrence.

**PLAINTIFFS' AMENDED MOTION FOR
ENTRY OF JUDGMENT**

1. On September 25, 2020, Plaintiffs moved for final judgment and submitted a proposed judgment that reflected not just the rulings that this Court has made about the constitutionality of Michigan's Sex Offenders Registration Act

¹ Pursuant to Fed. R. Civ. Proc. 25(d), Governor Gretchen Whitmer and Michigan State Police Director Colonel Joseph Gaspar are automatically substituted for their predecessors.

(“SORA”), but also a proposed timetable for entry of injunctive and notice relief that would allow for legislative action prior to entry of judgment. R. 99. The parties then briefed various aspects of the proposed judgment. R. 101, 103.

2. The Michigan legislature has now passed and the governor has signed a bill amending SORA, Michigan Public Act 295 of 2020 (“new SORA”) which takes effect on March 24, 2021. R. 105-1.

3. Plaintiffs believe that the new SORA does not remedy the statute’s constitutional deficiencies. Plaintiffs recognize, however, that their complaint challenged the current version of SORA (“pre-2021 SORA”), not the new SORA. Although litigation over the new SORA is likely, Plaintiffs believe that *this* piece of litigation over the pre-2021 SORA can now be brought to a close.

4. On January 14, 2021, Plaintiffs informed the Court that they would be working with Defendants to see whether the parties could agree on the language of a proposed final judgment, and that if the parties could not agree, Plaintiffs would file an amended motion for entry of judgment.

5. On January 27, 2021, the parties met and concluded that they would be unable to agree on terms of a proposed judgment.

6. Accordingly, Plaintiffs renew and amend their motion for judgment, and submit a revised proposed judgment.

WHEREFORE, plaintiffs John Does #1-6, on behalf of themselves, the primary class and the ex post facto subclasses, now ask this Court to enter the proposed final judgment attached as Exhibit A to the brief accompanying this motion.

Respectfully submitted,

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Dated: January 28, 2021

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JOHN DOES #1-6, on behalf of themselves
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**PLAINTIFFS' BRIEF IN SUPPORT OF
MOTION FOR ENTRY OF JUDGMENT**

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INTRODUCTION

After almost a decade of litigation, Michigan has passed a new Sex Offenders Registration Act (“SORA”). Michigan Public Act 295 of 2020 (“new SORA”) takes effect on March 24, 2021. This legislation, which fails to address many of the constitutional deficiencies identified by this Court and the Sixth Circuit and which in some respects makes the law even more punitive and unclear, has dashed Plaintiffs’ hopes that litigation over SORA will end. The legislature’s abject failure to pass a statute that responds to the judicial rulings does not, however, answer what should be done at the end-stage of the proceedings in *this* case, which challenged the current version of SORA (“pre-2021 SORA”). Nor is this the forum to debate the constitutionality of the new SORA.

This Court has granted summary judgment in favor of Plaintiffs on all four counts of their complaint challenging the constitutionality of the pre-2021 SORA, and it is appropriate that final judgment enter. While it is unfortunate that the legislature’s refusal to bring SORA within constitutional limits means that there will likely be litigation over the new SORA, this Court has already rendered its decision on the constitutionality of the pre-2021 SORA. This litigation can thus end, and judgment should enter.²

² In order to challenge the new SORA within this litigation, Plaintiffs would not only need to amend the complaint, but would also likely need to intervene new

ARGUMENT

I. Final Judgment Should Enter.

Plaintiffs attach a second amended proposed judgment as Exhibit A. To a large extent Plaintiffs' proposed judgment incorporates language jointly agreed upon by the parties prior to passage of the new SORA. *Compare* Exhibit A, with Defendants' Proposed Judgment, R. 101-1. Plaintiffs have removed much of the language that was previously in dispute, as passage of the new SORA has eliminated the need for it. Below, Plaintiffs will briefly review the language of the proposed judgment, but will not repeat the prior briefing, which comprehensively addresses the few areas where Plaintiffs' second amended proposed judgment diverges from the language Defendants had previously proposed. *See* R. 99, 101, 103.

Defendants' objection at this stage appears to be less with the language of the judgment than with the idea that the Court should enter a judgment at all. Defendants do not want this Court to set out its rulings or grant any relief because, in Defendants' view, the passage of the new SORA has made the case moot. But that simply is not the law, because class members still face prosecution under the old statute. Thus, Plaintiffs' claims are very much alive, and declaratory, injunctive, and notice relief remains necessary.

plaintiffs, bring new claims, and revise the class definitions or certify new subclasses. Plaintiffs believe it is simpler and cleaner to simply file a new case.

The pre-2021 SORA will no longer be in effect after March 24, 2021. But class members – absent relief from this Court – remain criminally liable for any violations of the old statute that occurred before March 24, 2021. Mich. Comp. Laws § 8.4a specifically provides that a repealed or amended statute “shall be treated as still remaining in force” for the purpose of prosecuting violations thereof. As the Michigan Supreme Court has explained “[b]y enacting § 8.4a, the Legislature has expressed its intent that conduct remains subject to punishment whenever a statute imposing criminal liability either is repealed outright or reenacted with modification, even though a specific saving clause has not been adopted.” *People v. Schultz*, 435 Mich. 517, 528; 460 N.W.2d 505, 510 (1990) (plurality).

Indeed, Section 8.4a was passed in response to *People v. Lowell*, 250 Mich. 349; 230 N.W. 202 (1930), which held that “the repeal of a criminal statute operates from the moment it takes effect, to defeat all pending prosecutions under the repealed statute.” *Id.* at 353. *Lowell* acknowledged that the legislature could avoid this result “by the enactment of a general saving statute.” *Id.* at 361. As the Michigan Supreme Court has recognized, that is precisely what the legislature did in enacting Section 8.4a. *Schultz*, 435 Mich. at 527–28. *See also id.* at 539 (Brickley, J., dissenting); *People v. Gibson*, 71 Mich. App. 220, 223; 247 N.W.2d 357, 359 (Mich. Ct. App. 1976) (§ 8.4a “is indicative of the legislative intent to allow prosecutions for violations of repealed statutes where the acts complained of occurred during the life

of that statute”); *People v. Dalby*, 181 Mich. App. 673, 674; 451 N.W.2d 201, 202 (Mich. Ct. App. 1989) (per curiam) (“Generally, amendments of criminal statutes are not applied to bar prosecutions for crimes committed before the amendatory act.”).

This understanding of Section 8.4a comports with federal case law and analogous state and federal statutes. Citing Section 8.4a (among other laws), Justice White observed that “46 States, as well as the Federal Government, make provision for saving pending criminal prosecutions from the repeal of the underlying statute,” meaning that “[c]onduct perfectly innocent under current law is nevertheless punishable if it occurred while a valid criminal statute proscribed it.” *United States v. U.S. Coin & Currency*, 401 U.S. 715, 736–38 & n.2 (1971) (White, J., dissenting). And, the Sixth Circuit, interpreting the analogous federal statute, 1 U.S.C. § 109, has held that “[w]hen Congress replaces or changes an existing criminal law, we presume that the new law does not alter penalties incurred before the new law took effect.” *United States v. Richardson*, 948 F.3d 733, 746 (6th Cir. 2020) (citation omitted).

Absent relief from this Court, Plaintiffs continue to face prosecution under a statute that this Court has found to be unconstitutional. And absent a final judgment incorporating this Court’s interim order suspending SORA enforcement during the pandemic, Plaintiffs could be prosecuted for failing to comply with SORA after

February 14, 2020, even though they relied on an order of this Court. Plaintiffs are not asking this Court (in this case) to enjoin enforcement of the new statute. But Plaintiffs, after years of litigation, are entitled to a judgment that bars enforcement of the pre-2021 SORA and sets forth the rulings of this Court in final form.

II. The Proposed Judgment Is Appropriate.

A. Provisions Regarding Declaratory and Injunctive Relief

Paragraphs 1 through 3 of the amended proposed judgment encapsulate the Court's rulings on Plaintiffs' motion for declaratory and injunctive relief, R. 62, and motion for partial summary judgment, R. 75, and spell out the declaratory and injunctive relief that the Court ordered. Defendants' proposed judgment, R. 101-1, largely tracks this language (although it combines Plaintiffs' paragraphs 1 and 2 into a single paragraph). Plaintiffs have added language to clarify that the declaratory and injunctive relief relates just to the pre-2021 statute, as this litigation did not address the constitutionality of the new SORA. The revised order thus provides that the injunction does not bar enforcement of the new SORA against members of the ex post facto subclasses.

B. Provisions Regarding Notice

Paragraph 4 of the proposed amendment judgment provides that Defendants notify law enforcement and prosecutors of the judgment within seven days after entry.

Paragraph 5 covers notice to registrants and provides that the process for and content of the notice(s) be negotiated by the parties for approval by the Court. The parties would try to provide jointly-drafted documents, but would provide their respective proposals if they cannot agree. The proposed judgment only covers how class members will be informed of the judgment in this case, and does not specify how class members will be informed of the new statute. This reflects the fact that the content and process for notice of the new statute is up to Defendants. But the fact that the new SORA requires notice will make it simpler to provide notice of the judgment here, eliminating many of the parties' prior disputes on that score.

Because Defendants had previously expressed concerns that they would have to do two separate mailings (one for the judgment notice and one for notice of a new statute), the proposed amended judgment specifically provides that the notice of judgment in this case can be included in the mailing for the required notice informing registrants of the new statute. Section 5a(1) of Public Act 295 provides that the Michigan State Police "shall mail a notice to each individual registered under this act who is not in a state correctional facility explaining the individual's duties under this act as amended." (Notice of the judgment here will still need to be provided to incarcerated registrants, since the new statute does not provide for notice prior to

their release from prison.³) Plaintiffs recognize that sending out both notices at the same time will result in cost savings and efficiencies for the Michigan State Police. In addition, the notice here can be drafted to avoid any confusion, for example, by explaining that the legislature has passed a new statute and specifically referring to the accompanying notice about a registrants' obligations going forward.

C. Provision Incorporating the Interim Order

Paragraph 6 incorporates this Court's interim order barring enforcement of registration, verification, school zone, and fee violations of SORA that occurred from February 14, 2020, until registrants receive notice. R. 91. Absent such relief, the state might try to prosecute registrants for failing to comply with SORA while the interim order was in effect. Registrants who relied on the interim order should not face prosecution, once final judgment enters, for their actions while the interim order was in effect. Moreover, given "the confusion which presently exists regarding the legal status of SORA," (Opinion, R. 84, PageID.1804), registrants cannot be held criminally responsible for failing to comply with SORA until they are informed what their obligations are. *See e.g., Does #1-5 v. Snyder*, 101 F. Supp. 3d 672, 693–94 (E.D. Mich. 2015). In other words, if the state wants to send people to prison for

³ *See* Mich. Pub. Acts 295, § 5a(2) (2020) (providing that registrants in a state correctional facility be notified only of the new statute upon release).

failing to comply with SORA, it must first tell them what the law requires them to do.

D. Provisions Regarding Class Member List

Paragraphs 7-9 of the proposed judgment relate to the class list, which is necessary for class counsel to do post-judgment monitoring and to respond to the expected deluge of questions from class members. The parties had previously agreed that class counsel should be provided with a class list, but had disagreed about precisely what information should be provided. Those disputes are covered in the parties' prior briefing, and need not be repeated here. *See* R. 99, 101, 103.

E. Provisions Regarding Attorney's Fees

Paragraph 10 of the proposed amended judgment address attorneys' fees. The language here is not in dispute. *See* Defendants' Proposed Judgment, R. 101-1 (proposing same language).

F. Provision Regarding Retention of Jurisdiction

Finally, the proposed judgment provides that the Court retains jurisdiction to ensure compliance with the orders set out in the judgment and to resolve post-judgment issues, including notice and attorney's fees.

CONCLUSION

There are no longer any obstacles to entry of judgment in this case. Judgment should enter forthwith.

Respectfully submitted,

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Attorneys for Plaintiffs

Dated: January 28, 2021

CERTIFICATE OF SERVICE

On January 28, 2021, the plaintiffs filed the above motion and brief for partial summary judgment using the Court's ECF system, which will send same-day email service to all counsel of record.

s/ Miriam J. Aukerman
Attorney for Plaintiffs

EXHIBIT A

PLAINTIFFS' SECOND AMENDED PROPOSED JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOES #1-6, on behalf of themselves
and all others similarly situated,

Plaintiffs,

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State of Michigan, and COL. JOSEPH
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Hon. Robert H. Cleland

Mag. J. David R. Grand

FINAL JUDGMENT

Whereas Plaintiffs filed a complaint in August 2016 and subsequently filed amended complaints challenging the constitutionality of the version of Michigan’s Sex Offenders Registration Act, Mich. Comp. Laws § 28.721 *et seq.*, in effect at the time (“pre-2021 SORA”);

Whereas this Court on September 11, 2018, entered a stipulated order certifying a primary class of all people required to be registered under Michigan’s pre-2021 SORA, and two “ex post facto” subclasses of individuals with offenses pre-dating January 1, 2006, and April 12, 2011, R. 46;

Whereas this Court on May 23, 2019, entered a stipulated order declaring the 2006 and 2011 SORA amendments to be unconstitutional as to the ex post facto subclasses, R. 55;

Whereas this Court on February 14, 2020, issued an opinion and order granting Plaintiffs' motions for summary judgment as to Counts I through IV of the second amended complaint, and ordered Defendants to provide notice of the Court's ruling to all registrants, and all law enforcement officials and prosecuting attorneys tasked with the enforcement of SORA, R. 34;

Whereas this Court subsequently entered an interim order suspending both enforcement of SORA and entry of the final judgment during the COVID-19 pandemic, R. 91;

Whereas the Michigan legislature thereafter passed, and the Michigan governor signed, Michigan Public Act 295 of 2020 (HB 5679), which amends SORA and which takes effect on March 24, 2021 ("new SORA");

This Court now enters final judgment as follows:

1. IT IS ORDERED that Plaintiffs' motion for declaratory relief (R. 62) is GRANTED. Michigan's pre-2021 SORA is DECLARED to be punishment, the ex post facto application of the 2006 and 2011 amendments is DECLARED unconstitutional, the 2011 amendments are DECLARED not severable, and the pre-2021 SORA is therefore DECLARED NULL AND VOID as applied to members of the

ex post facto subclasses (defined as all people who are or will be subject to registration under SORA, who committed their offense or offenses requiring registration prior to April 12, 2011, and who have committed no registrable offense since).

2. IT IS ORDERED that Plaintiffs' motion for injunctive relief (R. 62) is GRANTED. Defendants and their agents are permanently ENJOINED from enforcing ANY provision of the pre-2021 SORA against members of the ex post facto subclasses, for conduct that occurred or occurs before the effective date of the new SORA. As the legislature has now amended SORA, and as this litigation did not address the constitutionality of the new SORA, this injunction does not enjoin enforcement of the new SORA against members of the ex post facto subclasses.

3. IT IS FURTHER ORDERED that Plaintiffs' motion for partial summary judgment (R. 75) is GRANTED. The following provisions of the pre-2021 SORA are DECLARED unconstitutional, and Defendants and their agents are permanently ENJOINED from enforcing them against any registrant:

(a) Provisions Void for Vagueness:

- i. the prohibition on working within a student safety zone, Mich. Comp. Laws §§ 28.733–734;
- ii. the prohibition on loitering within a student safety zone, Mich. Comp. Laws §§ 28.733–734;
- iii. the prohibition on residing within a student safety zone, Mich. Comp. Laws §§ 28.733, 28.735;

- iv. the requirement to report “[a]ll telephone numbers . . . routinely used by the individual,” Mich. Comp. Laws § 28.727(1)(h);
- v. the requirement to report “[t]he license plate number, registration number, and description of any motor vehicle, aircraft, or vessel . . . regularly operated by the individual,” Mich. Comp. Laws § 28.727(1)(j).

(b) Provisions Void for Strict Liability:

- i. under the Due Process Clause of the U.S. Constitution, SORA must be interpreted as incorporating a knowledge requirement.

(c) Provisions Void under the First Amendment:

- i. the requirement to “report in person and notify the registering authority . . . immediately after . . . [t]he individual . . . establishes any electronic mail or instant message address, or any other designations used in internet communications or postings,” Mich. Comp. Laws § 28.725(1)(f);
- ii. the requirement to report “[a]ll telephone numbers . . . routinely used by the individual, Mich. Comp. Laws § 28.727(1)(h);
- iii. the requirement to report “[a]ll electronic mail addresses and instant message addresses . . . routinely used by the individual,” Mich. Comp. Laws § 28.727(1)(l);
- iv. the retroactive incorporation of the lifetime registration’s requirement to report “[a]ll electronic mail addresses and instant message addresses assigned to the individual . . . and all login names or other identifiers used by the individual when using any electronic mail address or instant messaging system,” Mich. Comp. Laws § 28.727(1)(i).

4. IT IS FURTHER ORDERED that Defendants shall PROVIDE NOTICE of this judgment to all law enforcement officials and prosecuting attorneys tasked with

the enforcement of SORA within 7 days. Within 7 days after notice is disseminated, Defendants will confirm in writing to class counsel that notice has been provided.

5. IT IS FURTHER ORDERED that Defendants shall PROVIDE NOTICE of this judgment to all registrants. Such notice may be included with the notice required under Section 5a(1) of Public Act 295 informing registrants of their duties under the new SORA. Class members for whom notice of the new statute is not required under Section 5a(1) of Public Act 295 (that is, class members who are in a state correctional facility) shall also receive notice of this judgment. Within 14 days of entry of this judgment the parties shall submit for the Court's approval a joint proposed process for notice and joint proposed notice(s) regarding this judgment and the pre-2021 SORA. If the parties cannot agree, they shall provide their respective proposed process and proposed notice(s). Defendants will keep track of the class members for whom notice was returned as undeliverable. Within 28 days after notice is disseminated, Defendants will confirm in writing to class counsel that the notice has been provided and will provide class counsel with a list of class members for whom notice was returned as undeliverable.

6. IT IS FURTHER ORDERED (consistent with this Court's Interim Order Delaying Entry of Final Judgment, Preliminarily Enjoining Reporting Requirements, and Directing Publication, R. 91, and this Court's Opinion and Order holding

that registrants cannot be held strictly liable for SORA violation, R. 84), that Defendants and their agents are permanently ENJOINED from enforcing registration, verification, school zone, and fee violations of SORA that occurred from February 14, 2020, against a registrant until the registrant receives notice of what duties he or she has under the new SORA going forward.

7. IT IS FURTHER ORDERED that to enable post-judgment monitoring, within 28 days after entry of this judgment, Defendants shall provide class counsel with a class list that is current as of that date containing at least the following information for each registrant, including registrants who are currently incarcerated or no longer reside in Michigan: name, date of birth, tier level, registrable offenses (including offense dates, conviction dates, court of conviction, and statutory provision(s) violated), last known address, primary phone numbers, and primary email address, and whether the registrant is in the ex post facto subclasses.

8. IT IS FURTHER ORDERED that any non-public information contained on the class list shall be confidential and shall not be further disclosed by class counsel, except that class counsel are authorized to share information on the class list pertaining to specific class members as needed to resolve their individual situations, including with that class member and his/her counsel.

9. IT IS FURTHER ORDERED that provision of the above lists pursuant to paragraphs 7 and 8 shall not be deemed a violation of any law or regulation that

might otherwise be read to protect the confidentiality of such information, including Mich. Comp. Laws. §§ 28.214, 28.728(4), 28.730.

10. IT IS FURTHER ORDERED that the parties shall have until 60 days after the conclusion of all appeals in this case to file any motion for an award of attorneys' fees and costs, including taxable costs. For purposes of this order, "the conclusion of all appeals" means the latest of:

- (a) the expiration of any party's time to file a notice of appeal to the United States Court of Appeals for the Sixth Circuit of any final order of this Court, including any final order of this Court after remand, in the event the case is remanded by a higher court;
- (b) the expiration of time to file a petition for certiorari to the United States Supreme Court following a final decision by the Sixth Circuit on appeal from any final order of this Court;
- (c) the denial of a petition of certiorari by the United States Supreme Court; or
- (d) the disposition of this case by the United States Supreme Court, if the Supreme Court grants a petition for certiorari.

Rather than file a separate bill of costs, the parties shall include the taxable items with the other costs for which they seek an award on the schedule established in this order.

11. IT IS FURTHER ORDERED that the Court retains jurisdiction to ensure compliance with its orders and to resolve any post-judgment issues, including notice and attorneys' fees.

SO ORDERED.

Hon. Robert H. Cleland
U.S. District Judge

Dated: February __, 2021