IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1774

ANGEL LUIS THOMAS, SR.; NORMAN E. GREGORY; GLENN MORRIS,

v.

Col. TYREE C. BLOCKER; Sgt. O. E. ROWLES; Capt. MAURICE A. TOMLINSON; Tpr. DAVID HOWANITZ; KEVIN KAUFFMAN; BRIAN HARRIS; NICOLE PITTMAN; JAMEY LUTHER; BRIAN URBAN; MICHELE JAMES; JAMES RIEVEL; KIM HAWN; PHILLIP CHAMBERLAIN; ADAM ROSS

Angel Luis Thomas Sr.,
Appellant

BRIEF FOR APPELLEES

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
ENTERED MARCH 20, 2019

JOSH SHAPIRO
Attorney General

BY: SEAN A. KIRKPATRICK
Senior Deputy Attorney General

J. BART DELONE
Chief Deputy Attorney General
Chief, Appellate Litigation Section

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 705-2331
FAX: (717) 772-4526

DATE: July 15, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ... iii

STATEMENT OF JURISDICTION ... 1

STATEMENT OF ISSUES ... 2

STATEMENT OF THE CASE ... 3

STATEMENT OF FACTS ... 8

1. A brief history of sex offender registration and notification in Pennsylvania. ... 8

2. Thomas restrained, assaulted, and then raped a woman in 1991. He was released from prison in 2018, whereupon his information was added to Pennsylvania's sex offender website. ... 12

STATEMENT OF RELATED CASES ... 14

SUMMARY OF ARGUMENT ... 15

ARGUMENT ... 17

I. The District Court Correctly Denied Thomas's Motion for Preliminary Injunction. ... 17

A. Thomas did not demonstrate likelihood of success on the merits. ... 18

1. Subchapter I requires Thomas to register with the State Police; any interpretation to the contrary leads to an absurd result contrary to the purpose of the statute. ... 19

2. The District Court correctly recognized that federal law separately requires Thomas to register with the State Police. ... 23

3. Thomas's causes of action fail as a matter of law. ... 32

B. Thomas suffers no irreparable harm by complying with Subsection I's registration requirements. 35

C. The public would be harmed if Thomas is removed from the Megan's Law website. 39

II. The District Court's Ruling Contains No "Procedural Lapses." Thomas's Personal Attack on the District Judge Should Be Rejected. 40

CONCLUSION 43

CERTIFICATE OF COUNSEL 44

CERTIFICATE OF SERVICE 45

TABLE OF AUTHORITIES

Page

Cases

Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.,
42 F.3d 1421 (3d Cir. 1994)....................17

Carr v. United States,
560 U.S. 438 (2010)....................9

Commonwealth v. Butler,
25 MAP 2018 (Pa)....................6

Commonwealth v. LaCombe,
35 MAP 2018 (Pa)....................6

Commonwealth v. Lee,
935 A.2d 865 (Pa. 2007).................... 9, 33, 39

Commonwealth v. Leidig,
956 A.2d 399 (Pa. 2008)....................8

Commonwealth v. Muniz,
164 A.3d 1189 (Pa. 2017).................... 11, 19, 39

Commonwealth v. Neiman,
84 A.3d 603 (Pa. 2013)....................10

Commonwealth v. Torsilieri,
37 MAP 2018 (Pa)....................6

Commonwealth v. Williams,
733 A.2d 593 (Pa. 1999) (*Williams I*)....................8

Commonwealth v. Williams,
832 A.2d 962 (Pa. 2003) (*Williams II*)....................8, 33

Conchatta, Inc. v. Evanko,
83 F. App’x 437 (3d Cir. 2003)....................35

Connecticut Dep't of Public Safety v. Doe,
538 U.S. 1 (2003) 34-36

Del. Strong Families v. Att'y Gen. of Del.,
793 F.3d 304 (3d Cir. 2015) 17

ECRI v. McGraw-Hill, Inc.,
809 F.2d 223 (3d Cir. 1987) 35

Fairview Twp. v. EPA,
773 F.2d 517 (3d Cir. 1985) 18

Gavin v. Loeffelbein,
205 A.3d 1209 (Pa. 2019) 22

Gunn v. Credit Suisse Grp. AG,
610 Fed.Appx. 155 (3d Cir. 2015) 42

Holland v. Rosen,
895 F.3d 272 (3d Cir. 2018) 17

In re One2One Commc'ns, LLC,
805 F.3d 428 (3d Cir. 2015) 31

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 8

Kulwicki v. Dawson,
969 F.2d 1454 (3d Cir. 1992) 34

Litmon v. Harris,
768 F.3d 1237, 1242 (9th Cir. 2014) 34

Mike's Train House, Inc. v. Lionel, L.L.C.,
472 F.3d 398 (6th Cir. 2006) 42

Mazurek v. Armstrong,
520 U.S. 968 (1997) 17

Nat'l Fed'n of Indep. Bus. v. Sebelius,
567 U.S. 519 (2012) 21

Printz v. United States,
521 U.S. 898 (1997) 30

Reynolds v. United States,
565 U.S. 432 (2012) 24

Sample v. Diecks,
885 F.2d 1099 (3d Cir.1989) 40-41

Smith v. Doe,
538 U.S. 84 (2003) 33-34, 39

Smolsky v. Blocker,
254 M.D. 2018, 2019 WL 2400283 (Pa.Cmwlth. May 20, 2019) 21

Swift v. Dep't of Transp. of Commonwealth,
937 A.2d 1162 (Pa.Cmwlth. 2007) 33

Treasurer of New Jersey v. U.S. Dep't of Treasury,
684 F.3d 382 (3d Cir. 2012) 30

United States v. Am. Trucking Ass'ns,
310 U.S. 534 (1940) 22

United States v. Ambert,
561 F.3d 1202 (11th Cir. 2009) 31

United States v. Billiot,
785 F.3d 1266 (8th Cir. 2015) 25

United States v. Brown,
586 F.3d 1342 (11th Cir. 2009) 25

United States v. Brown,
740 F.3d 145 (3d Cir. 2014) 30

United States v. Dupree,
617 F.3d 724 (3d Cir. 2010) 33

United States v. Felts,
674 F.3d 599 (6th Cir. 2012) 30

United States v. Gould,
568 F.3d 459 (4th Cir. 2009) 25

United States v. Gundy,
__ U.S.__, 139 S.Ct. 2116 (2019).. 5, 14, 22, 26

United States v. Guzman,
591 F.3d 83 (2d Cir. 2010)... 25, 27

United States v. Kebodeaux,
570 U.S. 387 (2013)..39

United States v. Loyola-Dominguez,
125 F.3d 1315 (9th Cir. 1997) 42

United States v. Mussari,
95 F.3d 787 (9th Cir.1996) 30

United States v. Pendleton,
636 F.3d 78 (3d Cir. 2011).. 25, 27, 31, 40

United States v. Raddatz,
47 U.S. 667 (1980)..41

United States v. Shenandoah,
595 F.3d 151 (3d Cir. 2010).. 9, 24, 30

United States v. Whaley,
577 F.3d 254 (5th Cir. 2009) 31

Vasquez v. Foxx,
895 F.3d 515 (7th Cir. 2018) 33

Statutes

1 Pa.C.S.A. § 1921 22

1 Pa.C.S.A. § 2310 32

18 U.S.C. § 2241 24

18 U.S.C. § 2250 .... 10, 26, 31

28 U.S.C. § 636 40
28 U.S.C. § 1292 1
28 U.S.C. § 1331 1
28 U.S.C. § 1343 1
34 U.S.C. § 20911 .... 24, 29
34 U.S.C. § 20912 .... 9, 29
34 U.S.C. § 20913 .... passim
34 U.S.C. § 20914 .... 28, 29
34 U.S.C. § 20920 .... 9, 28, 29
34 U.S.C. § 20912 10
34 U.S.C. § 20926 10
34 U.S.C. § 20927 10
42 Pa.C.S.A. § 9795.1 (expired) 20, 22
42 Pa.C.S.A. § 9795.2 (expired) 20
42 Pa.C.S.A. § 9795.3 (expired) 21
42 Pa.C.S.A. § 9799.10 30
42 Pa.C.S.A. § 9799.11 .... 11, 39
42 Pa.C.S.A. § 9799.19 11
42 Pa.C.S.A. § 9799.42 11
42 Pa.C.S.A. § 9799.51 .... 23, 39
42 Pa.C.S.A. § 9799.52 .... 12, 19, 21

42 Pa.C.S.A. § 9799.53 11

42 Pa.C.S.A. § 9799.55 21

42 Pa.C.S.A. § 9799.56 .... 12, 38

42 Pa.C.S.A. § 9799.60 12

42 Pa.C.S.A. § 9799.63 28

42 Pa.C.S.A. § 9799.70 11

42 Pa.C.S.A. § 9799.75 11

42 U.S.C. § 16913 24

42 U.S.C. § 1983 1

N.J. Stat. Ann. 2C:7–1 8

Sex Offender Registration Acts

Megan's Law I, Act of Oct. 24, 1995 8

Megan's Law II, Act of May 10, 2000 .... 8, 20

Megan's Law III, Act 152 of 2004 9

Federal SORNA, 34 U.S.C. § 20911 *et seq*. .... passim

Pa. SORNA, Act of Dec. 20, 2011, P.L. 446, No. 111 .... 10, 19, 33

Act 10, Act of Feb. 21, 2018, P.L. 27, No. 10. .... passim

Act 29, Act of June 12, 2018, P.L. 140, No. 29 11

Rules

Fed.R.Evid. 803(1) 42

Fed.R.Evid. 803(8) 42

Middle District Local Rule 7.5 4

Third Circuit IOP 9.1 31

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 18..31

U.S. Const. Tenth Amendment..5, 29

STATEMENT OF JURISDICTION

This is a civil rights action brought pursuant to 42 U.S.C. § 1983, over which the District Court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

This appeal is from an order denying an injunction, over which this Court has jurisdiction by virtue of 28 U.S.C. § 1292(a). The District Court's order was entered on March 20, 2019, and the notice of appeal was filed on April 4, 2019.

STATEMENT OF ISSUES

Although Appellant breaks up his argument into four separate issues, this appeal actually only asks the following two primary questions:

I. Where Appellant is a sex offender as defined by the federal Sex Offender Registration Notification Act (SORNA), 34 U.S.C. § 20911 *et seq*., did the District Court correctly deny his motion for preliminary injunction ordering Appellees to remove his name from the Pennsylvania Megan's Law website?

II. Did the District Court commit procedural error by adopting the Magistrate Judge's report and recommendations?

STATEMENT OF THE CASE

This case involves a convicted rapist's request for a preliminary injunction ordering the Pennsylvania State Police Commissioner to remove the sex offender's information from the Commonwealth's Megan's Law website.

Appellant, plaintiff below, is Angel Luis Thomas, Sr. (Thomas).[1] Appellees, defendants below, are numerous Pennsylvania State Police (State Police) and Department of Corrections (DOC) employees: State Police Commissioner Col. Tyree C. Blocker, Jr.; State Police Sgt. O.E. Rowles; State Police Capt. Maurice A. Tomlinson; State Police Trp. Davis Howanitz; Superintendent Kevin Kauffman of the State Correctional Institute at Huntingdon (SCI-Huntingdon); DOC Officer Brian Harris; Corrections Counselor Kim Hawn; and Records Specialist II Nicole Pittman.

Thomas initiated this civil action through counsel in April 2018 by filing a complaint raising six counts against Appellees. Count I is a Fourteenth Amendment due process claim. Joint Appendix (JA) 52 (complaint). Count II is a First Amendment retaliation claim against the DOC officials. JA 53. Count III claims violation of the *Ex Post Facto* Clause of the U.S. Constitution. Count IV

---

[1] A second amended complaint was filed on January 24, 2019 including two new plaintiffs, Norman E. Gregory and Glenn Morris, and six new DOC defendants. Doc. 59. These individuals were not part of the motion at issue.

through VI raise state law claims of defamation, invasion of privacy, and intentional infliction of emotional distress (IIED) respectively. JA 55-56.

Before serving Appellees, Thomas filed a motion for a temporary restraining order (TRO) against Commissioner Blocker and the Pennsylvania State Police,[2] ordering them to remove his name from the Pennsylvania sex offender website. Doc. 4 at 4 (1st motion). The District Court denied this motion without prejudice to file a motion for preliminary injunction after Appellees were served. JA 19 (R&R).

After serving Appellees, Thomas filed a "Second Application for Temporary Restraining Order" in June 2018, again seeking a TRO against Commissioner Blocker and the Pennsylvania State Police ordering the removal of his information from the sex offender website. Doc. 14 (2nd motion), JA 19. No brief was filed in support of this motion, as required by Local Rule 7.5. *Id.* Instead of deeming the motion withdrawn, *see* L.R. 7.5, the assigned Magistrate Judge granted Thomas additional time to file his brief. Doc. 31, JA 19. The motion was fully briefed, wherein Thomas conceded that the relief he was now seeking was a preliminary injunction. JA 19.

During this extended briefing period, Appellees answered the complaint, Thomas field a reply to that answer, and the Clerk of Court certified the

---

[2] The State Police were never a defendant below.

constitutional challenge to the Attorney General of Pennsylvania and the Attorney General of the United States. JA 19. Neither Attorney General intervened.[3] *Id.*

On November 26, 2018, the Magistrate Judge issued a report and recommendation, wherein she recommended that the motion be denied. JA 22. The Magistrate Judge first determined that, because the set of facts necessary to decide the motion were undisputed, no hearing was necessary. JA 21 fn 5. After reviewing the language of Pennsylvania's current sex offender registration and notification law, 42 Pa.C.S.A. §§ 9799.10 *et seq.* (Act 10), the Magistrate Judge determined that the court need not decide whether Act 10 applies to Thomas. JUA 27. Thomas has an independent obligation to register under the Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. 109-248), *amended as* 34 U.S.C. §§ 20911 *et seq*. (SORNA), precluding the injunctive relief he seeks. JA 27-35. The Magistrate Judge addressed and rejected Thomas's arguments that SORNA violates the Tenth Amendment anticommanderring doctrine or contains an improper delegation of authority by Congress to the Attorney General. JA 31-33.[4] The Magistrate Judge

---

[3] The Office of Attorney General of Pennsylvania, however, represents Appellees both below and on appeal.

[4] That argument was also recently rejected by the Supreme Court in *United States v. Gundy*, __ U.S.__, 139 S.Ct. 2116 (2019).

also rejected Thomas's argument that SORNA only applies to Thomas once he crosses state borders. JA 35.

Thomas filed objections to the report. On March 20, 2019, the District Court conducted a *de novo* review and adopted the Magistrate Judge's recommendations. JA 13. The District Court addressed three arguments raised by Thomas: (1) that SORNA imposes duties solely upon the states, not individuals; (2) that SORNA is only triggered once a sex offender crosses state lines; and (3) that SORNA is inapplicable when the Pennsylvania's registration scheme is unconstitutional.[5] JA 12-13. The District Court found none of these argument meritorious and denied the motion for preliminary injunction. JA 13.

Thomas filed a motion for reconsideration accusing the District Court of abdicating its responsibility to perform a *de novo* review and intentionally misquoting and inverting the meaning of the authority in order to reach a certain result. Doc. 67 at 3, 12. The District Court gently reminded Thomas's counsel of her ethical obligations not to recklessly attack the integrity of a judge. JA 123. That court also explained that:

---

[5] Although the constitutionality of Act 10 is currently being considered by the Pennsylvania Supreme Court, that court has not yet ruled the statutory scheme unconstitutional. *See Commonwealth v. LaCombe*, 35 MAP 2018 (Pa); *Commonwealth v. Torsilieri*, 37 MAP 2018 (Pa); *Commonwealth v. Butler*, 25 MAP 2018 (Pa).

> The length of the March 20, 2019 Order is not proportional to the amount of time and effort spent by this Court in reviewing the briefing and legal authorities pertinent to Mr. Thomas's preliminary injunction motion, especially in light of the thorough and well-reasoned Report and Recommendation which the Order ultimately adopted, and in light of the fact that circuit precedent . . . forecloses the arguments made by Mr. Thomas here.

JA 123-124.

Unsatisfied with the court's response, counsel for Thomas filed a letter with the District Court accusing the court of "*ad hominem* comments about another female attorney and female judge" and requesting that a court reporter be provided during an upcoming status conference.[6] Doc. 73 (letter). The District Court acquiesced to this request. JA 126. (transcript of hearing). During that conference, counsel for Thomas re-raised complaints about how the court adjudicated the motion, JA 135-139, 142-144 and accused the judge of inappropriate behavior during an unrelated CLE presentation, JA 148-151.

[6] We are compelled to discuss these matters because Thomas discusses them in his brief as grounds for reversal. Brief at 31-33.

STATEMENT OF FACTS

1. A brief history of sex offender registration and notification in Pennsylvania.

In response to the rape and murder of seven-year-old Megan Kanka by a sex offender, the State of New Jersey enacted "Megan's Law" in 1994, requiring the registration of sex offenders. N.J. Stat. Ann. 2C:7–1 *et seq*. A year later, Pennsylvania's General Assembly passed legislation following suit, commonly known as Megan's Law I.[7] This law was replaced five years later by Megan's Law II,[8] which was challenged on the grounds that its registration requirements for sex offenders were punitive, and therefore, violated due process. The Pennsylvania Supreme Court rejected that argument in *Commonwealth v. Williams*, 832 A.2d 962 (Pa. 2003) (*Williams II*) (applying the factors in *Kennedy v. Mendoza–Martinez*, 372 U.S. 144 (1963)), a holding repeatedly reaffirmed. *See e.g. Commonwealth v. Leidig*, 956 A.2d 399, 406 (Pa. 2008) ("the registration requirements of Megan's Law are collateral and not direct consequences of a plea

---

[7] Megan's Law I, 42 Pa.C.S.A. § 9791, *et seq*., Act of Oct. 24, 1995, P.L. 1079, No. 24, effective Oct. 24, 1995 (Spec. Sess. No. 1).

In *Commonwealth v. Williams*, 733 A.2d 593 (Pa. 1999) (*Williams I*), the Pennsylvania Supreme Court struck down the sexually violent predator provisions of Megan's Law I under the Fourteenth Amendment to the U.S. Constitution because a finding of sexually violent predator status increased the offender's maximum term of confinement above the statutory maximum for the underlying offense. *Id.* at 603. The General Assembly enacted Megan's Law II in response.

[8] Megan's Law II, 42 Pa.C.S.A. § 9791, *et seq*., Act of May 10, 2000, P.L. 74, No. 18, effective July 9, 2000.

or other conviction"); *Commonwealth v. Lee*, 935 A.2d 865 (Pa. 2007) (Megan's Law II was not punitive). Megan's Law II remained in place until November 2004, when the General Assembly replaced it with Act 152 of 2004 (Megan's Law III).

Meanwhile, in July 2006, the United States enacted Title I of the Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. 109-248), *amended as* 34 U.S.C.A. §§ 20911 *et seq*. (SORNA). SORNA "was enacted to close loopholes in previous sex offender registration legislation and to standardize registration across the states." *United States v. Shenandoah*, 595 F.3d 151, 154 (3d Cir. 2010). SORNA was also enacted "to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks." *Carr v. United States,* 560 U.S. 438, 455 (2010).

To meet these goals, SORNA places obligations upon both the states and individual sex offenders. As to the states, SORNA requires, *inter alia* that "each jurisdiction shall make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry." 34 U.S.C. § 20920.[9] The law made all registration requirements retroactive for sex offenders convicted prior to its enactment[10] and

---

[9] *See also* 34 U.S.C. § 20912(a) ("Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter").

[10] *See* Pub. L. 109-248, 120 Stat. 587, *amended as* 28 C.F.R. §§ 72.1-72.3.

failure of a state to comply could result in loss of partial funding under subpart 1 of part E of the Omnibus Crime Control and Safe Streets Act of 1968. *See* 34 U.S.C. §§ 20912, 20926, 20927. States are required to criminalize "the failure of a sex offender to comply with the requirements of this subchapter." 34 U.S.C. § 20913(e).

As to individuals, SORNA mandates that "[a] sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 34 U.S.C. § 20913(a). "The sex offender shall initially register . . . before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement[.]" 34 U.S.C. § 20913(b). It is a federal offense for a state sex offender to both fail to register and travel in interstate or foreign commerce. 18 U.S.C. § 2250(a).

On December 20, 2012, partly in response to Congress passing SORNA, the General Assembly passed its own Sex Offender Registration and Notification Act (Pa. SORNA), Act of Dec. 20, 2011, P.L. 446, No. 111, *amended as*, 42 Pa. Cons. Stat. §§ 9799.10 to 9799.41.[11] Pa. SORNA applied its provisions retroactively to

---

[11] After enactment of SORNA, the Pennsylvania Supreme Court struck down Megan's Law III solely for violating the state constitution' single subject rule due to the inclusion of an asbestos provision in the act. *Commonwealth v. Neiman*, 84 A.3d 603 (Pa. 2013).

sex offenders who committed their offenses prior to 2012. But on July 19, 2017, the Pennsylvania Supreme Court held that this retroactive application violated the *Ex Post Facto* Clause of the Pennsylvania Constitution. *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017).

In response to that ruling, on February 21, 2018, the General Assembly passed Act 10 of 2018 (H.B. 631) (Act 10) and, shortly thereafter, Act 29 of 2018 (H.B. 1952) (Act 29), which replaced Act 10 with only minor changes[12] (collectively Act 10). The General Assembly clarified that the sex offender registration provisions were non-punitive collateral consequences of the original conviction. 42 Pa.C.S.A. § 9799.11(B)(4); 42 Pa.C.S.A. § 9799.51(B)(4). It directly addressed *Muniz* by making changes to the statutory language.

Among the changes, Act 10 split Pennsylvania's sex offender registration and notification law into two subchapters. Subchapter H, 42 Pa.C.S.A. §§ 9799.10-9799.42, was applied only to individuals who committed a sexually violent offense on or after December 20, 2012. 42 Pa.C.S.A. § 9799.11(c). Subchapter I, 42 Pa.C.S.A. §§ 9799.51-9799.75 was created for offenders either convicted of a

---

[12] For example, the definition of sexually violent predator was changed slightly, 42 Pa.C.S.A. § 9799.53, the time period for an individual under federal supervision to register was modified, 42 Pa.C.S.A. § 9799.19(P)(2), and language requiring providers of Sexually Violent Predators counseling to notify the local District Attorney's Office was added, 42 Pa.C.S.A. § 9799.70(b).

sexually violent offense between April 22, 1996 and December 20, 2012, or who were "required to register with the Pennsylvania State Police under a former sexual offender registration law of this Commonwealth on or after April 22, 1996 but before December 20, 2012, [and] whose period of registration has not expired." 42 Pa.C.S.A. § 9799.52.

Subchapter I substantially reduced the in-person verification of residence requirements of Pa. SORNA, requiring only a single in-person visit per year instead of quarterly. 42 Pa.C.S.A. § 9799.60(a)-(b.2). Sex offenders under this subchapter no longer must appear in person when they update the State Police with a new address, place of employment, or place of schooling, requiring only that offenders "inform" the State Police of these changes. 42 Pa.C.S.A. § 9799.56(a)(2).

2. Thomas restrained, assaulted, and then raped a woman in 1991. He was released from prison in 2018, whereupon his information was added to Pennsylvania's sex offender website.

In 1991, Thomas was convicted in the Court of Common Pleas of York County, Pennsylvania, of rape, involuntary deviate sexual intercourse (IDSI), aggravated assault, reckless endangering, and unlawful restraint. JA 21 (R&R). He was sentenced to an aggregate term of imprisonment of 12 ½ to 27 years. JA 22. Thomas maxed out his sentence, being released on January 11, 2018. *Id.*

Prior to his release from prison, Thomas was required to register as a sex offender by DOC staff. JA 17. In February 2018, Thomas's information was briefly removed from the registry after the Pennsylvania Supreme Court struck down the retroactive application of Pa. SORNA. JA 17. When Pennsylvania enacted Act 10, Thomas's information was posted again on the sex offender website. *Id.* Thomas alleges that despite calls from his counsel to the State Police, they refuse to remove him. JA 18. Thomas alleges that his counsel was informed that he must continue to update his information on the registry or face state prosecution. *Id.*

STATEMENT OF RELATED CASES

This case has not previously been before the Court. There are no pending or completed cases to which it is related. The Supreme Court case referenced by Appellant, *United States v. Gundy*, __ U.S. __, 139 S.Ct. 2116 (June 20, 2019) was recently decided. The Supreme Court upheld the retroactive application of SORNA as not violative of the nondelegation doctrine. *Id.* at 2129 ("[I]f SORNA's delegation is unconstitutional, then most of Government is unconstitutional . . .").

SUMMARY OF ARGUMENT

Thomas seeks an injunction order compelling the removal of his information from Pennsylvania's sex offender website on the theory that the posting is unlawful. It is not. Thomas has an obligation to register as a convicted sex offender under both Subchapter I of Act 10 and federal SORNA.

Thomas became subject to Megan's Law II's lifetime registration requirements upon that law's enactment in July 2000 despite his incarceration. He, therefore, must continue to register for life under Subchapter I of Act 10. Thomas also has an independent duty to register under SORNA that does not depend upon interstate travel. This intrastate registration requirement is necessary to prevent sex offenders from attempting to avoid notice by slipping across state lines. Because these *intrastate* registration requirements are necessary and proper for the protection of *interstate* commerce, they do not offend the Tenth Amendment.

Pennsylvania has a separate obligation under SORNA to collect and publicly post Thomas's information. This does not offend the anticommandeering principles of the Tenth Amendment because the Commonwealth willingly chose to accept federal funds and comply with SORNA's mandates.

Thomas's claims against Col. Blocker are also either barred by sovereign immunity, were waived below, and/or fail to state a viable claim. The information contained on the sex offender website is true, and the public disclosure of

Thomas's convictions do not implicate any protected liberty interests. Moreover, Thomas has already received due process (his criminal trial) on the only fact at issue (whether he is a convicted sex offender).

Thomas cannot establish irreparable harm. Thomas's criminal history is already part of the public record and knowledge of his crimes is easily accessible through other online sources. Any ostracism Thomas may experience is not the fault of Act 10 or SORNA, but rather a direct consequence of raping a woman.

In contrast, the public will be harmed by removal of Thomas's information. The Supreme Court recognizes the special dangers posed by sex offenders. The website and notification provisions provide victims of sexual attacks with information necessary to avoid interaction with their attackers, so they can protect themselves from further trauma. It also provides the public with information necessary to protect themselves and their children from being future victims. Removing Thomas from the registry will make it more difficult for the public and his victim to protect themselves, and will frustrate the federal government's ability to track Thomas should he cross state lines.

Finally, the District Court appropriately adopted the Magistrate Judge's legal conclusions and Thomas's personal attacks against the District Judge should be ignored.

The District Court's ruling should be affirmed.

ARGUMENT

Standard of review: When reviewing the denial of a preliminary injunction, this Court reviews findings of fact for clear error, legal conclusions *de novo*, and the decision to deny the injunction for an abuse of discretion. *Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304, 308 (3d Cir. 2015).

I. The District Court Correctly Denied Thomas's Motion for Preliminary Injunction.

A preliminary injunction "is an extraordinary remedy . . . which should be granted only in limited circumstances." *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1426-27 (3d Cir. 1994) (citation omitted). Courts do not issue that relief "unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation and emphasis omitted). That burden typically involves four factors: (1) a reasonable likelihood of success on the merits; (2) irreparable harm to the applicant; (3) whether the denial of a preliminary injunction would injure the moving party more than the issuance of an injunction would harm the non-moving party; and (4) whether the grant of relief would serve the public interest. *Del. Strong Families*, 793 F.3d at 308. "The first two factors are prerequisites for a movant to prevail." *Holland v. Rosen*, 895 F.3d 272, 285–86 (3d Cir. 2018).

The District Court correctly determined that Thomas failed to meet his burden of showing a likelihood of success on the merits. Given this conclusion, the District Court did not address the other factors. Because this Court may affirm a ruling on any basis supported by the record, *Fairview Twp. v. EPA*, 773 F.2d 517, 525 n.15 (3d Cir. 1985), we will address the irreparable harm and public interest factors as well.

A. Thomas did not demonstrate likelihood of success on the merits.

The District Court determined that Thomas was unlikely to succeed on the merits of his claims because SORNA requires him to register as a sex offender. JA 27-28 (R&R); 12-13 (Opinion). As we discuss later, this holding is correct. But as addressed in our brief,[13] Thomas is also required to register under Subchapter I of

[13] This issue was raised again in our brief in opposition to Thomas' objections to the Report and Recommendation, Doc. 53 at 3, fn 1. In the procedural history section of our brief in opposition to the motion for preliminary injunction, Appellees stated that "[a]lthough [Thomas] was subject to all prior version of the registration statutes (because he would have had to have registered under them upon release from incarceration), the statutes did not require registration until he was released." Doc. 35 at 4. This inartful sentence confused the Magistrate Judge, JA 27, because as actually argued in the argument section of that brief, Thomas is subject to Act 10. Doc. 35 at 11-3. Contrary to Thomas' assertion on appeal, this was not a concession about Act 10's applicability. Opening brief at 25. The above procedural history sentence assumed a familiarity with the text of earlier Megan's Laws, resulting in confusion. Appellees meant to simply explain that although Thomas was subject to prior versions of Megan's Law based upon a requirement to register under those statutes, for obvious practical reasons, his duty to physically appear before the State Police did not begin until after he was released from prison.

Act 10, an issue the District Court did not reach. Doc. 35 at 7-13; JA 27 (R&R); JA 12-13 (Opinion). Because resolution of that issue avoids questions of federalism, we address the applicability of state law first.

1. Subchapter I requires Thomas to register with the State Police; any interpretation to the contrary leads to an absurd result contrary to the purpose of the statute.

Subchapter I was enacted by the Pennsylvania General Assembly to, *inter alia,* address the state Supreme Court's decision in *Commonwealth v. Muniz* by enacting a non-punitive sex offender registration and notification regime that could be applied retroactively to individuals who committed sex offenses prior to Pa. SORNA's enactment. 42 Pa.C.S.A. § 9799.51(b)(4). In furtherance of that end, Subchapter I applies to individuals who were either: (1) convicted of a sexually violent offense committed between April 1996 and December 2012 and whose period of registration has not expired; or (2) were "required to register with the Pennsylvania State Police under a former sexual offender registration law of this Commonwealth on or after April 22, 1996, but before December 20, 2012, whose period of registration has not expired." 42 Pa.C.S.A. § 9799.52.

Thomas does not fall within the first definition. In support of his argument that he does not fall within the second definition, Thomas contends that because he

---

Appellees have repeatedly argued below that Act 10 applies to Thomas. Doc. 35 at 7-13; Doc. 53 at 3 fn 1.

was not released from incarceration until January 2018, he was never required to register between 1996 and 2012. That is incorrect. At minimum, Thomas was required to register under Megan's Law II.

Under the first section of Megan's Law II, individuals convicted of certain enumerated offenses "shall be required to register with the Pennsylvania State Police for a period of ten years" and individuals convicted of more serious offenses—such as rape and IDSI—"shall be subject to lifetime registration[.]" 42 Pa.C.S.A. § 9795.1 (effective July 10, 2000 to Feb. 19, 2001). Nothing in this section excludes incarcerated individuals from this requirement. For obvious practical reasons, however, offenders where only "required to register *all current residences or intended residences* with the Pennsylvania State Police upon release from incarceration . . . ." 42 Pa.C.S.A. § 9795.2(a)(1) (emphasis added). Before that point, their current residence—prison—was already known.

The duty to register under Megan's Law II, therefore, did not begin after release. This is demonstrated by other sections of Megan's Law II. For example, an incarcerated sex offender had an obligation under that former sex offender registration law to register his or her intended residence, with the assistance of the DOC, *before* release. 42 Pa.C.S.A. § 9795.2 (same effective dates)(4)(i). In the case of a sex offender granted parole, registration was a *prerequisite* to release. *Id.* Notice of one's obligation to register with the State Police was also provided at

sentencing, not at release from incarceration. 42 Pa.C.S.A. § 9795.3 (same effective dates).

Upon enactment of Megan's Law II, Thomas became "subject to lifetime registration" with the State Police. This places him squarely within the second definition of 42 Pa.C.S.A. § 9799.52, and as such, he is required to register for life. 42 Pa.C.S.A. § 9799.55(b)(i)(A).[14]

Thomas's narrow reading of "required to register" as only beginning when a sex offender must physically register in person with the State Police takes the phrase out of all meaningful context. "The text of a statute can sometimes have more than one possible meaning," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 562 (2012), and as recognized by the Magistrate Judge, "Thomas's construction of the phrase 'required to register'. . . is not the only plausible [reading]." JA 27 fn. 9. The Second Circuit, in interpreting similar language in SORNA, concluded that a sex offender was "'required to register' once he or she is

---

[14] In a recent unpublished, non-precedential decision, the Pennsylvania Commonwealth Court came to the opposite conclusion in a challenge before it. *Smolsky v. Blocker*, 254 M.D. 2018, 2019 WL 2400283 (Pa.Cmwlth. May 20, 2019). That decision, however, should be given no weight as the parties' briefs "failed to adequately address the question posed by this Court or to provide any meaningful legal analysis to assist this Court in deciding whether the provisions of Act 29 apply to [the sex offender]." *Id.* at *2 fn 4. Because of this failure, that court did not address the applicability of Subchapter I due to the requirement to register under Megan's Law II, or any of the other arguments presented here. Had it done so, we believe it would have ruled differently.

'subject to' SORNA's registration requirements," in that case, "once SORNA was made retroactively applicable to him." *U.S. v. Gundy*, 804 F.3d 140, 147 (2d Cir. 2015). Likewise here, Thomas was "required to register" once he became subject to Megan's Law II upon its enactment in 2000, which retroactively applied to all sex offenders. 42 Pa.C.S.A. § 9795.1 (effective July 10, 2000 to Feb. 19, 2001).

Critically, Thomas's interpretation would also create an absurd result at odds with the purpose of Subchapter I. It is axiomatic that when an interpretation of a statute would lead "to absurd or futile results," court will "look[ ] beyond the words to the purpose of the act." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543–44 (1940). "[E]ven when the plain meaning [does] not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' [the Supreme] Court has followed that purpose, rather than the literal words." *Id.* Pennsylvania law follows similar statutory construction rules: "our interpretation [of a statute] must not render any provision extraneous or produce an absurd result." *Gavin v. Loeffelbein*, 205 A.3d 1209, 1221 (Pa. 2019). *See also*, 1 Pa.C.S.A. § 1921(a) ("The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly").

A simple hypothetical demonstrates the absurdity and danger of Thomas's interpretation. Imagine there are three offenders convicted of rape and sentenced on the same day in 1991. Offender A, due to ameliorating factors, is sentenced to

only 10 years incarceration and is released in 2001. Offender B is sentenced to 10-27 years incarnation, but due to good behavior and evidence of reformation, is released on probation in 2006. Offender C is also sentenced to 10-27 years, but due to the cruelty of his crimes and incorrigibility in prison, maxes out his sentence in 2018. Under Thomas's interpretation of Subchapter I, Offenders A and B would be required to register for life, whereas the more potentially dangerous Offender C would not have to register at all. This interpretation is antithetical to the stated purpose of Subchapter I of "[p]rotect[ing] the safety and general welfare of the people of this Commonwealth by providing for registration . . . [of] . . . offenders who are about to be released from custody and will live in or near their neighborhood." 42 Pa.C.S.A. § 9799.51(b)(1). The General Assembly did not intend such an absurd and counter-productive result.

Thomas was required to register for life under a former sex offender law of the Commonwealth. Accordingly, he is required to register with the State Police under Subchapter I. Thomas's motion for an injunction removing him from the registry runs aground on these state law shoals.

2. The District Court correctly recognized that federal law separately requires Thomas to register with the State Police.

SORNA mandates that "[a] sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 34 U.S.C. §

20913(a) (formerly cited as 42 U.S.C. § 16913).[15] The District Court denied Thomas's request for a preliminary injunction removing him from Pennsylvania's sex offender registry because of this registration requirement in SORNA. JA 12-13 (Opinion); JA 35 (R&R). Although separated out into different sections in his brief, Thomas essentially raises a single argument in response: SORNA applies to states and not individuals who have not crossed state borders because, to do so, would violate the Tenth Amendment. As noted by the District Court and Magistrate Judge, this type of argument has already been rejected by this Court. JA 12 (Opinion); JA 18-19 (R&R).

In *United States v. Shanandoah,* this Court concluded that under 34 U.S.C. § 20913, formerly cited as 42 U.S.C. § 16913, "an independent and federally enforceable duty is placed on sex offenders to register." 595 F.3d 151, 157 (3d Cir. 2010), *abrogated on other grounds by Reynolds v. United States*, 565 U.S. 432 (2012), (the directive found in [§ 20913] applies to sex offenders—not states").

---

[15] SORNA defines "Sex offender" as an individual convicted of a "sex offense," 34 U.S.C. § 20911(1), which in turn is defined as "a criminal offense that has an element involving a sexual act or sexual contact with another[.]" *Id.* § 20911(5). Rape fits within that definition and is classified as a Tier III offense requiring lifetime registration. *Id.* § 20911(4); § 20915(a)(3). A Pennsylvania offense comparable to or more severe than aggravated sexual abuse is classified as a Tier III offense. 34 U.S.C. § 20911. Aggravated sexual abuse occurs if an individual, *inter alia*, "knowingly causes another person to engage in a sexual act . . . by using force against that other person[.]" 18 U.S.C. § 2241. Rape is comparable to that federal offense and is thus a Tier III offense.

Therefore, even if a state never implements SORNA, such "failure to implement a federal law . . . [would] not give sex offenders a reason to disregard their federal obligation to update their state registration." *Id.* "Put simply, [a sex offender's] federal duty to register under SORNA [is] not dependent upon his duty to register under [state] law." *United States v. Pendleton*, 636 F.3d 78, 86 (3d Cir. 2011). *See also*, *United States v. Guzman*, 591 F.3d 83, 93 (2d Cir. 2010); *United States v. Brown*, 586 F.3d 1342, 1347-49 (11th Cir. 2009); *United States v. Gould*, 568 F.3d 459, 463-66 (4th Cir. 2009). As summarized by the Eighth Circuit:

> SORNA imposes an independent federal obligation for sex offenders to register that does not depend on, or incorporate, a state-law registration requirement. . . . While the SORNA obligations are imposed as a result of the underlying sex offense convictions in [the state], those obligations are independent of the state reporting requirements.

United States v. Billiot, 785 F.3d 1266, 1269 (8th Cir. 2015).

In response, Thomas argues that § 20913 cannot be the basis for his inclusion on the sex offender website because he has committed no federal offense and, despite living in Lancaster County, which abuts the state border, "[h]e has no plans to travel" out of the state. Brief at 22. This is unavailing for two reasons.

First, Thomas directly contradicts his self-serving statement on appeal that "[h]e has no plans to travel" in his complaint. In paragraph 66 of his complaint, Thomas alleges that sex offender registration inhibits "traveling out of state[.]" JA 50. Clearly a desire to travel in interstate commerce is present.

Second, Thomas improperly conflates his obligation to register under 34 U.S.C. § 20913 with the criminal sanctions of 18 U.S.C. § 2250(a). Although these statutes complement each other, they are separate and distinct. Under the plain text of SORNA, a sex offender's duty to register is not dependent upon the federal government's ability to prosecute: "[A] person can be 'subject to SORNA's registration requirements,' *before* he or she is subject to immediate sanction for "fail[ing] to register.'" *Gundy*, 804 F.3d at 146 (internal citations omitted) (emphasis added). And "§ 2250(a) treats being 'required to register' and 'fail[ing] to register or update a registration as required' as separate and distinct elements of the criminal offense." *Id.* As the District Court explained, "while criminal penalties attach only when an unregistered sex offender crosses state lines, there is no corresponding interstate travel requirement in the statutory provision imposing that registration requirement in the first place." JA 12-13 (footnotes omitted).

Thomas's argument that the *registration* requirements only come into effect when a sex offender crosses state lines finds no support in either the language or purpose of SORNA. Section 20913 unequivocally states:

The sex offender *shall* initially register--

(1) *before* completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement[.]

34 U.S.C. § 20913 (emphasis added). That requirement necessarily occurs before a sex offender crosses state lines. A sex offender is also required—the statute uses the word "shall"—to keep his or her registration updated without any mention of interstate travel. *Id.*

"'Requiring sex offenders to update their registrations due to *intrastate* changes of address or employment status is a perfectly logical way to help ensure that states will more effectively be able to track sex offenders when they do cross state lines.'" *Pendleton*, 636 F.3d at 87 (quoting *Guzman*, 591 F.3d at 91) (emphasis added). The *intrastate* registration requirements are necessary to fulfill SORNA's *interstate* purpose of preventing sex offenders from slipping through the cracks. Waiting until after a sex offender—like Thomas—crosses state lines to require registration is contrary to both the language and purpose of SORNA.

Thomas cites extensively from, and relies heavily upon, a document published by the Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) Office within the Department of Justice. Brief at 14-15. This document, however, is merely a non-formal "Overview of U.S. Sex Offender Registration." *See* Current Case Law and Issues, March 2018, https://smart.gov/caselaw/1-Case-Law-Update-2018-Residency-Overview.pdf (last visited July 2019). At the bottom of the first page of that document, the

Department of Justice explicitly disclaims any legal reliance upon, or even the accuracy of, the information contained within:

> The U.S. Department of Justice makes no claims, promises, or guarantees about the accuracy, completeness, or adequacy of the contents of this update, and expressly disclaims liability for errors and omissions in the contents of this update. The information appearing in this update is for general informational purposes only and <u>is not intended to provide legal advice to any individual or entity</u>. . . .

(emphasis added). As detailed above, SORNA requires Thomas to register, even if the federal government cannot criminally prosecute his refusal to do so until he travels in interstate commerce. Just as critical, SORNA separately places obligations upon the states, in this case mandating that Pennsylvania collect and publish certain identifying information about Thomas on the Internet. *See* 34 U.S.C. §§ 20920, § 20914.

Thomas's arguments on appeal ignore Pennsylvania's obligations under SORNA. The issue below and currently before this Court is not whether Thomas can be federally prosecuted for failing to comply with SORNA's registration requirements. This appeal comes before this Court on a motion for preliminary injunction seeking affirmative, prospective relief—the removal of Thomas's information from Pennsylvania's sex offender website. Even if, as Thomas contends, Subchapter I of Act 10 does not authorize the posting of the information—which it does, *see* 42 Pa.C.S.A. § 9799.63—the continued posting of

that information is nevertheless mandated by SORNA because of Pennsylvania's choice to accept certain federal funds.

Pennsylvania "*shall* maintain a jurisdiction-wide sex offender registry conforming to the requirements of [SORNA]." 34 U.S.C. § 20912 (emphasis added). The state "in which the sex offender registers *shall* ensure that . . . [an enumerated list of information] is included in the registry for that sex offender[.]" 34 U.S.C. § 20914(b). Pennsylvania "*shall* make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry" absent certain enumerated exceptions. 34 U.S.C. § 20920 (emphasis added). Because there is no dispute that Thomas falls within the definition of sex offender under SORNA, *see* 34 U.S.C. § 20911, Pennsylvania has an obligation to keep Thomas's registry information on the Internet. Therefore, even assuming arguendo that Thomas has no obligation to register under SORNA, Pennsylvania has its own separate federal obligation under § 20914 to maintain Thomas's information on its website.

Thomas argues that these SORNA requirements violate Tenth Amendment anti-commandeering principles. Brief at 23-26. They do not. "Given the attention [this] and other circuit courts have already paid to the [constitutionality of SORNA]," this Court has begun summarily rejecting arguments that "SORNA encroaches upon state's power and violate[s] the Tenth Amendment" or "that

Congress exceeded its authority under the Commerce Clause in enacting SORNA[.]" *United States v. Brown*, 740 F.3d 145, 148 fn 6 (3d Cir. 2014).

Although the "Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program," *Printz v. United States*, 521 U.S. 898, 935 (1997), SORNA does not command—it relies on its spending power by tying compliance with receipt of federal funds. *United States v. Felts*, 674 F.3d 599, 607-08 (6th Cir. 2012). Through the enactment of Pa. SORNA in 2012, Pennsylvania has willingly chosen to come into compliance with SORNA and implement its requirements. 42 Pa.C.S.A. § 9799.10(1).

As to Thomas's duty to register, "[i]f Congress acts under one of its enumerated powers . . . there can be no violation of the Tenth Amendment." *Treasurer of New Jersey v. U.S. Dep't of Treasury*, 684 F.3d 382, 413 (3d Cir. 2012) (quoting *United States v. Mussari*, 95 F.3d 787, 791 (9th Cir.1996)). Congress clearly possesses the authority under the Commerce Clause to regulate the channels of interstate commerce and protect persons in interstate commerce even though the threat may come only from intrastate activities. *Shenandoah*, 595 F.3d at 161. "When a sex offender travels between states, he or she is a person in interstate commerce who travels via the use of the channels of interstate commerce." *Pendleton*, 636 F.3d at 86. The federal registration requirement does

not exceed federal authority "because it is 'necessary and proper for carrying into execution' Congress's power under the Commerce Clause." *Pendleton*, 636 F.3d at 88 (quoting U.S. Const. art. I, § 8, cl. 18).

Under this authority, SORNA criminalizes, *inter alia*, sex offenders who travel across state lines and knowingly fail to register or update a registration as required by § 20913. 18 U.S.C. § 2250. SORNA addresses "the problem of sex offenders escaping their registration requirements through interstate travel" by requiring sex offenders to register both before and after they travel in interstate commerce. *Pendleton*, 636 F.3d at 87-88 (quoting *United States v. Whaley*, 577 F.3d 254, 259 (5th Cir. 2009)). "The requirement that sex offenders register under [§ 20913] is necessary to track those offenders who move from jurisdiction to jurisdiction." *United States v. Ambert*, 561 F.3d 1202, 1212 (11th Cir. 2009). Because this registration requirement is "reasonably adapted to the attainment of a legitimate end under the Commerce Clause[,]" it does not exceed Congress's authority.

Thomas argues that this Court may have "to revisit the precedential rulings in *Shenandoah* and *Pendleton*." Brief at 7. Respectfully, a "panel is not free to overturn a precedential opinion." *In re One2One Commc'ns*, LLC, 805 F.3d 428, 431 (3d Cir. 2015); IOP 9.1 ("no subsequent panel overrules the holding in a precedential opinion of previous panel. Court en banc reconsideration is required

to do so”). But even if this panel could overturn prior precedent, as explained above, Thomas’s arguments are untenable.

Thomas’s arguments that Pennsylvania cannot collect and publish his information until after he crosses state lines would require this Court to ignore precedent, the clear text of § 20913, and SORNA’s purpose. Thomas’s motion for preliminary injunction was correctly denied.

3. Thomas’s causes of action fail as a matter of law.

Thomas’s request for injunctive relief fails because he is required to be on the sex offender website under both Subchapter I of Act 10 and SORNA. Additionally, as we argued below, he cannot succeed on any of the claims he raised against Blocker in his complaint.

Thomas brings five claims against Blocker: (1) Fourteenth Amendment deprivation of liberty interests without due process; (2) violations of the *Ex Post Facto* Clause of the United States Constitution; (3) defamation; (4) invasion of privacy; and (5) intentional infliction of emotional distress. JA 52-56 (complaint).

The last three claims are state law torts against which Blocker enjoys sovereign immunity. State officials are immune from state law suit for actions within the scope of their duties, except in instances in which the immunity has been specifically waived. *See* 1 Pa.C.S.A. § 2310. “The General Assembly has not waived immunity for equitable claims seeking affirmative action by way of

injunctive relief." *Swift v. Dep't of Transp. of Commonwealth*, 937 A.2d 1162, 1168 (Pa.Cmwlth. 2007). Because Thomas seeks an order compelling Col. Blocker, as Commissioner of the State Police, to remove him from the registry, those claims are barred. JA 65.

As acknowledged by the Magistrate Judge, Thomas failed to argue his *Ex Post Facto* claim below. JA.35 at fn 14. That argument is, therefore, waived on appeal. *See United States v. Dupree*, 617 F.3d 724, 728 (3d Cir. 2010) (discussing the "well-established" rule that arguments not raised below are waived on appeal). That argument is also legally unavailing. "[U]nder *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), SORNA's registration regime for sex offenders is not penal in nature" and therefore does not implicate *ex post facto* protections. *Vasquez v. Foxx*, 895 F.3d 515, 520 (7th Cir. 2018), *cert. denied*, 139 S.Ct. 797, 202 L.Ed.2d 572 (2019). Likewise, whereas the Pennsylvania Supreme Court found Act 10's predecessor Pa. SORNA to violate the *Ex Post Facto* Clause of the U.S. Constitution, that court has yet to consider Subchapter I's much more lenient requirements. Subchapter I effectively reenacts the requirements of Megan's Law II, which the Pennsylvania Supreme Court has already found to be non-punitive for purposes of *ex post facto* application. *Williams II*, 832 A.2d 962; *Lee*, 935 A.2d 865.

This leaves Thomas's Fourteenth Amendment claim as the basis for his motion. Being listed on the sex offender website, however, does not implicate a protected liberty interest. "There is no federal constitutional right to reputation," *Kulwicki v. Dawson*, 969 F.2d 1454, 1468 (3d Cir. 1992), and even if there was, "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Smith,* 538 U.S. at 99. *See also, Litmon v. Harris*, 768 F.3d 1237, 1242 (9th Cir. 2014) (lifetime in-person registration does not violate substantive due process or *ex post facto* protections).

Thomas has also received all the due process warranted—his criminal trial. In *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003), the Supreme Court was presented with Connecticut's Megan's Law. As here, that statute required a compilation of information gathered from convicted sexual offender registrants for dissemination to the public. Doe, a convicted sex offender, asserted that his reputational rights were violated because state officials did not allow offenders a pre-deprivation hearing to determine current dangerousness. The Court, assuming a liberty interest in reputation, nevertheless held that due process was *not* implicated because a person who had been convicted of a sex offense already receives all the process due entitled—the criminal trial. 538 U.S. at 7. Thus, a sex offender is not entitled to an additional hearing before he must register. *Id.* As that Court explained:

> [T]he fact that respondent seeks to prove—that he is not currently dangerous—is of no consequence under Connecticut's Megan's Law. As the DPS Website explains, the law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest.

Id.[16] "Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme. Respondent cannot make that showing here." 538 U.S. at 8.

Thomas failed to demonstrate a likelihood of success on the merits of any of his causes of action. That alone, as the District Court correctly determined, precludes his extraordinary request for injunctive relief.

B. Thomas suffers no irreparable harm by complying with Subsection I's registration requirements.

Thomas also fails to allege any facts, which if true, establishes irreparable harm. "Establishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a 'clear showing of immediate irreparable injury.'" *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987) (quoting *Continental Group, Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351, 359 (3d Cir. 1980)); *see also Conchatta, Inc. v. Evanko*, 83 F. App'x 437, 442 (3d Cir. 2003) (collecting cases).

---

[16] Pennsylvania's website does the same. *See* pages 37-38 below.

None of the injuries alleged in his complaint, even if true, amount to immediate irreparable harm. JA 50-51 (complaint). Thomas does not allege that he cannot obtain housing or employment, but rather that his choices are limited. This is not the fault of the sex offender website. Thomas's criminal history is already part of the public record and knowledge of his crimes is easily accessible through Pennsylvania's Unified Judicial System's website.[17] Removal from the registry will not expunge his criminal record or make it private; "[l]andlords and employers could conduct background checks on the criminal records of prospective employees or tenants even with the [sex offender registration] Act not in force." *Smith*, 538 U.S. at 100.

Thomas alleges that the "Internet quickly links his name to the sex-offender registry." JA 51. This is not irreparable harm. *Accord*. *Doe*, 538 U.S. at 99 ("[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment"). It is also a half-truth. A Google search of Angel Luis Thomas's name does not bring up Pennsylvania Megan's Law Website, because that website does not permit search engine

---

[17] Trial Court summary of 1991 convictions for rape and IDSI and 1988 conviction for aggravated assault and resisting arrest, https://ujsportal.pacourts.us/DocketSheets/CourtSummaryReport.ashx?docketNumber=CP-67-CR-0000447-1991&dnh=lAjb1bZoLrp9XqGXr8bG2g%3d%3d (last visited July 2019).

crawling.[18] Of the 30 million mostly unrelated results Google does list, the first two results link to the opinion below, wherein Thomas's placement on the Megan's Law website is discussed. Thomas's decision to bring this action, therefore, has broadcast his convictions far louder than Pennsylvania's website.

Similarly, Thomas does not allege that he has been threatened or harassed, only that he fears "potential violence and ridicule." JA 50-51. Any ostracism Thomas may experience is not the fault of Act 10 or SORNA, but rather a direct consequence of raping a woman. Further, Pennsylvania's website specifically warns users that "[a]ny person who uses the information contained herein to threaten, intimidate, or harass the registrant or their family, or who otherwise misuses this information, may be subject to criminal prosecution or civil liability." Pa. Megan's Law Website, https://www.pameganslaw.state.pa.us (last visited June 2019).[19] The website further clarifies that "[b]y placing [a sex offender's] information on the Internet, no representation is being made the listed individual

---

[18] An automated process whereby search engines use programs to collect information from websites to populate their indices. *See generally* Web crawler, https://en.wikipedia.org/wiki/Web_crawler (last visited July 2019).

[19] This warning is also contained on the National Sex Offender Website. See https://www.nsopw.gov/en/search/verification/ (last visited June 2019) ("Any person who uses information contained in or accessed through this Website to threaten, intimidate, or harass any individual, including registrants or family members, or who otherwise misuses this information may be subject to criminal prosecution or civil liability under federal and/or state law").

will commit any specific crime in the future, nor is any representation being made that if the individual commits an offense, one of the listed offenses will be the offense committed." Pa. Megan's Law Website, https://www.pameganslaw.state.pa.us/TermsandCondition/TermsAccepted (last visited June 2019).

Thomas also complains about the "onerous requirement" of "check[ing] in" with the State Police when he changes residence or employment. JA 63 (motion). Under Subchapter I, a sex offender need only *inform* the Pennsylvania State Police of changes to their registration information, which may done using a form found on the website. *See* 42 Pa.C.S.A. § 9799.56(a)(2); Pa. Megan's Law Website, Sexual Offender Update Form, https://www.pameganslaw.state.pa.us/Documents/Sexual%20Offender%20Registration%20-%20SP%204-218%20Public.pdf (last visited July 2019).

Finally, Thomas alleges incorrectly that the "registry listing implies that Thomas's conviction was more recent than it actually was," creating a heightened sense of social isolation. JA 51 (complaint at ¶ 71). Pennsylvania's Megan's Law website lists both the offense date and conviction date of his rape and IDSI. Angel Thomas Offense List, Pa. Megan's Law Website, https://www.pameganslaw.state.pa.us/OffenderDetails/Offenses/44259 (last visited July 2019).

Any alleged harm is either speculative or can be compensated with an award of damages. Thomas has not alleged any allegations that rise to the level of immediate irreparable harm.

C. The public would be harmed if Thomas is removed from the Megan's Law website.

In contrast to the lack of harm to Thomas, the harm to the public would be significant. The General Assembly, the United States Supreme Court, and the Pennsylvania Supreme Court have all recognized the special dangers posed by sex offenders. *See e.g.* 42 Pa.C.S.A. § 9799.51 (legislative findings); *United States v. Kebodeaux*, 570 U.S. 387, 395-96 (2013) ("[t]here is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals"); *Lee*, 935 A.2d 865 ("There is little question that the threat to public safety and the risk of recidivism among sex offenders is sufficiently high to warrant careful record-keeping and continued supervision"). Additionally, the General Assembly found that "[k]noweldge of whether a person is a sexual offender could be a significant factor in protecting oneself and one's family members, or those in care of a group or community organization, from recidivist acts by such offenders." 42 Pa.C.S.A. § 9799.11(a)(7).

There can be no dispute that Thomas's crimes are troubling: Thomas was convicted of restraining, assaulting, and then raping a woman. JA 21 (R&R). There can also be no dispute that protecting the public from becoming crime victims is a

quintessential public interest. *Muniz,* 164 A.3d at 1217. "There is little question that the threat to public safety and the risk of recidivism among sex offenders is sufficiently high to warrant careful record-keeping and continued supervision." *Lee*, 935 A.2d at 885 (citing *Smith*, 538 U.S. at 103). Although Thomas would like to forget his past crimes, it is doubtful that Thomas's victim has forgotten her ordeal. The website and notification provisions of Act 10 provide victims of sexual attacks with information necessary to avoid interaction with their attackers, so they can protect themselves from further trauma.

Removing Thomas from the registry will make it more difficult for the public and his victim to protect themselves. It would also frustrate the federal government's ability to track Thomas should he cross state lines. *See Pendleton*, 636 F.3d at 87. The public's interest weighs strongly against the injunction.

II. The District Court's Ruling Contains No "Procedural Lapses." Thomas's Personal Attack on the District Judge Should Be Rejected.

The final section of Thomas's brief warrants little discussion. Thomas accuses the District Court of failing to perform a *de novo* review of the Magistrate Judge's recommendations, JA 33, and while mocking the court's grammar, accuses the District Court of improper behavior towards his counsel, JA 31-33. These allegations are meritless.

Where objections to the magistrate judge's report are filed, the District Court must conduct a *de novo* review of the contested portions of the report. *Sample v.*

Diecks, 885 F.2d 1099, 1106 n. 3 (3d Cir.1989) (citing 28 U.S.C. § 636(b)(1)(C)). In making its *de novo* review, however, the District Court may accept, reject, or modify, in whole or in part, the legal conclusions of the magistrate judge. *See* 28 U.S.C. § 636(b)(1). Although the review is *de novo*, the statute permits the Court to rely on the recommendations of the magistrate judge to the extent it deems proper. *See United States v. Raddatz*, 447 U.S. 667, 675-76 (1980).

The District Court stated that it fully reviewed the Magistrate Judge's report and recommendation, using a *de novo* standard, in its March 20, 2019 Order (JA 13), in its April 4, 2019 Order (Doc. 70 at 3), and again at the May 6, 2019 conference (JA 133-34, transcript 8:11-9:3).[20] Thomas's assertion amounts to little more than his disbelief in the veracity of the District Court's repeated assurances.

Thomas accuses the Magistrate Judge and District Court of being swayed by the contents of an Arrest Warrant Affidavit and Criminal Complaint, which describe the nature of the crimes for which Thomas was convicted. Brief at 30; Doc. 35-2 (affidavit); Doc. 35-1 (complaint). The District Court did not consider these documents. JA 12 fn 6. And contrary to Thomas's arguments, these

---

[20] During the conference, the District Judge explained that, when he agrees with the Magistrate Judge's reasoning, it would be a waste of judicial resources to simply regurgitate the Magistrate Judge's reasoning into his own opinion. JA 133. Whenever he disagrees with the Magistrate Judge's reasoning, however, he will write a longer and detailed opinion. JA 133-134.

documents fall within the public record exception to hearsay. *See* Fed.R.Evid. 803(8); s*ee also Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 412 (6th Cir. 2006) (admission of notice of arrest under public record hearsay exception was not error); *United States v. Loyola-Dominguez*, 125 F.3d 1315, 1318 (9th Cir. 1997) (conclusion that arrest warrant was public record not erroneous). The affiant's observation that Thomas's victim was seven months pregnant at the time of the attack would also fall within the present sense impression exception. *See* Fed.R.Evid. 803(1).

Likewise, Thomas's decision to discuss the post-appeal conference in his brief is puzzling, brief at 31-34, as it does not support his position. A fair reading of the transcript reveals a judge repeatedly attempting to reassure Thomas's counsel that he takes the case very seriously and that he holds no ill-will towards her. That court's actions throughout the litigation below bolsters these statements. Thomas's *ad hominem* attacks against the District Court are inappropriate and should be ignored by this Court. *See e.g. Gunn v. Credit Suisse Grp. AG*, 610 Fed.Appx. 155, 158 (3d Cir. 2015) (admonishing pro se litigant for including *ad hominem* attacks against the District Court and opposing counsel).

CONCLUSION

For these reasons, the Court should affirm the decision of the District Court.

Respectfully submitted,

JOSH SHAPIRO
Attorney General

By: */s/ Sean A. Kirkpatrick*

SEAN A. KIRKPATRICK
Senior Deputy Attorney General
Bar No. 92960 (Pa.)

J. BART DeLONE
Chief Deputy Attorney General
Chief, Appellate Litigation Section

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 705-2331
FAX: (717) 772-4526

DATE: July 15, 2019

CERTIFICATE OF COUNSEL

I, Sean A. Kirkpatrick, Senior Deputy Attorney General, hereby certify as follows:

1. That I am a member of the bar of this Court.

2. That the text of the electronic version of this brief is identical to the text of the paper copies.

3. That a virus detection program was run on the file and no virus was detected.

4. That this brief contains 9,335 words within the meaning of Fed. R. App. Proc. 32(a)(7)(B). In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

/s/ Sean A. Kirkpatrick

SEAN A. KIRKPATRICK
Senior Deputy Attorney General

CERTIFICATE OF SERVICE

I, Sean A. Kirkpatrick, Senior Deputy Attorney General, do hereby certify that I have this day served the foregoing Brief For Appellees, via electronic service, on the following:

Marianne Sawicki, Esq.
Law Office of Marianne Sawicki LLC
2530 South Blair Ave.
Huntingdon, PA 16652
(*Counsel for Appellant*)

Seven copies were also sent by first class mail to the Clerk of the United States Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania.

/s/ Sean A. Kirkpatrick

SEAN A. KIRKPATRICK
Senior Deputy Attorney General

DATE: July 15, 2019