UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ANGEL LUIS THOMAS, SR.,	:	CIVIL NO: 4:18-CV-00812
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Plaintiff	:	(Judge Brann)
	:	
v.	:	(Chief Magistrate Judge Schwab)
	:	
	:	
COL. TYREE C. BLOCKER, JR., *et al.*,	:	
	:	
	:	
Defendant	:	
	:	

REPORT AND RECOMMENDATION

I. Introduction.

Plaintiff Angel Luis Thomas, Sr. claims that the defendants violated his federal Constitutional rights as well as state law by requiring him to register as a sex offender. Currently pending is Thomas's motion for a preliminary injunction seeking an order requiring the Commissioner of the Pennsylvania State Police to remove his name from the sex-offender registry. Because we conclude that Thomas does not have a reasonable likelihood of succeeding on the merits of his claim that he should not be part of the sex-offender registry, we recommend that the Court deny his motion for a preliminary injunction.

II. Background and Procedural History.

On April 15, 2018, Thomas began this action by filing a complaint naming as defendants: (1) Col. Tyree C. Blocker, Jr., the Commissioner of the Pennsylvania State Police (PSP); (2) Sergeant O.E. Rowles, the Commander of the Megan's Law Section of the PSP Division of Operational Records; (3) Captain Maurice A. Tomlinson, a commander with the PSP; (4) Trooper Davis Howanitz, a trooper with the PSP; (5) Kevin Kauffman, the Superintendent of the State Correctional Institute at Huntingdon (SCI-Huntingdon); (6) CO Harris, a corrections officer who works in the Security Office of SCI-Huntingdon; (7) Ms. Hawn, a corrections counselor at SCI-Huntingdon; and (8) Nicole Pittman, a records specialist at SCI-Huntingdon. On November 1, 2018, Thomas along with two other plaintiffs filed an amended complaint. Although the amended complaint names other defendants in addition to the eight listed above, those additional defendants are named in connection with the claims of the other two plaintiffs; the additional defendants are not named in connection with Thomas's claims.

Thomas alleges that the defendants required him to register as a sex offender and refused to remove him from the sex-offender registry even though they knew that no statute required his registration.[1] He alleges that the corrections defendants

[1] As we are addressing Thomas's motion for a preliminary injunction, we briefly summarize only the allegations that relate to Thomas. In connection with the current motion, the allegations relating to the other plaintiffs are not relevant.

did so as retaliation for his prior civil lawsuits against prison officials. He alleges that the PSP defendants did so because they disliked the Pennsylvania Supreme Court's decision in *Commonwealth v. Muniz*, 164 A.3d 1189, 706 (Pa. 2017) (holding that the retroactive application of Pennsylvania's Sex Offender Registration and Notification Act (Pennsylvania SORNA)[2] to a petitioner convicted of a sex offense prior to the effective date of Pennsylvania SORNA violated the Ex Post Facto Clauses of the Pennsylvania and United States Constitutions), *cert. denied*, 138 S. Ct. 925 (2018), as well as the limitations set forth in a later statute and they sought to covertly continue to register men like Thomas, who they deemed to be dangerous and predestined to re-offend.

Thomas alleges that he has been wrongfully listed on Pennsylvania's sex-offenders registry since December 27, 2017, with the exception of a brief time in late January and early February of 2018, when, following the United States Supreme Court's denial of certiorari in *Muniz*, he was temporarily removed from the registry. According to Thomas, after Pennsylvania enacted a new sex-offender registration statute, known as Act 10, on February 21, 2018, defendants Blocker and Rowles restored Thomas's information to Pennsylvania's online sex-offender website. He alleges that they did so even though they knew that Act 10 did not

[2] We refer to the Pennsylvania statute as "Pennsylvania SORNA" so as to distinguish it from the federal Sex Offender Registration and Notification Act, which we refer to as "SORNA."

apply to him because Act 10 applies only to those who committed offenses on or after April 22, 1996, and to those who had been required to register under a prior statute, whereas he committed his offense in 1991 and he had never been required to register under a prior statute because none of the prior registration statutes required registration during incarceration and he had been continuously incarcerated from 1991 until his release in January of 2018. Although Thomas's counsel informed the PSP that ACT 10[3] did not apply to Thomas, she was informed that Thomas's name and information would remain on the sex-offender registry unless a court ordered the PSP to remove them. Thomas's counsel was also informed that Thomas would be arrested and charged if he did not present himself to the PSP by May 22, 2018, for another round of registration. Thomas alleges that given those threats, he had no choice but to continue to cooperate with the improper registration regime. He alleges that he has been harmed by being listed on the registry.

Thomas presents five counts against the defendants. Count I is a due process claim. Count II is a retaliation claim against the corrections defendants. Count III is an ex post facto claim. Count IV is a state-law defamation claim. And Count V is a state-law claim of invasion of privacy. Thomas seeks compensatory

[3] Although the Pennsylvania General Assembly again later amended the sex-offender registration act effective June 12, 2018, *see* 2018 Pa. Legis. Serv. Act 2018-29 (H.B. 1952) (Act 29), the parties continue to refer to the statute as Act 10. We will do the same, but we cite to the current version of the statute.

and punitive damages as well as injunctive relief enjoining the PSP from listing him in the sex-offender registry.

Two days after filing the complaint, Thomas filed a motion for a temporary restraining order (TRO), which Judge Brann denied without prejudice to Thomas filing a motion for a preliminary injunction after the defendants had been served. After the defendants were served, Thomas filed a "Second Application for Temporary Restraining Order," in which he seeks a TRO against defendant Blocker and the PSP instructing them to immediately remove him from the sex-offender registry and a hearing as to a preliminary injunction. *Doc. 14*.

Thereafter, the defendants filed answers to the complaint, and with leave of court, Thomas filed a reply. Thomas also filed a notice that he was challenging the constitutionality of certain provisions of Pennsylvania's Act 10 and of certain provisions of SORNA. The Clerk of Court then certified the constitutional challenges to the Attorney General of Pennsylvania and the Attorney General of the United States and gave them until October 1, 2018, to intervene in this action. Neither has intervened.

Although Thomas filed his second motion for a TRO on June 6, 2018, he did not file a brief in support of that motion until October 5, 2018, after being ordered by the Court to do so. Thomas concedes that the relief he is now seeking is a preliminary injunction, rather than a TRO. On October 19, 2018, defendant

Blocker[4] filed a brief in opposition to Thomas's motion, and on October 21, 2018, Thomas filed a reply brief.

III. Preliminary Injunction Standards.

A motion for preliminary injunctive relief is governed by Rule 65 of the Federal Rules of Civil Procedure and is judged against exacting legal standards. To obtain a preliminary injunction, a party must show: (1) a reasonable probability of success on the merits; and (2) that he or she will suffer irreparable harm if the injunction is denied. *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017). These "factors are prerequisites for a movant to prevail." *Holland v. Rosen*, 895 F.3d 272, 286 (3d Cir. 2018). "If these gateway factors are met, a court then considers" "(3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." *Reilly*, 858 F.3d. at 176, 179. And the Court must determine "in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Id*. at 179.

Preliminary injunctive relief is not granted as a matter of right. *Kershner v. Mazurkiewicz*, 670 F.2d 440, 443 (3d Cir. 1982). Rather, the decision to grant or

[4] Although all the defendants named in the original complaint filed the brief in opposition, because Thomas's motion and brief make clear that he is seeking preliminary injunctive relief only as to defendant Blocker, from here on out we refer to the brief and the arguments in the brief as if they were made only by defendant Blocker.

deny such relief is committed to the discretion of the district court. *United States v. Price*, 688 F.2d 204, 210 (3d Cir. 1982). "A preliminary injunction 'is an extraordinary remedy . . . which should be granted only in limited circumstances.'" *Holland*, 895 F.3d at 285 (quoting *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994)). A "preliminary injunction must be the only way of protecting the plaintiff from harm." *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989). "It has been well stated that upon an application for a preliminary injunction to doubt is to deny." *Madison Square Garden Corp. v. Braddock*, 90 F.2d 924, 927 (3d Cir. 1937).

IV. Undisputed Facts.[5]

The following facts are not in dispute. In 1991, Thomas was convicted in the Court of Common Pleas of York County, Pennsylvania of rape, involuntary deviate sexual intercourse, aggravated assault, reckless endangering, and unlawful restraint. *See* Docket in *Commonwealth v. Thomas*, CP-67-CR-0000447-1991 (C.C.P. York Cty).[6] His conviction was based on an offense that occurred on

[5] Because the facts set forth here are undisputed and are sufficient to decide the motion for a preliminary injunction, we deny Thomas's request for a hearing.

[6] The court may take judicial notice of adjudicative facts that are not subject to reasonable dispute because they are "generally known within the trial court's territorial jurisdiction" or because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."

January 4, 1991. *Id*. In 1992, he was sentenced to an aggregate term of imprisonment of 12½ to 27 years. *Id*. Thomas was in prison continuously from 1991 until his release on January 11, 2018. *Doc. 1* (Complaint) at ¶ 3 and *Doc. 16* (Answer of PSP defendants) at ¶ 3.[7]

At the time Thomas was charged, tried, and sentenced, there was no provision for the registration of sex offenders in Pennsylvania. *Doc. 1* at ¶ 16 and *Doc. 16* at ¶ 16. In 1995, Pennsylvania's General Assembly enacted Megan's Law (Megan's Law I). *Muniz*, 164 A.3d at 1196. After the Pennsylvania Supreme Court struck down certain provisions of Megan's Law I, the General Assembly enacted Megan's Law II in May of 2000. *Id*. "The General Assembly made further amendments to Megan's Law II with the passage of Act 152 of 2004, commonly referred to as Megan's Law III, which was signed into law on November 24, 2004." *Id*. at 1197. The Pennsylvania Supreme Court struck down Megan's Law III because it violated the "single subject" rule of the Pennsylvania Constitution.

Fed.R.Evid. 201(b)(2). The docket in Thomas's criminal case is a public record of which we can take judicial notice. *See Wilson v. McVey*, 579 F. Supp. 2d 685, 688 (M.D. Pa. 2008) (taking judicial notice of court docket).

[7] Even though an amended complaint was recently filed, we cite here to facts set forth in Thomas's original complaint. The facts to which we cite are materially the same as set forth in the complaint and in the amended complaint. The amended complaint was only very recently filed, and the PSP defendants have not yet answered the amended complaint. Thus, in order to avoid delaying a decision on the motion for a preliminary injunction, we rely on the facts sets forth in the original complaint as admitted by the defendants in their answers to the original complaint.

Commonwealth. v. Neiman, 84 A.3d 603, 605 (Pa. 2013). The General Assembly then enacted Pennsylvania SORNA, which became effective on December 20, 2012. *Muniz*, 164 A.3d at 1193 n.3, 1198.

On July 19, 2017, the Pennsylvania Supreme Court issued its decision in *Muniz*, holding that the retroactive application of Pennsylvania SORNA to a petitioner convicted of a sex offense prior to the effective date of Pennsylvania SORNA violated the Ex Post Facto Clauses of the Pennsylvania and United States Constitutions. *Muniz*, 164 A.3d at 1193. Thereafter, the Commonwealth filed a petition for a writ of certiorari, which the United States Supreme Court denied on January 22, 2018. *Pennsylvania v. Muniz*, 138 S. Ct. 925 (2018).

Thomas was scheduled to be release from prison in January of 2018. *Doc. 1* at ¶ 21 and *Doc. 16* at ¶ 21. After certain of the corrections defendants told Thomas he was required to register as a sex offender, on December 27, 2017, defendant Harris escorted Thomas to the prison records office and compelled him to undergo registration procedures. *Doc. 1* at ¶¶ 22–23 and *Doc. 15* (Answer of Corrections defendants) at ¶¶ 22–23. Certain of the corrections defendants fingerprinted and photographed Thomas and then entered his name, home address, photograph, and criminal record into the online sex-offender registry. *Doc. 1* at ¶ 24 and *Doc. 15* at ¶ 24. The Corrections defendants told Thomas that upon his

release he was required to report to the PSP to register again. *Doc. 1* at ¶ 28 and *Doc. 15* at ¶ 28.

Thomas was released from SCI-Huntingdon on January 11, 2018. *Doc. 1* at ¶ 29 and *Doc. 16* at ¶ 29. On January 13, 2018, he went to the PSP station in Lancaster where he was again photographed, and his new photo and home address were entered into the registry. *Doc. 1* at ¶¶ 29–30 and *Doc. 16* at ¶ 29–30.

After the Supreme Court denied the petition for writ of certiorari in *Muniz*, Thomas's name was temporarily removed from the sex-offender registry. *Doc. 1* at ¶ 42 and *Doc. 16* at ¶ 42. On February 21, 2018, the Pennsylvania legislature enacted Act 10, which became effective immediately. *Doc. 1* at ¶ 43 and *Doc. 16* at ¶ 43. At some point after February 21, 2018, Thomas's name, home address, and photograph were again displayed on the sex-offender website. *Doc. 1* at ¶ 47 and *Doc. 16* at ¶ 47.

In April of 2018, Thomas's counsel contacted the PSP about Thomas's status. *Doc. 1* at ¶ 48 and *Doc. 16* at ¶ 48. Thomas's counsel was told that the PSP would not remove Thomas's name and photograph from the registry unless ordered by a court to do so. *Doc. 1* at ¶ 49 and *Doc. 16* at ¶ 49. Thomas's counsel was also informed that Thomas would be arrested and charged if he did not present himself to the PSP by May 22, 2018, for another round of registration. *Doc. 1* at ¶ 50 and *Doc. 16* at ¶ 50.

Because of Thomas's inclusion on the sex-offender registry, Thomas's name, photograph, home address, conviction, and other sensitive information is exposed to anyone with Internet access, including but not limited to potential employers, landlords, and friends. *Doc. 1* at ¶ 64 and *Doc. 16* at ¶ 64.

V. Discussion.

Judged against the exacting standards applicable to motions for a preliminary injunction, Thomas's motion for a preliminary injunction fails. Thomas cannot meet the first element for such injunctive relief, which requires the movant to show that he "can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not)." *Reilly*, 858 F.3d at 179. Thomas cannot satisfy that element since his claims are premised on the conclusion that he is not required to register or maintain his registration as a sex offender, but we conclude that he is so required.

Thomas contends that at the time of his release from prison, he was not required to register as a sex offender because the Pennsylvania Supreme Court in *Muniz* had declared Pennsylvania SORNA unconstitutional as retroactively applied to offenders, like him, who committed a sexual offense before the Pennsylvania SORNA became effective. He also contends that even after Pennsylvania enacted

Act 10, he was not required to register or update his registration because Act 10 by its terms does not apply to him.

Act 10[8] requires "[a]n individual who committed a sexually violent offense within this Commonwealth and whose period of registration with the Pennsylvania State Police, as specified in section 9799.55 (relating to registration), as of February 21, 2018, has not expired" to register with the Pennsylvania State Police. 42 Pa.C.S.A. § 9799.54(a)(1). Thomas is required to register under Act 10 only if he committed a "sexually violent offense" as defined in Act 10.

Act 10 contains a two-prong definition of "sexually violent offense." The first prong of that definition provides that a "sexually violent offense" is "a criminal offense specified in section 9799.55 (relating to registration) committed on or after April 22, 1996, but before December 20, 2012, for which the individual was convicted." Because Thomas committed his offense in 1991, his offense does not meet the first prong of Act 10's definition of a "sexually violent offense."

Thus, Thomas is required to register under Act 10 only if his offense meets the second prong of the definition of "sexually violent offense." That prong provides that a "sexually violent offense" is "a criminal offense for which an

[8] Act 10 was amended effective June 12, 2018. *See* 2018 Pa. Legis. Serv. Act 2018-29 (H.B. 1952) (Act 29). The parties continue to refer to Pennsylvania's current registration statute as Act 10. Although for ease of reference in tracking the parties' arguments, we will do the same, our citations are to the current version of the Act as amended by Act 29.

individual was 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." Whether Thomas's offense meets this definition depends on whether Thomas was required to register with the PSP under Pennsylvania's Megan's Laws I through III on or after April 22, 1996, but before December 20, 2012. Thomas contends that he was not because those laws did not require him to register until he was released from incarceration, and he was not released from incarceration until January of 2018.[9] Blocker admits in his brief that "[a]lthough [Thomas] was subject to all prior versions 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 (footnote omitted). Yet, without explanation, Blocker suggests that Act 10 applies to Thomas.

But we need not decide whether Act 10 applies to Thomas because regardless of whether Act 10 applies to Thomas, Thomas was required to register as a sex offender under SORNA. As we discuss below, SORNA contains a

[9] Although Thomas's construction of the phrase "required to register" may be a plausible one, it is not the only plausible one. *Cf. United States v. Gundy*, 804 F.3d 140, 145–47 (2d Cir. 2015) (deciding that there is a difference between when the requirement to register under SORNA attaches and the deadline for initial registration under SORNA and concluding that "a sex offender is 'required to register' [under SORNA] once he or she is 'subject to' SORNA's registration requirements" even though that may be well before the deadline for initial registration) *cert. granted in part on other issue*, 138 S. Ct. 1260, 1261 (2018).

registration requirement that does not depend upon state law. Thus, even if Thomas was not required to register under Act 10, he was required to register under SORNA. And since Thomas had a duty to register under SORNA and to maintain his registration under SORNA, he cannot show that he is entitled to a preliminary injunction.

In 2006, "Congress enacted SORNA as Title I of the Adam Walsh Child Protection and Safety Act of 2006, Pub.L. No. 109–248, §§ 101–155, 120 Stat. 587, 590–611 (2006)." *United States v. Cooper*, 750 F.3d 263, 264 (3d Cir. 2014).[10] Aware that before SORNA, "registration law consisted of a patchwork of federal and 50 individual state registration systems," Congress sought "to make those systems more uniform and effective." *Reynolds v. United States*, 565 U.S. 432, 435 (2012). SORNA "does so by repealing several earlier federal laws that also (but less effectively) sought uniformity; by setting forth comprehensive registration-system standards; by making federal funding contingent on States' bringing their systems into compliance with those standards; by requiring both

[10] On September 1, 2017, without any change in statutory language, SORNA was transferred from 42 U.S.C. § 16901 *et seq.* to 34 U.S.C. § 20901 *et seq. United States v. Sedlak*, No. 1:09-CR-0079-01, 2018 WL 3056188, at *1 n.2 (M.D. Pa. June 20, 2018). Although defendant Blocker briefly mentions the Adam Walsh Child Protection and Safety Act of 2006 in connection with a review of a history of Pennsylvania's registration statutes, he does not argue that SORNA required Thomas to register and keep his registration current. We cannot, however, overlook SORNA in deciding whether Thomas is entitled to a preliminary injunction.

state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current); and by creating federal criminal sanctions applicable to those who violate the Act's registration requirements." *Id*.

SORNA sets forth requirements for states. "Among its many provisions, SORNA instructs States to maintain sex-offender registries that compile an array of information about sex offenders, § 16914; to make this information publicly available online, § 16918; to share the information with other jurisdictions and with the Attorney General for inclusion in a comprehensive national sex-offender registry, §§ 16919–16921; and to 'provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter,' § 16913(e)." *Carr v. United States*, 560 U.S. 438, 455–56 (2010).

SORNA also contains separate requirements applicable to sex offenders. SORNA requires a "sex offender" to "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 (formerly codified at 42 U.S.C. § 16913).[11] SORNA "defines 'sex offender' broadly to include any

[11] SORNA provides when a sex offender shall initially register—either before completing his sentence of imprisonment or if not sentenced to a term of imprisonment, within three days of sentencing—and how a sex offender shall keep his registration current—by appearing in person in a least one jurisdiction where he is required to register within three days after "each change of name, residence,

'individual who was convicted of a sex offense.'" *Reynolds*, 565 U.S. at 442 (quoting 42 U.S.C. § 16911(1) (now codified at 34 U.S.C. § 20911)). And with limited exceptions not applicable here, it broadly defines "sex offense" to include "a criminal offense that has an element involving a sexual act or sexual contact with another." 34 U.S.C. § 20911(5)(A)(i) (formerly codified 42 U.S.C. § 16911(5)(A)(i)).[12] "There is no doubt here that Thomas was convicted of sexual offenses." *Doc. 37* (Thomas's Reply Brief) at 11.

Although SORNA "defines 'sex offender' to include individuals who were convicted of sex offenses prior to the enactment of SORNA," it "does not set forth

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employment, or student status" and informing that jurisdiction of such change. 34 U.S.C. §§ 20913(b), 20913(c) (formerly codified at 42 U.S.C. §§ 16913(b), 16913(c)). The registration requirement of SORNA—§16913 (now codified at 34 U.S.C. §20913)—"does not have an enforcement provision, but under 18 U.S.C. § 2250(a), . . . a person commits a crime when he or she '(1) is required to register under the Sex Offender Registration and Notification Act; (2) . . . (B) travels in interstate or foreign commerce . . .; and (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act." *United States v. Pendleton*, 636 F.3d 78, 83 (3d Cir. 2011). "In other words, '[o]nce a person becomes subject to SORNA's registration requirements . . . that person can be convicted under § 2250 if he thereafter travels and then fails to register.'" *Id*. (quoting *Carr*, 560 U.S. at 447). Here, we are not dealing with the criminal provision of SORNA. Rather, we are dealing with only the registration requirement.

[12] SORNA divides offenders into Tier I, Tier II, or Tier III sex offenders, and it requires offenders to periodically "appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered" every year for Tier I sex offenders, every six months for Tier II sex offenders, and every three months for Tier III sex offenders. 34 U.S.C. §§ 20911, 20918 (formerly codified at 42 U.S.C. §§ 16911, 16916).

the registration procedures for pre-SORNA sex offenders." *Cooper*, 750 F.3d at 265. Rather, "in 42 U.S.C. § 16913(d), Congress delegated to the United States Attorney General the authority to determine whether SORNA's registration requirements would apply retroactively to pre-SORNA sex offenders." *Id*.

The Supreme Court held that SORNA's "registration requirements do not apply to pre-Act offenders until the Attorney General so specifies." *Reynolds*, 565 U.S. at 445. In 2007, the Attorney General issued an "Interim Rule that made SORNA's registration requirements retroactive for all pre-SORNA offenders." *United States v. Reynolds*, 710 F.3d 498, 505 (3d Cir. 2013). The Third Circuit held that the Attorney General promulgated that Interim Rule in violation of the Administrative Procedure Act's notice-and-comment requirements. *Id*. at 514. But after the Interim Rule and after a notice-and-comment period, the Attorney General "issued a Final Rule, which became effective as of January 28, 2011." *Cooper*, 750 F.3d at 266; 75 F.R. 81849-01(Dec. 29, 2010). That final rule provides that the requirements of SORNA "apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of" SORNA. 28 C.F.R. § 72.3.

Thomas contends that Congress impermissibly delegated its legislative authority to the Attorney General to determine whether the registration requirements of SORNA apply to sex offenders convicted before SORNA was

enacted. But the Third Circuit has held otherwise. *See Cooper*, 750 F.3d at 272 (holding that "SORNA's delegation to the Attorney General in 42 U.S.C. § 16913(d) does not violate the nondelegation doctrine"). Thomas correctly notes that this issue is currently pending before the Supreme Court. *See United States v. Gundy*, 695 F. App'x 639, 641 n.2 (2d Cir. 2017), *cert. granted in part*, 138 S. Ct. 1260, 1261 (2018). But unless and until the Supreme Court holds that SORNA violates the nondelegation doctrine, we are bound by the Third Circuit's decision that it does not.

Thomas also contends that SORNA violates the anticommandeering doctrine of the Tenth Amendment by "purporting to require state officials to perform certain tasks." *Doc. 32* at 10–11. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. "The principles of limited national powers and state sovereignty are intertwined." *Bond v. United States*, 564 U.S. 211, 225 (2011). "While neither originates in the Tenth Amendment, both are expressed by it." *Id.* "[A]ction that exceeds the National Government's enumerated powers undermines the sovereign interests of States," and such "unconstitutional action can cause concomitant injury to persons in individual cases." *Id.* "[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of

the States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). "The anticommandeering doctrine simply represents the recognition of this limit on congressional authority." *Id.*

'"If 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. Parker,* 108 F.3d 28, 31 (3d Cir.1997)). Thomas's Tenth Amendment challenge to SORNA's registration requirement fails because Congress enacted SORNA pursuant to its enumerated powers. The Third Circuit has held that in enacting SORNA's registration requirement Congress acted pursuant to its authority under the Commerce Clause. *Pendleton*, 636 F.3d at 88 (holding that § 16913's registration requirement is a proper exercise of "Congress's power under the Commerce Clause, U.S. Const. art. I, § 8, cl. 18"). In enacting SORNA, Congress also acted under its Spending Clause authority. *See* 42 U.S.C. §§ 16925(a), (d) (now codified at 34 U.S.C §§ 20927(a), (d)) ("The provisions of this subchapter that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section"); *see also United States v. Shenandoah*, 572 F. Supp. 2d 566, 584 (M.D. Pa. 2008) ("Moreover, a second enumerated power—the spending power of Article I, § 8, cl.

1—insulates SORNA from Tenth Amendment challenge."), *aff'd on other grounds*, 595 F.3d 151, 161 (3d Cir. 2010), *abrogated in part by*, *Reynolds*, 565 U.S. at 445, and *Bond*, 564 U.S. at 226 (2011);[13] *United States v. Kebodeaux*, 570 U.S. 387, 398 (2013) (stating in dicta that SORNA uses "Spending Clause grants to encourage States to adopt its uniform definitions and requirements" but that "[i]t

[13] As the Third Circuit has recognized:

> Central to *Shenandoah*'s holding that the defendant lacked standing for his nondelegation and APA claims was its interpretation of SORNA—namely that SORNA's registration requirements applied to pre-SORNA sex offenders automatically, without any action needed by the Attorney General. This understanding of SORNA made the administrative rule challenged by the defendant irrelevant to his case, in that SORNA, rather than the rule, was the basis of his conviction. *Id.* at 157–58, 163–64. This understanding of SORNA was rejected by the Supreme Court in its *Reynolds* decision. *Reynolds v. United States*,[565 U.S. 432], 132 S.Ct. 975, 978, 181 L.Ed.2d 935 (2012).
>
> The defendant lacked standing to raise his Tenth Amendment claim because, at the time of the decision, private parties were thought to be unable to assert Tenth Amendment claims absent the involvement of a State. *Id.* at 161–62. This holding was rejected by the Supreme Court in *Bond v. United States*, [564 U.S. 211], 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011). In that case, the Supreme Court held that private persons may assert Tenth Amendment arguments even when an apparatus of the State is not a party to the suit. *Id.* at 2360, 2367.

United States v. Reynolds, 710 F.3d 498, 504 n.4 (3d Cir. 2013).

did not insist that the States do so"). Accordingly, Thomas's Tenth Amendment challenge to SORNA fails.[14]

Thomas's duty to register under SORNA does not depend upon state law. *Pendleton*, 636 F.3d at 86 ("Put simply, Pendleton's federal duty to register under SORNA was not dependent upon his duty to register under Delaware law."). And since Thomas had a duty to register under SORNA, he has not shown that he has a reasonable likelihood of success on the merits of his claims that he is not currently required to maintain his registration as a sex offender.[15] Thus, Thomas is not entitled to a preliminary injunction. *See Am. Exp. Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012) ("The moving party's failure to show a likelihood of success on the merits 'must necessarily result in the denial of

[14] In his brief, although Thomas challenges SORNA on the basis of the nondelegation doctrine and the anticommandeering doctrine, he does not argue that SORNA violates the Ex Post Facto Clause. Thus, we do not consider whether SORNA violates the Ex Post Facto Clause.

[15] Thomas contends that SORNA is addressed to state legislatures, not state employees acting in their official capacity, like the defendants in this action. But state employees acting in their official capacities are the equivalent of the state. And because we are here addressing a motion for a preliminary injunction that seeks removal of Thomas from the sex-offender registry, the issue is whether Thomas is at this time required to be registered and keep his registration up to date under SORNA. We need not at this time, determine the propriety of the actions taken by the defendants in the past.

a preliminary injunction.'") (quoting *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1143 (3d Cir. 1982)).[16]

VI. Recommendation.

Based on the foregoing, we recommend that the Court deny Thomas's motion (doc. 14) for a preliminary injunction.

The Parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.

[16] Because we conclude that Thomas cannot show a reasonable likelihood of success on the merits, we do not consider the other preliminary-injunction factors, including the public-interest factor. As to that factor, however, we note that Blocker submitted a criminal complaint and an arrest warrant affidavit setting forth the purported details of Thomas's offense. Thomas contends that the Court should strike those documents because they are inflammatory, impertinent, and irrelevant, and because Blocker filed them for an improper purpose. He also contends that those portions of Blocker's brief that set forth the details from the criminal complaint and affidavit should be stricken as well. We will not strike the documents or parts of Blocker's brief because although we conclude that we need not reach the public interest factor, the documents could reasonably be seen as relevant to that factor.

The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 26th day of November, 2018.

S/Susan E. Schwab
Susan E. Schwab
Chief United States Magistrate Judge