Multiple Documents

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

GRETCHEN WHITMER[1], Governor of the State of Michigan, and COL. JOSEPH GASPAR, Director of the Michigan State Police, in their official capacities,

Defendants.

File No. 2:16-cv-13137

Hon. Robert H. Cleland

Mag. J. David R. Grand

Statement on Concurrence

Pursuant to Local Rule 7.1, on September 22, 2020, plaintiffs sought concurrence from defendants in the relief sought. Defendants' counsel denied concurrence.

PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT

1. More than five years ago, in March 2015, this Court held portions of Michigan's Sex Offenders Registration Act (SORA) unconstitutional as violating the Due Process Clause and First Amendment. *See Does #1-5 v. Snyder*, 101 F. Supp.

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

3d 672 (E.D. Mich. 2015). *See also Does #1-5 v. Snyder*, 101 F. Supp. 3d 722 (E.D. Mich. 2015). More than four years ago, the Sixth Circuit held SORA violates the Ex Post Facto Clause. *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017) (collectively *Does I*).

2. The legislature failed to pass a new statute to bring SORA into compliance with the Constitution. Instead Michigan continued to enforce SORA as if this Court and the Sixth Circuit had never spoken. Plaintiffs brought this action to ensure that the *Does I* decisions would be applied to all registrants.

3. As the Court has repeatedly expressed, and as all parties agree, the best resolution of this case would be a legislative one. Plaintiffs have therefore again and again over the last several years agreed to defer judicial decisions in a good faith effort to reach a legislative resolution that would result in a statute that is constitutional and evidence-based. Yet again and again the legislature has failed to deliver. At the most recent status conference on September 8, 2020, the Court and parties once again discussed whether legislative resolution was possible. Plaintiffs asked the Court for time to confer with legislative staff regarding the prospects for new legislation.

4. Unfortunately, Plaintiffs must inform the Court that the prospects are dim for new legislation that will remedy SORA's constitutional deficiencies. It is far from clear that the legislature can pass *any* SORA legislation. And it appears that *if*

the legislature does pass new legislation, that legislation will not address SORA's constitutional deficiencies, much less be evidence-based. Plaintiffs' goal throughout has been passage of legislation that would end the litigation once and for all. Despite years of litigation, first in *Does I* and now in this case, and despite the patience of this Court, that goal does not appear to be within reach.

5. On February 14, 2020, this Court decided the substantive issues here in Plaintiffs' favor. Opinion & Order, ECF 84. Entry of judgment, however, was delayed by the pandemic. Interim Order, ECF 91. Given that the logistical obstacles to implementation of the judgment have been resolved and given the dim prospects for legislative reform that would address SORA's constitutional deficiencies, the Court should now enter a final judgment.

6. A proposed judgment, much of which was jointly agreed upon by the parties prior to entry of the Interim Order delaying entry of judgment, is attached. The brief below addresses which aspects of the judgment are in dispute.

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

Respectfully submitted,

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Dated: September 25, 2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT

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INTRODUCTION

All sides in this litigation agree that constitutional deficiencies of Michigan's Sex Offenders Registration Act (SORA) are best addressed through new legislation. Plaintiffs—and this Court—have been more than patient with the legislature. More than five years ago in March 2015 this Court held that SORA violates the Due Process Clause and First Amendment, and more than four years ago the Sixth Circuit held that SORA violates the Ex Post Facto Clause. *See Does #1-5 v. Snyder*, 101 F. Supp. 3d 672 (E.D. Mich. 2015); *Does #1-5 v. Snyder*, 101 F. Supp. 3d 722 (E.D. Mich. 2015); *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017) (collectively "*Does I*"). Because the legislature failed to act, Plaintiffs were forced to bring this action seeking to enforce the *Does I* decisions. Over the last several years, Plaintiffs and the Court have repeatedly deferred resolution in order to allow legislative negotiations to proceed. And even when the Court granted relief on Plaintiffs' dispositive motions in February, the Court provided that its injunctions would not be effective for 60 days "principally to allow time for the legislature to craft and enact a new statute." Opinion & Order, ECF 84, Pg.ID# 1805. When the pandemic hit, the Court granted even more time. Interim Order, ECF 91.

The reason Plaintiffs have again and again agreed to postpone judgment is because they hoped for a legislative solution: a new statute that remedies SORA's

unconstitutional provisions, that is grounded in modern social science research, and that resolves the litigation. During the summer of 2019 that seemed possible. A legislative workgroup comprised of key stakeholders was meeting regularly and had made substantial progress before those conversations were shut down, forcing Plaintiffs to move forward to seek final judgment. After the Court's February decision, Plaintiffs hoped that the impending entry of judgment would finally result in comprehensive SORA reform. While legislative conversations were delayed due to the pandemic, legislators—without reconvening the work group—introduced a new SORA bill. *See* 2020 H.B. 5679. It was patently unconstitutional.

Plaintiffs' hope has been not just to resolve this case, but to end their litigation over SORA once and for all. To that end Plaintiffs have deferred relief for the class repeatedly over the past several years in a good faith effort to forge a legislative resolution that would result in a statute that is both constitutional and evidence-based. It is with great disappointment, therefore, that Plaintiffs must inform the Court, based on conversations with the ACLU's legislative staff, that the prospects are dim for new legislation that will remedy SORA's constitutional deficiencies. It is far from clear that the legislature can pass *any* SORA legislation. Even more unfortunately, it appears that if the legislature does pass new legislation, that legislation will not address SORA's constitutional deficiencies. Rather, that legislation would at most tinker with SORA in an effort to prevent this Court's judgment from

taking effect. Such minor revisions will not make the substantive changes necessary to bring SORA into compliance with the Constitution. And they will not end the litigation.

Plaintiffs have been willing to defer relief in pursuit of a statute which—though it would surely not be everything Plaintiffs want—meets basic constitutional standards. But Plaintiffs are not willing to defer relief just so the legislature can pass another unconstitutional statute, forcing the Plaintiffs to file *Does III*. Legislation that does not end the litigation is not legislation worth waiting for. Accordingly, Plaintiffs must now ask the Court to enter a final judgment as soon as possible.

BACKGROUND

This case was brought to secure class-wide relief on the issues on which the *Does I* plaintiffs prevailed. Defendants stipulated to class certification. Stip. Class Certification Order, ECF 46. In July 2018, over two years ago, the plaintiffs moved for partial summary judgment as to the ex post facto subclasses, seeking declaratory and injunctive relief. Motion, ECF 40. Plaintiffs then invited defendants to work together to develop legislation that the parties could jointly send to the legislature. Plaintiffs' goal was passage of legislation that would address the constitutional infirmities in SORA and prevent the need for further litigation. The Court repeatedly postponed briefing to permit legislative negotiations. Sched. Orders, ECF 41, 44, 45, 47, 51, 54.

In May 2019—almost a year after Plaintiffs moved for partial summary judgment—the parties, hoping to spur legislative action, proposed and the Court then entered a stipulated order declaring the 2006 and 2011 amendments to be unconstitutional as to the ex post facto subclasses. Order for Declaratory Judgment and for 90-Day Deferral of Decision on Injunctive Relief to Provide Opportunity for Legislative Resolution, ECF 55. The Court deferred ruling on injunctive relief "to avoid interfering with the Michigan legislature's efforts to address the *Does I* decisions and their findings of constitutional deficiencies with SORA." *Id*., Pg.ID# 783. But the state again failed to take advantage of the opportunity provided by this Court to address SORA's constitutional problems through legislation. In August 2019, after the 90 days had passed, the Court entered a Stipulated Order Setting Briefing Schedule Pending Legislative Action to Replace or Amend Michigan's SORA, noting that "while a working group of state stakeholders has made significant progress on proposed new legislation, no replacement or amended law has yet been introduced." ECF 60, Pg.ID# 795. The parties then briefed the remaining issues.

On February 14, 2020, more than seven months ago, this Court issued an opinion and order granting Plaintiffs' motions for summary judgment on all four counts of the second amended complaint. Opinion & Order, ECF 84. The Court held that the 2011 SORA amendments are not severable, and that SORA is null and void as applied to members of the ex post facto subclasses. *Id.*, Pg.ID#1806. The Court

further held that certain parts of SORA are void for vagueness, void for impermissibly imposing strict liability, or void under the First Amendment, and therefore cannot be imposed on any registrant. *Id.*, Pg.ID# 1806-07. The Court ordered Defendants to provide notice of the Court's ruling to all registrants, and all law enforcement officials and prosecuting attorneys tasked with the enforcement of SORA. *Id.*, Pg.ID# 1807. The injunctions were to become effective sixty days after entry of judgment—another attempt to allow for legislative resolution—and the Court directed the parties to submit a proposed final judgment by March 13, 2020. *Id.*, Pg.ID#1808.

Before final judgment could enter, the pandemic hit. After hearing from the parties, the Court on April 6, 2020, entered an Interim Order Delaying Entry of Final Judgment, Preliminarily Enjoining Reporting Requirements, and Directing Publication in order "to provide direction to registrants and law enforcement while the coronavirus (COVID-19) pandemic state of emergency continues and renders effectively impossible the entry of a final order providing complete relief." ECF 91, Pg.ID# 1847.

Despite being given additional time, legislative leaders did not reconvene the work group but instead introduced and held hearings on House Bill 5679, a revised version of SORA that repeats many of the features of SORA that the Sixth Circuit and this Court have held unconstitutional. *See* 2020 H.B. 5679. Indeed, both the

Attorney General and the Michigan State Police submitted comments noting the constitutional deficiencies. *See* Exhibit B, Attorney General Comments on H.B. 5679; Exhibit C, Michigan State Police Comments on H.B. 5679. At hearing before the House Judiciary Committee, virtually every speaker opposed the bill. No further action was taken and no substitute legislation has been introduced.

ARGUMENT

I. The Court Should Enter a Final Judgment.

This Court effectively granted final relief on February 14, 2020, over seven months ago, deciding the substantive issues on the merits in Plaintiffs' favor and ordering the parties to prepare a judgment under which the injunctions would become effective in 60 days. Opinion & Order, ECF 84. The Court's subsequent April 6 order was specifically designated as "interim", and suspended entry of a final judgment "for the duration of the current COVID-19 crisis," which

> shall be considered ended:
> (a) when there is no longer an operative federal or state executive order or legislative act declaring a state of emergency, or
> (b) when the Court determines that the conditions giving rise to the need for this Interim Order no longer apply.

Id., Pg.ID# 1849-50. It is unclear, particularly given legal challenges to the Governor's authority to issue executive orders, for how long there will be operative executive orders or legislative acts declaring a state of emergency. The more salient question, therefore, is whether the conditions giving rise to the need to suspend entry

of judgment continue to apply. After all, in April when this order was entered, neither the Court nor the parties could have foreseen that the pandemic might extend well into 2021 or beyond.

The Court's decision to delay entry of judgment was predicated on several factors: the pandemic had "severely restrict[ed] the abilities of government and [made] it virtually impossible for the Michigan State Police (MSP) Sex Offender Registration (SOR) Unit to complete the steps necessary to implement a final judgment," "the MSP has not yet identified the members of the ex post facto subclasses," it "would be effectively impossible for the MSP SOR Unit to mail the 44,000 individual notices to class members within the time frames originally contemplated," and the legislature was not meeting in regular session and legislative processes had come to a near standstill.[2] Interim Order, ECF 91, Pg.ID# 1848-49. Those conditions no longer apply. At a status conference on September 8, 2020, Defendants reported orally to the Court that the Michigan State Police has almost completed the process of identifying the members of the ex post facto subclasses. (Plaintiffs note that

[2] The Court's decision to preliminarily enjoin enforcement of registration, verification, school zone violations, and fees until the current crisis has ended and thereafter until registrants are notified of what duties they have under SORA, reflected the fact that registrants cannot be required to comply with SORA absent notice of their obligations, the fact that registrants were being turned away when trying to report, and the fact that the widespread closure of police stations to the public made in-person compliance with SORA effectively impossible for registrants, and was inconsistent with physical isolation directives (which largely remain in effect). *Id.*, Pg.ID# 1849.

Defendants have been on notice since the Sixth Circuit's *Does I* decision in August 2016 that they would need to identify those registrants to whom SORA's 2006 and 2011 amendments could not be retroactively applied. The Michigan State Police has had more than four years to complete that task.) Defendants further reported that, while the mailing of notices would require coordination with the Department of Technology, Management and Budget, a mass mailing should be possible 7-10 days after the content of the notices is finalized. And the Michigan legislature has resumed conducting business and holding hearings. In short, the Michigan State Police is now able to complete the steps necessary to implement the final judgment. And the state's failure to pass new SORA legislature is not due to the pandemic, but to the same lack of political will to engage with an unpopular issue that has stymied reform for years. Final judgment should enter.

II. The Proposed Judgment Is Appropriate.

Plaintiffs attach a proposed judgment as Exhibit A. After this Court's February 2020 decision, ECF 84, the parties were working together to draft a joint proposed judgment, and to a large extent Plaintiffs' proposed judgment incorporates language jointly agreed upon by the parties. Because Defendants oppose entry of judgment at this time, however, it was not possible for Plaintiffs to provide the Court with a joint proposed judgment. There are also a few areas of disagreement about

the content of the final judgment. Accordingly, Plaintiffs set out below their understanding of what parts of the proposed judgment are and are not in dispute.

A. Provisions Regarding Declaratory and Injunctive Relief

Paragraphs 1 and 2 of the proposed judgment encapsulate the Court's rulings on Plaintiffs' motion for declaratory and injunctive relief, ECF 62, and motion for partial summary judgment, ECF 75, and spell out the declaratory and injunctive relief that the Court ordered. Plaintiffs' understanding is that Defendants agree with the proposed language.

Paragraph 3 provides that the injunctions shall be effective 60 days from judgment. Again, Defendants agree with this language. Plaintiffs have added a sentence, consistent with this Court's opinion, ECF 84, Pg.ID# 1808 n.11, that allows the parties jointly to seek an extension of the effective date of the injunctions if there is both substantial legislative progress towards the amendment of SORA in a manner that will address its constitutional deficiencies and a substantial prospect that new legislation will be passed within the additional time requested. While Plaintiffs are skeptical that the legislature will move forward with legislation that will make SORA compliant with the Constitution, Plaintiffs would still very much prefer a legislative solution that would end the litigation once and for all. Accordingly, if, counter to expectations, there is real legislative movement and further negotiation might obviate the need for a *Does III*, the judgment provides that the parties can

return to the Court for more time. This provision should address any argument that Defendants might make that a legislative solution is nigh. If Defendants are right, and there is real progress, the Court can always give the parties a bit more time.

B. Provisions Regarding Notice

Paragraphs 4-6 of the proposed judgment address notice. In accordance with this Court's February order directing the parties to draft joint notices and an updated Explanation of Duties, ECF 84, Pg.ID# 1807-08, the parties negotiated during February and March on both the content for the notices and the process for their distribution and made extensive progress. Since then, however, Defendants have expressed concern that it would be burdensome for the Michigan State Police and potentially confusing for registrants if a notice is sent out about this Court's judgment, only for the legislature to then pass a new statute, which would require the time and expense of a second new notice. Plaintiffs believe that the process of drafting notices should move forward, particularly since it could take time for the Court to resolve any disputes. If the legislature does pass a new statute before the notices go out, those notices can be revised accordingly.

Accordingly, Plaintiffs propose that the process of finalizing the notices move forward, but that the notices themselves need not be disseminated until the injunctions go into effect, i.e., 60 days after entry of judgment. In the event that the legislature does amend SORA before then, the parties could return to the Court and

seek permission to revise the notice process, notice content and timeline for disseminating notice. This approach has the advantage of keeping the case moving forward, while avoiding the expense and potential confusion of sending an initial notice about the judgment and second notice about the (as of now hypothetical) new statute. The notices will be ready to send if no statute passes by the time the injunctions go into effect. And if a statute passes before then, the notices will be revised. Either way, Defendants will need to send out only one set of notices.

Accordingly, the proposed judgment provides that within 14 days the parties submit a proposed process for notice; proposed notices for registrants,[3] prosecutors and law enforcement; and an updated Explanation of Duties. The parties would endeavor to provide jointly-drafted documents, but would provide their respective proposals if they cannot agree. Notices would not need to go out until the injunctions themselves go into effect, and Defendants would then provide confirmation that the notices were disseminated.

Defendants do not agree that the parties should be finalizing notice, and may

[3] There will need to be at least two different notices for registrants—one for members of the ex post facto subclasses and one for other registrants—since under this Court's order their obligations differ. A notice which describes both sets of obligations, without informing the registrant which set of obligations applies, would not provide adequate notice to inform registrants of what they are required to do. Nor would a notice setting out both sets of obligations inform registrants whether or not the state considers them to be within the ex post facto subclasses, i.e., which set of obligations the state believes applies to him or her.

argue—as they did at the most recent status conference—that a new statute could moot disputes about notice content/process and that it would be inefficient to mail notices that could become obsolete. That is, of course, not a reason to deny this motion for entry of judgment. If the long-awaited legislative solution appears magically close by the time this Court would decide any disputes about the notice content or process, or if new legislation passes before the notices are to be mailed 60 days after entry of judgment, the parties can ask the Court to modify the schedule at that time. *See* Proposed Judgment, ¶ 6. What Plaintiffs are asking for now is simply entry of the long-delayed judgment (with a schedule that could be adjusted if appropriate, for finalizing and disseminating the notices). Entry of judgment should not be further delayed by hypothetical disagreements about notices.

C. Provision Incorporating the Interim Order

Paragraph 7 incorporates this Court's interim order barring enforcement of registration, verification, school zone, and fee violations of SORA that occurred from February 14, 2020, until registrants receive notice. ECF 91. The purpose of this provision is to foreclose any argument that the final order supersedes the interim order, and registrants can therefore be prosecuted for SORA violations that occurred between February 14, 2020, and when they received notice. The provision also ensures that if there any delays in notice (for example delays resulting from requests

by Defendants to adjust the schedule for notice), registrants cannot be prosecuted until they are informed of their obligations.

D. Provisions Regarding Class Member List

Paragraphs 8-10 of the proposed judgment relate to the class list. It is standard in class litigation for Defendants to provide Plaintiffs with a class list, including such information about class members as is relevant to the claims at issue.[4] Here, due to the unusual posture of this case, no class list has yet been provided. Yet a class list will be essential for class counsel to be able to monitor compliance with the judgment and to answer class members' questions.

There are more than 44,000 class members, and as this Court is all too aware, a large percentage of them have questions about how this Court's orders affect them. Not only has the Court been inundated with questions, but Plaintiffs' litigation team receives voluminous contact from registrants. Once notice goes out, the volume is likely to increase exponentially and it will be critical to ensure that the notice makes clear that questions are not to be directed to the Court. But that makes it all the more important for class counsel to have the information necessary to answer the many

[4] *See, e.g.*, *Underwood v. Carpenters Pension Tr. Fund-Detroit & Vicinity*, No. 13-CV-14464, 2014 WL 4602974, at *11 (E.D. Mich. Sept. 15, 2014); *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2010 WL 5638219, at *2 (E.D. Mich. Sept. 2, 2010); *Reed v. Am. S.S. Co.*, 682 F. Supp. 333, 339 (E.D. Mich. 1988).

questions that will arise. (The Michigan State Police will also receive many questions, but the MSP—unlike class counsel—has access to the information about registrants needed to answer those questions.)

Class counsel will not be able to answer class members' questions without a class list that contains basic information about those class members.[5] The proposed judgment accordingly requires Defendants to provide a class list that includes for each registrant: name, date of birth, tier level, registrable offenses (including offense date, conviction date, court of conviction and statutory provision(s) violated), last known address, phone, email/internet identifiers, and whether the registrant is in the pre-2006 ex post facto subclass, the 2006-2011 ex post facto subclass or neither subclass. The proposed judgment also provides that 21 days after notice is disseminated, Defendants will provide a list of class members for whom notice was returned as undeliverable. Because notice is the predicate for liability under SORA, knowing which individuals did not get notices will be important. (A police officer or prosecutor can, of course, easily address any notice defect by providing notice, and then proceeding with charges if the registrant, now knowing of his/her duties, still fails to comply.)

[5] Even if new legislation passes, that will not obviate the need for a class list since class members will still be contacting class counsel (or failing that the Court) with questions. And while it is impossible to know what legislation might pass, any legislation will likely distinguish between registrants based both on the nature and date of the offense—information class counsel will thus need to answer questions.

The proposed judgment provides that any non-public information provided on the registry is confidential and shall not be further disclosed, except that class counsel are authorized to share information pertaining to specific class members as needed to resolve their individual situations. For example, a class member who calls and says he is in the ex post facto subclasses could be informed that, based on his offense date, he is not a subclass member.

In order to ensure that the information on the class list is as current as possible, Plaintiffs will work with Defendants to discuss steps that can be taken to improve the accuracy of the data, particularly address information. That work will be necessary not just for the class list, but also for notice. In other words, steps to ensure data accuracy must be part of the notice process in order to reduce the number of notices that are returned. The parties had already begun discussing possible options when they were previously drafting a proposed notice process.[6] The proposed judgment provides that the class list will be provided 28 days after judgment. This will allow the parties to discuss necessary data clean-up issues as part of the process they will

[6] For example, SOR registry data about incarcerated individuals is often out of date. The parties have discussed how to work with the Michigan Department of Corrections to ensure that notices mailed to incarcerated registrants are not returned. Plaintiffs recognize that no list of 44,000 names will be 100% accurate, but believe that time invested on the front end in data clean-up will help avoid many issues during implementation of the judgment.

propose for notice, *see* Proposed Judgment, ¶ 4 (proposed notice process due 14 days after judgment), and for the Court to resolve any disagreements about that process.[7]

Defendants have indicated that they do not oppose providing a class list in principle. The Michigan State Police is concerned, however, that sharing non-public information about registrants could expose it to liability under Michigan statutes regarding data disclosure. Accordingly, Defendants wish to provide a class list that contains only publicly available information. There are two problems with Defendants' approach: practical and legal.

First, as a practical matter class counsel cannot respond to class member inquiries without access to non-public registry information. For example, the MSP has now categorized registrants based on whether they are in the ex post facto sub-classes. That information is not publicly available, but it is critical to class counsel's ability to answer questions. The main question likely to be asked is what parts of the Court's judgment apply to a particular registrant. That question is impossible to answer without being able to verify the offense date. For registrants who claim that the MSP misclassified them (e.g. registrants who claim to be in the ex post facto subclasses but whom MSP sent a notice requiring them to continue registering under

[7] If the Court believes it will need more time to approve the notice process, Plaintiffs do not object to receiving the class list somewhat later. The critical issue is that Plaintiffs receive the list with sufficient time before notice goes out to be able to set up the necessary systems to address class member calls.

the terms applicable to non-subclass members), it will be necessary to know how the MSP classified them and what information it relied on in doing so. Moreover, most Tier I registrants and registrants listed for offenses committed as juveniles are not on the public registry. Mich. Comp. Laws § 28.728(4). Under Defendants' proposal, class counsel would receive no information at all about any of these class members. Class counsel also need contact information because, in their experience, many registrants forget to include contact information when calling or writing with questions. Particularly because address information could be somewhat out of date given the suspension of reporting requirements, it is important for class counsel to have all contact information that is available. In sum, class counsel are only asking for the most critical information needed to determine a registrant's legal obligations and respond to their questions.

Second, Plaintiffs' understanding is that Defendants are relying on Michigan Compiled Laws §§ 28.214 and 28.730 to oppose release of non-public registry information as part of the list being provided to class counsel.[8] Section 28.214

[8] Plaintiffs have repeatedly requested that Defendants provide a list of any statutes they believe bar disclosure, but Defendants have not done so. When Plaintiffs requested concurrence on this motion and reiterated their request for the basis on which Defendants oppose providing a class list, Defendants responded: "The statutes prohibiting disclosure include, but are not limited to MCL 28.730 and MCL 28.214. There are also many other statutes that prohibit disclosure of certain specific criminal history information." Plaintiffs obviously cannot address any statutes Defendants have failed to identify.

prohibits the disclosure of nonpublic information governed by that act "for personal use or gain" or "in a manner that is not authorized by law or rule." *See* Mich. Comp. Laws § 28.214(3), (5). Because the class list would be disclosed only for purposes of this litigation, it would not be used for personal use or gain under subsection (3). And in *Dupuie-Jarbo v. Twenty-Eighth District Court*, No. 10-10548, 2010 WL 2813343 (E.D. Mich. July 14, 2010) (Cleland, J.), this Court squarely addressed the question of whether subsection (5) prohibits the release of criminal justice information to a plaintiff's counsel. There, this Court held that a court order to compel the production of information from criminal justice information systems functions as the requisite authorization under the statute. *See id.* at *2; *see also Napier v. County of Washtenaw*, No. 11-CV-13057, 2013 WL 1395870, at *7 (E.D. Mich. Apr. 5, 2013) (same). The only requirement is that the records be relevant to the litigation, *see Dupuie-Jarbo*, 2010 WL 2813343, at *2, which of course is the case here because such information is necessary for class counsel to effectively represent the class members.

Defendants also cite to Section 28.730, which states:

> (1) Except as provided in this act, a registration or report is confidential and information from that registration or report shall not be open to inspection except for law enforcement purposes. The registration or report and all included materials and information are exempt from disclosure under section 13 of the freedom of information act, 1976 PA 442, MCL 15.243.

Mich. Comp. Laws § 28.730(1). The clear purpose of that provision is to prevent public disclosure of registry information[9] that is not contained on the public website. *See Redmond v. Heller*, --- N.W.2d ----, 2020 WL 2781719, at *7–8 (Mich. Ct. App. May 28, 2020). A member of the public, for example, could not submit an open records requests to get that nonpublic information. *See* Mich. Comp. Laws § 28.730(1). But disclosure of the requested information to class counsel does not implicate this provision, because class counsel represent and are acting on behalf of registrants. The statute conceives of a registrant having access to their own nonpublic registry information. *See id.* § 28.730(4) (making it a misdemeanor for "an individual other than the registrant" to divulge, use, or publish nonpublic SORA information). The MSP will necessarily have to provide nonpublic information to registrants in responding to their questions about the judgment, because that information will determine the registrant's responsibilities. If the MSP can provide that information to registrants, it is also able to provide that information to class counsel, who are standing in registrants' stead. *See Uniprop, Inc. v. Morganroth*, 678 N.W.2d 638, 641 (Mich. Ct. App. 2004) (explaining that "an attorney often acts

[9] Plaintiffs note that Mich. Comp. Laws § 28.730 applies only to information collected pursuant to SORA. Some of the information on the requested class list—such as the MSP's categorization of individuals into the subclasses—is not information that is part of the registry record that SORA requires the state to maintain. *See* Mich. Comp. Laws §§ 28.727–.728. Accordingly, that information is not subject to Section 28.730 in the first place.

as his client's agent"). Indeed, the Michigan Supreme Court has interpreted a similarly worded statute (prohibiting the disclosure of presentence reports) to permit a defendant's attorney access to that information. *People v. Malkowski*, 188 N.W.2d 559, 560 n.1 (Mich. 1971).

In order to remove any doubt that Defendants can release the non-public registry information, however, the proposed order specifically provides that the information can be disclosed under the terms set out in the judgment. *See* Proposed Judgment, ¶ 10.

E. Provisions Regarding Attorney's Fees

Paragraphs 11 and 12 of the proposed judgment address attorneys' fees. Paragraph 11 of the proposed judgment provides that, unless this judgment is reversed on appeal, Plaintiffs are "prevailing parties" within the meaning of 42 U.S.C. § 1988(b). The purpose of this provision is to avoid any future disputes about the impact of potential legislative action on Plaintiffs' entitlement to fees. When the state did not come into compliance with the *Does I* rulings about the unconstitutionality of SORA, Plaintiffs were forced to bring this action. They have spent years litigating it, have won, and are entitled to fees. At the same time, Plaintiffs believe it is important that they be able to continue working towards a legislative solution without concern that the Defendants might later use Plaintiffs' good faith efforts against them by claiming that any long-delayed legislative resolution should deprive

Plaintiffs of fees. For example, it would be unfortunate if, at long last, a legislative solution seemed near, but Plaintiffs feared that agreeing to an extension of time for entry of the injunctions would deprive them of compensation for the hundreds of hours they have invested in this case. Paragraph 11 does not determine the amount of fees, but merely reflects the facts: plaintiffs have prevailed in this action.

Paragraph 12, which is modeled after the process used in *Does I*, No. 12-cv-11194, ECF 120 (Stipulation and Order for Extension of Time for Parties to Move for Attorney's Fees and Costs), defers adjudication of the amount of attorney's fees that will be awarded until after any appellate proceedings are concluded. Defendants here have already informed the Court at a status conference that, absent new legislation, they are likely to appeal. It would be inefficient for this Court to adjudicate hours and rates now, only to inevitably have to adjudicate those issues again to account for the additional time spent by class counsel on the appeal, proper rates by the time appeals are concluded, or any decision by the appellate courts that would impact the fees awarded. Defendants have agreed to this provision.

F. Provision Regarding Retention of Jurisdiction

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

CONCLUSION

It is time for the Court's February decision to be given effect. Accounting for briefing and the 60-day delay built into the judgment, at least three months—and the election—will have passed by the time the injunctions go into effect. Defendants ask this Court to wait several more months to start finalizing the judgment and notices, But if there is no legislative breakthrough at long last, waiting those additional months only means that the Court and parties will have to start this process of entering judgment in January or February, effectively delaying judgment for another half a year.

Three more months is plenty of time for the legislature to pass new legislation if it so chooses. It is far from clear that any new legislation will pass. And if new legislation does pass, it is far from clear whether the legislature will actually bring SORA into compliance with the Constitution, or whether the legislature will simply pass another unconstitutional statute, forcing Plaintiffs to file *Does III*. The only thing that is clear is that it is time to bring an end to *Does II*. The Court should do so by entering the proposed judgment as soon as possible.

Respectfully submitted,

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Attorneys for Plaintiffs

Dated: September 25, 2020

CERTIFICATE OF SERVICE

On September 25, 2020, the plaintiffs filed the above motion and brief for partial summary judgment using the Court's ECF system, which will send same-day email service to all counsel of record.

s/ Miriam J. Aukerman
Attorney for Plaintiffs

INDEX OF EXHIBITS

EXHIBIT A

Proposed Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

GRETCHEN WHITMER, Governor of the State of Michigan, and COL. JOSEPH GASPAR, Director of the Michigan State Police, in their official capacities

Defendants.

File No. 2:16-cv-13137

Hon. Robert H. Cleland

Mag. J. David R. Grand

FINAL JUDGMENT

This Court, having issued an opinion and order on February 14, 2020, granting Plaintiffs' motions for summary judgment as to Counts I through IV of the second amended complaint, and having ordered Defendants to provide notice of the Court's ruling to all registrants, and all law enforcement officials and prosecuting attorneys tasked with the enforcement of Michigan's Sex Offenders Registration Act (SORA), Mich. Comp. Laws § 28.721 et seq., and having subsequently entered an interim order suspending entry of the final judgment during the COVID-19 pandemic, now enters final judgment as follows:

1. IT IS ORDERED that Plaintiffs' motion for declaratory and injunctive relief (ECF No. 62) is GRANTED. Michigan's SORA is DECLARED to be punishment,

the ex post facto application of the 2006 and 2011 amendments is DECLARED unconstitutional, the 2011 amendments are DECLARED not severable, and SORA is therefore DECLARED NULL AND VOID as applied to members of the ex post facto subclasses (defined as all people who are or will be subject to registration under SORA, who committed their offense or offenses requiring registration prior to April 12, 2011, and who have committed no registrable offense since). Defendants and their agents will be ENJOINED from enforcing ANY provision of SORA against members of the ex post facto subclasses.

2. IT IS FURTHER ORDERED that Plaintiffs' motion for partial summary judgment (ECF No. 75) is GRANTED. Defendants and their agents will be ENJOINED from enforcing the following provisions of SORA against any registrant:

(a) Provisions Void for Vagueness:

i. the prohibition on working within a student safety zone, Mich. Comp. Laws §§ 28.733–734;

ii. the prohibition on loitering within a student safety zone, Mich. Comp. Laws §§ 28.733–734;

iii. the prohibition on residing within a student safety zone, Mich. Comp. Laws §§ 28.733, 28.735;

iv. the requirement to report "[a]ll telephone numbers . . . routinely used by the individual," Mich. Comp. Laws § 28.727(1)(h);

v. the requirement to report "[t]he license plate number,

registration number, and description of any motor vehicle, aircraft, or vessel . . . regularly operated by the individual," Mich. Comp. Laws § 28.727(1)(j).

(b) Provisions Void for Strict Liability:

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

(c) Provisions Void under the First Amendment:

i. the requirement "to report in person and notify the registering authority . . . immediately after . . . [t]he individual . . . establishes any electronic mail or instant message address, or any other designations used in internet communications or postings," Mich. Comp. Laws § 28.725(1)(f);

ii. the requirement to report "[a]ll telephone numbers . . . routinely used by the individual, Mich. Comp. Laws § 28.727(1)(h);

iii. the requirement to report "[a]ll electronic mail addresses and instant message addresses . . . routinely used by the individual," Mich. Comp. Laws § 28.727(1)(l);

iv. the retroactive incorporation of the lifetime registration's requirement to report "[a]ll electronic mail addresses and instant message addresses assigned to the individual . . . and all login names or other identifiers used by the individual when using any electronic mail address or instant messaging system," Mich. Comp. Laws § 28.727(1)(i).

3. IT IS FURTHER ORDERED that the injunctions in paragraphs 1 and 2 above shall be effective 60 days after the date of entry of this judgment. The parties may jointly seek an extension of the effective date of the injunctions if the parties agree

and can demonstrate that there has been substantial legislative progress towards amendment of the Sex Offenders Registration Act in a manner that will address its constitutional deficiencies and that there is substantial prospect that new legislation will be passed within the additional time requested.

4. IT IS FURTHER ORDERED that no later than the effective date of the injunctions, Defendants shall PROVIDE NOTICE of this judgment to all registrants, and all law enforcement officials and prosecuting attorneys tasked with the enforcement of SORA. Within 14 days of entry of this judgment the parties shall submit for the Court's approval a joint proposed process for notice; joint proposed notices for (a) registrants who are members of the ex post facto subclasses; (b) registrants who are not members of the ex post fact subclasses; (c) prosecutors; and (d) law enforcement; and a joint updated Explanation of Duties form. If the parties cannot agree, they shall provide their respective proposed process, proposed notices and proposed Explanation of Duties.

5. IT IS FURTHER ORDERED that in the event that the legislature amends SORA prior to the date the injunctions are to take effect, the parties may jointly seek the Court's permission to revise the notice process, notice content, and timeline for disseminating notices.

6. IT IS FURTHER ORDERED that within 7 days after notice is disseminated, Defendants will confirm in writing to class counsel that the notice has been provided to registrants, prosecutors and law enforcement.

7. IT IS FURTHER ORDERED, consistent with this Court's Interim Order Delaying Entry of Final Judgment, Preliminarily Enjoining Reporting Requirements, and Directing Publication, ECF 91, and this Court's Opinion and Order holding that registrants cannot be held strictly liable for SORA violation, ECF 84, that Defendants and their agents are PERMANANTLY ENJOINED from enforcing registration, verification, school zone, and fee violations of SORA that occurred from February 14, 2020, against a registrant, until the registrant receives notice of what duties he or she has under SORA going forward.

8. IT IS FURTHER ORDERED that to enable post-judgment monitoring, within 28 days after entry of this judgment Defendants shall provide class counsel with a class list that is current as of that date containing at least the following information for each registrant, including registrants who are currently incarcerated or no longer reside in Michigan: name, date of birth, tier level, registrable offenses (including offense dates, conviction dates, court of conviction, and statutory provision(s) violated), last known address, phone, email/internet identifiers, and whether the registrant is in the pre-2006 ex post facto subclass or the 2006-2011 ex post facto

subclass or neither subclass. Within 21 days after notice is disseminated to registrants, Defendants will provide class counsel with a list of class members for whom notice was returned as undeliverable.

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

10. IT IS FURTHER ORDERED that provision of the above lists pursuant to paragraphs 8-9 shall not be deemed a violation of any law or regulation that might otherwise be read to protect the confidentiality of such information, including Mich. Comp. Laws. §§ 28.214, 28.730.

11. IT IS FURTHER ORDERED that, unless this judgment is reversed on appeal, Plaintiffs are "prevailing parties" within the meaning of 42 U.S.C. § 1988(b).

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

(a) the expiration of any party's time to file a notice of appeal to the United States Court of Appeals for the Sixth Circuit of any final order of this Court,[1] including any final order of this Court after remand, in the event the case is remanded by a higher court;

(b) the expiration of time to file a petition for certiorari to the United States Supreme Court following a final decision by the Sixth Circuit on appeal from any final order of this Court;

(c) the denial of a petition of certiorari by the United States Supreme Court; or

(d) the disposition of this case by the United States Supreme Court, if the Supreme Court grants a petition for certiorari.

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

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

[1] The parties agree that under Fed. R. App. P. 4(a)(1)(A), any appeal must be taken within 30 days of the date of this judgment, even though the injunctions set out in paragraphs 1 and 2 do not go into effect for 60 days. Accordingly, if no appeal is taken, Plaintiffs' fee petition will be due within 90 days of entry of this judgment.

SO ORDERED.

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

Dated:

Exhibit B

Attorney General Comments on HB 5679

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. BOX 30212
LANSING, MICHIGAN 48909

DANA NESSEL
ATTORNEY GENERAL

May 11, 2020

The Honorable Graham Filler, Chair
House Judiciary Committee
124 North Capitol Avenue
Lansing, MI 48933

Re: House Bill 5679

Dear Chairman Filler and members of the Judiciary Committee:

I appreciate the opportunity to weigh in on House Bill 5679 and the important issue of amending Michigan's current Sex Offender Registry Act (SORA). The scope and contours of SORA are issues I care about deeply, for reasons I set forth in my amicus brief to the Michigan Supreme Court in the SORA cases pending in that court.

For reasons that include community stability and public safety, I have particular concerns with SORA's overall lack of individualized assessment of risk, its geographic exclusion zones, the tiers, and its onerous in-person reporting requirements. And given that the Sixth Circuit addressed these same points when it held that imposition of SORA on individuals who had committed offenses prior to July 1, 2011, was an Ex Post Facto Clause violation, *Does #1-5 v Snyder*, 834 F3d 696 (CA 6, 2016), it is vital that amendments to SORA fully address these concerns.

I believe that HB 5679 has made some headway in doing so, and I appreciate the work that has gone into its drafting. But it is my opinion that the bill does not sufficiently address either my concerns or those of the federal court in these key areas and others. The bill needs considerably more work if the State is going to avoid future litigation over the constitutionality of its registry. And because courts tend to analyze the registry as a whole, any major area that remains insufficiently addressed could cause the entire Act to fall.

For ease, I have organized my comments based on the specific provision, as follows:

Overall view

The bill has further complicated, rather than simplified, SORA. One key way it has done so is by bifurcating the registry—essentially creating separate registries for pre-2011 and post-2011 registrants. And within those separate registries there are actually five different sets of rules, depending on the length of registration. This makes an already "byzantine code," *Does #1-5 v Snyder*, 834 F3d 696, 697 (CA 6, 2016), even more difficult for registrants to understand and for law enforcement officials to enforce. This is likely to lead to increase rather than avoid litigation.

Lack of individualized risk assessment

The length of registration should be based on risk and should be supported by evidence and research on recidivism. (Nessel amicus at pp 29–40.) The current SORA uses the offense of conviction as the only factor in determining whether an individual has to register and, if so, the length of the registration. HB 5679 continues this shortsighted offense-based assessment, and for post-2011 registrants who are still subject to tier designations, their assigned tier is tied to the offense(s) rather than to degree of risk. The Sixth Circuit criticized our SORA on this very point, noting that it "ascribes and publishes tier classifications corresponding to the state's *estimation* of present dangerousness *without providing for any individualized assessment*." *Does #1-5*, 834 F3d at 703 (emphasis added).

And problematically, HB 5679 suffers from the same weakness as the current SORA in that it affords a registrant no path to get off the registry. There is no ability to petition for removal based on an individualized assessment of risk or the passage of a specified number of years with no new sex offense.

HB 5679's offense-only approach does not adequately address public safety or federal court concerns. Unless this approach is re-evaluated, I believe the State will continue to be vulnerable to litigation. Other states have utilized various models, and some existing tools—such as Static-99 and Parole Board evaluation—could potentially be utilized in this endeavor.

Geographic exclusion zones

The bill retains school geographic exclusion zones (Sec 33(e); Sec 34(1)(a),(b)). This will be problematic given that the existence of geographic exclusion zones was a key focus of the Sixth Circuit in holding that SORA was unconstitutional Ex Post Facto punishment. The Sixth Circuit said that these zones pose "a great difficulty in finding a place where [registrants] may live or work" and "put significant restraints on how registrants may live their lives." *Does #1-5*, 834 F3d at 702, 703. And the Court noted that there was "scant" evidence that these zones actually keep

the public safe. *Id*. at 704–705. I argued those same points to the Michigan Supreme Court. (Nessel amicus at pp 7.)

Therefore, the mere inclusion of these zones—even if clarity is added—could cause the entire Act to fall. Student safety zones are not required under the Sex Offender Registration and Notification Act (SORNA). It is one of the many ways Michigan's SORA goes beyond the requirements of SORNA.

The bill does attempt to clarify what constitutes an exclusion zone, which is a help. But it falls short in its definition of a school safety zone. It defines the zone as 1,000 feet or less from school property line (Sec 33(3)). It is unlikely that individuals will know where those property lines are, particularly since school property often extends a considerable distance from the school building itself and can include play yards and fields whose boundaries are not clearly delineated. Thus, the vagueness problems that Judge Cleland identified in 2015, see *Doe v Snyder*, 101 F Supp 3d 672 (ED Mich, 2015); *Doe v Snyder*, 101 F Supp 3d 722 (ED Mich, 2015), remain.

The bill also takes a positive step in fixing a vagueness problem by removing references to, and the definition of, "loitering" in school safety zones, Sec 33(b), and by adding some exceptions such as transport to and from school, attendance at school events, meetings with school employees, and intermittent passing through for work (Sec 34(4)(a)–(d)). These exceptions help registrants to stay connected to children and family members—which promotes stability. The bill should also indicate whether the restrictions are imposed 24/7 or just during school hours and whether there are exceptions for non-school activities that are held on school property (for example, a private dance studio recital where the studio has rented space in a high school theatre or auditorium).

Tiers

HB 5679 took a significant step forward in removing the tiers for pre-2011 registrants (Sec 2a(2)). The tiers were part of what drove the Sixth Circuit to conclude that SORA is an unconstitutional Ex Post Facto violation. The Sixth Circuit said that "SORA ascribes and publishes tier classifications corresponding to the state's estimation of present dangerousness without providing for any individualized assessment." *Does #1-5*, 875 F3d at 703. And the Court noted that the tiers "are unappealable." *Id*.

But for post-2011 registrants, the tiers remain. Again, the tiers are tied to offenses rather than to degree of risk, which burdens the registrant without adequately addressing public safety concerns. Thus, the problems with the tiers as outlined by the Sixth Circuit may remain unconstitutional for registrants moving forward.

In-person reporting requirements

The bill reduces the burden of reporting requirements by slightly extending the reporting periods. But it still requires in-person reporting on a wide variety of information unless the Michigan State Police comes up with a different system. The in-person reporting is burdensome especially for registrants who must do so for life. *Id*. For those whose offenses were after 2011, the lengths of registration, including lifetime registration, remain. For all others, the period is 25 years or 10 years after release from incarceration, whichever is longer, or lifetime registration if the registrant has committed certain offenses.

These requirements, especially the voluntary nature of an MSP alternative to in-person reporting, are still problematic based on the fact that the Sixth Circuit focused on SORA's "cumbersome in-person" reporting. *Does #1-5*, 875 F3d at 703. The Court specifically noted that the requirement that registrants make frequent in-person visits to law enforcement "appears to have no relationship to public safety at all." *Id*. at 705.

In sum, I appreciate your careful consideration of these comments and concerns. And once again, I thank you for the opportunity to be a part of this important, ongoing discussion.

Sincerely,

Dana Nessel

Dana Nessel
Attorney General

DN/AMS

EXHIBIT C

Michigan State Police Comments on H.B. 5679

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
LANSING

GRETCHEN WHITMER
GOVERNOR

COL. JOSEPH M. GASPER
DIRECTOR

May 6, 2020

The Honorable Graham Filler, Chair
House Judiciary Committee
124 North Capitol Avenue
Lansing, MI 48933

Dear Chairman Filler and members of the Judiciary Committee:

The Department of State Police is supportive of the intent of HB 5679 in amending the Sex Offender Registration Act (SORA) and is looking forward to working with Rep. Lower on addressing the constitutional concerns recently noted by the U.S. District Court for the Eastern District of Michigan. Additionally, we look forward to addressing several issues within SORA in an effort to improve efficiency and functionality of the sex offender registration process for both offenders and law enforcement. Of note, the department would initially like to highlight the following areas:

- The department supports removing the student safety zone provisions (MCL 28.733 through MCL 28.736) from HB 5679 and SORA. In addition to the historical difficulties often encountered when attempting to define the boundaries of these zones for the purpose of enforcement, the department has been advised by its attorneys in the present litigation that because the student safety zones were found to be unconstitutional and unenforceable, any effort to retain the student safety zone provisions would almost certainly result in further litigation and a similar determination that zones are unconstitutional and unenforceable. Perhaps even more importantly, the inclusion of the Student Safety Zones will impact not just the enforcement of those discrete provisions, but the constitutionality of SORA as a whole. The existence of the geographic exclusion zones was central to the determination by the federal appellate court that SORA imposes unconstitutional ex post facto punishment. It is unlikely that SORA as a whole will survive a constitutional challenge with the Student Safety Zones included. Additionally, student safety zones are not required under the Sex Offender Registration and Notification Act (SORNA) as found in Title I of the Adam Walsh Child Protection and Safety Act of 2006, and is not a requirement for Michigan's substantial compliance with SORNA.

- The department has concerns about the way the individuals with out of state convictions requiring registration in that state will be treated if the individual decides to reside, work or go to school in Michigan at any point in time. Any revision of SORA should ensure and clarify that an individual convicted in another state of an offense requiring sex offender registration in that state should, at a minimum, be required to register in Michigan for a similar duration under substantially similar terms *regardless of the date of offense*. Otherwise, registered sex offenders from other states with offenses prior to Michigan's 2011 amendments to SORA could seek sanctuary from all sex offender registration by simply relocating to Michigan. Even if an out of state offender is not required to register in Michigan under MCL 28.723(1)(a) and (b) because the out of state offense is not substantially similar to a "listed offense" as that term is defined in MCL 28.722(j) of SORA, registration should remain required under MCL 28.723(1)(d) because the person is "an individual from another state who is required to register or otherwise be identified as a sex or child offender or predator under a comparable statute of that state." By clarifying that such an out of state sex offender is similarly required to register in Michigan regardless of offense date, the state of Michigan can give full faith and credit to the lawful determination in another state that the offense

requires registration, and Michigan can avoid becoming a destination state for offenders seeking to avoid registration.

- HB 5679 attempts to address the constitutional issues surrounding the use of vague terms like "regularly operate" and "routinely used" by adding the term "primary" to the definition of those other terms. The department has been advised by its attorneys in the present litigation that adding additional descriptive terms such as "primary" will likely result in continued litigation or claims for vagueness. Like the term "routinely," the term "primary" is subject to varying interpretations and is equally susceptible to vagueness challenges.

- The department would like to address the issue of the fees associated with registration and elimination of the sunset provision. The department would also like to clarify the indigency provisions and how confusion over that designation has had an impact on fees.

MSP appreciates the committee taking the issue up, and recognizes the opportunity to improve and simplify the process for both offenders and law enforcement agencies.