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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, 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

PLAINTIFFS' REPLY BRIEF ON MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

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I. Introduction

Defendants argue that a preliminary injunction is improper because Plaintiffs are not likely to succeed on the merits. In fact, Plaintiffs seek a permanent injunction, and have already succeeded: this Court, consistent with *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (*Does I*), held that the Sex Offenders Registration Act (SORA), M.C.L. § 28.721 *et seq.*, is punishment and that retroactive application of the 2006 and 2011 amendments is unconstitutional. Stip. Order, ECF 55.

Of the other injunction factors—none of which Defendants contest—the most important is irreparable injury. Plaintiffs suffer under SORA every day, despite the Sixth Circuit's decision three years ago that SORA is punishment, and despite this Court's declaratory ruling in May. Indeed, even where registrants, relying on that ruling, have sought clarification that SORA's unconstitutional provisions do not apply to them, Defendants have refused to lift the unconstitutional conditions "in the absence of further direction from Judge Cleland as to the entire class." Exh. A, Fabian/Michigan State Police Letters. Thus, the question is not whether injunctive relief should be granted, but only what its scope should be.

II. Defendants Do Not Dispute Injunctive Relief on the 2006 Amendments.

Defendants concede that the Sixth Circuit's decision "precludes the retroactive application of the 2006 amendments." ECF 66, Pg.ID#970. They offer no reason why this Court should not enjoin the enforcement of M.C.L. §§ 28.733-736

and the second sentence of M.C.L. § 28.730(3), as applied to Does #1-3 and the pre-2006 ex post facto subclass.[1] The Court should grant that relief.

III. Defendants' Revisionist Reading of *Does I* Is Untethered from the Actual Sixth Circuit Decision.

Defendants argue that when the Sixth Circuit held that the retroactive application of SORA's 2006 and 2011 amendments must cease, what the Sixth Circuit really meant to say was that retroactive application of M.C.L. §§ 28.725(1)(e)-(g), 28.728(2)(l), and 28.733-736—which exceed the Sex Offenders Registration and Notification Act (SORNA)—must cease. Though certainly creative, this position is entirely untethered from the Sixth Circuit's actual decision,[2] and assumes that the Court of Appeals is not capable of saying what it means. If the Sixth Circuit only cared about provisions that differ from SORNA, why did it never once mention SORNA? And if the Sixth Circuit was only concerned about a few provisions, why did it not remand with instructions simply to enjoin those specific subsections?

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[1] Defendants address only the exclusion zones, but M.C.L. § 28.730(3), which provides for e-notice to the public, was also added in 2006, and must be enjoined.

[2] Defendants' revisionist reading also contradicts the state's own prior interpretation of *Does I*. When seeking *cert*, the state argued that "the Sixth Circuit's decision prevents Michigan wholesale from applying SORA's 2006 and 2011 amendments retroactively," rather than allowing specific provisions to be severed. Cert Pet., *Snyder v. Does*, U.S. S. Ct. 16-768, at 15. The state identified the Sixth Circuit's central concerns as lifetime registration, classification without individualized assessments, geographic exclusion zones, and frequent in-person reporting—a different and longer list than Defendants argue now. *Id.* at 16-24.

The simple reason is that *Does I* was based on the *cumulative impact* of a "byzantine code governing in minute detail the lives of the state's sex offenders." *Does I*, 834 F.3d at 697. Under *Smith v. Doe*, 538 U.S. 84 (2003), the ex post facto analysis requires courts to consider the statute as a whole, asking whether "the statutory scheme," the "regulatory scheme," or "the Act" imposes punishment, *in toto*. *Id.* at 92, 94, 96-97, 99, 104-05. This makes sense, because even if a single obligation, standing alone, might not be punishment, the combined effect of many obligations can make a statute punitive. Whether a law's cumulative burdens are punishment will depend on how many restrictions the law imposes, the duration, magnitude, and interplay of the restraints, the penalties for violations, and the relationship between the restrictions and the state's public safety goals. For example, whether in-person reporting is punitive may depend on whether one must verify basic information infrequently for a limited time or whether one must report a vast array of information often, immediately, and for life, with even inadvertent noncompliance leading to felony charges and the risk of imprisonment.

Consistent with *Smith*, the Sixth Circuit in *Does I* analyzed SORA as whole, applying the factors of *Kennedy v. Mendoza-Martinez*, 372 U.S. 114 (1963), with different SORA provisions being relevant to different factors. For example, in finding SORA similar to historical punishments, the Court likened the exclusion zones to banishment, the unappealable public tier classifications and registration of

people without sex convictions to public shaming, and the in-person reporting requirements, exclusion zones, and risk of imprisonment (for noncompliance) to probation and parole. *Does I*, 834 F.3d at 702-03. In finding that SORA is not rationally related to a non-punitive purpose, the Court considered SORA's overall impact, citing the lack of individualized assessment and ineffective nature of offense-based registration. *Id.* at 704-05. And the Court repeatedly emphasized that for Tier III registrants, SORA's burdens last for life. *Id.*, at 703, 705. Defendants would let most of these burdens stand, even though *Does I*'s core holding is that the cumulative impact of the 2006 and 2011 changes made SORA punitive, and that therefore the retroactive enforcement of those amendments must cease.

Defendants try to recast *Does I* as limiting only (1) publication of tier information, (2) in-person reporting on travel, electronic identifiers and vehicles; and (3) exclusion zones. But the Sixth Circuit identified many other aspects of SORA as punitive, including its lifetime reach, its lack of individualized assessments, its application to registrants without convictions for sex offenses, the serious sanctions for even inadvertent violations, and the lack of relationship to public safety. Moreover, the Court did not just question publication of tier information, but also the fact that tier classifications are both unappealable and offense-based rather than risk-based. *Id.* at 698, 702, 704-05. Nor were the Court's concerns about reporting limited to the in-person requirement for travel, electronic identifiers, and vehicle

reporting.[3] Rather the Court found it punitive that registrants must frequently and immediately report a vast array of trivial information. *Id.* at 698, 703, 705.

Defendants argue that under *United States v. Felts*, 674 F.3d 599 (6th Cir. 2012), any SORA provision that derives from SORNA must be permissible. Not so. *Does I*, without mentioning *Felts*, found many SORNA-derived provisions of SORA—like lifetime registration, immediate in-person reporting, and unappealable tier classifications without individualized assessments—to be punitive. The questions in *Felts* and *Does I* were different. Mr. Felts was convicted under SORNA for not registering after moving from one state to another. The issue was whether Felts' two-year sentence was retroactive punishment for his original sex offense. The Court said it was not: "SORNA provides for a conviction for failing to register; it does not increase the punishment for the past conviction." *Id.* at 606. The Court rejected Felts' argument that he was being sent to prison twice for the same offense, viewing his failure to register as "entirely separate" from the earlier crime. *Id.* Thus, *Felts* addressed the question of whether a prison sentence for failure to comply with SORNA's basic registration requirement[4] punishes a new or old

[3] SORNA in fact requires immediate reporting of this information; the only difference from SORA is that reporting need not be in person. *See* Department of Justice, National Guidelines for Sex Offender Registration and Notification, at 52, *available at* https://www.smart.gov/pdfs/final_sornaguidelines.pdf.

[4] Because the constitutionality of a basic, initial registration requirement had been addressed by the Supreme Court in *Smith*, it is unsurprising that the Sixth Circuit upheld Felts' imprisonment for his failure to meet that requirement.

offense. Imprisonment is indisputably punishment, so the *Felts* Court never considered whether SORNA's burdens are punishment. In *Does I*, the Sixth Circuit did consider those burdens (to the extent they are mirrored in SORA) and found them to be punitive.[5] Plaintiffs here are not challenging prison sentences imposed for failure-to-register convictions, but are bringing an affirmative civil challenge to SORA's cumulative burdens. *Does I* is controlling; *Felts* is inapposite.

Finally, Defendants' revisionist account contradicts the Sixth Circuit's holding that its ex post facto ruling mooted the other claims "because none of the contested provisions may now be applied to the plaintiffs." *Does I*, 834 F.3d at 706. The *Does I* plaintiffs had challenged retroactive lifetime registration as violating due process; the vagueness of various reporting requirements; restrictions on registrants' fundamental rights to speak, parent, travel and work; registration of people who were never convicted, or did not commit sex offenses; and SORA's

[5] There is no reason to believe Michigan will lose federal funding if it amends SORA to comply with *Does I*. SORNA requires only "substantial" compliance and it excepts a state's inability to comply due to court rulings. 34 U.S.C. § 20927(b). In determining "substantial compliance" for funding purposes, DOJ has considered both state and federal court rulings of unconstitutionality requiring states to deviate from SORNA. *See e.g.*, Department of Justice, SORNA Substantial Implementation Review State of Kansas, at 3 (July 19, 2011), https://smart.gov/pdfs/sorna/Kansas.pdf; and SORNA Implementation Review State of Nevada, at 1 (Feb. 2011), https://smart.gov/pdfs/sorna/Nevada%20.pdf. Under the National Guidelines for Sex Offender Registration and Notification, 11 (July 2008) the federal government "will consider on a case-by-case basis whether jurisdictions' rules or procedures that do not exactly follow the provisions of SORNA or these Guidelines 'substantially' implement SORNA." *See* www.smart.gov/guidelines.htm.

strict liability provisions. Pls' 1st Brf, *Does #1-5 v. Snyder*, 15-cv-2346/2486. Those other challenges would not have been moot if the Sixth Circuit's decision only voided M.C.L. §§ 28.725(1)(e)-(g), 28.728(2)(l), and 28.733-.736.

IV. The 2011 Amendments Are Not Severable.

Severability focuses on whether unconstitutional provisions are so entangled with valid portions of a statute that they cannot be cleanly cut out. *Blank v. Dep't of Corrections*, 611 N.W.2d 530, 540 (Mich. 2000). Here, because the Sixth Circuit was focused on the cumulative impact of the amendments, one cannot simply excise a couple subsections and be done. Rather, this Court would need to engage in "quintessentially legislative work" to "rewrit[e] state law to confirm it to constitutional requirements." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006). The point is not that every word added in 2011 is unconstitutional[6]—there may be provisions that the legislature could retain without their cumulative impact being punitive. But it is up to the *legislature* to decide whether, in making SORA less punitive, it wants shorter non-public registration or longer public registration based on individual assessments. Similarly, reporting could be made less punitive by decreasing its frequency or by substituting on-line/mail

[6] For example, the 2006 amendments define a minor as a person younger than eighteen. M.C.L. § 28.733(c). Although that is perfectly constitutional, Defendants acknowledge that § 28.733(c) must be stricken because it makes no sense standing alone. The same analysis applies to the 2011 amendments.

reporting for in-person reporting. But those are legislative, not judicial, choices.[7]

The responsibilities of the judicial and legislative branches do not change just because the legislature fails to act. Plaintiffs do not dispute that enjoining SORA for pre-2011 registrants is strong medicine. But after more than three years of legislative inaction, strong medicine is needed. The Court can always delay the injunction's effective date for 60 days, which is plenty of time to pass a new law.

V. Certification Is Unnecessary, and Is Impermissible so Long as the Punishment of Plaintiffs Continues.

Not one of L.R. 83.40's requirements for certification is met here. First, Michigan's severability law is not "unsettled." L.R. 83.40(a)(1). Federal courts regularly engage in severability analyses of Michigan statutes.[8] Here, Michigan severability law compels a finding that the 2011 amendments are not severable. Defendants' arguments to the contrary do not make this a novel question. *See Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) ("mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit"); *Duryee v. U.S. Department of Treasury*, 6 F. Supp. 2d

[7] Defendants argue that the 2011 amendments reflect the legislature's desire to make Michigan's law SORNA-compliant. But the question is not what the legislature wanted in 2011, but what the legislature wants now that the 2011 amendments cannot be retroactively applied. A unified statute for all registrants would be very different than one where registration requirements depend on the offense date.

[8] *See, e.g.*, *Int'l Outdoor, Inc. v. City of Troy*, 361 F.Supp.3d 713, 718 (E.D. Mich. 2019); *Larkin v. State of Mich.*, 883 F. Supp. 172, 180 (E.D. Mich. 1994).

700, 704 (S.D. Ohio 1995) (denying certification because parties' analysis of how Ohio severability law should apply demonstrated that the question was not novel).

Defendants argue that the question must be novel, because the Michigan Supreme Court has granted leave on the allegedly "identical" issue in *People v. Betts*, 928 N.W.2d 699 (Mich. 2019). But the issues are not identical. The Sixth Circuit has already decided as a matter of federal law that retroactive application of the 2011 amendments is unconstitutional. Thus the severability issue here is whether those deeply embedded amendments can be severed. By contrast, the Michigan Supreme Court, which unlike this Court is not bound by the Sixth Circuit, will first address the threshold questions of whether SORA is punishment, and if it became punitive only upon the enactment of certain amendments. Were the Court to decide, for example, that SORA became punitive after the 1997 amendments, then the question would be whether *those* amendments are severable.

With respect to the second requirement for certification, Defendants claim that "[t]here is a high likelihood that the decision in *Betts* will reach all the provisions challenged by Plaintiffs," ECF 66, Pg.ID#957, and that therefore "the issue certified will likely control the outcome of the federal suit." L.R. 83.40(a)(2). That is simply not true. Certifying a question on severability of the 2011 amendments affects only the ex post facto subclasses. The *Betts*' leave grant does not address any of the claims of the primary class (which comprises both pre- and post-2011

registrants), namely whether SORA is unconstitutionally vague, imposes strict liability without due process, and violates Plaintiffs' First Amendment rights. 1st Am. Compl., ECF 34, Pg.ID# 384-86. *See Warren Prescriptions, Inc. v. Walgreen Co.*, 2018 WL 287951, at *3 (E.D. Mich., Jan. 4, 2018) (denying certification because multiple other claims would survive regardless).

Because L.R. 83.40(a)(2) must be read in tandem with subsection (b), which provides that "certification shall stay federal proceedings," Plaintiffs believe the best reading of the rule is that its requirements relate only to the claim on which the issue is certified. Any other reading would either prevent certification of dispositive questions that are *not* the sole question in the litigation, or stall federal litigation whenever there is certification on a question relevant to only one claim. Here, there is no plausible argument that certification on severability will control the outcome of the entire case. Therefore, certification is clearly impermissible unless Plaintiffs can proceed on their other claims if the case is certified.

Finally, L.R. 83.40(a)(3) permits certification only if it "will not cause undue delay or prejudice." Defendants have failed to comply for more than three years with a binding Sixth Circuit decision, and have failed to take any curative action to comply with this Court's declaratory ruling. ECF 55. Yet now they ask this Court to allow the unconstitutional punishment of tens of thousands of people to continue for however long certification takes. Another year could easily pass before (a) this

Court rules on certification, (b) the statement required by L.R. 83.40(c) is negotiated and approved, (c) the parties brief the issue and the Michigan Supreme Court decides whether to accept the certified question, Mich. Ct. R. 7.308(A)(2) if the Michigan Supreme Court does accept certification, it decides the question and issues a merits opinion. Without doubt certification severely prejudices Plaintiffs.

Accordingly, certification is not just unnecessary, it is also impermissible. Defendants raise the specter of inconsistent state and federal results, but severability law in Michigan is clear. Moreover, in the unlikely event that the Michigan Supreme Court rules differently (assuming it even reaches the question of the 2011 amendments' severability), this Court can always modify its injunction. Fed. R. Civ. Proc. 60(b). The Court should therefore grant a permanent injunction.

Because L.R. 83.40 permits certification only in the absence of undue delay or prejudice, the Court cannot certify absent interim relief. Such relief could be modeled on the final judgment in *Does I*. *See* Pls' Opening Brf., ECF 62, Pg.ID# 834-35. Alternately, the Court could grant a preliminary rather than a permanent injunction enjoining application of SORA to the ex post facto subclasses, while certifying severability. That would ensure that registrants are not prejudiced by ongoing punishment while the certification process plays out, and would mean there is zero risk of inconsistent state and federal results.

VI. Defendants Should Be Responsible for Notice.

The state has a statutory responsibility to inform registrants of their SORA obligations. M.C.L. § 28.725a. But even after entry of this Court's declaratory judgment, ECF 55, the state has continued to inform registrants falsely that they must comply with SORA as written. *See* ECF 62-4, 62-5. Pursuant to Fed. R. Civ. P. 23(c)(2)(A), the Court should (1) order Defendants to notify registrants that liability has been decided and that parts of SORA cannot be applied retroactively; (2) order the Michigan State Police to provide notice (because it is in the best position to do so given that it administers the registry and regularly provides information to registrants); and (3) order the parties to present a joint notice, or proposed separate notices, to the Court for approval. *See Hunt v. Imperial Merch. Servs., Inc.*, 560 F.3d 1137, 1143-44 (9th Cir. 2009); *Barry v. Lyon*, 13-cv-13185, Dkt. 114 (E.D. Mich., March 31, 2015) (state to provide notice to (b)(2) class) (Exh. B).

In addition, pursuant to Rule 65(d)(2), the Court should order Defendants to provide notice to prosecutors and law enforcement, so that they will be bound by any injunction. *Platinum Sports Ltd. v. Snyder*, 715 F.3d 615, 619 (6th Cir. 2013) (prosecutors are bound by injunctions against the governor); *Cady v. Arenac Co.*, 574 F.3d 334, 343 (6th Cir. 2009) (prosecutors act as agents of the state); *Pusey v. City of Youngstown*, 11 F.3d 652, 657-658 (6th Cir. 1993). Local law enforcement agencies have responsibility for enforcing SORA, M.C.L. § 28.722(n), and are "in active concert or participation" with Defendants. Fed. R. Civ. Proc. 65(d)(2)(C).

Respectfully submitted,

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Attorneys for Plaintiffs

Dated: November 12, 2019

Certificate of Service

On November 12, 2019, 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

A. Fabian and Michigan State Police Correspondence

B. *Barry v. Lyon* Order on Class Notice

Exhibit A

Fabian and Michigan State Police Correspondence

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
LANSING

GRETCHEN WHITMER
GOVERNOR

COL. JOSEPH M. GASPER
DIRECTOR

October 3, 2019

Pavol Fabian
ZamzowFabianPLLC
15 Ionia Avenue SW, Suite 460
Grand Rapids, Michigan 49503

RE: [redacted]

Dear Mr. Fabian:

The Michigan State Police (MSP) received your request to amend the Michigan Sex Offender Registry (SOR) for your client, [redacted] In your request, you are "asking MSP to enforce *Does I*, as made applicable by the declaratory judgment in *Does II*, and to ensure that he does not continue to suffer ongoing retroactive punishment under the current (unchanged) SORA regime. "

The SOR Unit has been advised that because *Does II* is on ongoing class action in which your client is apparently a member, it would be inappropriate for the MSP to grant individual relief to a specific class member in the absence of further direction from Judge Cleland as to the entire class. If you have any concerns regarding the status of *Does II* and its current impact, if any, on your client's individual SOR status, you should direct those concerns to the attorneys representing the class.

Sincerely,

Elizabeth Arritt

Ms. Elizabeth Arritt, Manager
Michigan State Police
Criminal Justice Information Center
Sex Offender Registry Unit

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September 30, 2019

Delivered by Email
MSP - psors@michigan.gov
gbabbitt@miottawa.org (Ottawa County - Appellate Division)

RE: REQUEST TO AMEND MICHIGAN STATE POLICE (MSP) SEX OFFENDER REGISTRY FOR [redacted]

To whom it may concern,

I am writing as the attorney for and on behalf of [redacted] to request that his current registry status be amended to comply with the recent declaratory judgment from the Eastern District of Michigan in *Does #1-6 v. Snyder*, Docket No. 2:16-cv-131137 (*Does II*) (*Stipulated Order*, attached). *Does II* is a class action lawsuit following the final decision in *Does #1-5 v. Snyder*, 834 F.3d 696, 705-06 (6th Cir. 2016), *cert denied* 138 S. Ct. 55 (2017) (*Does I*). This *Stipulated Order* provides immediate, declaratory relief to *all* eligible class members—like [redacted]—who do not currently have any direct criminal appeals or any open civil cases in state or federal court; [redacted] does not have any pending appeals or cases in any court at this time. *See Stipulated Order* at 4.

In *Does II*, "[t]he Court enter[ed] a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202 and consistent with Does #1-5 v. Snyder, 834 F.3d 696 (6th Cir. 2016), cert. denied, 138 S. Ct. 55 (2017), that the current Sex Offender Registration Act

(SORA), M.C.L. § 28.721 et seq. is punishment and that the ex post facto application of the 2006 and 2011 amendments is unconstitutional." *Stipulated Order* at 3 (underline added).

[redacted] now submits that he is a class member eligible for immediate relief under this judgment and requests that MSP amend his registry status to reflect this. The 2006 and 2011 amendments are no longer applicable to [redacted] and his registry must be amended to reflect these changes.

BACKGROUND

[redacted] was convicted in 1997 of kidnapping of a minor, M.C.L. 750.349, during the commission of a carjacking and robbery of a 16-year-old driver. There was no sexual component to this offense. At that time, kidnapping a minor was not a listed nor registrable offense under Michigan's Sex Offender Registration Act (SORA), MCL 28.721 et seq. But simply based on SORA's retroactivity, as [redacted] languished in prison, the law changed, again and again—as did his registry status. Before his release in 2014, [redacted]—who was not a registered sex offender in 1997—was retroactively placed on a 25-year registry in 1999 when the legislature amended SORA[1] (*see* Mich Pub act 85 of 1999; Sec. 4 (4)(c), Sec. 5 (6) and (7)(g)); and was subjected to the additional constrictions, e.g., school-zone restriction, in 2006 when it was amended again; and ultimately he was changed to a tier III offender and his registry changed to a life term. All simply because of his status as a prisoner in Michigan convicted of a later-added offense. *See* Mich Pub Act 85 of 1999 (SORA 1999) (attached); *see also* SORA 2006 and 2011.

[1] available at: http://www.legislature.mi.gov/documents/1999-2000/publicact/pdf/1999-PA-0085.pdf (accessed on September 28, 2019).

Based on nothing more than Michigan's addition of kidnapping of a minor in 1999 to its registrable offenses, [redacted] is, today, subjected to a lifetime registry and all of the additional restrictions and requirements that were added along the way.

From the time of his release, [redacted] has been compliant with SORA and has not violated the law nor been convicted of any new offense. Lastly, [redacted] does not have any direct appeal arising from a criminal case nor any civil case pending in Michigan or in any Federal court.

LAW

More than four years ago, the court held (1) that SORA's prohibitions on working, residing, or loitering in exclusion zones are unconstitutionally vague; (2) that certain SORA reporting requirements are unconstitutionally vague; (3) that imposing strict liability for SORA violations violates due process (and therefore SORA must be read to incorporate a knowledge requirement); and (4) that the requirement to report certain electronic identifiers immediately violates the First Amendment. *See Does #1-5 v. Snyder*, 101 F. Supp. 3d 672 (E.D. Mich. 2015).

In a later opinion, *Does #1-5 v. Snyder,* 101 F. Supp. 3d 722 (E.D. Mich. 2015), the court further held that the retroactive incorporation of the lifetime registration obligation to report certain electronic identifiers also violates the First Amendment.

Approximately three years ago, in what is *now a final judgment*, the Sixth Circuit held that Michigan's Sex Offender Registration Act (SORA), M.C.L. § 28.721 et seq., imposes punishment in violation of the Ex Post Facto Clause, and that retroactive application of its 2006 and 2011 amendments must stop. *See Does #1-5 v. Snyder*, 834 F.3d 696, 705-06 (6th Cir. 2016), *cert denied* 138 S. Ct. 55 (2017) (*Does I*).

And now, the court has made clear that these previous holdings are applicable to *all* registrants similarly-situated to those class members identified in *Does II* through its declaratory judgment. *See Stipulated Order*.

APPLICATION

Plainly, [redacted] is an individual eligible for relief under *Does I* and the declaratory judgment in *Does II*. He was only initially registered and later subjected to the now-unconstitutional 2006 and 2011 amendments because of his status as a prisoner under the supervision of the Michigan department of corrections at the time of these amendments. Because these 2006 and 2011 amendments are no longer applicable to him, [redacted] should, at this time, be subject to that registry as amended in 1999.[2] *See* SORA 1999.

Under SORA 1999, his registry must be amended from tier III, life offense to a non-tiered registry with a definitive end date. The law in 1999 provided for registration for "25 years after the date of initially registering or, if the individual is in a state correctional facility, for 10 years after release from the state correctional facility, whichever is longer." SORA 1999, Sec. 5(6); *see also* Sec. 5(7)(g) (clarifying that the life registry for kidnapping of a minor did not apply to those convicted prior to 1999). [redacted] was convicted in 1997 and has been registered since July 28, 1997. *Michigan Public Sex Offender Registry* (available online).

[redacted] was released from prison in 2014. His 25 years on the registry would end in 2022 but, 10 years after release, would be in 2024, which is, of the two options prescribed by law, "longer." *See* SORA 1999, Sec. 5(7)(g).

[2] Without arguing, but preserving, whether imposition of SORA 1999 was punishment to begin with, given the non-sexual nature of the offense.

RELIEF REQUESTED

For the reasons stated in this letter, [redacted] is asking the MSP to change his registry status and conditions to comply with the current law. In doing so, he seeks to have his registry length changed from life to one with an end-date in 2024. He further seeks to have all unconstitutional provisions and restrictions found to be ex post facto punishment by the court removed.

In sum, [redacted] is asking MSP to enforce *Does I*, as made applicable by the declaratory judgment in *Does II*, and to ensure that he does not continue to suffer ongoing retroactive punishment under the current (unchanged) SORA regime.

Please do not hesitate to contact this attorney should you need have any questions or require any clarification about this request or its merits. All contact information may be found in the header of this letter.

Respectfully submitted,

Pavol Fabian (P78542)
Attorney for [redacted]

Attachments to email: (1) Stipulated Order; (2) SORA 1999

CC: Ottawa County Prosecutor by email: gbabbitt@miottawa.org

Exhibit B

Barry v. Lyon

Order on Class Notice

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Walter Barry, et al.,

Plaintiffs, Case No. 13-cv-13185
Hon. Judith E. Levy

v.

Nick Lyon, in his capacity as
Acting Director, Michigan
Department of Human Services,

Defendant.

_____/

ORDER REGARDING AMENDED CLASS NOTICE [107] AND IMPLEMENTATION OF THE COURT'S JANUARY 9, 2015 ORDER [91]

This matter is before the Court on plaintiffs' Amended Proposed Notice (Dkt. 107) to the class certified in the Court's January 9, 2015 Opinion and Order (Dkt. 91). The Court held a status conference with the parties on March 24, 2015, at which the contents of plaintiffs' original proposed notice (Dkt. 98) and defendant's objections to the notice (Dkt. 102) were discussed. Plaintiffs were permitted to file an amended proposed notice based on those discussions. Having

thoroughly reviewed the parties' submissions on the proposed notice and the amended proposed notice, and having carefully considered defendant's objections to the proposed notice, as articulated both in his response brief and through counsel at the status conference, the Court ORDERS that:

(1) Plaintiffs' Amended Proposed Notice to Class (Dkt. 107-1), Claim Form for FAP (Dkt. 98-3), Hearing Form (Dkt. 98-4), and Poster (Dkt. 98-5) are APPROVED as to form and content[1];

(2) Within 28 days of entry of this Order, defendant shall mail the Notice (Dkt. 107-1), Claim Form (Dkt. 98-3), Hearing Request Form (Dkt. 98-4), an application for food assistance benefits, and a postage paid envelope addressed to Department of Human Services, Barry Lawsuit Processing Unit, [address to be determined], to all class members, by first class mail addressed to the last address known to the Department of Human Services (DHS);

[1] Defendant objects that the Notice must inform class members that they may opt out of the litigation and that they may enter an appearance through their own attorney, under Fed. R. Civ. P. 23(c)(2)(B). (Dkt. 102 at 5.) But Rule 23(c)(2)(B) only applies to classes certified under Rule 23(b)(3). The class in this case was certified under Rule 23(b)(2). (Dkt. 91, Opinion and Order 91.) Rule 23(c)(2)(A) thus applies to the Notice, which is only required to be "appropriate."

(a) DHS shall fill in information specific to each class member on the Notice, Claim Form, and Hearing Request Form, to the extent such information is contained in DHS records;

(b) The return address on the envelopes shall indicate the notice was sent from the Michigan Department of Human Services, and the front of the envelope shall contain the statement, "IMPORTANT NOTICE ABOUT DHS BENEFITS" in bold, capital letters;

(c) DHS shall send the Notice, Claim Form, and Hearing Request Form in Spanish to any class member on record with DHS as being Spanish-speaking or who later comes to defendant's attention as needing information in Spanish;

(d) DHS shall send the Notice, Claim Form, and Hearing Request Form in Arabic to any class member on record with DHS as being Arabic-speaking or who later comes to defendant's attention as needing information in Arabic;

(3) For any notices sent under (1) above that are returned as undeliverable, defendant shall use a people locator service to find the current address for the relevant class member, and shall re-send the notice with the new mailing date and new deadline date to the corrected address within 21 days of receiving the returned notice;

(4) Within 28 days of entry of this Order, defendant shall print and distribute 24 inch by 36 inch copies of the Notice Poster (Dkt. 98-5). Defendant shall distribute a number of posters to each DHS office sufficient to ensure that one poster will be posted in each lobby, reception, and waiting area, along with directions that these posters must be prominently displayed in all lobby, reception, and waiting areas. DHS shall post the notice on its website at a location to be agreed upon by the parties, which location will be available via links on locations to be agreed upon by the parties. DHS shall also provide at least one poster to all legal services offices in Michigan listed in Dkt. 98-6, and at least one poster to each Community Action Agency in Michigan and to each Michigan Works! Agency office, with a request that these

posters be prominently displayed until at least 180 days after entry of this Order. DHS shall also provide up to 500 posters to not-for-profit, community-based organizations or human services providers that request them by emailing DHS at an email address to be determined, or by calling DHS at a phone number to be determined, on a first-come, first-served basis;

(5) Food Assistance Program (FAP) benefits due on or after January 1, 2013 shall be restored to class members under 7 U.S.C. § 2023(b). The Court will postpone determination of how defendant will restore FAP benefits (*see* Dkt. 98, pp. 6-12 and Dkt. 102, pp. 10-13) until discussions between DHS and the U.S. Department of Agriculture Food and Nutrition Service regarding a streamlined process for restoration of FAP benefits have concluded, or until notified by the parties that further action from the Court is necessary;

(6) Defendant shall compile and provide to plaintiffs' attorneys a searchable and sortable spreadsheet or data file (such as an Excel or Access file) that contains for all class members the information specified below;

(a) Within 21 days of entry of this Order, defendant shall provide a spreadsheet or data file that contains, for each class member, the information listed in numbers 1-6 below;

(b) Within 42 days of entry of this Order, defendant shall provide an updated spreadsheet or data file that contains, for each class member, the information listed in numbers 1-12 below. The information in numbers 7-12 shall be provided to the extent that defendant has that information;

(c) Every 14 days thereafter, defendant shall provide an updated spreadsheet or data file that contains, for each class member, the information listed in numbers 1-12 below;

(d) Defendant shall continue to provide such updates until 12 months have elapsed from the date of provision of the first spreadsheet or data file, per (6)(a) above. After the 12 months have elapsed, if the spreadsheet or data file shows that there are pending applications, claims, or hearing requests, defendant shall continue to provide the biweekly

updates in (6)(c) until all pending applications, claims, or hearing requests have been resolved;

(e) Updates shall consist of a completely updated spreadsheet or data file;

(f) The spreadsheet or data file shall contain, for each class member, the following information:

All class members:

1. Name;

2. Last address known to DHS;

3. Case number;

4. The date the criminal justice disqualification notice was sent to the class member, both initially and, if returned, when re-mailed;

5. The type of benefits (FAP, FIP, CDC, SDA, or RAP) affected by the denial, termination, or reduction of benefits, and, for each type of benefit affected, whether it was denied, terminated, or reduced, and the

effective date(s) of the termination, denial, or reduction of benefits;

6. The date, if any, on which the class member requested a hearing regarding benefits denied, reduced, or terminated because of a criminal justice disqualification, as well as the disposition of the hearing request or that it is pending;

7. The date, if any, on which the class member applied for benefits after DHS sent the class member a Notice of Decision (Dkt. 107-1),

a. Which benefits (FIP, FAP, CDC, SDA, RAP) the class member applied for, and whether the application is still pending,

b. If approved, the monthly benefit amount approved,

c. If denied, the reason for the denial;

Subclass members

8. Contingent on the outcome of discussions between DHS and the U.S. Department of Agriculture Food and Nutrition Service, whether DHS has classified the class member as being in Group 1, Group 2, or Group 3, or as not a member of those groups (*See* Dkt. 98, pp. 6-12);

9. The date(s), if any, of all applications for FAP submitted by the class member or household subsequent to the criminal justice disqualification, other than those disclosed in number 7 above, and whether the application(s) was approved, denied, or is still pending,

a. If approved, the monthly FAP allotment for the first full month for which FAP was prospectively approved for the class member and his / her household after the criminal justice disqualification notice,

b. If denied, the reason for denial;

10. The date, if any, on which the class member submitted a Claim Form;

11. Whether the class member or class member's household received a FAP supplement (restored back benefits) for benefits denied, terminated, or reduced based on a criminal justice disqualification,

a. The total amount of the FAP supplement / back benefits,

b. The months for which the FAP supplement / back benefits were approved,

c. For any class member for whom benefits are not restored, the specific problem that prevented restoration of benefits (e.g., income, assets, residence, verification, work sanction, not in Groups 1, 2, or 3, etc.),

d. Whether the class member filed a Hearing Request in response to notice regarding the denial or amount of the FAP supplement, and the

disposition of any such hearing request. Disposition means whether the request was dismissed without a hearing, the appeal was settled without a hearing, defendant's decision was reversed by a decision and order, or defendant's decision was affirmed by a decision and order;

12. The number of notices mailed out under (2) above that are returned as undeliverable, the number of individuals not located under (3) above, and the number of notices returned after remailing under (3) above;

(7) For the period defined in (6)(d) above, defendant shall provide the Court and plaintiffs with monthly written reports detailing DHS' progress in implementing the Court's January 9, 2015 Order.

IT SO ORDERED.

Dated: March 31, 2015 s/Judith E. Levy

Ann Arbor, Michigan

JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on March 31, 2015.

s/Felicia M. Moses
FELICIA M. MOSES
Case Manager