Multiple Documents

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3	Exhibit A: Mannikko Declaration
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5	Exhibit C: White Declaration
6	Exhibit D: Poxson Declaration

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 AMENDED MOTION FOR ENTRY OF JUDGMENT

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INTRODUCTION

Defendants twist themselves into knots trying to avoid a final judgment in a case they lost over a year ago. Their arguments fail.

First, Defendants argue that this case should be dismissed as moot because Michigan's new Sex Offenders Registration Act ("new SORA" or "SORA 2021") applies retroactively, and therefore SORA compliance violations that pre-date the new SORA (effective 3/24/21) will be prosecuted under the new law. But the theories Defendants spin are cut out of whole cloth. Because SORA 2021 is not and cannot be retroactive for purposes of creating or eliminating criminal *liability* for offenses that pre-date the new law, or would violate the Ex Post Facto Clause if it were retroactive, this case is not moot, and the class needs the protection that only a final judgment can provide.[1] *See* Pls.' 2d Am. Proposed J., ECF 107-1.

Second, Defendants ask the Court to wade unnecessarily into complex preclusion issues by including a provision in the final judgment stating that the judgment does not apply to two criminal appeals pending in the Michigan Supreme Court. But the Michigan Supreme Court is the proper court to decide whether and how a final

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[1] Plaintiffs' original briefs explained the content of the proposed judgment. *See* Pls' Mot & Br. for Entry of J., ECF 99; Pls' Reply Br., ECF 103. While parts of those briefs are no longer relevant due to the passage of SORA 2021, the Court should read this round of briefs in conjunction with the earlier ones.

judgment in this federal civil class action impacts those pending cases.

Finally, Defendants seek even further delay, arguing that no judgment should enter until the Michigan Supreme Court decides those two cases because those decisions could affect the content of class notice. But the new SORA requires notice to registrants in any event, and unless the state wishes to delay enforcement of SORA 2021 until the Michigan Supreme Court decides the two pending cases, notice will need to go out regardless. Moreover, Plaintiffs' amended proposed judgment explicitly provides that *after* judgment enters the parties will work together on the content and process for notice, with the Court resolving any disputes. There is no reason to further postpone entry of judgment when the details of notice can be (and indeed should be) worked out *after* judgment enters.

I. UNDER MICHIGAN LAW, THE OLD SORA GOVERNS CRIMINAL LIABILITY FOR PRE-3/24/2021 SORA VIOLATIONS.

A. Criminal Liability Is Determined by the Statute in Effect at the Time of the Offense.

Though Defendants wish otherwise, black-letter law holds that a criminal law in effect when a violation occurs is the law under which an offense is charged. "The general rule of statutory construction in Michigan is that a new or amended statute applies prospectively" absent clear intent to give it retrospective effect. *People v.*

Russo, 487 N.W.2d 698, 702 (Mich. 1992).[2] "This rule applies equally to criminal statutes." *Id*. In the criminal context, retroactive legislation raises ex post facto concerns because it is constitutionally impermissible to retroactively define new crimes, redefine existing crimes, increase punishments, or alter the evidence needed to convict. *Calder v. Bull*, 3 U.S. 386, 390 (1798).

As the Michigan Supreme Court held more than 90 years ago, due to the prospective orientation of criminal laws, absent a savings clause, the repeal or amendment of a criminal statute bars prosecution of pending or subsequent cases under the repealed or amended statute (the so-called "common law abatement doctrine"). *People v. Lowell*, 230 N.W. 202, 203–04 (Mich. 1930). Thus, in *Lowell* the defendant could not be prosecuted under any law, because the old statute was no longer operative under the abatement doctrine, and the new law was prospective. *Id.* at 203. The *Lowell* Court therefore "invited the legislature to enact a general saving

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[2] *See also People v. Thomas*, 678 N.W.2d 631, 637 (Mich. Ct. App. 2004) ("Amendments of statutes are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent." (citation omitted)); *Rashad v. Lafler*, 675 F.3d 564, 570 (6th Cir. 2012) ("[C]ourts generally presume that 'legislation, especially of the criminal sort, is not to be applied retroactively' unless the legislature clearly requires otherwise." (quoting *Johnson v. United States*, 529 U.S. 694, 701 (2000))); *United States v. Richardson*, 948 F.3d 733, 746 (6th Cir. 2020) ("When Congress replaces or changes an existing criminal law, we presume that the new law does not alter penalties incurred before the new law took effect." (citation omitted)).

statute." *People v. Schultz*, 460 N.W.2d 505, 510 (Mich. 1990) (plurality). The legislature then enacted M.C.L. § 8.4a, which "was specifically adopted to abrogate an anomaly resulting from the interplay between the common law abatement doctrine and the constitutional Ex Post Facto Clause." *Id*. In other words, M.C.L. § 8.4a is designed to ensure that people can still be held criminally liable for past violations of a repealed/amended statute, because new criminal laws cannot be retroactively applied and offenders would otherwise escape criminal responsibility. In effect M.C.L. § 8.4a undoes the "common law abatement doctrine" by creating a general "savings clause"—allowing offenders who violated laws that have since been repealed/amended to still be prosecuted under the prior statutes.

The language of M.C.L. § 8.4a, like its history, makes clear that after enactment of a new statute, liability for offenses that occurred under the old statute arises under the old statute, and must be prosecuted under it:

> The repeal of any statute or part thereof shall not have the effect to release or relinquish any penalty, forfeiture, or *liability* incurred under such statute or any part thereof, unless the repealing act shall so expressly provide, and *such statute and part thereof shall be treated as still remaining in force for the purpose of instituting or sustaining any proper action or prosecution* for the enforcement of such penalty, forfeiture or *liability*. (Emphasis added.)

Thus, any SORA compliance offenses that occurred before March 24, 2021, must be prosecuted under the version of SORA in effect at the time that the SORA compliance violation occurred.

B. The Amelioration Doctrine Does Not Mean, As Defendants Suggest, that Liability for Old SORA Violations Arises Under the New SORA.

Defendants attempt to avoid the plain language of M.C.L. § 8.4a and the well-established principle that criminal laws operate prospectively by pointing to the "amelioration" doctrine, which in Michigan holds that where a new/amended law reduces the *punishment* for an offense, the lesser punishment applies to pre-enactment offenses. The rationale for this doctrine is that people who violated the old law should be held accountable for their criminal conduct (which is the point of M.C.L. § 8.4a), but that their punishment should not exceed the punishment of others who commit similar or identical crimes under a more lenient new or amended law.

People v. Schultz, the principal case on which Defendants rely, makes abundantly clear that although a lesser *punishment* can be retroactively imposed, the law in effect at the time of the offense remains the exclusive source of criminal *liability*. 460 N.W.2d at 509–11. In *Schultz*, the legislature amended the governing law mid-prosecution to reduce the minimum term of imprisonment. *Id.* at 507–08. In finding that the amendment applied retroactively, the plurality highlighted the difference between criminal *liability*, which was determined under the old statute, and criminal *punishment*, which was determined under the new one:

> By enacting § 8.4a, the Legislature has expressed its intent that conduct remains subject to punishment whenever a statute imposing criminal liability is either repealed outright or reenacted with modification, even though a specific saving clause has not been adopted. While § 8.4a does indicate that conduct remains subject to punishment, it does not indicate

> that the Legislature intended the statute prior to amendment to provide the *terms of punishment* where an amendatory act mitigates the authorized terms of punishment but continues to proscribe the same conduct.

Id. at 510 (emphasis added). The plurality thus drew a distinction between the conduct that was forbidden at the time of the offense, which is measured under the old law, and the punishment, which can be ameliorated by a new or amended law.

In light of this distinction, the Michigan Court of Appeals has concluded that "*Schultz* only addresses the applicability of *sentence* alterations the Legislature interposes between the crime and sentencing." *People v. Muniz*, 675 N.W.2d 597, 599 (Mich. Ct. App. 2003). The court has therefore refused to retroactively apply amendments that change the scope of prohibited conduct. *See, e.g.*, *People v. Doxey*, 687 N.W.2d 360 (Mich. Ct. App. 2004). For instance, amendments that have changed what constitutes a criminal violation or have added new crimes have been found to apply only prospectively. *Id.* at 363.

Because these cases make it clear that the "amelioration" doctrine applies only to changes in criminal *punishment*, and not to criminal *liability*, SORA 2021 cannot apply retroactively to define liability for pre-3/24/2021 SORA compliance violations. Moreover, SORA 2021 does not change the sentences for violations of SORA: the prison, jail, or probation terms imposed for SORA compliance violations are identical under the old and the new laws. *Compare* M.C.L. § 28.729 (2020), *with* amended M.C.L. § 28.729 (2021) (both authorizing penalties up to ten years

imprisonment). Because Defendants confuse criminal liability with criminal punishment, Defendants' argument in support of mootness necessarily fails. Under M.C.L. § 8.4a, and under the rationale of *Schultz, Muniz,* and *Doxey*, *supra*, past SORA compliance violations remain subject to prosecution under the old SORA.

C. The Question of Whether the New SORA "Cures" the Problems with the Old SORA Is Irrelevant to Which Law Will Be Used to Punish Pre-3/24/21 Violations.

Defendants further confuse the issues by arguing that if the new SORA "ameliorates" the ex post facto violation of the old SORA by no longer rising to the level of punishment,[3] then SORA compliance offenses committed before March 24, 2021, can be retroactively governed by the new SORA. This argument is based on an analytical error: Defendants conflate the punishment for the SORA compliance violation with the punishment for the underlying sex offense.

The old SORA imposed a broad regime of restrictions and requirements on people who committed a registrable sex offense—a regime that the Sixth Circuit

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[3] As stated previously, Plaintiffs dispute Defendants' contention that SORA 2021—which continues to impose a little-changed regime of extensive restrictions and requirements without any individualized assessment, continues to apply most of the 2011 amendments retroactively despite the Sixth Circuit's *Does I* decision, and is *more* burdensome than the old SORA in some ways, though less burdensome in others—is constitutional. But the constitutionality of SORA 2021 is beyond the scope of this case and will be litigated in a future case.

found rose to the level of punishment that could not be retroactively applied. But that "punishment" was not imposed for non-compliance with SORA itself, but rather *as a consequence of the underlying sex offense*. It was additional punishment on top of whatever prison/jail/probation sentence the offender received—not for having failed to comply with SORA's many restrictions and requirements, but for having committed the registrable sex offense itself.

By contrast, the punishment imposed for a SORA compliance violation is prison, jail, or probation, and SORA 2021 continues to impose the exact same harsh penalties as the previous statute, as noted above. So nothing related to the sentence for the SORA compliance violation—which is the only thing at issue with respect to mootness—has been "ameliorated." In that regard SORA has not changed one whit, and any change to the regime of restrictions and requirements imposed on registrants for their *underlying offense* cannot be bootstrapped to make SORA 2021 retroactive in terms of defining *SORA compliance violations*.

In sum, whether the new SORA is constitutional is irrelevant to the question before this Court: even if Defendants were to prevail in future litigation about the new SORA's constitutionality, criminal *liability* for pre-3/24/21 SORA compliance violations would still have to be defined by the old SORA, which this Court and the Sixth Circuit have found to be unconstitutional. Under clear state statutory and case law, criminal *liability* is governed by the law in effect when the offense occurs.

Moreover, the "amelioration" doctrine does not apply because the punishment for SORA violations is unchanged, and because any "amelioration" in SORA 2021 goes to punishment for the underlying sex offense, not for alleged violations of SORA itself. Thus, the present case is not moot because anyone who committed a SORA compliance offense before March 24, 2021 can still be prosecuted under the old SORA, and will remain liable until the six-year statute of limitations runs, *see* M.C.L. § 767.24(10), unless an injunction issues.

II. APPLYING SORA 2021 RETROACTIVELY WOULD CREATE EX POST FACTO PROBLEMS.

A. Applying SORA 2021 Retroactively Where It Changes the Definition of the Offense Would Violate the Ex Post Facto Clause.

Under the Ex Post Facto Clause, "Legislatures may not retroactively [1] alter the definition of crimes or [2] increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). The present *Does II* litigation, like *Does # 1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (*Does I*), has thus far focused primarily on whether SORA's restrictions and requirements are so onerous that they constitute additional *punishment* retroactively imposed for the underlying *sex offense.* But the question here is whether pre-3/24/2021 *SORA compliance violations* should be prosecuted based on how the *crimes are defined* in the old law versus in the new law. *See Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 505 (1995) (the Ex Post Facto Clause prohibits retroactive changes that "effect[] [a] change in the definition of

[the] crime"); *People v. Wilson*, 902 N.W.2d 378, 382 n.3 (Mich. 2017) (same). The chart below summarizes these differences:

Offense	Offense Definition	Sentence Imposed at Time of Conviction	Retroactive Punishment
Sex offense	Crimes are defined by the version of the criminal law in effect at the time the sex offense occurred.	Prison, jail, probation	*Does I* and *II* held that the old SORA's burdens rise to the level of retroactive punishment for the underlying sex offense, for pre-2011 registrants. Whether or for whom the new SORA's burdens are retroactive punishment (or are otherwise unconstitutional) will be determined by future litigation (i.e., in *Does III*).
SORA compliance violations (enforcement of SORA's obligations and restrictions)	Pre-3/24/2021: crimes are defined by the old SORA (law in effect at the time when the violation occurred). Post-3/24/2021: crimes are defined by the new SORA.	Prison, jail, probation	The new SORA cannot be applied retroactively to prosecute pre-3/24/2021 SORA violations under M.C.L. § 8.4a; nor would retroactivity be consistent with the Ex Post Facto Clause.

If, as Defendants argue, SORA 2021 governs pre-3/24/2021 conduct, then even a cursory look at SORA 2021 reveals ex post facto problems because in many instances the offense definitions in the old and new SORA differ. For example:

- Under the old SORA, registrants had to report telephone numbers "routinely" used. While in this regard SORA 2011 was (unconstitutionally) vague, the word "routinely" surely meant that a registrant who used as phone just once need not report it. SORA 2021 creates criminal liability for a broader category of conduct, requiring reporting of "All telephone numbers registered to or ~~routinely~~ used by the individual, **including, but not limited to, residential, work, and mobile telephone numbers.**" M.C.L. § 28.727(1)(h) (strike out and emphasis added to show alterations from old SORA). If the new law applies retroactively, then registrants who, prior to March 24, 2021, failed to register all phones they have *ever* used, even to make a single call, could arguably be prosecuted for the offense, even though they had no obligation under the old SORA to report every number ever used.

- The old and new SORA have different requirements for initial reporting of electronic identifiers: "~~All~~ **Except as otherwise provided in this subdivision, all** electronic mail addresses and ~~instant message addresses assigned to the individual or routinely~~ **internet identifiers register to or** used by the individual ~~and all login names or other identifiers used by the individual when using any electronic mail address or instant messaging system~~." M.C.L. § 727(1)(i) (strike out and emphasis added to show alterations from old SORA). SORA 2021 broadens the definition of which IDs must be reported to include "all designations used for self-identification or routing in internet communications or postings." M.C.L. § 28.722(g) amended. Plaintiffs' counsel do not know what this text means, but it could include not just log-in names, but also passwords, account numbers, and IP addresses. Moreover, the three-day reporting of such IDs under the old SORA only applied when "[t]he individual establishes any electronic mail or instant message address, or any other designation used in internet communication or posting." M.C.L. § 28.725(1)(f) (2020). Under SORA 2021 there is no such limitation. Post-2011 registrants must report within three days of "any change" in email addresses and internet IDs "registered to or used by the individual." M.C.L. § 28.725(2)(a) (2021). In short, applying SORA 2021's internet reporting requirements retroactively would fundamentally redefine the offense.

Accordingly, SORA 2021 cannot be applied *retroactively* to create new substantive SORA compliance requirements without violating the Ex Post Facto Clause.

B. Applying SORA 2021 to Retroactively Criminalize Pre-3/24/2021 Conduct by the Ex Post Facto Subclass Would Violate the Ex Post Facto Clause.

In 2016 the Sixth Circuit held that old SORA constituted punishment, that the 2006 and 2011 amendments could not be retroactively applied, and that the plaintiffs' other constitutional challenges were moot because "none of the contested provisions may now be applied to the plaintiffs." *Does I*, 834 F.3d at 706. On February 14, 2020, this Court applied the *Does I* decision to the ex post facto subclasses (registrants whose offense occurred prior to the 2011 amendments), and held that the 2011 amendments could not be severed from the rest of the law and no previous version of the law could be revived. Op. & Order Granting Pls.' Mot. for Injunctive & Notice Relief, ECF 84, PgID.1787–89, 1793–97, and 1797–1801. The Court said that it "cannot now impose additional limits to the Sixth Circuit's decision and must read *Does I* as broadly—and quite clearly—*invalidating all portions of the 2006 and 2011 amendments as applied retroactively to the members of the ex post facto subclasses*." *Id.*, at PgID.1788–89 (emphasis added). But for COVID, this Court would have entered a final declaratory judgment and a permanent injunction barring enforcement of the old SORA to the ex post facto subclasses.

Thus, under the decisions of the Sixth Circuit and this Court, the old SORA cannot apply to pre-2011 registrants as a matter of law and thus *cannot create criminal liability*. Pre-2011 registrants are legally innocent of any possible SORA

violations because, as this Court put it, "SORA *in toto* cannot be applied to any members of the ex post facto subclasses." *Id.* at PgID.1797. For pre-2011 registrants, there was no constitutionally valid law in effect from 2011 onward.

Under Defendants' theory, SORA 2021 could now be used to retroactively criminalize pre-3/24/2021 conduct by members of the ex post facto subclasses even though the old version of SORA in effect when that conduct occurred is null and void. The state cannot charge a person for past conduct under a law that was constitutionally invalid as to them when the offense occurred, period. *See Calder,* 3 U.S. at 390 (ex post facto violations include "mak[ing] an action done before the passing of the law, and which was innocent when done, criminal; and punish[ing] such action"); *Stanton v. Lloyd Hammond Produce Farms*, 253 N.W.2d 114, 117 (Mich. 1977) (noting that unconstitutional statutes are void ab initio).

It is important to understand that a final judgment declaring the old SORA void as to pre-2011 registrants and enjoining its enforcement will not remove anyone from the registry or make the registry go "dark." Entry of judgment will not occur until after the new law takes effect on March 24th, and SORA 2021 will—pending future challenges to the new statute's constitutionality—govern the ex post facto subclass' duties and responsibilities, just as it will for the post-2011 members of the primary class. The only thing the judgment will do as to this issue is guarantee that pre-2011 registrants cannot be charged with or prosecuted for past violations of an

unconstitutional statute, because that law was and is null and void as to them.

III. A PERMANENT INJUNCTION IS NECESSARY TO PROTECT REGISTRANTS FROM PROSECUTION FOR SORA COMPLIANCE VIOLATIONS.

A. Without Entry of a Permanent Injunction, Registrants Will Remain Liable for Violations of the Unconstitutional Parts of the Old SORA.

Defendants argue that because this litigation challenges the old SORA, which will no longer be in effect after March 24, 2021, the case is moot. The Sixth Circuit's recent decision in *Ramsek v. Beshear*, __ F.3d __, No. 20-5749, 2021 WL 800266 (6th Cir. Mar. 3, 2021) says exactly the opposite. In *Ramsek*, the plaintiff challenged an executive order prohibiting mass gatherings to prevent the spread of COVID-19, but by the time of the Sixth Circuit's decision, that order had been rescinded. *Id.* at *2–4. "Believing that a law's repeal does not immunize a past violator from prosecution," the plaintiff worried that until the "one-year [statute of limitations] expires, the threat of prosecution lives on, necessitating final injunctive relief." *Id.* at *4 (citing Ky. Rev. Stat. Ann § 446.110 (the Kentucky analog to M.C.L. § 8.4a)). The Sixth Circuit agreed and declined to dismiss the case as moot, instead remanding to the district court to determine what injunctive relief was necessary to protect the plaintiff's rights, and against whom it should issue. *Id.* at *5.

The statute of limitations for SORA offenses is six years, *see* M.C.L. § 767.24(10), and absent a final judgment and permanent injunction, class members will remain criminally liable for violating unconstitutional provisions of the old

SORA. For post-2011 members of the primary class, that would mean they could be prosecuted for the next six years for violating provisions of the old SORA that this Court held were unconstitutional. *See* Op., ECF 84, PgID.1802–03 (declaring M.C.L. §§ 28.733–35, 28.727(1)(h), 28.727(1)(j) unconstitutionally vague; requiring SORA prosecutions to incorporate a knowledge requirement; declaring that M.C.L. §§ 28.725(1)(f); 28.727(1)(h), 28.727(1)(l) and the retroactive incorporation M.C.L. § 28.727(1)(i) violate the First Amendment). In other words, unless or until this Court enjoins enforcement of those provisions, post-2011 primary class members will be criminally liable for violating any of the above-cited provisions at any time from 2015 to 2021. (Other parts of the old SORA can still be enforced against post-2011 registrants.) For members of the ex post facto subclass, the Court has already said that "Michigan's SORA is DECLARED NULL AND VOID." *Id.*, PgID.1806. But unless that declaratory judgment is enshrined in a final order, along with an accompanying permanent injunction, pre-2011 registrants will remain criminally liable under the old SORA despite the clear decisions of this Court and the Sixth Circuit that the law's retroactive application is unconstitutional.

Accordingly, as set forth in the proposed judgment, ECF 107-1, Plaintiffs seek a final judgment enshrining the Court's February 14, 2020, decision, ECF 84, granting final declaratory relief and permanently barring enforcement of the unconstitutional provisions. As this Court noted, "[f]or several years, registrants have been

forced to comply with unconstitutional provisions of SORA." *Id.* at PgID.1804. The Court should, at long last, enter a final judgment that will protect them.

The necessity of a final judgment against the old SORA is not simply an academic issue. The continued enforcement of these provisions will consume law enforcement resources while also imposing serious consequences for registrants. As shown in *Does I,* 12,460 registrants were convicted of SORA compliance violations in the eight-year period from 2006 to 2013. *Does #1-5 v. Snyder*, No. 12-11194 (E.D. Mich.), Michigan State Police SORA Conviction Data, ECF 91-22, PgID.4906–08. Of those, 4,832 were convicted of felonies and 7,628 were convicted of misdemeanors. *Id.* More recent data confirms that prosecutions have not significantly abated even during the pendency of this case. In 2018, there were 664 convictions for SORA compliance violations with only 253 being misdemeanors; these numbers remained virtually the same in 2019 when there were 648 convictions for SORA compliance violations with only 243 being misdemeanors.[4]

As was true after the Sixth Circuit's 2016 decision in *Does I*, and after this Court's 2020 *Does II* Opinion, ECF 84, there is no guarantee that local prosecutors will stop filing charges, seeking convictions or filing appeals in these SORA

[4] *See* Mich. Dep't of Corr., 2018 Statistical Report, at A-12 (Nov. 14, 2019), https://perma.cc/S75T-TY6E; Mich. Dep't of Corr., 2019 Statistical Report, at A-12 (Feb. 9, 2021), https://perma.cc/QZ5B-PH5N.

compliance cases. *See* Ex. A, Mannikko Decl. (describing prosecution of pre-2011 registrant despite *Does I* and *II* decisions); Ex. B, Ryan Decl. (same); Farkas Decl., ECF 62-6 (describing prosecutions retroactively applying SORA 2011 amendments to pre-2011 registrants); Ex. C, White Decl. (describing prosecution during pandemic despite *Does II* interim order); Ex. D, Poxson Decl. (describing SORA enforcement despite *Does I* and *II* decisions). VanGelderen Decl., ECF 62-7 (describing prosecution of pre-2011 registrant for violating exclusion zones). But at least this Court will have done all it can to bar enforcement. The judgment and permanent injunction will be a powerful tool in the hands of criminal defense attorneys around the state, and the notice provisions will advise law enforcement, prosecutors, and all 44,000 registrants that these illegal prosecutions must cease.

B. Absent Entry of Judgment, the Class Members Will Remain Criminally Liable under the Old SORA for Enforcement Violations Barred by this Court's 4/6/20 Interim Order.

When COVID hit, this Court entered a preliminary injunction barring enforcement of SORA's registration, verification, school zone, and fee provisions from February 14, 2020, "until the current crisis has ended, and thereafter until registrants are notified of what duties they have under SORA going forward." Interim Order, ECF 91, PgID.1850 (4/6/20). If the Court were to dismiss the case, as Defendants suggest, registrants who relied on that injunction would become criminally liable for

failing to comply with enjoined provisions of SORA. Absent a permanent injunction, the primary class will be criminally liable for *any* violation temporarily protected by the interim order.[5] Defendants do not explain how, if the new SORA is retroactive, registrants would be protected from prosecution for SORA violations during the pandemic. Nor do Defendants explain how it would be constitutional to impose criminal liability retroactively for violating SORA provisions that were enjoined.

For example, a registrant who was abiding by the governor's stay-at-home orders and decided not to leave his home to report that he had lost his job (which must be reported within three day, *see* M.C.L. §28.725(1)(b) (2020); §28.725(1)(b) amended (2021)) could be prosecuted. This is no hypothetical. Class counsel regularly hear from registrants and their attorneys that prosecutors are charging SORA violations even though this Court's interim order remains in effect. *See* Ex. C, White Decl.; Ex. D, Poxson Decl. While a registrant charged today in violation of the interim order can point to that order as a defense, unless the same relief is incorporated into a final judgment, the registrant could go to prison once the interim order lapses.

Defendants fail to address in their response brief why the relief granted in the interim order should not be incorporated into a permanent injunction. To be clear,

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[5] The Court's interim order covers far more of SORA than the provisions held to violate the Due Process Clause or the First Amendment, but it also covers a much shorter period of time: from Feb. 14, 2020 until the Court lifts the suspension.

Plaintiffs are not suggesting that SORA enforcement be indefinitely suspended, but rather that the final judgment provide—as the interim order does—that violations of SORA's registration, verification, school zone, and fee provisions occurring from February 14, 2020, "until registrants are notified of what duties they have under SORA going forward" cannot be enforced. Without a permanent injunction and notice to the class, registrants and their defense counsel may not know that a defense to such charges exists. Plaintiffs' counsel are regularly contacted by registrants (or their lawyers) who have been told over the past several months that they must register or verify or stay out of school zones or pay fees, despite the fact that this Court's interim order says the opposite and remains in effect.

The only way to ensure registrants are protected from unconstitutional prosecutions is to enter a final judgment incorporating the interim order, setting forth which provisions of the old SORA are unconstitutional, and enjoining their enforcement. Such limited relief will ensure that 44,000 people are not left in legal limbo for the next six years, nor prosecuted under SORA provisions that were enjoined.

IV. THIS COURT NEED NOT AWAIT A DECISION IN *BETTS*, NOR SHOULD IT DECIDE UNNECESSARY PRECLUSION QUESTIONS

This Court granted summary judgment to Plaintiffs over a year ago, yet Defendants urge the Court to further delay final judgment, apparently in the hope that the Michigan Supreme Court might say something in *People v. Betts* (No. 148981)

that differs from what the Sixth Circuit and this Court have decided. On questions of federal constitutional law—like whether SORA violates the Ex Post Facto Clause—this Court is of course bound by *Does I*, regardless of what the Michigan Supreme Court decides. On questions of state law where the Michigan Supreme Court's decisions are controlling, this Court has already explained that Defendants' argument for delay "misses the mark because the issues in *Betts* are not identical to the . . . questions of law in this case." Op., ECF 84, PgID.1791. The Michigan Supreme Court "must first address threshold issues of state constitutional law which the Sixth Circuit has already answered at the federal level . . . and may come to different conclusions based on Michigan's constitution . . . [or] may reach a narrower decision" that presents different severability questions than those presented here. *Id.* at PgID 1791–92. Indeed, at this point there is no telling if the Michigan Supreme Court will even decide *Betts*. Given the passage of SORA 2021, the court might conclude that leave was improvidently granted and instead await a case in which the constitutionality of the new statute is presented. And even if the Michigan Supreme Court decides *Betts*, and its decision as to state-law issues runs counter to this Court's determinations, Defendants can move for relief from judgment under Fed. R. Civ. P. 60(b), as this Court previously noted. Op., ECF 84, PgID.1792 n.6.

Defendants, while professing that state courts should decide state law issues,

simultaneously urge this Court *to decide* preclusion issues pending before the Michigan Supreme Court by opining on how the final class-wide judgment here will affect the pending state court prosecutions of two specific class members, Paul Betts and David Snyder. The Court need not decide those issues—which are complex and essentially unbriefed—in order to enter a final class-wide judgment. The Michigan Supreme Court is perfectly capable of deciding for itself whether, and if so how, this Court's class-wide decisions on the ex post facto claim impact the two individual cases before it. Indeed, it would be inappropriate for this Court to tell the Michigan Supreme Court how to decide the preclusion issues, which present a tangled interplay of state and federal law.

Plaintiffs have previously briefed why it is up to the Michigan Supreme Court to decide how *Does I* and *Does II* impact *Betts*, and Plaintiffs will not repeat all those arguments here. *See* Reply Br. on Mot. for Final J., ECF 103, PgID 2087–2092. But two points do need to be made.

First, Defendants again misrepresent Plaintiffs' position as being that *Does II* bars the Michigan Supreme Court from ruling in *Betts*. *See* Defs' Opp'n to Am. Mot. for Entry of J., ECF 110, PgID.2188. Not so. The Michigan Supreme Court is the final arbiter of whether SORA violates the Michigan Constitution's Ex Post Facto Clause, and it is also entitled to make its own decisions about what the federal Constitution requires. *See Abela v. General Motors Corp.*, 677 N.W.2d 325, 327

(Mich. 2004). But before the Michigan Supreme Court can reach the *federal* constitutional question, it must decide several threshold questions: (1) is the State of Michigan barred under collateral estoppel from relitigating whether the old SORA violates the federal Ex Post Facto Clause where the state litigated and lost that issue in *Does I*, and (2) is the State barred from litigating the federal ex post facto issue in an individual case where the exact same issue has been certified for class treatment in *Does II*? *See* ACLU *Betts* Amicus Br., ECF 101-3, PgID.2005–16; ACLU Suppl. *Betts* Amicus Br., ECF 101-2, PgID.1975–77, 1979–81. But this Court need not decide these questions in order to enter a final judgment, and should let the Michigan Supreme Court make its own decision as to the effect of the judgment here on the cases pending there.

Second, Defendants' brief incorrectly focuses on when the judgment in *Does II* will become final versus when the judgment in *Betts* will be final. But what is relevant in assessing the preclusive effect of *Does II* turns on a different question, namely when the class was certified. This means that whether *Does II* has preclusive effect will vary from case to case,[6] depending on the timing of the prosecution and

[6] If this Court were to opine on how *Does II* impacts Mr. Betts, would it then also have to opine on how *Does II* would impact the criminal defendants described in the Manniko, Ryan, White, Farkas, and VanGelderen Declarations? *See* Exs. A–C; ECF 62-6, 62-7. Because the chronology of individual criminal prosecutions matters to

any appeals relative to when the *Does II* class was certified, which was on September 11, 2018. *See* Class Certification Order, ECF 46. And nothing that this Court does or does not include in its final judgment in *Does II* will affect the preclusion analysis for *Does I*. (The preclusive effect of *Does I* on any specific prosecution, including the ones involved in *Betts*, turns on the timing of that prosecution and the direct appeals, relative to when the *Does I* judgment became final.) Moreover, Defendants also get the law on finality of judgments wrong.[7]

Finally, should the Court wish to do so for comity reasons, it can simply note that the state courts, including the Michigan Supreme Court in *Betts*, will need to resolve any preclusion issues that might arise. The Court could also note that a motion to modify the judgment can be filed under Fed. R. Civ. P. 60(b) should a

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the analysis, *Does II* might have preclusive effect in one case and not in another. These issues will have to be resolved case-by-case in state court.

[7] Defendants rely on federal law to argue that the *Betts* is already final, despite the pending appeal, but as more fully explained in the ACLU Suppl. *Betts* Amicus Br., ECF 101-2, PgID.1979–80, state law determines when a state court judgment is final, *see Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 928 (9th Cir. 2006), and Michigan law is clear that state court decisions are final only "when all appeals have been exhausted or when the time available for an appeal has passed," *Leahy v. Orion Twp.*, 711 N.W.2d 438, 441 (Mich. Ct. App. 2006). Defendants, relying on a federal bankruptcy case, "contend that they offer the better reading of Michigan law." Defs' Opp'n, ECF 110, PgID.2187. But if any Court is going to parse Michigan law and overturn *Leahy*, then that should be the Michigan Supreme Court, not this Court.

decision in *Betts* reach a contrary ruling on severability. *See* Pls.' Reply Br., ECF 103, PgID.2091 n.14 (proposing language).

V. NOTICE OF THE JUDGMENT CAN BE GIVEN AT THE SAME TIME AS NOTICE OF THE NEW STATUTE.

As to notice, Plaintiffs agree that only a single mailing is needed, to save costs. *See* 2d Am. Proposed J., ECF 107-1, ¶ 5. But that single mailing will need to contain two distinct notices. First, under SORA 2021, the state must notify registrants (who are not in a state prison) what their duties will be under the new law. *See* M.C.L. § 28.725a(1) (2021). Second, the parties must notify all registrants (including those incarcerated), state and local law enforcement, and prosecutors, of the outcome of the *Does II* case.[8] In addition, the second notice must also instruct the same audience that compliance violations of the parts of SORA suspended by this Court's interim order cannot be prosecuted for offenses occurring during the period of the suspension. *See* ECF 91, Interim Order (4/6/20).

Defendants argue that notice should be delayed until after a decision in *Betts*,

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[8] At this point information is key to making sure that people are not prosecuted or punished for having violated unconstitutional parts of SORA. The only way to do that is to send individual notice letting registrants know (1) that post-2011 members of the primary class cannot be prosecuted for violations of the SORA provisions this Court held to be unconstitutional; (2) that ex post facto (pre-2011) subclass members cannot be prosecuted for *any* old-SORA violations; and (3) that under this Court's interim order, the primary class (all registrants) cannot be prosecuted for violations of the parts of SORA this Court suspended from 2/14/20 until the suspension ends.

which could impact registrants' obligations. Because the new statute requires notice of its terms, M.C.L. § 28.725a(1) (2021), and because this Court's interim order requires individual notice to registrants before enforcement can resume, ECF 91, PgID.1850, and because registrants must know what their obligations are in order to be criminally responsible for compliance, *see Does #1-5 v. Snyder*, 101 F. Supp. 3d 672, 693–94 (E.D. Mich. 2015), waiting to send notice will delay the start date for enforcement of the new SORA. If the state wants to delay the new law's implementation, that is a choice it can make, but that choice should not control when this Court enters a final judgment about the old law.[9]

In any event, Plaintiffs' proposed judgment does not mandate a specific time frame for notice, but simply provides that the parties discuss the content of the notice and then submit their joint or respective proposed processes for notice and joint proposed notices. *See* 2d Am. Proposed J., ECF 107-1, ¶ 5. If Defendants want more than the proposed 14 days to negotiate over notice, Plaintiffs have no objection, as long as such discussions occur after the entry of judgment.

CONCLUSION

The Court should enter final judgment as set out in Plaintiffs' Second Amended Proposed Judgment, ECF 107-1.

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[9] If Defendants send notice of the new statute now, they may *still* have to send a second notice if or when *Betts* is decided, depending how that case is decided.

Respectfully submitted,

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Attorneys for Plaintiffs

Dated: March 22, 2021

CERTIFICATE OF SERVICE

On March 22, 2021, the plaintiffs filed the above brief 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. Bruce Mannikko Declaration

B. John Ryan Declaration

C. Anna White Declaration

D. Timothy Poxson Declaration

Exhibit A

Bruce Mannikko Declaration

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

DECLARATION OF BRUCE K. MANNIKKO

1. I am a public defender in Bay County, Michigan. I have been assigned to represent a client in a pending case related to SORA compliance.

2. The charge is for failing to report a change of address under MCL 28.725(1)(a); the warrant was issued in 2019.

3. The client's underlying sex offense occurred in February 2004, long before the 2011 SORA amendments, which were held to be unconstitutional (as applied retroactively) in the *Does I* and *Does II* cases.

4. My understanding is that in *Does I* the Sixth Circuit held that the 2011 SORA amendments are unconstitutional and cannot be applied retroactively in their

[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.

entirety (which is why the Sixth Circuit held the plaintiffs' remaining claims in that case to be moot).

5. My understanding is that in *Does II* this Court adopted the holding of *Does I* and applied it to all members of the ex post facto subclass, that is, to those whose underlying sex offense pre-dates the effective date of the 2011 SORA amendments.

6. My client is a member of the ex post facto subclass.

7. My understanding is that the district court also held that the unconstitutional parts of SORA cannot be severed from the constitutional parts, and that no previous version of SORA can be revived. Accordingly, I believe that no version of SORA exists under which my client can be prosecuted.

8. I believe that the prosecution of my client is therefore illegal. But absent a declaratory judgment and a permanent injunction barring enforcement of the 2011 SORA amendments, I cannot cite to any final judgment or permanent order showing that *Does I* has been applied to my client in *Does II*, or showing that prosecution of a post-2011 SORA violation for a pre-2011 sex offense is unenforceable or otherwise barred, as I believe it to be.

9. This is not an isolated case, and without a clear finding of what the federal court requires as to the various *Does II* classes, I am certain that other criminal defendants in Bay County will be prosecuted for similar SORA violations that would otherwise be barred.

Pursuant to 28 U.S.C. § 1746, I state under penalty of perjury that the above statements are true and correct to the best of my knowledge, information, and belief.

Dated: March 19, 2021

s/Bruce K. Mannikko
Bruce K. Mannikko (P47238)
Bay County Public Defender

Exhibit B

John Ryan Declaration

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

DECLARATION OF JOHN RYAN

1. I am an assistant public defender in Shiawassee County, Michigan. I have a client who has been charged with two SORA compliance violations (for failure to report and failure to report a change of address). The offenses were alleged to have occurred between 2017 and 2020.

2. The client's underlying sex offense occurred in 2008, so he is a member of the *Does II* ex post facto subclass.

3. I don't understand how my client can be charged with SORA compliance violations given the Sixth Circuit's holding in *Does I* (that the 2011 SORA amendments are unconstitutional and cannot be applied retroactively in their entirety), and given this Court's holding in *Does II* (that the unconstitutional parts of SORA cannot be

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severed from the constitutional parts, and that no previous version of SORA can be revived).

4. I reached out to the plaintiffs' counsel in the *Does* cases because it looks to me like no version of SORA existed as to my client at the time when he is said to have committed the alleged offenses, which would mean that the prosecutions are illegal.

5. Without a declaratory judgment and a permanent injunction barring enforcement of the 2011 SORA amendments, however, I cannot cite to any final judgment or permanent order showing that *Does I* has been applied to my client in *Does II*, or showing that prosecution of a post-2011 SORA violation for a pre-2011 sex offense is unenforceable or otherwise barred.

6. In my experience these are hardly isolated charges, and without a clear ruling as to what *Does II* prohibits, I am certain that other criminal defendants in Shiawassee County will be prosecuted for similar SORA violations that should be prohibited.

Pursuant to 28 U.S.C. § 1746, I state under penalty of perjury that the above statements are true and correct to the best of my knowledge, information, and belief.

Dated: March 20, 2021

s/ John J. Ryan
John J. Ryan (P84120)
Assistant Public Defender
Shiawassee County, Michigan

Exhibit C

Anna White Declaration

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

DECLARATION OF ANNA C. WHITE

1. I'm an assistant public defender with the Ottawa County Office of the Public Defender.

2. I have a client who was charged with a SORA violation on November 11, 2020, for a failure to register violation that allegedly occurred on October 6, 2020.

3. This charge was brought despite the fact that an operative class-wide injunction was entered in *Does II* suspending enforcement of major portions of SORA during the pandemic, including routine registration violations like that charged in my case. The interim order remains in effect.

4. I am planning to seek dismissal of the criminal charges based on the interim order in *Does II*.

[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.

5. If the interim order is not incorporated into a final order in *Does II*, I fear that my client could face criminal liability, including jail or prison, because the prosecutor would argue that the interim order no longer controls.

6. In other words, I am concerned that absent a final judgment in *Does II*, my client could be convicted of violating a statute whose enforcement was enjoined at the time of the alleged violation.

Pursuant to 28 U.S.C. § 1746, I state under penalty of perjury that the above statements are true and correct to the best of my knowledge, information, and belief.

Dated: March 22, 2021

s/ Anna C. White
Anna C. White (P76154)
Assistant Public Defender
Ottawa County, Michigan
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616-393-4438

Exhibit D

Timothy Poxson Declaration

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

DECLARATION OF TIMOTHY POXSON

1. I am a volunteer for the ACLU of Michigan. I have worked with the ACLU on SORA issues since 09/2010. One of my major responsibilities as the SORA specialist is to be the point person for communication with the 44,000 members of the plaintiff class in the *Does II* litigation.

2. Over the past year or so I have been getting about 40 emails a week, and phone calls range from 3 to 5 a day, with the average being probably a little over 3.

3. Despite the entry of an interim order suspending enforcement of parts of SORA for the duration of the pandemic, I have heard from people all around the state that they are being told they must come in to register or fulfill other requirements (like school zones, email IDs, or having to report even when they are too sick to do so or have COVID-related transportation issues), or they will risk prosecution.

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[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.

4. While registrants report that it is mainly local police and county sheriff's departments that are sending this message, on occasion I hear that a state police post has also made similar statements to registrants. A handful of people have reported that their county prosecutor's office told them they would be prosecuted if they did not go and register or take other compliance measures.

5. Most of the people who contact me on this issue do not know what their status is as far as registering or complying with other parts of SORA during the pandemic.

6. Most of the people I get phone calls and emails from on this issue are pre-2011 ex post facto class members. My understanding is that the old SORA was held to be null and void as to those registrants, so I have trouble explaining to them how they can be prosecuted for failing to do something under a law that does not apply to them (and at a time when much of that law is also suspended).

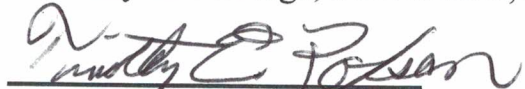
7. Both the pre-2011 and post-2011 people I talk to are confused about the holdings and the effects of *Does II* on their SORA status, and almost no one I talk to knows what will be required under the new SORA 2021.

8. My overall impression is that law enforcement and prosecutors are continuing to enforce SORA, or threatening to do so, around the state, despite the decision of the Sixth Circuit in *Does I* and this Court's interim order in *Does II*.

9. Occasionally I get calls or emails from criminal defense attorneys about SORA. Typically they ask very pointed questions going to SORA issues that affect a specific pending case. They, too, are unaware of or confused about what the law requires and/or the effects of *Does II* on what can or cannot be prosecuted.

Pursuant to 28 U.S.C. § 1746, I state under penalty of perjury that the above statements are true and correct to the best of my knowledge, information, and belief.

Dated: March 22, 2021



Timothy E. Poxson ACLU-Michigan Intern