No. 19-1774

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ANGEL LUIS THOMAS, Sr.,

Appellant,

v.

Col. TYREE C. BLOCKER, et al.,

Appellees.

On Appeal from the Order of March 20, 2019, of the
United States District Court for the Middle District of Pennsylvania
denying a Preliminary Injunction

REPLY BRIEF FOR APPELLANT

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I. SUMMARY OF REPLY

On all four issues presented in this appeal, Colonel Blocker and the other Appellees concede the correctness of the positions argued by Mr. Thomas, the Appellant. Explicitly, they concede that Pennsylvania law exempts Thomas from registering as a sex offender. Implicitly, they concede Thomas's positions on the federal statute as well, by declining to challenge them. This reveals the underlying conundrum here: *the state chose not to implement the federal statute.* The Brief for Appellees labors to conceal what is obvious. It urges this Court to rewrite state law, misconstrue the federal statute, and exceed binding precedent. Most troubling among its many departures from facts of record is its assertion – repeated six times – that Thomas's counsel "accused" the district judge of improprieties. Nothing remotely resembling that can be found in the record. These distractions bespeak the desperation of Appellees' counsel. Though they tried to concoct some reason not to vacate the order, they have come up empty-handed.

II. ARGUMENT IN REPLY

A. Pennsylvania's sex-offender registration law, which exempts Thomas, is not "absurd" as Appellees contend.

No Pennsylvania statute, whether current or superseded, has ever required Thomas to register as a sex offender. But, Appellees point to Subchapter I of Chapter 42 of the Pennsylvania Consolidated Statutes. *See* Br. at 19-23. They contend that one of its sections is absurd on its face and needs to be, in effect, rewritten by this Court. *See id.* Section 9799.52 has two subsections defining the "scope" of Subchapter I. The first subsection exempts Thomas because his crime was not "on or after April 22, 1996." The second subsection also exempts Thomas, who was not

> required to register with the Pennsylvania State Police under a former sexual offender registration law of this Commonwealth on or after April 22, 1996, but before December 20, 2012.

42 Pa.C.S. § 9799.52. Thomas was in prison throughout that period. The former law was "Megan's Law II." Br. at 20. It did not require registration during incarceration. It provided:

> Offenders and sexually violent predators shall be required to register all current residences or intended residences with the Pennsylvania State Police *upon release from incarceration,* upon parole from a State or county correctional institution or upon the commencement of a sentence of intermediate punishment or probation.

42 Pa.C.S. § 9795.2(a)(1) (emphasis added). *See Commonwealth. v. Muniz*,

164 A.3d 1189, 1197 (Pa. 2017), *cert. denied sub nom. Pennsylvania v. Muniz*, 138 S. Ct. 925 (2018) (interpreting Megan's Law II).

The Commonwealth Court recently confirmed the plain meaning of these statutes in the case of another former prisoner, Raymond Smolsky, who also sued Colonel Blocker over a wrongful listing:

> Mr. Smolsky was not "required to register with the Pennsylvania State Police under a former sexual offender registration law of this Commonwealth on or after April 22, 1996, but before December 20, 2012." 42 Pa. C.S. § 9799.52(2). A convicted sex offender's registration obligation *does not begin until he or she is released from incarceration*. *See* 42 Pa. C.S. § 9799.15 (b)(1)(i)(A) and (B) (stating that a sex offender's period of registration "shall commence upon ... release from incarceration in a State or county correctional facility" or upon "parole or a sentence of probation"). It is undisputed that Mr. Smolsky was released on parole in April 2017. Thus, even if Mr. Smolsky had been required to register under a prior version of SORNA, he would not have been required to register between April 22, 1996 and December 20, 2012 because he was still incarcerated during that period, *as Mr. Blocker plainly acknowledges*. *See* Mr. Blocker's Resp. to Suppl. Br. at 1 (stating that Mr. Smolsky's "obligation to register did not commence until his release on parole").

Smolsky v. Blocker, 254 M.D. 2018, 2019 WL 2400283, at *3 (Pa.Cmwlth. May 20, 2019) (emphasis added). Blocker's counsel in *Smolsky* include some of his counsel in the case at bar. They can hardly explain away the *Smolsky* ruling as inadequately briefed, which they seem to try to do in their Brief for Appellees here. *See* Br. at 21 n.14. Moreover, in yet another state appellate case, they argued that a prisoner lacked standing to challenge the registry

statute because he was still incarcerated, hence not yet obliged to register. A panel of the Commonwealth Court remarked:

> PSP [Pennsylvania State Police] argues that the Petition should be dismissed because it is not yet ripe for adjudication as Petitioner has no obligation to register under SORNA until he is paroled. . . .

Lusik v. Pennsylvania State Police, No. 405 M.D. 2017, 2018 WL 6165343, at *1 (Pa.Cmwlth. Nov. 26, 2018); *see also id.* at *2.

In Mr. Thomas's case, the same counsel representing the same parties have abruptly changed their minds. They argue the exact opposite position to this Court. *See* Br. at 20-23 (contending that Thomas was required to register while he was incarcerated, after all). To explain this about-face, they invite the Court to follow them in an elaborate thought experiment meant to show the "absurdity" of the statute if taken at its face value. *See* Br. at 22-23. This is supposed to serve "the stated purpose of Subchapter I." *See* Br. at 23.

Such speculation is not the way to discern the intent of the statute. A federal appellate court can assume that the state legislators knew what their own purpose was. If the lawmakers had wanted the scope of the statute to encompass offenders whose crimes occurred in 1991, like Thomas, then they could have inserted an earlier date into Subsection 1 of Section 9799.52. But, the legislators chose to exempt offenses prior to 1996. It is not for a federal

court to deem that choice "absurd" or inadvertent, much less to contrive a way to circumvent it.

Counsel for Appellees in this case were correct to argue in *Smolsky* and in *Lusik* that Pennsylvania did not require incarcerated offenders to register. The Commonwealth Court was correct to endorse that position in both of those cases. The same result is correct here: Subsection (2) of Section 9799.52 excludes Thomas from the scope of the registration requirement. Subsection (1) also excludes Thomas, undisputedly. *See* Br. for Appellees at 19 ("Thomas does not fall within the first definition."). Therefore, Pennsylvania's sex-offender registration statute – the state SORNA – does not apply to Thomas.

B. It is uncontested that the district court acted without regard to the legal impediments set forth in Thomas's briefing below.

Federal SORNA has no enforcement mechanism of its own. It requires state legislatures to enact certain specific registration regimes if the states elect to accept federal funding. Pennsylvania did not. As a result, legal authority was entirely lacking to compel Mr. Thomas to register. Although Thomas diligently briefed this problem in the district court, it was disregarded there.

Appellees are mistaken to deny that procedural anomalies occurred in the district court and to impute improper conduct to Thomas's counsel. *See*

Br. for Appellees at 6-7, 16, 40-42. The issues on appeal here were before the district court, yet they come to this honorable Court without having undergone judicial review below. Most salient among them are the question of the proper statutory construction for federal SORNA and the question of whether to extend circuit precedent pertaining to that statute. These questions involve "issues of first impression," as Appellant proposes and Appellees do not contest. *See* Br. for Appellant at 7. The issues include:

> whether federal SORNA imposes registration requirements on an individual; whether the statute applies to an individual who remains within his home jurisdiction; and whether it allows state employees to compel an individual to register as a sex offender when the applicable state SORNA does not require him to do so.

Id. at 7; *see also id.* at 1-3. The Order under appeal here is a denial of preliminary injunctive relief based on a finding that Thomas was unlikely to prevail in the underlying case. J.A. 35 (Report and Recommendation); J.A. 13 (Order adopting R&R). That finding unexpectedly relied on federal statutory and case law, which had not yet been briefed.

1. The magistrate judge based her recommendation on the federal statute, which the parties had not yet briefed.

Thomas, in applying for injunctive relief, addressed Pennsylvania's sex-offender registration statute. When the parties briefed the injunction request, they naturally focused their arguments on state SORNA, also called "Act 10." *See* briefs, ECF Nos. 32, 35, 37. The state SORNA statutes are

convoluted in their current version and complex in their history, as explained above and in the Brief for Appellant. The magistrate judge devoted a few lines to state SORNA in her R&R. J.A. 25-27. However, she ultimately disregarded it and reasoned that:

> we need not decide whether Act 10 [state SORNA] applies to Thomas because regardless of whether Act 10 applies to Thomas, Thomas was required to register as a sex offender under [federal] SORNA.

J.A. 13. The R&R went on to interpret the requirements of the federal sex-offender registration statutes. J.A. 29-36. The recommendation to deny injunctive relief was based on the magistrate judge's unbriefed interpretation of federal SORNA. J.A. 28. Thomas's counsel, when setting forth specific objections to the R&R, duly cited the R&R to show that its

> interpretation of the federal statute issued *sua sponte* and without briefing by the parties. *See* R&R at 14 n.10. [J.A. 28 n.10]. Statutory construction of federal SORNA is argued here for the first time in this case, as a foundation for potentially lengthy litigation of constitutional questions.

Pl.'s Objections to R&R at 1 n.1. ECF No. 46. Because the magistrate judge elected to analyze the prospects of the parties under a federal statute instead of the state statute, the magistrate judge had no fund of adversarial briefing upon which to draw.[1]

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1. Thomas's initial supporting brief had commented on the federal statute in passing: "Federal SORNA and its enabling regulations are addressed

The parties supplied that briefing later, in the context of objections to the R&R. *See* ECF Nos. 46, 53, 57. The facts, precedents, and arguments in those papers were not before the magistrate judge, obviously, because they were filed subsequently and in response to her R&R. They should have been considered by the district court in a review *de novo* of the findings of the magistrate judge.[2] 28 U.S.C. § 636(b)(1).

2. Decisive questions of statutory construction and of the reach of circuit precedent have yet to undergo judicial consideration.

The district court did not conduct any *de novo* review. The district judge remained unaware that the parties' discussions of the *federal* statute and precedents had not been before the magistrate judge, and that they had yet

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to the state legislature, which has the option of implementing them in whole, in part, or not at all. *They are irrelevant here.*" Br. at 12 (emphasis added). ECF No. 32. That fact was uncontested by Appellees, defendants below. They did not address the federal statute in their opposition brief. ECF No. 35. Hence, Thomas did not address it in his reply brief. ECF No. 37.

2. Most importantly, the district court should have considered the problems of statutory construction for federal SORNA and the limitation of Third Circuit precedent to cases where the unregistered sex offender had crossed state lines, unlike Thomas. Those issues were before the district court for *de novo* review. *See* Pl.'s Objections to R&R at 5-13 (statutory construction); *id.* at 4 n.3 and 13 (limits of circuit precedent). ECF No. 46. *See also* Reply to Opp'n to Pl.'s Objections at 2 (limits of circuit precedent). ECF No. 57. *See also* Br. in Supp. of Mot. for Reconsideration at 3-8 (limits of circuit precedent); *id.* at 8-10 (statutory construction). ECF No. 57.

to receive any judicial consideration or review whatsoever. As the district judge later explained during a conference in chambers:

> I am not going to issue a 20- or 25-page memorandum opinion and order that *essentially regurgitates everything that [Magistrate] Judge Schwab has done* in a 20- or 25-page report and recommendation. It's not necessary. That defeats the purpose of having the magistrate judges be co-assigned to the case to begin with. . . . In my view, Judge Schwab did a good job. She did a very thorough job in this.

J.A. 137-38 (Transcript of May 6, 2019 Conference) (emphasis added). These comments indicate that the district court mistakenly believed the R&R had already reviewed the parties' positions on the federal statute, which was impossible given that the relevant briefs were those submitted to the district judge in the wake of the R&R.

The district judge also persisted in his mistaken belief that the statutory basis for the magistrate judge's recommendation had been *state* SORNA, not *federal* SORNA. *See, e.g.*, Order ¶ 4 (show-cause order referencing state appellate litigation). J.A. 14. In his conference with the parties, the district judge repeatedly adverted to ongoing litigation of the Pennsylvania statute when counsel attempted to redirect discussion to the federal statute. For example, the district judge remarked:

> I tried to work my way through these issues. And it seems to me the principal issue that I would have to be concerned about, and I would also have to think that my brethren, my colleagues, on the Court of Appeals would be concerned about is what the Pennsylvania

> Supreme Court is going to do in *Commonwealth against Lacombe*.[3]
>
> We have looked into, to the extent that we can, the docket of the *Lacombe* case. . . . But it looks, by our reading of this, as if the reply briefs in *Lacombe* were just submitted to the Pennsylvania Supreme Court about ten days ago. So I think that matter is not even – it's probably ripe at this point for an oral argument, but it doesn't look like the Supreme Court has acted on it. . . .
>
> THE COURT: Ms. Sawicki, I know it's not your case, but are you familiar with the posture of *Lacombe* at the moment?
>
> MS. SAWICKI: Your Honor, you may be overlooking the fact that we did respond in your order to show cause that *Lacombe* is absolutely irrelevant to this case. That's our position.[4]
>
> THE COURT: I understand. We disagree with that. But I think it's significant. And my prediction is the Court of Appeals will think that it is. No. No. I'm not dismissing what you're saying. I understand. We're just in disagreement with one another. But I just wonder if you know what the position of *Lacombe* is.

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3. *Lacombe* is one of many cases in which the state SORNA statute is undergoing challenges in Pennsylvania appellate courts. Those challenges are irrelevant here, because the state SORNA does not apply to Thomas. *See supra* Section A. *See also* Br. for Appellant at 4, 32-33. *See also* Reply Br. in Supp. of 2d. Appl. for TRO at 6-8. ECF No. 37. Pennsylvania's appellate courts "recognize that our Supreme Court recently granted review to determine the issue of whether Acts 10 and 29 are constitutional. *See Commonwealth v. Lacombe*, 35 MAP 2018 (Pa. 2018)." *Commonwealth v. Wood*, 208 A.3d 131, 140 (Pa.Super. 2019). The date of the offense in *Lacombe* was February 2, 1997, which is within the period covered by Act 10.

4. The show-cause order reveals the district court's mistaken belief that *state* SORNA was the controlling statute. J.A. 14. Thomas replied as ordered and argued, once again: "The constitutional challenges to Act 10 are irrelevant, because – constitutional or not – the statute on its face neither requires registration for individuals like the plaintiffs nor authorizes state actors to compel them to register as a condition for release from prison." Response to Order to Show Cause at 4. ECF No. 65.

> MS. SAWICKI: There are hundreds of little *Lacombe*s coming up under *Lacombe*. That's the flurry of confusion that opposing counsel have thrown at my client that I'm asking the Court please, swat away those butterflies and *look at this case*. I understand you're saying we disagree. That's fine. But I think that it's very wrong to hold Mr. Thomas's urgent need in abeyance and to allow the Office of The Attorney General to cloud the waters with cases that are about the law as it stands, the current [state] SORNA law, which *doesn't even apply to Mr. Thomas or my other two clients* [in this case, Gregory and Morris].
>
> THE COURT: I think we're going to have to agree to disagree about that. I think intellectually that case, it may actually be dispositive of *Thomas against Blocker*.

J.A. 136-38 (Transcript) (emphasis added). Counsel protested that a pending federal decision could be dispositive, but *Lacombe* could not be so. J.A. 140.

The district judge responded with a "kindergarten" lesson for counsel. J.A. 141. Counsel then tried to reassure the district judge that she had thought he would write "a very good opinion that we can use as our basis to go to the Third Circuit." J.A. 142. The district judge reiterated his view that the R&R had already addressed all relevant issues: "I think you really had that with [Magistrate] Judge Schwab. I mean, Judge Schwab did a good job, in my view." J.A. 142. Counsel then explained why that view was problematic:

> [T]he April 4th order tends to confirm the impression that there was no *de novo* determination, because the April 4th order points to the fact that Judge Schwab's ruling was so good, it didn't need to be redone. That's exactly what a *de novo* review does. . . .

> But to refer to the strength of Judge Schwab's initial analysis as the reason why a *de novo* review is not given is *ipso facto* against the magistrate judge law. That's in my appeal.
>
> THE COURT: That's fine. I don't agree with that.

J.A. 143. *See also* J.A. 124 (April 4th Order relying on "the thorough and well-reasoned" R&R); J.A. 143 (counsel suggesting that April 4th Order reads content into her brief that is not really there).[5]

Hence, the district court remained unaware that the crux of the matter before it was the impotence of federal SORNA to compel registration when a state has declined to enact the legislation prescribed by federal SORNA.

C. Appellees concede that circuit precedent reaches only interstate travel by unregistered offenders and that principles of statutory construction apply to federal SORNA.

The Brief for Appellees concedes the major premises of Thomas's arguments with respect to statutory interpretation and circuit precedent.

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5. The April 4 Order plainly misquotes the brief. *See* Br. in Supp. of Mot. for Reconsideration at 3-10 (showing errors for reconsideration) and at 10-11 (showing omission of requisite review *de novo*). ECF No. 67. Those misreadings, together with prior *ad hominem* criticism of a female attorney, "alarmed" Thomas's counsel and prompted her request for transcription of an upcoming status conference. J.A. 130, 143,148-50, and 154 (counsel responding to court's request that she explain letter of April 5, 2019). *See also* April 5 letter (asking that conference be transcribed). ECF No. 73.

1. <u>Circuit precedent should not be extended to prophylactically cover an individual who stays at home.</u>

Appellees agree that Thomas cited the relevant precedential cases: *Muniz*; *United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010); *United States v. Kebodeaux*, 570 U.S. 387 (2013); *United States v. Pendleton*, 636 F.3d 78 (3d Cir. 2011); *United States v. Shenandoah*, 595 F.3d 151 (3d Cir. 2010); *Reynolds v. United States*, 565 U.S. 432 (2012). However, Appellees continue to delete relevant language from their citations, as they did below. *See* Br. for Appellees at 24-26. The district court unfortunately followed them in this, as Thomas shows. Br. for Appellant at 19-21. Below, Thomas had argued:

> No judicial authority holds that federal SORNA can or does require a sex offender to register if he stays within his home state. Truncation of precedent to create the appearance of such a requirement was proposed to this Court by the defendants in their opposition brief here. . . .

Br. in Supp. pf Mot. for Reconsideration at 5. ECF No. 67. Arguing grounds for reconsideration, Thomas quoted extensively from precedential opinion and from his prior briefing.[6] *Id.* at 3-8. The holdings of *Pendleton*,

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6. The tendentious editing was attributed to defendants. However, the district court perceived this as criticism directed at the judge personally. J.A. 122-23 (Order of April 4, 2019); J.A. 144-46, 152-53 (admonishing Thomas's counsel for "inappropriate" and "disrespectful" language). The brief contends that it was error for the court to accept the defendants' edited versions of authorities without consulting them in context. *See* ECF No. 67. The intent was "timely amendment of the Order to cure its errors of law and eliminate the need for appeal to the Third Circuit." Br. at 3 n.2.

Shenandoah, and all other precedents cited by the Appellees pertain to cases where the unregistered sex offender crossed a state border. *Kebodeaux* is "the exception that proves the rule." Br. for Appellant at 21 (observing that jurisdiction arose from underlying federal offense though offender remained within Texas).

Appellees still can identify no precedent holding that federal SORNA imposes a duty to register on an offender who stays at home, like Thomas. They cite three additional cases from other circuits. Br. for Appellees at 25. These, too, pertain to offenders who crossed state lines. Dicta and holdings of those cases are inapposite here. Appellees assert that the magistrate judge "rejected Thomas's argument that SORNA only applies to Thomas once he crosses state borders." Br. at 5-6 (citing J.A. 35). That is just not so. The R&R does not reach the question.

Grasping at straws, Appellees remark that Lancaster County, where Thomas resides, abuts Maryland. Br. at 25. In fact, twenty-nine Pennsylvania counties abut other states. Appellees mock Thomas's sincerity and impute to him an intent to violate the law. *See id.* Their position seems to be that state officers must register Thomas now because, some day, he might take the bus to Maryland but neglect to register before embarking. Such prophylactic measures are inimical to the rule of law. Yet, Appellees offer no other reason

why this court should extend its precedents to cover an individual, like Thomas, who stays in his home state where the state SORNA exempts him.

2. Appellees set forth no reason why the well established principles of statutory interpretation would not apply to federal SORNA.

Colonel Blocker and the other Appellees concede that courts may apply techniques of statutory construction to determine the meaning of a statute. Br. for Appellees at 21-22. Appellees raise no objection to Thomas's parsing of federal SORNA to discern the "statutory scheme" unifying all of its component sections. *See* Br. for Appellant at 9-11; *see also id.* at 16-18 (applying federalism cannon and principle of constitutional avoidance). Appellees merely contend, incorrectly, that sections of federal SORNA are "separate and distinct" statutes because they are codified in different chapters of the United States Code. Br. for Appellees at 26. But, all sections were enacted together on July 27, 2006 as Title I of the Adam Walsh Child Protection and Safety Act, Public Law No. 109-248. All sections advance the same scheme and derive their meaning from it. Yet, in principle, Appellees do not dispute Thomas's argument that the statute should be interpreted in light of legislative intent as expressed in the statutory scheme.

Nevertheless, Appellees appear to reject *Chevron* deference. Thomas argued that "[c]ourts defer to the understanding of the agency that administers a federal statute." Br. for Appellant at 13 (citing *Chevron, U.S.A., Inc. v. Nat.*

Resources Def. Council, Inc., 467 U.S. 837 (1984) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 135 (1944)). For federal SORNA, that is an agency within the Department of Justice. Thomas cited its holdings relative to the situation here, namely, partial noncompliance with federal SORNA by a state that still seeks certification of compliance to receive federal funds. *Id.* at 13-16. Appellees reject that information. Br. for Appellees at 27-28. Apparently, they oppose *Chevron* and *Skidmore* deference as such, without saying why. They put forth no agency interpretations to support the position that they advocate, i.e., that federal SORNA imposes obligations directly on individuals. No federal administrative agency supports that position or operates in any manner that would accord with it.

Every accepted tool of statutory construction leads to the same conclusion. Federal SORNA is addressed to the states. Congress did not intend the statute to impose duties directly on individuals.

D. Appellees cannot cite any statute or regulation that authorizes state employees to enforce federal SORNA.

In his Brief for Appellant, Thomas correctly contends that "[m]onetary incentives are the only way in which the federal government can get state employees to do its bidding" and "[f]ederal SORNA can effect registration only through the various registration regimes that the states and other

localities establish." Br. at 24, 26 (citing authority). Colonel Blocker and the other Appellees decline to challenge those principles.

Nor do they point to any statute or regulation that requires or authorizes a state employee or a state agency in Pennsylvania to involuntarily register an individual whom the state SORNA exempts from registration, like Thomas. On one hand, Appellees acknowledge the federalism principles that Thomas relies on. *Compare* Br. for Appellant at 16-18, 24 *with* Br. for Appellees at 28-31. On the other hand, Appellees try to evade the import of those principles by resorting to a rhetorical trick: equivocation. They pretend that the word "Pennsylvania" refers to every state agency and state employee instead of to the law-making body of the Commonwealth. *See* Br. for Appellees at 28-30. The obligation of Pennsylvania arises from its choice to accept full federal funding. *Id.* at 30; *see also id.* at 15. The obligation falls upon the Commonwealth, and specifically upon its legislature, to enact a state SORNA to implement the federal SORNA. No obligation accrues to any individual or agency directly.

The Commonwealth's choice to accept funding does not circumvent its sovereign lawmaking authority. The state's funding choice does not place any obligation upon private citizens like Thomas, or even upon state employees like Colonel Blocker. An individual may well *sympathize with* federal

SORNA, and he may even *wish that* the Commonwealth had enacted a state SORNA whose reach was co-extensive with that of federal SORNA. But, if the individual takes it upon himself to force someone to register whom the state SORNA exempts, then that individual acts as a vigilante, an outlaw, a person entirely lacking legal authority – even if the vigilante is a Commonwealth employee.

Appellees project their own equivocation back onto Thomas when they inaccurately assert: "Thomas argues that . . . [federal] SORNA requirements violate Tenth Amendment anti-commandeering principles." *See* Br. for Appellees at 29; *see also id.* at 5. On the contrary, Thomas asserts a fact that Appellees also concede: Pennsylvania freely committed itself to enact certain specific legislation in order to acquire full federal funding. The state legislature was not commandeered; it volunteered. That is, Pennsylvania voluntarily instructed its agents to implement some, *but not all,* of the provisions of federal SORNA. Commandeering as such would begin at the point where judicial authority would – incorrectly – deem federal SORNA to compel state employees to act beyond the scope defined by Pennsylvania's legislature. Were judicial authority to hold – again, incorrectly – that federal SORNA does not compel but merely *empowers* state employees to act beyond the scope of state SORNA, that holding would endorse vigilantism. It

would judicially sanction domestic terrorism by state employees acting outside the law.

These incorrect results were reached by the district court here. No legal authority justifies them, as Appellees tacitly concede.

E. The Brief for Appellees stands in need of correction on several points of fact.

Pennsylvania's Attorney General and his learned Deputies, for whatever reason, have drafted and filed a brief with numerous errors of material fact.[7] Those mistakes should not be allowed to mislead this honorable Court. They include the following:

1. Appellees put words into the mouths of Pennsylvania legislators.

Appellees mislead the court by injecting words into the state's registration statute that do not appear there. *See* Br. for Appellees at 11 (citing 42 Pa.C.S. § 9799.11(B)(4) and 42 Pa.C.S. § 9799.51(B)(4)); *see also id.* at 19. The phrase "non-punitive consequences of the original conviction" is not in those statutes or in any related legislative material. The Appellees had

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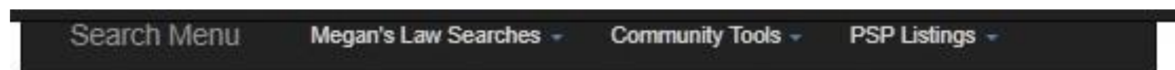
7. The brief seems unsure of its intended audience. Its drafters use first-person plural pronouns in some passages, suggesting introspection more than argument. A lengthy footnote reads like an internal memo circulated among the Deputies, fretting because an "inartful sentence" of theirs has "confused the Magistrate Judge" and has made a concession that they now wish to retract. *See* Br. at 18 n.13.

attempted this same deception in their briefing below, and Thomas's counsel called them out. *See* Reply Br. in Supp. of 2d Appl. for TRO, at 2-3, 8-10 (citing this very error, showing that the language comes from the Saylor Dissent in *Muniz*). ECF No. 37. The lawmakers, being aware of the Dissent, deliberately chose *not to* adopt that language. *See id.* at 9.

<u>2. PSP compels Thomas to appear in person every 90 days.</u>

Appellees contend that the Pennsylvania Legislature relaxed registration requirements in Subchapter I of the state SORNA, so that Thomas does not have to appear in person before the State Police (PSP) every three months to update his registration. Br. for Appellees at 12, 38. That contention is inaccurate. The statute requires personal appearances. 42 Pa.C.S. § 9799.15(e) and (g). The PSP web site advises:



Verification Sites

Approved Registration/Verification Sites

Individuals required to register as a sexual offender shall appear in-person at an approved Registration/Verification site to update or verify their required information. The below list of approved Registration/Verification sites now includes several new locations, including some county sheriff's offices, county probation offices, and municipal police departments. The list of sites will be periodically updated as new locations are added. Prior to going to a site, it is recommended that you call the site to ensure that it is currently open to the public and/or that a registering official is there to process you.

Appellees contend that Thomas can mail in his registration instead of appearing personally. Br. for Appellees at 38. Not so. He must appear in

person every three months. The PSP website provides: "This 'mail notification' option does not apply to normally required monthly, quarterly, semi-annual, or annual in person verifications required under 42 Pa.C.S. §9799.60, but rather to changes in between normally scheduled verifications." https://www.pameganslaw.state.pa.us/InformationalPages/Registration (Aug. 18, 2019).

3. PSP registration invites neighborhood trolling.

Appellees contend that just because Thomas's conviction appears in public court records, he incurs no immediate irreparable harm by being listed in the registry as well. Br. for Appellees at 36-37. In fact, the PSP registry facilitates searches that cannot be done on the basis of court records. In effect, it paints a bullseye on any location where Thomas may work, reside, or attend classes. The PSP registry invites searches by "county, municipality, city, zip code, mile radius" as well as by name. It lists automobiles by make, model, and license plate number. The PSP registry displays current and former photos. It describes physical characteristics, even tattoos and their location on the body. Neighbors, landlords, and employers can and do troll at will.

4. Onerous registration duties are deprivations of liberty cognizable under the Fourteenth Amendment.

Appellees mislead the Court as to the substance of the Due Process claims of Count I. Appellees pretend that Thomas alleges only an injury to his reputation. *See* Br. for Appellees at 15-16, 34. In fact, Thomas alleges deprivation of liberty, inasmuch as he is compelled to appear before the State Police at frequent intervals for the rest of his life. J.A. 52-53 (pleading loss of liberty interests). Appellees contend that Thomas had due process prior to that deprivation because he had a criminal trial in 1991. Br. for Appellees at 34. That is impossible. Thomas was tried and sentenced long before the enactment of any SORNA.

Appellate courts have found that Pennsylvania's registration regime is onerous enough to be deemed punishment over and above the sentence initially imposed by the criminal trial court. In *Lusik*, the Commonwealth Court agreed that registration was "a hardship." 2018 WL 6165343, at *3. In *Muniz*, Pennsylvania's Supreme Court ruled that frequent in-person registration is "a direct restraint." 164 A.3d at 1211. *See also id.* at 1210-18. Thomas cited *Muniz* to show that "the onerous requirement to travel frequently to a PSP office to re-register in person" is a cognizable deprivation of a constitutionally protected liberty interest. *See* Br. in Supp. of 2d Appl.

for TRO at 5. ECF No. 32. While lost wages and transportation expenses could potentially be compensated, loss of liberty is irreparable.

5. PSP is a party because Colonel Blocker is sued in his official capacity.

Appellees mislead the Court when they assert that "[t]he State Police were never a defendant below." *See* Br. for Appellees at 4 n.2. On the contrary, the PSP is a party because its chief, Colonel Blocker, and other Troopers are sued in their official capacity and as individuals. J.A. 39 ¶¶ 4-7. "Official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (internal quotes omitted).

6. Action outside the law is *ipso facto* beyond the scope of the official duties of state employees.

Appellees contend that their conduct is shielded by sovereign immunity. Br. for Appellees at 15, 32. Not so. Appellees fail to make the factual showing demanded by the statute and judicial authority that they cite. *See id.* at 32. Only actions "within the scope of their duties" are immune from suit in tort. 1 Pa.C.S. § 2310. Vigilante action in the workplace is not

shielded. *See* Section D *supra*. Moreover, sovereign immunity was not considered by the district court, and this defense is not affirmatively pleaded. *See* J.A. 99 ¶ 121 (pleading that claims "may be" barred).

7. Thomas's counsel served the Complaint to defendants' counsel before filing the application for a temporary restraining order.

Appellees contend that Thomas sought a temporary restraining order before filing the Complaint. Br. for Appellees at 4. Not so. The docket shows that the Complaint was filed April 15, 2018. J.A. 1, 38. The Complaint was promptly served to defendants' counsel along with Rule 4 waiver requests on April 16, 2018. ECF No. 3. The Application for TRO was filed April 17, 2018. ECF No. 4. The attorney affidavit that accompanies the Application for TRO attests that the filings occurred in proper order. ECF No. 4-1 ¶¶ 14-16. There never was a "motion" for a TRO, as Appellees mistakenly assert, so there was no need to brief it. *See, e.g.*, Br. in Supp. of 2d Appl. for TRO at 1 n.1. ECF No. 32. *Cf.* Br. for Appellees at 4 (inaccurately imputing procedural error to Thomas). The district judge was simply mistaken to assert, when denying the TRO on April 18, 2018, that "[a]s of the date of this Order, Defendants, have not been properly served." *See* Order ¶ 6; *see also id.* ¶ 9. ECF No. 5. Defendants' counsel had in fact been served with Rule 4 waiver requests together with the Complaint. Defendants timely waived service. ECF Nos. 7, 10. 12.

8. The charging documents are inadmissible because they ceased to be "relevant," under Fed. R. Evid. 401, after trial and conviction.

Appellees contend that the lurid charging documents from 1991 are admissible in these proceedings as public records under Fed. R. Evid. 803(8) or as present sense impressions under Rule 803(1). Br. for Appellees at 41-42. That contention misrepresents the reason why those records are inadmissible, as argued by Thomas. They are irrelevant under Rule 401. "The charging documents cannot make the facts of the conviction and the sentence any 'more or less probable', for those facts are already 100% certain." Reply Br. in Supp. of 2d Appl. for TRO at 11-13. ECF No. 37. *See also* Pl.'s Objections to R&R at 22-25 and Reply to Opp'n to Pl.'s Objections to R&R at 11-13. ECF Nos. 46 and 57. It was an error of law for the magistrate judge to find that "the documents could reasonably be seen as relevant to" the public interest. *See* J.A. 22 n.16.

The lurid charging documents would have been excluded as inadmissible hearsay had the prosecutor attempted to show them to the jury at Thomas's trial in 1991. They became irrelevant once the jury convicted Thomas of crimes that, had he committed them seven years later, might have prompted a listing in the PSP registry. "Irrelevant evidence is not admissible." Fed. R. Evid. 402.

9. Public interest and the other *Holland* factors favor Thomas.

Appellees assert that "the public will be harmed by removal of Thomas's information" from the PSP registry. Br. for Appellees at 16, 39-40. That conclusory assertion is unsupported. The record of this case shows the opposite. After a jury heard the facts during Thomas's criminal trial, the sentencing court determined that he could be released from prison after 27 years without danger to the public. *See* Reply Br. in Supp. of 2d Appl. for TRO at 12. ECF No. 37. The Pennsylvania Legislature determined that crimes prior to 1996 did not portend danger persisting into 2018 and beyond; hence, it did not require registration for those convicted of such crimes. *See id.* at 12-13. *See also* Section A *supra*.

Moreover, the public interest is served when a former inmate rejoins society as a productive citizen, without the hindrances that accompany inclusion in the online registry of sex offenders. *See* Br. in Supp. of 2d Appl. for TRO at 14-15. ECF No. 32. Appellees do not dispute Thomas's argument on this point now, and they did not dispute it below. *See* Defs.' Joint Br. in Opp'n to Pl.'s Appl. for TRO at 13-16 (harping on "horrific" details in charging documents, only). ECF No. 35. Hence, Thomas has shown, both to this Court and in the court below, that he:

> meets the equitable criteria as stated in *Holland v. Rosen*, 895 F.3d 272, 285-86 (3d Cir. 2018). First, he is reasonably likely to succeed

> on the merits because no statute or regulation requires him to register or authorizes state actors to compel him to undergo registration. Second, Thomas experiences irreparable harm to his reputation and his liberty every day that the wrongful registration continues. Third, the requested injunction carries no possibility of harm to the non-moving parties. And fourth, the public interest is advanced by removing the grave impediment that registration poses to Mr. Thomas's efforts to make a new start on a life of gainful employment and wholesome relationships in which he need not resort to criminal activity to get by.

Br. in Supp. at 6 and *generally*. ECF No. 32.

III. CONCLUSION

For the reasons stated herein and in the Brief for Appellant, the Order of March 20, 2019 should be vacated. Mr. Thomas's application for a preliminary injunction should be remanded to the district court for consideration of all relevant factors and circumstances.

IV. CERTIFICATE OF COMPLIANCE

I, Marianne Sawicki, hereby certify, on this 18th day of August, 2019, that:

(1) This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted

by Fed. R. App. P. 32(f), it contains 6,466 words as counted by the word processing software.

(2) This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it is composed in Microsoft Word 2016 using 14-point Times New Roman typeface.

(3) The electronic versions of the Brief for Appellant and the Joint Appendix are identical in content to the paper copies.

(4) The electronic versions of the Brief for Appellant and the Joint Appendix were examined by a virus detection program, and no virus was detected. The virus protection program is McAfee LiveSafe Version 14.0.

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Respectfully submitted,

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V. PROOF OF SERVICE

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Dated: August 18, 2019