No. 19-35391

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOES, John and Jane, 1-134,

Plaintiffs-Appellants,

v.

LAWRENCE WASDEN, Attorney General
of the State of Idaho; et al.,

Defendants-Appellees.

On appeal from the United States District Court
for the U.S. District of Idaho
D.C. No. 1:16-cv-00429-DCN
Honorable David C. Nye

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Does assert that the Idaho Sex Offender Registry is unconstitutional in that it is punitive and discriminatory.

JURISDICTIONAL STATEMENT

The District Court has original subject matter jurisdiction over the federal Constitutional violations alleged in this matter pursuant to the provisions of 42 U.S.C. §1983, and 28 U.S.C. §§1331, 1343. Pursuant to 28 U.S.C. §1367(a), the District Court has supplemental jurisdiction over Does' state law claims. The District Court has jurisdiction to issue injunctive and declaratory relief pursuant to 28 U.S.C. §2201 and 42 U.S.C. §1983. Venue is proper in the District of Idaho pursuant to 28 U.S.C. §1391. The Court of Appeals has jurisdiction to hear this appeal pursuant to 28 U.S.C. §1291.

The final judgment from which the Plaintiff appeals is the Judgment entered April 9, 2019. (ER1) Does' Notice of Appeal was filed on May 5, 2019. (ER Vol. II-1) Does' appeal is timely as it was filed within thirty (30) days of the final judgment pursuant to F.R.A.P. 4. This appeal is from a final judgment that disposed of all parties' claims.

STATUTORY AUTHORITIES

All relevant statutory authorities appear in the Addendum to this brief.

ISSUES PRESENTED FOR APPEAL

1. Whether or not the Court erred in granting the Defendants' Motion to Dismiss Amended Complaint.

2. Whether or not the Court erred in granting the Motion to Dismiss Amended Complaint for Injunctive and Declaratory Relief (Part II).

STATEMENT OF THE CASE

Does' filed an Amended Complaint for Injunctive and Declaratory Relief on April 26, 2017, wherein they alleged that Idaho's Sexual Offender Registration Notification and Community Right-to-Know Act ("SORA") was unconstitutional both facially and as-applied. (ER Vol II 54-227) The Does allege violations of the United States Constitution including Procedural and Substantive Due Process violations under the Fourteenth Amendment, (ER Vol II 56, 142-144, 195) Ex Post Facto Clause violations (ER Vol II 56, 142-144), Equal Protection violations under the Fourteenth Amendment (ER Vol II 56, 142-144, 195), Cruel and Unusual Punishment violations under the Eighth Amendment (ER Vol II 57, 142-144), Double Jeopardy Clause violations under the Fifth Amendment (ER Vol II 56, 142-144), Free Exercise of Religion violations under the First Amendment (ER Vol II 56, 142-144, 195), Contracts Clause violations, and Takings violations under the Fifth Amendment (ER Vol II 56, 142-144). Does also included claims

for Contracts Clause, Separation of Powers, and Police Power violations under the Idaho Constitution (ER Vol II 56-57, 142-144) as well as Idaho Constitutional violations on those claims set forth above. (ER Vol II 142-144)

There are 33 named defendants including several of Idaho's county sheriffs, members of the Sexual Offender Management Board, and various state officials. Individually and collectively, these Defendants shall be referred to as "Defendants".

The Defendants filed a Motion to Dismiss Amended Complaint on November 17, 2017. (ER Vol II 51-53) After briefing and argument, the Court issued its Memorandum Decision and Order on May 17, 2018. (ER Vol I 29-68)

The Does filed an Amended Complaint for Injunctive and Declaratory Relief Part II on August 30, 2018. (ER Vol II 6-50) The Defendant filed a Motion to Dismiss Amended Complaint for Injunctive and Declaratory Relief (Part II) on October 18, 2018. (ER Vol II 4-5) The Court issued it's Memorandum Decision and Order on April 5, 2019, which dismissed the matter with prejudice. (ER Vol I 2-28) The Court issued Judgment on April 9, 2019**.** (ER Vol I 1)

SUMMARY OF THE ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT GRANTED THE DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Each of the arguments set forth below, while set forth in differing sections, are all meant to establish the punitive nature of Idaho's Sex Offender Registry (SORA). Therefore, all of the arguments in this brief, regardless of section, are also made in support of a finding of punitive purpose and/or effect.

A. Ex Post Facto

The State of Idaho has enacted laws with manifestly unjust and oppressive retroactive effects. Many of the Does in this case, when convicted, were eligible to apply for removal from the sex offender registry. However, after several amendments to said statutes, many Does became ineligible for removal.

B. Due Process

The State of Idaho has interfered with protected liberty and/or property interests and the procedures attendant upon that deprivation are constitutionally insufficient. There is no rational relationship between Idaho's decision to utilize an "inception date" creating several classes of individuals, including those convicted prior to 1993, and those convicted on or after 1993. In addition, the statutes at issue do not accomplish the goals of the legislature and further discriminate between in-state and out-of-state residents.

C. Equal Protection

Each of the Does suffers the unequal burdening of a fundamental right, in particular, their right to travel. The State's interest in supervising sex offenders is not rationally advanced by a classification that differentiates between offenders based upon out-of-state residency/registration.

D. Cruel and Unusual Punishment

Idaho’s sex offender registry is so punitive in purpose and/or effect as to overcome the legislature's civil intent.

E. Double Jeopardy

Idaho’s sex offender registry is punitive in purpose and/or effect and constitutes multiple punishments.

F. Contracts/Taking/Police Power

Given that Idaho’s sex offender registry is punitive in purpose and/or effect, Does’ constitutional rights have been violated.

G. Free Exercise Of Religion

Does assert that because the 2001, 2009, and 2011 amendments to SORA were enacted after the Free Exercise of Religion Protected (FERPA), and SORA does not enumerate FERPA as an exclusion, the provisions of SORA run contrary to FERPA.

II. STATUTE OF LIMITATIONS

Does assert that no statute of limitations should apply to the instant case given the nature of the relief requested. In the alternative, Does assert that this case is not barred by the statute of limitation in that it does not take into consideration that the claims of the various Does fall within the "Doctrine of Continuing Violations" and that Idaho's two (2) year personal injury statute of limitations has yet to accrue due to the ongoing daily civil rights violations suffered by these Does.

III. THE DISTRICT COURT ERRED WHEN IT GRANTED THE DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF (PART II)

A. 1993 Inception Date

Idaho's SORA has created a registration scheme that is nonsensical and creates several different classes of individuals.

B. Registration Based On Out-Of-State Conviction/Registration

Idaho's SORA has created a registration scheme that is nonsensical and creates several different classes of individuals.

STANDARD OF REVIEW

A dismissal with leave to amend is reviewed de novo. See *Kennedy v. Southern California Edison, Co.*, 268 F.3d 763, 767 (9th Cir. 2001). We review a district court's grant of a Rule 12(b)(6) motion to dismiss for failure to state a

claim de novo. See *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004); *Smith v. Pacific Props. & Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004) The constitutionality of statute is reviewed de novo. See *United States v. Vongxay,* 594 F.3d 1111, 1114 (9th Cir. 2010).

The case of *Bain v. California Teachers Ass'n*, 891 F.3d 1206 (9th Cir. 2018), discussed a motion to dismiss for failure to state a claim as follows:

> "A motion under Rule 12(b)(6) should be granted only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,' construing the complaint in the light most favorable to the plaintiff." *Id*. (internal citation omitted) (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

Bain v. California Teachers Ass'n, 891 F.3d 1206, 1211 (9th Cir. 2018)

The case of *Forsyth v. Eli Lilly & Co.*, 904 F. Supp. 1153 (D. Haw. 1995) discusses the standard in a motion to dismiss for failure to state a claim as follows:

> Under Fed.R.Civ.P. 12(b)(6), in determining whether to grant a motion to dismiss for failure to state a claim upon which relief can be granted, the Court must accept as true the plaintiff's allegations contained in the complaint and view them in a light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 334 (9th Cir.1990); *Shah v. County of Los Angeles*, 797 F.2d 743, 745 (9th Cir.1986). Thus, the complaint must

> stand unless it appears beyond doubt that the plaintiff has alleged no facts that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 101–102, 2 L.Ed.2d 80 (1957); *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1990). A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory. *Balistreri*, 901 F.2d at 699; *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533–34 (9th Cir.1984).
>
> In essence, as the Ninth Circuit has stated, "[t]he issue is not whether a plaintiff's success on the merits is likely but rather whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims." *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir.), cert. denied, 441 U.S. 965, 99 S.Ct. 2416, 60 L.Ed.2d 1072 (1979). The Court must determine whether or not it appears to a certainty under existing law that no relief can be granted under any set of facts that might be proved in support of plaintiffs' claims. *Id.*

Id. at 1156.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT GRANTED THE DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

In granting the Defendant's Motion to Dismiss Amended Complaint, the District Court dismissed the portion of Does' Complaint for Injunctive and Declaratory Relief alleging facial violations of the United States Constitution.

A. Ex Post Facto

The U.S. and Idaho Constitutions forbid the Idaho Legislature from passing any "ex post facto law." United States Constitution, Article I, §10; ID CONST., Article I, §16. The Ex Post Facto Clause "protects liberty by preventing govern-

ments from enacting statutes with 'manifestly unjust and oppressive retroactive effects'." *Stogner v.California*, 539 U.S. 607, 611 (2003) (quoting *Calder v. Bull*, 3 U.S. (3 Dal.) 386, 391 (1798). It prevents legislatures from abuse of authority through the enactment of arbitrary, vindictive legislation aimed at disfavored groups. *Miller v. Florida*, 482 U.S. 423, 429 (1987).

A law can violate the Ex Post Facto Clause in one of two ways: (1) where punitive intent is shown, the analysis ends – the law violates the Ex Post Facto Clause; or (2) where the intent is civil, a law nonetheless violates the Ex Post Facto Clause if its effects are punitive. *Smith v. Doe*, 538 U.S. 84, 92 (2003).

Pursuant to *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), the following factors have been deemed determinative of whether a laws's effects are punitive: whether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment; whether its operation will promote the traditional aims of punishment, retribution and deterrence; whether an alternative purpose to which it may rationally be connected is assignable for it; whether it appears excessive in relation to the alternative purpose assigned; whether it comes into play only on a finding of scienter, and; whether the behavior to which it applies is already a crime. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963).

The automatic placement of an offender into a tier without determining

whether he or she is likely to reoffend rings of punishment and retribution. See *Tison v. Arizona*, 481 U.S. 137, 180-181 (1987) (retribution follows the core logic of "an eye for an eye."). Particularly so in the State of Idaho, given that all offenders convicted of a sexual offense must undergo a psychosexual evaluation prior to sentencing. (I.C. §18-8316). "Psychosexual evaluation" means an evaluation that specifically addresses sexual development, sexual deviancy, sexual history and risk of reoffense as part of a comprehensive evaluation of an offender. (I.C. §18-3303(18)).

Given that said evaluation is required for all those convicted of a sexual offense, the State of Idaho has imposed a sentencing framework upon those who are convicted of a sexual offense which requires an analysis of that defendant's risk of reoffense prior to sentencing. *Id.* While the case of *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), has made it clear that "[t]he Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences", it is not as clear where Idaho has a sentencing framework in place which requires a psychosexual evaluation to analyze that defendant's risk of reoffense prior to sentencing. *Smith,* at 103-04.

As set forth by *Smith*, "[w]e have upheld against ex post facto challenges laws imposing regulatory burdens on individuals convicted of crimes without any

corresponding risk assessment." *Id.* However, *Smith* can be distinguished from the instant case in that Idaho already requires the preparation of a risk assessment prior to sentencing. (I.C. §18-8316) To suggest that the State of Idaho should not be required to perform an individualized risk assessment prior to imposing regulatory consequences is absurd, given that Idaho already requires a risk assessment prior to sentencing, i.e., prior to imposing regulatory consequences.

B. Due Process

Does assert violations of the Due Process Clauses of the U.S. and Idaho Constitutions which safeguard citizens "from the mistaken or unjustified deprivation of life, liberty, or property." U.S. Const. Amend. XIV, §1; ID CONST., Article I, §13 ; See also, *Tarkanian v. Nat'l Collegiate Athletic Ass'n*, 741 P.2d 1345, 1349 (1987), rev'd on other grounds, 488 U.S. 179 (1988). (ER Vol II 56, 142-144, 195) The touchstone of due process is protection of the individual against arbitrary action of government. See, *Dent v. West Virginia*, 129 U.S. 114, 124 (1889).

To determine whether a person has been denied due process relative to a protected liberty or property interest, courts conduct a two-step inquiry: (1) whether the State has interfered with a protected liberty or property interest; and (2) whether the procedures attendant upon that deprivation were constitutionally sufficient. *Ky. Dep't of Corrs. v. Thompson*, 490 U.S. 454, 460 (1989).

As set forth in *Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043 (9th Cir. 2000):

> To withstand Fourteenth Amendment scrutiny, a statute is required to bear only a rational relationship to a legitimate state interest, unless it makes a suspect classification or implicates a fundamental right. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (per curiam) (equal protection); *Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1162 (9th Cir.1997), cert. denied, 525 U.S. 871, 119 S.Ct. 168, 142 L.Ed.2d 137 (1998) (substantive due process)

Id. at 1049.

Fundamental rights include "the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to refuse unwanted lifesaving medical treatment." *United States v. Juvenile Male*, 670 F.3d 999, 1012 (9th Cir. 2012)(citing *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997)).

In particular, Does assert that Idaho's SORA laws are excessive and do not bear any rational relationship to any nonpunitive purpose nor a rational relationship to public safety. (ER Vol II) See *State v. Myers*, 260 Kan. 669, 698-699 (1996), cert. denied, *Kansas v. Myers*, 521 U.S. 1118 (1997). (ER Vol II 180, 189)

Perhaps one of the most important facts that the Does ask this Court to consider is that SORA has an "inception date" and does not apply to those who

plead guilty to, or have been found guilty of, a sex crime prior to July 1, 1993, where the person, as a result of the offense, was not incarcerated in a county jail facility or a penal facility and was not under probation or parole supervision, on or after July 1, 1993. (I.C. §18-8304(d)).

Presumably, sex offenders are equally dangerous, no matter the date of their conviction, all other things being held equal. Should this Honorable Court agree with the prior sentence, it cannot be disputed that SORA is punitive, as there can be no rational relationship of an "inception date" to any nonpunitive purpose nor public safety. Are sex offenders equally dangerous, regardless of the date of conviction, or not? It cannot be both. In addition, this Court will find that this "inception date" only applies to those who are convicted in Idaho, as set forth in more detail below.

The State of Idaho only requires those who 1) plead guilty to, or have been found guilty of, a sex crime on or after July 1, 1993, and; 2) those who plead guilty to, or have been found guilty of, a sex crime prior to July 1, 1993, and the person, as a result of the offense, is incarcerated in a county jail facility or a penal facility or is under probation or parole supervision, on or after July 1, 1993, to register as sex offenders. (I.C. §18-8304(d))

It appears that the timing of the conviction, as well as the timing of probation, parole, or incarceration, whichever the case may be, will determine whether

or not a conviction in Idaho for a sexual offense requires registration.

However, I.C. §18-8304(c) states that the registration provisions also apply to any person who:

> [h]as been convicted of any crime, an attempt, a solicitation or a conspiracy to commit a crime in another jurisdiction, including military courts, that is substantially equivalent to the offenses listed in paragraph (a) of this subsection and was required to register as a sex offender in any other state or jurisdiction when he established residency in Idaho.

As such, an *Idaho* offender who was convicted prior to July 1, 1993 and had completed probation, parole, or incarceration prior to July 1, 1993, would not have to register. However, an *out of state* offender who was convicted prior to July 1, 1993 and had completed probation, parole, or incarceration prior to July 1, 1993, would be required to register if that offender had been convicted of any crime, an attempt, a solicitation or a conspiracy to commit a crime in another jurisdiction, that is substantially equivalent to the offenses requiring registration in Idaho, and was required to register as a sex offender in any other state or jurisdiction when he established residency in Idaho. (18-8304(c))

The failure to include the "inception date" information contained in subparagraph (d) of I.C. §18-8304, in subparagraph (c), has created two (2) classes of individuals- those who are convicted of a sexual offense in Idaho, and all those who are convicted of a sexual offense outside of Idaho. As such, Idaho's incep-

tion date only applies to those convicted in Idaho.

This statutory framework calls into question "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith,* at 105.

In addition, the Does contend that SORA's requirements are so vague that they cannot understand what is actually required. (ER Vol II 184) A statute does not comport with due process if the statute "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 1845, 170 L. Ed. 2d 650 (2008)(citing *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000))

As set forth below, a literal reading of Idaho's SORA actually requires a person convicted of *any crime* in another jurisdiction, on or after July 1, 1993, who enters this state to establish residence, *to register as a sex offender*.

C. Equal Protection

The equal protection clause of the U.S. Constitution (U.S. CONST., Amend. XIV) and of the Idaho Constitution (ID CONST., Article I, §1) guarantees that no person or class of persons shall be denied the same protection of the laws that is enjoyed by other persons or other classes in like circumstances in their lives, liberty, property, and pursuit of happiness.

As set forth in *United States v. Juvenile Male*, 670 F.3d 999 (9th Cir. 2012):

> The Equal Protection Clause of the Fourteenth Amendment applies strict scrutiny if the aggrieved party is a member of a protected or suspect class, or otherwise suffers the unequal burdening of a fundamental right. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439–40, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). "Government actions that do not ... involve suspect classifications will be upheld if [they] are rationally related to a legitimate state interest." *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir.2005).

United States v. Juvenile Male, 670 F.3d 999, 1009 (9th Cir. 2012)

Pursuant to *Saenz v. Roe*, 526 U.S. 489 (1999), citizens of a State have the right "to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when. . . present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz* at 500. As such, the right to travel may not be burdened unless justified by a compelling state interest. See *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972).

Those persons who are convicted of a substantially equivalent sexual offense outside the state of Idaho will be required to register as a sex offender based solely upon a determination of whether the offender was required to register as a sex offender in another state, without an accompanying examination of the date of conviction. To say it another way, all of those who are convicted of a substantially equivalent sexual offense outside of the state of Idaho will be required to register in the State of Idaho, if the State from which they are moving

requires them to register, *regardless of the date of their conviction, or the timing of their probation, parole, or incarceration.* It gets worse.

Consider subparagraph (b) of I.C. § 18-8304 which requires registration for those who:

> On or after July 1, 1993, has been convicted of ***any crime*****,** an attempt, a solicitation or a conspiracy to commit a crime in another jurisdiction ***or*** who has a foreign conviction that is substantially equivalent to the offenses listed in paragraph (a) of this subsection ***and*** enters this state to establish residence or for employment purposes or to attend, on a full-time or part-time basis, any public or private educational institution including any secondary school, trade or professional institution or institution of higher education.

Id. (emphasis added)

Apparently, a person convicted of *any crime*, including an attempt, solicitation, or a conspiracy, in another jurisdiction, on or after July 1, 1993, who enters this state to establish residence, *will be required to register as a sex offender.*

A similar issue was raised in Idaho in the case of *State v. Dickerson*, 142 Idaho 514 (2006) (holding that the former (2003) I.C. §18-8304(1)(b) created an unconstitutional burden on the right to travel). In that case, Dickerson was convicted of child rape in 1990, in Washington. *Id.* at 515. In 2002 he moved to Idaho where he did not register as a sex offender. *Id.* at 515-516. In 2003, Dickerson was charged with failure to register. *Id.* at 516. Dickerson alleged the statute at issue to be unconstitutional. *Id.*

The *Dickerson* Court stated that "[h]istorically, when evaluating the constitutionality of laws that affect the right to travel, the Supreme Court conducted its analysis under the Equal Protection Clause of the Fourteenth Amendment." (Citations omitted) *Id.* at 518. However, in discussing constitutional law, *Dickerson* noted that "this implicated the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same state," a right protected not by the Equal Protection Clause, but by the Privileges and Immunities Clause of the Fourteenth Amendment. *Saenz*, 526 U.S. at 502, 119 S.Ct. at 1526, 143 L.Ed.2d at 703–04." *Id.* at 518-519.

Dickerson found that the statute at issue had elements that penalize migration, and created fixed, permanent distinctions among citizens, and ultimately concluded "that the State's interest in apprehending re-offending sex offenders was not rationally advanced by a classification that differentiated between offenders based solely upon their date of entry into the state." *Id.* at 522

In spite of the *Dickerson* holding, the statute has not been appropriately amended to address this unconstitutional aspect of Idaho Code §18-8304. Although the amendment in 2005 made an attempt to address this concern (foreign conviction for conforming sexual offense prior to 1993, where the person was not required to register in another state prior to moving to Idaho, will not have to register in Idaho), the amendment in 2011 obliterated any benefit from the 2005

amendment. The salient errors contained in the 2011 amendment exist to this day and are featured in I.C. Section §18-8304(b).

D. Cruel and Unusual Punishment

Based on the punitive nature of the SORA registration requirements, in relation to its alleged nonpunitive objective, Idaho SORA's affects are in prohibition of the cruel and unusual punishment mandates of the United States and Idaho Constitutions.

Very recently, the United States District Court for the District of Colorado in the case of *Millard v. Rankin*, 265 F.Supp.3d 1211 (D. Colo. 2017), in a ruling on the similar issues posed herein, found that the punitive nature of the State of Colorado's version of SORA violated the plaintiffs' Eighth Amendment rights against cruel and unusual punishment. The Court in *Millard* noted as follows in this regard:

> Applying the same analytical framework to other states' laws or under state constitutional provisions, a number of courts have reached a conclusion different from the Supreme Court's in *Smith v. Doe*. The Alaska Supreme Court, considering the same statute before the Supreme Court in *Smith v. Doe*, held that the act was so punitive in purpose or effect as to overcome the legislature's civil intent, and therefore violated the Alaska Constitution. *Doe v. State*, 189 P.3d 999 (2008). See also, e.g., *Does v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (Michigan's sex offender registration act retroactively imposed punishment and therefore violated Ex Post Facto Clause of United States Constitution); *State v. Letalien*, 985 A.2d 4 (Me. 2009) (retroactive application of Maine registration statute violated both Maine and United States Constitutions' Ex Post Facto Clauses); *Doe v. State*,

> 167 N.H. 382, 111 A.3d 1077 (2015) (effects of New Hampshire sex offender registration provisions were punitive; retroactive application violated New Hampshire Constitution); *Starkey v. Okla. Dept. of Corrections*, 305 P.3d 1004 (Okla. 2013) (Oklahoma sex offender registration statute was punitive; retroactive application of its provisions violated the Oklahoma Constitution)

Id. at 1224-1225.

E. Double Jeopardy

The Double Jeopardy Clause states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. AMEND. V. and ID CONST., Article I, §13). Although commonly understood to prevent a second prosecution for the same offense, the United States Supreme Court has applied the Double Jeopardy Clause to prevent a state from punishing an offender twice. See, *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997); *Witte v. United States*, 515 U.S. 389, 396 (1995). Only a "punitive" sanction is subject to the Fifth Amendment protection against multiple punishments. *Hudson v. United States*, 522 U.S. 93, 101 (1997).

As detailed above, the Idaho SORA laws are punitive – and thus also violate the prohibitions against Double Jeopardy. See *Smith* at 97 (noting that the *Kennedy v. Mendoza-Martinez* factors, 372 U.S. at 168-169 "migrated into our ex post facto case law from double jeopardy jurisprudence.")

SORA focuses more upon retribution and deterrence then the good order

and protection of society. At some point in time, this Honorable Court will recognize that even should individual registration requirements be found to be constitutional, a fundamental analysis of the sheer volume of regulations must be undertaken to determine its cumulative impact upon the registrant(s).

The Court in *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), discussed the concepts of retribution and deterrence as follows:

> "[a]s Professor Packer observed, under a theory of deterrence the state may justify such punishments as "boiling people in oil; a slow and painful death may be thought more of a deterrent to crime than a quick and painless one." Packer, Making the Punishment Fit the Crime, 77 Harv.L.Rev. 1071, 1076 (1964). Retribution, which has as its core logic the crude proportionality of "an eye for an eye," has been regarded as a constitutionally valid basis for punishment only when the punishment is consistent with an "individualized consideration" of the defendant's culpability, *Lockett v. Ohio*, 438 U.S., at 605, 98 S.Ct., at 2965, and when "the administration of criminal justice" works to "channe[l]" society's "instinct for retribution." *Furman v. Georgia*, 408 U.S. 238, 308, 92 S.Ct. 2726, 2761, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring). Without such channeling, a State could impose a judgment of execution by torture as appropriate retribution for murder by torture. Thus, under a simple theory either of deterrence or retribution, unfettered by the Constitution, results disturbing to civil sensibilities and inconsistent with "the evolving standards of decency" in our society become rationally defensible. *Cf. Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958).

Tison at 180–81.

The Idaho legislature has enacted separate sex offender registration requirements, one (1) for adult sex offenders (I.C. §18-8301, et seq., "SORA") and one

(1) for juvenile sex offenders (I.C. §18-8401, et seq., "Juvenile Sex Offender Registration Notification and Community Right-To-Know-Act") ("Juvenile SORA").

The Juvenile SORA imposes sex offender registration requirements for all juvenile offenders, who were between the ages of fourteen (14) years and eighteen (18) years at the time of the commission of the offense, and who were adjudicated to be guilty of those criminal offenses set forth in I.C. §18-8304. (I.C. §18-8403).

The Adult SORA imposes sex offender registration requirements for all offenders, who were the age of eighteen (18) years or over, at the time of the commission of the offense, and who were found to be guilty of those criminal offenses set forth in I.C. §18-8304. (I.C. §18-8304).

By the inclusionary provisions of each SORA, the Idaho Legislature has created two (2) separate but similarly situated groups, one (1) between fourteen (14) and eighteen (18) years of age, and one (1) eighteen (18) years of age and older, members of each group having committed and been found guilty of one (1) or more included criminal offenses.

The Idaho Legislature further created important distinctions in the registration requirements, and consequences for failure to register, ascribed to each group. Those differences are as follows:

a. Juvenile sex offenders are not subject to the same tiered designations as

adult sex offenders (i.e., "rescidivist", those convicted of an "aggravated offense", and "violent sexual predator"). (See I.C. §18-8403).

b. Juvenile sex offenders, even in those circumstances where they would otherwise qualify as a "violent sexual predator", are limited to registration as a sex offender annually (I.C. §§18-8403, 8407), as opposed to the more onerous requirement of every ninety (90) days, are not faced with more burdensome and frequent verification of address, and are not subject to the requirement that they wear an electronic monitoring device at all times, faced by adult offenders in that same class. (I.C. §§18-8307, 8309).

c. In the event of a failure to register, juvenile offenders are subject to a general misdemeanor criminal charge (I.C. §18-8409), whereas adult sex offenders are subject to being charged criminally at a felony level for the identical conduct. (I.C. §18-8311).

d. Upon reaching the age of twenty-one (21) years, all juvenile sex offenders are entitled to be removed from the juvenile sex offender registry, unless the prosecuting attorney files a petition with the court asking that the juvenile offender be transferred to the adult registry and, after hearing, that the court determines the juvenile poses an ongoing threat to the safety of others. (I.C. §18-8410). The level of the burden of proof on the State in making such a showing is not prescribed by the statute.

By contrast, adult sex offenders who have been designated as a "recidivist", a "violent sexual predator", or those who were convicted of an "aggravated offense" are required to register for life. (I.C. §18-8310). Only those adult sex offenders whose conviction(s) do not fall within one (1) of those designations may petition for removal from the sex offender registry. *Id.* The petition may be filed on or after a period of ten (10) years from the date the adult offender was released from incarceration or placed on parole, supervised release or probation, whichever is greater, at which time the court is required to schedule a show cause hearing to determine whether the offender is to be exempted from the duty to register as a sexual offender. *Id.*

The burden of proof required to be shown by the petitioner is clear and convincing evidence. *Id.* In fact, the Court may not grant relief unless the Court finds that "[i]t is highly probable or reasonably certain the petitioner is not a risk to commit a new violation for any violent crime or crime identified in section 18-8304, Idaho Code." (I.C. §18-8310(4)(c)) There exists no rational legislative purpose or basis for the disparate treatment of registration requirements and penalties for non-compliance between these two (2) similarly situated groups.

Furthermore, there is no rational legislative purpose or basis for the disparate post-conviction treatment of those offenders having been convicted of crimes under I.C. §18-8304, and other serious felony level crimes where evidence

indicates sexual offenders are no more likely to re-offend, nor any more likely to pose a threat to the safety of others.

This discussion of the differing treatment of juvenile and adult sex offenders serves to show that Idaho has implemented a system whereby an individualized risk assessment is actually being performed for juveniles (at age 21 as set forth above), whereas adult sex offenders are given no such consideration. It is worth noting that the age of review, for the purposes of continuing sex offender registration, on the basis of a juvenile conviction, is age 21. Effectively, this means that all juvenile sex offenders will register for a minimum of three (3) years, after which a risk based assessment (hearing) *may* be requested by the prosecution to determine whether the juvenile poses an ongoing threat to the safety of others. If such a request is not made by the prosecutor, the juvenile is deleted from registry. (I.C. §18-8410).

F. Contracts/Taking/Police Power

The claims by Does relating to the Contracts Clause, Takings, Police Power, and Separation of Powers, in most ways relate to the analysis set forth above, i.e. punitive vs. non-punitive.

G. Free Exercise Of Religion

The Does allege that Idaho has substantially burdened their exercise of religion without demonstrating that application of the burden to the person is both

(a) essential to further a compelling governmental interest, and; (b) is the least restrictive means of furthering that compelling government interest. (ER Vol II 47)

Idaho enacted the Free Exercise of Religion Protected Act ("FERPA") in 2000. (I.C. §73-401, *et. seq*.). FERPA protects the free exercise of religion in Idaho and mandates that the government cannot substantially burden a person's exercise of religion. (I.C. §§73-402(1),(2)). Any state law enacted subsequent to FERPA is subject to FERPA's requirements unless the law explicitly excludes FERPA by reference. *Id*. at §73-403(2).

Does assert that because the 2001, 2009, and 2011 amendments to SORA were enacted after FERPA, and SORA does not enumerate FERPA as an exclusion, the provisions of SORA run contrary to FERPA.

FERPA outlines that the government may only burden a person's free exercise of religion if the burden is essential to furthering a compelling government interest and the burden is the least restrictive means of furthering that interest. (I.C. §§73-402(3)(a),(b)).

II. STATUTE OF LIMITATIONS

In anticipation of an argument relating to statute of limitations the Does have chosen to briefly discuss this issue.

This action is being brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §2201 for injunctive and declaratory relief to address the unconstitutionality of

Idaho's SORA as being both facially and as-applied to Does, and each of them, unconstitutional under a variety of grounds.

In the case of *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d. 254 (1985), the U.S. Supreme Court set about simplifying, and unifying, the holdings of various jurisdictions as it related to the establishment of a statute of limitations in civil rights actions under §1983. In its analysis, the Supreme Court first looked to the language of 42 U.S.C. §1988, which directs that the matter of characterization of the civil rights claim should be treated as a federal question. The Court went on to conclude that characterization of all §1983 claims as a tort action for the recovery of damages for personal injuries was the best alternative available. *Id.* at 276. Finally, the Supreme Court concluded that, "only the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law." *Id.* at 268.

However, see *Wallace v Kato*, 549 U.S. 384, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007), holding that the accrual date of a §1983 cause of action is a question of federal law that is not resolved by reference to state law. Idaho sets that limitation period for the commencement of an action at two (2) years. (I.C. §5-219). See also, *McCabe v. Craven*, 145 Idaho 954, 188 P.3d 896 (2008), holding that the statute of limitations applicable to a §1983 action is that which the state provides for personal injury torts. Later, in 1990, Congress enacted 28 U.S.C. §1658 which

contained a four (4) year catch-all statute of limitations that applied to all Federal statutory enactments occurring after December 1, 1990. Therefore, any §1983 civil rights causes of action enacted on or after that date were and are subject to the federal four (4) year statute of limitations, as opposed to the personal injury statute of limitations applicable to the particular state court forum. See, *Jones v. R.R. Donnelly & Sons Co.,* 541 U.S. 369, 124 S.Ct. 1836, 158 L.Ed.2d 645 (2004).

All of the above authority relates to civil rights actions seeking claims for damages. They deal with an event(s) which may be clearly pinpointed as causing damage to the plaintiff and commencement of the statute of limitations period. This is in contrast to the facts and claims before this Honorable Court wherein Does seek declaratory and injunctive relief that Idaho SORA is unconstitutional, both facially and as-applied to the individual Does, resulting in virtually daily, on-going harm to Does in direct violation of their civil rights under both the Idaho and United States Constitutions.

Any claim that this case is barred by the statute of limitations must fail in that it does not take into consideration that the claims of the various Does fall within the "Doctrine of Continuing Violations" and that Idaho's two (2) year personal injury statute of limitations has yet to accrue due to the ongoing daily civil rights violations suffered by these Does. See, *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 122 S. Ct. 2061 (2002).

While the Does assert that no statute of limitations should apply to the instant case given the nature of the relief requested (declaratory and injunctive), *Morgan* presents an apt analogy of the doctrine of continuing violations, should this Court seek to apply a statute of limitations. The Does are not alleging that a singular act or event damaged them, for which they seek recourse. The specific factual incidences that Does allege are not being submitted to the Court for the purposes of determining whether or not that act, standing alone, was a violation of their constitutional rights, but that the conduct is a continuous chain of violations that is occurring each and every day. In effect, the Does are alleging an ongoing unlawful practice.

In *Morgan*, the court stated that:

> [w]e conclude that a Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate time period—180 or 300 days—set forth in 42 U.S.C. § 2000e–5(e)(1). A charge alleging a hostile work environment claim, however, will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period.

Id at 122.

Any argument that Idaho SORA does not violate Ex-Post Facto requirements will likely rely upon *Smith v. Doe*, 538 U.S. 84, 92 (2003). However, it has been clearly shown in the Declarations of Dr. James J. Prescott and Dr. Jill Levinson filed as attachments to Does' Amended Complaint on file herein (ER

Vol II 200-227) that the research and data upon which the United States Supreme Court made its decision in 2003 was prompted by a study submitted to the Court conducted by a person substantially unqualified in that field of study and that his conclusions have later been debunked by researchers in the field of sex offender recidivism far more qualified than the original author. This has resulted in a long line of cases which have understandably relied upon the holding of the United States Supreme Court in *Smith v. Doe*, *supra*, without taking into consideration more recent and extensive studies on the matter.

Furthermore, with the evolution and development of SORA laws in recent years which have converted regulatory and administrative procedures for safe-guarding the public from those sexual offenders who have been clinically deter-mined to be true dangers to the public, to statutory schemes that arbitrarily and without any subjective basis pigeonhole virtually all sexual offenders into a classification of a lifetime of probation. Also, in the approximate sixteen (16) years which have transpired since the Opinion in *Smith v. Doe*, technology in terms of the amount of readily available information through internet services has exponentially compounded the grossly disproportionate affect that lifetime registration has on convicted sex offenders, as compared to the punitive level which the registration imposed upon offenders in 2003, the time of the *Smith* decision.

In the Ninth Circuit opinion that preceded *Smith v. Doe*, *Doe I v. Otte*, 259 F.3d 979 (9th Cir. 2001), the Court stated as follows:

> Not only do the Alaska statute's registration provisions impose an affirmative disability, but its notification provisions do so as well. By posting the appellants' names, addresses, and employer addresses on the internet, the Act subjects them to community obloquy and scorn that damage them personally and professionally. For example, the record contains evidence that one sex offender subject to the Alaska statute suffered community hostility and damage to his business after printouts from the Alaska sex offender registration internet website were publicly distributed and posted on bulletin boards.

Id. at 987–88.

III. THE DISTRICT COURT ERRED WHEN IT GRANTED THE DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF (PART II)

In granting the Defendants' Motion to Dismiss Amended Complaint for Injunctive and Declaratory Relief (Part II), the District Court dismissed the remaining claims set forth in Does' Amended Complaint Part II with prejudice, which alleged as-applied violations of the United States Constitution.

A. 1993 Inception Date

Each of the Does in the instant case have been required to register as sex offenders in the State of Idaho for convictions set forth in I.C. §18-8304. (ER Vol II 57-150) Idaho's SORA has created no less than four (4) classes of individuals.

Class #1 - The State of Idaho requires those who 1) plead guilty to, or have been found guilty of, a specifically set forth crime on or after July 1, 1993, and; 2)

those who plead guilty to, or have been found guilty of, a "crime covered in this chapter" (Chapter 83, Title 18, Idaho Code), prior to July 1, 1993, and the person, as a result of the offense, is incarcerated in a county jail facility or a penal facility or is under probation or parole supervision, on or after July 1, 1993, to register as sex offenders. (I.C. §18-8304(a), (d)).

There is a significant potential for misinterpretation of the term "crime covered in this chapter" as this term is used in I.C. §18-8304(a). Subparagraphs (b) and (c) of said statute utilize the terms "substantially equivalent to the offenses listed in paragraph (a) of this subsection", however, subparagraph (d) does not. Does have interpreted the term "crime covered in this chapter" as referring to those specific Idaho charges enumerated in subparagraph (a). Does can find no cogent support for the assertion that said term includes not only those specific Idaho charges, but all substantially equivalent offenses as well. Therefore, any foreign conviction where the person was incarcerated, on parole or probation, on or after July 1, 1993, *should not be required to register as a sex offender pursuant to SORA*, by virtue of that fact alone.

Class #2 - The State of Idaho requires a person convicted of *any crime*, including an attempt, solicitation, or a conspiracy, in another jurisdiction, on or after July 1, 1993, who enters this state to establish residence, to register as a sex offender. (I.C. §18-8304(b)). (Registration is required for those convicted of *any*

foreign crime on or after July 1, 1993, who enter Idaho for residency.)

Class #3 - The State of Idaho requires a person with a foreign conviction, sustained on or after July 1, 1993, that is substantially equivalent to the offenses requiring registration in Idaho, who enters this state to establish residence, to register as a sex offender. (I.C. §18-8304(b)). (Registration is required for those who, on or after July 1, 1993, were convicted of a substantially equivalent offense requiring registration in Idaho, who enter this state to establish residency, to register as a sex offender.)

Class #4 - The State of Idaho requires a person to register if that person has been convicted of any crime, an attempt, a solicitation or a conspiracy to commit a crime in another jurisdiction, that is substantially equivalent to the offenses requiring registration in Idaho, *and* was required to register as a sex offender in any other state or jurisdiction when he established residency in Idaho. (I.C. §18-8304(c)) (Registration is required for those who were convicted of a substantially equivalent offense requiring registration in Idaho, and were required to register in any other state, who enters this state to establish residence, to register as a sex offender.)

There is no rational relationship to any non-punitive purpose, or public safety, for these distinctions among those who are required to register and those who are not, and therefore, SORA is punitive.

B. Registration Based On Out-Of-State Conviction/Registration

An *Idaho* offender who was convicted prior to July 1, 1993 and had completed probation, parole, or incarceration prior to July 1, 1993, would not have to register. However, an *out of state* offender who was convicted prior to July 1, 1993 and had completed probation, parole, or incarceration prior to July 1, 1993, would be required to register if that offender had been convicted of any crime, an attempt, a solicitation or a conspiracy to commit a crime in another jurisdiction, that is substantially equivalent to the offenses requiring registration in Idaho, and was required to register as a sex offender in any other state or jurisdiction when he established residency in Idaho. (I.C. §18-8304(c))

Those persons who are convicted of a substantially equivalent sexual offense outside the state of Idaho will be required to register as a sex offender based solely upon a determination of whether the offender was required to register as a sex offender in another state, without an accompanying examination of the date of conviction. To say it another way, all of those who are convicted of a substantially equivalent sexual offense outside of the state of Idaho will be required to register in the State of Idaho, if the State from which they are moving requires them to register, *regardless of the date of their conviction, or the timing of their probation, parole, or incarceration*.

However, it appears that the Sex Offender Management Board does not

interpret this code section as Does do.

For instance, John Doe 85 was convicted in Cape Girardeau County, state of Missouri, of the crime of Sexual Abuse in the 1st Degree, to-wit: victim twelve (12) years of age, a felony. (ER Vol II 115-116) In December of 1985, he moved to the state of Idaho where he completed probation/parole and was released in 1986. *Id.* The SORA requirements had not been enacted at the time he was released from probation/parole requirements. The ex post facto amendments to Idaho SORA effective from and after July 1, 2009, expanded the definition of "aggravated offense" to include all registration offenses where the victim was less than thirteen (13) years of age. Based on that amendment, Doe 85 was required to start registering as a sex offender in Idaho, even though his conviction was in 1985 and his probation completed in 1986.

On May 11, 1988, Doe 132 was convicted in Santa Barbara County, state of California, of the crime of Lewd and Lascivious Act w/Child Under Fourteen (14) Years, to-wit: victim eight (8) years of age at the time of commission of the offense, a felony. (ER Vol II 41-42) He was sentenced to a term of incarceration of six (6) years in the custody of a California state prison facility, but was released from custody in February of 1991. (ER Vol II 42) He was released from parole in March of 1992. *Id.* He was not required to register as a sex offender in the state of California. *Id.* He moved to the state of Idaho in 2000, and was informed of his

obligation to register as a sex offender at that time. *Id.* The ex post facto amendments to Idaho SORNA effective from and after July 1, 2001, created the "aggravated offense" exception to eligibility for release from the Idaho Sex Offender Registry. Under this designation, the offense was classified as an "aggravated offense", which required lifetime registration.

Pursuant to Idaho's statutory framework, neither Does 85 or 132 should be registering as a sex offender in Idaho as neither of their convictions occurred on or after July 1, 1993, nor were either or them incarcerated, or on probation or parole, on or after July 1, 1993. Neither of the Does was required to register as a sex offender until Idaho required it. Idaho is forcing them to register because they have a substantially equivalent conviction, without regard to the date of their conviction, or the date of incarceration, probation or parole; and without regard to whether or not they were required to register in another state.

It appears that the Idaho Sex Offender Management Board has missed the word "and" in I.C. §18-8304(c). Pursuant to that section, the person must have been convicted of a substantially equivalent offense "*and* was required to register as a sex offender in any other state or jurisdiction when he established residency in Idaho." (I.C. §18-8304(c))(emphasis added) There can be no clearer proof of punitive intent.

C. Punitive Effects

John Doe 82 was convicted on May 12, 1986, in Sitka County, state of Alaska, of the crime of Sexual Abuse of a Minor in the 2nd Degree, to-wit: Sixteen (16) or Seventeen (17) Years, a felony. (ER Vol II 9) At the time of imposition of sentence, the laws of the State of Alaska did not provide for sex offender registration.

In 1995 he was released from parole unconditionally with no further duties or obligations to the state of Alaska as a result of the above-mentioned conviction. Thereafter, he was notified by the state of Alaska that due to a change in state law, he would be brought back into the criminal justice system for the purpose of newly enacted sex offender registration requirements. *Id.* That this was done without prior notice to Doe 82 without the opportunity to be heard in opposition to the newly enacted registration requirements.

In the year 2000, he moved to the state of Florida and began registering as a sex offender pursuant to that state's registration requirements. (ER Vol II 10) That by letter dated November 19, 2008, he was advised by the Florida Department of Law Enforcement that he was being permanently released from the requirement that he register as a sex offender from that point forward. *Id.* Between the time of receiving the letter and 2013, he continued to reside in the State of Florida without any registration requirements. *Id.* During this time period, said his owner oper-

ated business flourished as a direct result of his removal from Florida's sex offender registry. *Id.*

That in 2013, Doe 82 moved with his family to the State of Idaho. *Id.* Shortly after his arrival, he applied for an Idaho's driver's license and was informed by the State of Idaho law enforcement authorities that he would, once again, be required to register as a sex offender in that state, for life. *Id.* Furthermore, due to the fact Idaho was now requiring him to register, he was notified by Idaho authorities that in the event of his return to the state of Florida, he would once again have to register as a sex offender in that state, despite his earlier unconditional release from reporting requirements there. *Id.*

Pursuant to Idaho's SORA, Doe 82 should not be required to register as a sex offender.

Doe 82 has experienced increases in the reporting requirements relative to mail verifications, appearing in person, as well as police checks at his home. He feels that he has been relentlessly persecuted for 33 years for his offense. He never shares his last name to people he meets, however, once he is found to be a sex offender, he is shunned and alienated. He has been routinely denied living accommodations, employment and opportunities for advancement. At times, he has considered suicide due to the stigma. He was financially successful when he was off the sex offender registry and suffered financial losses and debt while on

the registry. (ER Vol II 10-12)

Doe 62 was convicted in January, 1988 in Grand County, Colorado, for Sexual Assault of a Minor, to wit: the age of 9 years, a felony. (ER Vol II 12) He was sentenced to a period of probation of four (4) years. *Id.* In 1992, he moved to Idaho while still on probation. *Id.* On January 5, 1994, he was released from probation by the Grand County, without any conditions whatsoever. *Id.*

That Doe 62's probation officer in Idaho informed him to either quit school and go back to Colorado, or be placed on the sex offender registry. (ER Vol II 13) Doe 62 felt he had too much invested in is education to leave, so he was placed on the registry. *Id.*

Pursuant to Idaho's SORA, Doe 62 should not be required to register as a sex offender, unless this Court were to interpret "[pleads guilty to or has been found guilty of a crime covered in this chapter" to mean that somehow all substantially equivalent crimes are "covered in this chapter". (I.C. 18-8304(d)).

His life was forever changed from the moment he was required to register. The fact of his registration was used against him in his divorce, he was ostracized and persecuted by his family, and could not be alone with his grandchildren out of fear.

Doe 106 pled guilty pursuant to an *Alford Plea* to the crimes of Rape of a Child and Child Molestation, for which conviction was entered on December 31,

1990, in King County, Washington. (ER Vol II 14) He was placed on probation for a period of one (1) year. *Id.* That same year, said Plaintiff was advised he was required to register as a sex offender in the State of Washington, and he was released from probation in October, 1995. *Id.*

In 2000, he moved to Idaho, where he began registering as a sex offender. *Id.* At this point in time, Idaho SORA's requirements provided that the register for a period of ten (10) years from the date of release from his probation, i.e., October, 2005. (ER Vol II 14-15) That subsequent to the amendment to Idaho SORA which became effective July 1, 2009, said Plaintiff was notified he would thereafter be required to register for life as a sex offender. *Id.*

Doe 106 was prohibited from participating in community theater, felt that he was discriminated against by law enforcement, suffered confusion as to the interpretation of registration requirements and was nearly arrested in Yellowstone, has lost significant financial contracts, denied a liquor license, lost customers to his brewery and suffered decreased revenues, and has received death threats, among other things. (ER Vol II 15-17)

Many of the Does set forth in the Amended Complaint have alleged that the amendments to SORA modified and/or eliminated their right to pursue removal from SORA without prior notice to them and without any ability to object, and often times in direct contradiction of the registration requirements at the time of

conviction. In addition, the amendments have increased the registration requirements over time which have become overly burdensome as well as vague and ambiguous.

CONCLUSION

For the foregoing reasons, the Judgment of the District Court should be reversed and the case remanded for consideration of Does' claims on the merits.

Counsel requests oral argument.

Dated This 12th day of September, 2019.

FULLER LAW OFFICES

/s/ Greg J. Fuller
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Attorneys for Appellants
John and Jane Does 1-134

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 19-35391

I am the attorney or self-represented party.

This brief contains 9,771 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- [x] complies with the word limit of Cir. R. 32-1.
- [ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- [ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- [ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- [ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - [ ] it is a joint brief submitted by separately represented parties;
  - [ ] a party or parties are filing a single brief in response to multiple briefs; or
  - [ ] a party or parties are filing a single brief in response to a longer joint brief.
- [ ] complies with the length limit designated by court order dated ______.
- [ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Greg J. Fuller **Date** Sep 12, 2019

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

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9th Cir. Case Number(s) 19-35391

The undersigned attorney or self-represented party states the following:

- (●) I am unaware of any related cases currently pending in this court.
- ( ) I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.
- ( ) I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature s/Greg J. Fuller **Date** Sep 12, 2019

(use "s/[typed name]" *to sign electronically-filed documents)*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 15. Certificate of Service for Electronic Filing

Instructions for this form: *http://www.ca9.uscourts.gov/forms/form15instructions.pdf*

9th Cir. Case Number(s) 19-35391

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Service on Case Participants Who Are Registered for Electronic Filing:

☐ I certify that I served the foregoing/attached document(s) via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing system.

Service on Case Participants Who Are NOT Registered for Electronic Filing:

☐ I certify that I served the foregoing/attached document(s) on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case participants *(list each name and mailing/email address)*:

Description of Document(s) *(required for all documents)*:

Appellants' Brief, Addendum, Excerpts of Record Volume I, Excerpts of Record Volume II, Certificate of Compliance for Briefs and Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Signature s/Greg J. Fuller **Date** Sep 12, 2019

(use "s/[typed name]" *to sign electronically-filed documents)*

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