UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY ROE,

Plaintiff,

v.

RICHARD SNYDER, Governor of the State of Michigan, Col. KRISTE ETUE, Director of the Michigan State Police, CORRIGAN O'DONOHUE, Royal Oak Chief of Police, and JESSICA COOPER, Oakland County Prosecutor, in their official capacities, and Royal Oak Police Officer CABANAW, in his individual capacity

Defendants.

File No. 16-cv-13353

Hon. Mark A. Goldsmith

Mag. Judge David R. Grand

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

This motion is being filed in conjunction with Plaintiff's Verified Complaint (Dkt. 1) and Plaintiff's Motion to Proceed Anonymously (Dkt. 5). On August 26, 2016, the Sixth Circuit held in a published decision that the "retroactive application of [the Michigan Sex Offender Registration Act's] 2006 and 2011 amendments to Plaintiffs is unconstitutional, and it must therefore cease." *Does v. Snyder*, __ F.3d __, slip op. at 13 (6th Cir. 2016) (attached as Exhibit 1 to complaint). This motion seeks enforcement of that decision with respect to Mary Roe, who was not herself a plaintiff in *Does* but whose own circumstances are materially indistinguishable.

She seeks immediate relief in the form of a temporary restraining order and preliminary injunction because unless she quits the job she has held for the last eight years, she faces an imminent threat of arrest and/or prosecution in direct violation of the Sixth Circuit's holding.

As set out in the verified complaint, Mary Roe was convicted in 2003 of criminal sexual conduct, third degree, for having sex as a teenager with a younger teen. She is currently the Clinical Director at a residential drug treatment center where she has worked for the last eight years.

Ms. Roe is subject to Michigan's Sex Offender Registration Act (SORA), M.C.L. § 28.721 *et seq.*, which imposes a wide range of obligations and restrictions on registrants, including a prohibition on working within 1,000 feet of a school. M.C.L. § 28.734(1)(a). On September 9, 2016, the Royal Oak Police Department informed Ms. Roe that she would have to quit her job or face prosecution because her place of employment is allegedly within 1,000 feet of a school.

By this motion, and pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiff seeks a temporary restraining order and/or preliminary injunction barring Defendants from enforcing SORA against her.[1]

[1] Concurrently with this motion, Ms. Roe is filing a motion to proceed under a fictitious name. Ms. Roe asks that the Court consider both motions together in order to ensure that any relief granted under this motion for a temporary restraining order/preliminary injunction can be effectuated without requiring Ms. Roe's identity to be publicly revealed. The proposed protective order states that her identity

Local Rule 7.1(a)(1) requires Plaintiff to ascertain whether this motion will be opposed. Because this motion was filed shortly after Ms. Roe filed her complaint, no attorney for Defendants has entered an appearance. Nevertheless, counsel for Plaintiff has sought concurrence in the relief sought in this motion from the attorneys who have represented the State of Michigan in *Does v. Snyder*, from the Oakland County Prosecutor's Office, and from the Royal Oak City Attorney's Office. A supporting brief accompanies this motion.

Respectfully submitted,

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Dated: September 16, 2016

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will be provided to Defendants so that they can litigate this action and comply with any orders from this Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY ROE,

Plaintiff,

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RICHARD SNYDER, Governor of the State of Michigan, Col. KRISTE ETUE, Director of the Michigan State Police, CORRIGAN O'DONOHUE, Royal Oak Chief of Police, and JESSICA COOPER, Oakland County Prosecutor, in their official capacities, and Royal Oak Police Officer CABANAW, in his individual capacity

Defendants.

File No. 16-cv-13353

Hon. Mark A. Goldsmith

Mag. Judge David R. Grand

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Dated: September 16, 2016

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INTRODUCTION

On August 25, 2016, the Sixth Circuit held, in a published and binding decision, that Michigan's Sex Offender Registration Act (SORA), M.C.L. § 28.721 *et seq.*, imposes punishment, and therefore its retroactive application violates the Ex Post Facto Clause. *Does v. Snyder*, __ F.3d __ (6th Cir. 2016) (slip op.). The Sixth Circuit specifically held that retroactive application of SORA's 2006 and 2011 amendments, which include a prohibition on registrants working within 1,000 feet of a school, must cease. *Id.*, slip op. at 13. Nevertheless, Defendants are threatening to continue to enforce SORA against Mary Roe, who was convicted prior to the 2006 amendments, and who now must either face arrest, prosecution and imprisonment or quit a job which she has held for eight years and to which she is deeply committed. Because Ms. Roe faces an imminent threat of irreparable harm from Defendants' continued retroactive enforcement of SORA in clear violation of the Sixth Circuit's holding, this Court should enter a temporary restraining order and preliminary injunction prohibiting Defendants from enforcing SORA against her.

BACKGROUND AND FACTS

At the age of 19, Mary Roe engaged in sexual activity with a younger teen[2]. She was convicted in 2003 of criminal sexual conduct, third degree. At the time

[2] Ms. Roe's declaration verifying the facts alleged both in this motion and in the complaint is attached as Exh. 2 to the complaint.

she had a drug addiction, and was on probation for uttering and publishing. She served about two and half years in prison.

After being released from prison, Ms. Roe pursued her education, first earning a Bachelors of Science in Addiction Studies *summa cum laude*, and then a Masters in Counseling. She is currently the Clinical Director at a residential drug treatment center for the homeless where she has worked for the last eight years.

As Clinical Director, Ms. Roe supervises 20 staff in residential treatment and recovery housing, providing services to over 500 clients each year. She has been responsible for tripling the residential treatment program revenue to $2.7 million. If she were forced to quit her job, not only would she suffer that loss of employment, but because she is integral to the operations and program development at her organization, her employer and clients would suffer her loss as well. Ms. Roe has also served on the boards of other nonprofit organizations doing similar work, and has been recognized for her achievements through a leadership development fellowship to travel overseas.

Ms. Roe is passionate about her work and feels that it is her life's calling. As a former addict, she is keenly aware of the difficulties that young people with drug problems face, and she has dedicated herself to ensuring that others do not make the mistakes that she made. For her, losing her job would mean losing her life's work.

Pursuant to Michigan's Sex Offender Registration Act (SORA), M.C.L. § 28.721 *et seq.*, Ms. Roe has been required to register her place of employment with law enforcement. She has verified her current work address with law enforcement once every three months for the last eight years. Until several days ago, no law enforcement official had ever suggested that she is barred from working at her current place of employment.

Ms. Roe recently moved to a new apartment in Royal Oak. On or about August 28, 2016, Officer Cabanaw from the Royal Oak Police Department came to Ms. Roe's home in order to verify that she lived at that address. On September 9, 2016, Officer Cabanaw informed Ms. Roe by phone that she was noncompliant with her registration requirements, purportedly because her place of employment is within 1,000 feet of a school. The officer told Ms. Roe that if she did not quit her job, she could face criminal charges. Ms. Roe not only explained to Officer Cabanaw that she has worked at that job for eight years, but that SORA's exclusion zones had recently been ruled unconstitutional in *Does v. Snyder*. The officer indicated that he was aware of that court decision, but that he would be referring the case to a detective.

No law enforcement official had ever told Ms. Roe that her place of employment is within 1,000 feet of a school. When Ms. Roe attempted to determine the distance between her place of employment and the nearest school by using Google

maps, she found that the distance was 1,056 feet. Officer Cabanaw, however, told her that his computer research showed that the distance was less than 1,000 feet. After Officer Cabanaw spoke with Ms. Roe, the registry page for Ms. Roe on the Public Sex Offender Registry was changed to show her as non-compliant. Underneath her name and picture, in bright red letters, there is now a large red bullet with an exclamation point, and the text: "Non-compliant, Employment Violation." *See* Exhibit 3 (Redacted Registry Print-Out).

Absent a temporary restraining order or an injunction from this Court, Ms. Roe must either quit her job of eight years or face an imminent threat of arrest and prosecution for continuing to work at that location. Ms. Roe was threatened with arrest and prosecution *after* the Sixth Circuit decided *Does v. Snyder*, and despite Officer Cabanaw's awareness of that decision, indicating that Defendants do not intend to comply with Sixth Circuit's holding unless specifically enjoined from doing so by a court.

ARGUMENT

THIS COURT SHOULD GRANT A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION BARRING DEFENDANTS FROM RETROACTIVELY ENFORCING SORA AGAINST MS. ROE.

Ms. Roe seeks immediate injunctive relief so that she is not forced to quit her job or face arrest and prosecution for allegedly violating SORA. Specifically, without injunctive relief, she faces arrest and prosecution for working within 1,000

feet of a school in violation of M.C.L. § 28.734(1)(a) if she does not quit her job.

In ruling on a motion for a preliminary injunction, a district court must consider the following factors:

1. the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim;

2. whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief;

3. the probability that granting the injunction will cause substantial harm to others; and

4. whether the public interest is advanced by the issuance of the injunction.

Washington v. Reno, 35 F.3d 1093, 1099 (6th Cir. 1994). The same factors apply to a motion for a temporary restraining order. *See Tocco v. Tocco*, 409 F. Supp. 2d 816, 823-24 (E.D. Mich. 2005).

A. Ms. Roe Is Likely to Succeed on the Merits.

1. Because Ms. Roe Was Convicted in 2003, the 2006 Geographic Exclusion Zones Cannot Be Applied to her Retroactively.

In *Does v. Snyder*, __ F.3d. __ (6th Cir. 2016), the Sixth Circuit held that the retroactive application of SORA violates the constitutional prohibition on Ex Post Facto laws. In reaching that conclusion, the Court was particularly concerned by the 2006 SORA amendments (codified as M.C.L. §§ 28.733-736) that created exclusion zones barring registrants from working, living, or "loitering" within 1,000 feet of a school. *Id.* at 7-8 (using illustrative map to show how exclusion

zones make it illegal for registrants to work or live in many areas).

> We conclude that Michigan's SORA imposes punishment. And while many (certainly not all) sex offenses involve abominable, almost unspeakable, conduct that deserves severe legal penalties, punishment may never be retroactively imposed or increased. Indeed, the fact that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the Ex Post Facto clause. As the founders rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people without prior notice…. *The retroactive application of SORA's 2006 and 2011 amendments to Plaintiffs is unconstitutional, and it must therefore cease.*

Id. at 13 (emphasis added).

Here, Ms. Roe was convicted in 2003, before the 2006 exclusion-zone amendments were added to SORA. *See* Mich. Pub. Acts 121, 127 (2005) (effective January 1, 2006). The Sixth Circuit has made clear that applying the 2006 amendments retroactively violates the Ex Post Facto Clause. The Sixth Circuit decision is published, precedential, and therefore controlling authority in this case. Ms. Roe is therefore likely to succeed on her claim that the geographic exclusion zones cannot be applied to her.

2. The Geographic Exclusion Zones Are Void for Vagueness.

While the likelihood-of-success factor is clearly met because the Sixth Circuit's ex post facto holding is binding precedent, it is also worth noting that the district court in *Does v. Snyder* held that SORA's geographic exclusion zones are unconstitutional for a different reason, namely vagueness. 101 F. Supp. 3d 672,

682-85 (E.D. Mich. 2015), *reversed on other grounds*, __ F.3d __ (6th Cir. 2016) (slip op) (Exh.1). On appeal, the Sixth Circuit concluded that since the contested provisions, including the exclusion zones, could not be applied retroactively, it did not need to reach the due process vagueness issues. However, the Court did not vacate the lower court's vagueness decision. *See Does*, __ F.3d __, slip op at 13 (reversing only the district court's decision that SORA is not an Ex Post Facto law). In fact, the Sixth Circuit noted that "as the district court's detailed opinions make evident, Plaintiffs' arguments on these other issues are far from frivolous and involve matters of great public importance." *Id*.

Ms. Roe's situation vividly illustrates the void-for-vagueness problems identified by the district court in *Does*. While she concluded that her place of employment is 1,056 feet from a school, the Royal Oak Police Department came to a different measurement. Moreover, she reported that employment address every three months for eight years without incident. It was only when she moved her residential address, leading her registration to be reviewed by a different police department, that she was suddenly informed that her job is too close to a school. No other law enforcement agency had ever reached that conclusion. Accordingly, Ms. Roe is likely to succeed on her claim that SORA's exclusion zones are void for vagueness.

B. The Remaining Preliminary-Injunction Factors Favor Ms. Roe.

If the Court determines that Plaintiff is likely to succeed on the merits of her ex post facto and Fourteenth Amendment claims, a preliminary injunction or TRO is warranted. *See Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010) ("Because the plaintiffs have established a substantial likelihood of success on their free speech and [due process] claims, there appears to be no issue as to the existence of the remaining preliminary injunction factors."). The three remaining factors – (1) irreparable harm to Plaintiff, (2) harm to others, and (3) the public interest – all weigh in Plaintiff's favor.

1. Irreparable Harm

If the Court finds that it is likely unconstitutional to enforce SORA's geographic exclusion zones against Ms. Roe, then the Court must also find that such enforcement would likely cause irreparable harm. "[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *ACLU of Kentucky v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003).

Here, Ms. Doe will suffer irreparable harm if immediate injunctive relief is not granted. She will be forced to quit her job or face arrest and criminal prosecution if she continues to work. If she is forced to leave her employment, she will not only lose her income, but lose the opportunity to continue work that she sees as

her life's mission. If she continues to work, she could be arrested and jailed.

The Supreme Court has made clear that "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute" that violates the individual's constitutional rights. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

> [W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat – for example, the constitutionality of a law threatened to be enforced…. [W]e did not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative action.

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128-29 (2007) (original emphasis). *See also WomanCare of Southfield, P.C. v. Granholm*, 143 F. Supp. 2d 827, 846 (E.D. Mich. 2000) (finding irreparable harm where plaintiffs faced threat of arrest, conviction, monetary fines and fear of incarceration if they continue to violate a potentially unconstitutional law).

Here, unless this Court grants immediate injunctive relief, Ms. Roe would be "betting the farm" if she continues to work knowing that it could lead to her arrest. Alternately, she will lose her livelihood, and the job she loves.

2. Harm to Others

The Sixth Circuit has held that "if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be

said to inhere in its enjoinment." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001); *see also Tyson Foods v. McReynolds*, 865 F.2d 99, 103 (6th Cir. 1989) ("[Defendant] has suffered no injury as a result of the preliminary injunction [because it] has no right to the unconstitutional application of state laws."). Here, because Plaintiff has shown a likelihood of success on the merits of her claims asserting an imminent threat of unconstitutional arrest and prosecution by Defendants, no harm to Defendants or others justify withholding injunctive relief. The fact that Ms. Roe has worked at her current place of employment for eight years is further proof that no harm will come to others from allowing her to continue in that job.

3. The Public Interest

The final factor is whether the public interest will be served by an injunction. Again, Plaintiff's likelihood of success on the merits of her claims largely disposes of the public-interest factor. "When a constitutional violation is likely, ... the public interest militates in favor of injunctive relief because it is always in the public interest to prevent violation of a party's constitutional rights." *Miller*, 622 F.3d at 540 (internal quotation marks omitted).

In this case, the public-interest factor weighs in favor of preliminary injunctive relief because, as demonstrated above, "a constitutional violation is likely." *Id*. Moreover, given Ms. Roe's unique skill set and the important role she

plays for her employer, her staff, and her many clients, the public interest is served by allowing her to continue in her job.

CONCLUSION AND RELIEF REQUESTED

Based on the foregoing, Plaintiff requests that this Court enter a temporary restraining order and/or preliminary injunction barring enforcement of SORA against her.

Respectfully submitted,

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September 16, 2016

CERTIFICATE OF SERVICE

On September 16, 2016, I e-filed the above document using the Court's ECF system which will send same-day e-notification to all counsel of record. I also emailed the filing to: AAG Erik Grill at grille@michigan.gov and AAG Denise Barton at bartond@michigan.gov, assistant Oakland County counsel Keith Lerminiaux at lerminiauxk@oakgov.org, and Royal Oak City Attorney Mark Liss at markl@romi.gov. The above document will also be served on the Defendants with the complaint as soon as practicable to:

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