CASE NO. 15-2346/2486

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DOES, #1-5; MARY DOE

Plaintiffs-Appellants/Cross-Appellees,

-vs-

RICHARD SNYDER, Governor of the State of Michigan; COL. KRISTE ETUE, Director of the Michigan State Police, in their official capacities,

Defendants-Appellees/Cross-Appellants.

On appeal from the United States District Court
for the Eastern District of Michigan

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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Case Number: 15-2346/2486 Case Name: *Does v. Snyder*

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Pursuant to 6th Cir. R. 26.1, John Does 1-5 and Mary Doe
Name of Party
make the following disclosures:

1. Are any of these parties a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on January 4, 2016, the foregoing document was served on all parties or their counsel of record through the MC/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Miriam J. Aukerman

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Other Authorities

Carpenter, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L. J. 1071, 1073-74 (2012) 23
Henry M. Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401 (1958) 36

Senate Fiscal Agency Bill Analysis, P.A. 542 (2002) 29
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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-appellants/cross-appellees request oral argument because Michigan's Sex Offender Registration Act affects tens of thousands of state residents, making a ruling on its constitutionality of significant interest to registrants, law enforcement, and the public. Oral argument will be helpful to the Court given the extensive record compiled by the parties below. Oral argument will allow the parties to assist the Court with the many issues arising out of the three consolidated appeals, which include defendants' interlocutory appeal of the injunctive relief granted by the district court, and both parties' appeals from the final judgment. Finally, oral argument will be helpful because the questions presented here are being litigated around the country, particularly the question of whether the Supreme Court's holding in *Smith v. Doe*, 538 U.S. 84 (2003), still applies given the significant changes to registration schemes in the intervening years.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§1331 and 1343. Plaintiffs and defendants filed appeals of the district court's final judgment, entered October 21, 2015, on October 26, 2015 and November 20, 2015, respectively. This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF ISSUES

1. Given that Michigan's Sex Offender Registration Act (SORA) has evolved to impose sweeping restrictions on virtually every aspect of plaintiffs' lives, does SORA violate the Ex Post Facto Clause by imposing those restrictions retroactively based solely on past convictions without individualized assessments of current dangerousness?

   Plaintiffs say yes.

   Defendants say no.

   District court said no.

2. Does retroactively requiring plaintiffs to comply with SORA's restrictions for life violate due process, where plaintiffs did not receive fair warning of lifetime registration at the time of their convictions?

   Plaintiffs say yes.

   Defendants say no.

   District court said no.

3. Do SORA's internet reporting requirements violate the First Amendment and the Due Process Clause of the Fourteenth Amendment?

   Plaintiffs say yes.

   Defendants say no.

District court said yes in part and no in part.

4. Should the state be enjoined from enforcing the facially invalid SORA provisions as to all registrants?

   Plaintiffs say yes.

   Defendants say no.

   District court said no.

5. Does SORA violate plaintiffs' fundamental right to parent?

   Plaintiffs say yes.

   Defendants say no.

   District court did not decide.

6. Does imposing SORA retroactively on Doe #1, who was never convicted of a sex offense, and on Doe #2, who was promised secrecy under the terms of his plea bargain, violate due process?

   Plaintiffs say yes.

   Defendants say no.

   District court said no.

7. Did the district court err in dismissing, at the pleadings stage, plaintiffs' claims that SORA unconstitutionally interferes with their right to work and right to travel?

   Plaintiffs say yes.

   Defendants say no.

   District court said no.

STATEMENT OF THE CASE

1. The Historical Evolution of SORA

Michigan's sex offender registry is the country's fourth largest, with 40,000-49,000 registrants. Joint Statement of Facts (JSOF) ¶¶213-15, R. 90, Pg.ID#3769. Michigan's Sex Offender Registration Act (SORA), M.C.L. §28.721, *et seq*., restricts where plaintiffs can live, work, or interact with their children. Plaintiffs must report in person every three months, provide an exhaustive list of personal information for dissemination to the public, and appear immediately in person when their information changes. Violations carry prison terms of up to 10 years. M.C.L. §§28.725, 28.725a, 28.727, 28.729, 28.734-35.

It was not always so. When first created in 1994, Michigan's registry was a private, law-enforcement-only database of convictions. Mich. Pub. Act 295, Sec. 10 (1994). Over the last two decades the legislature repeatedly amended SORA, transforming registration from a list of convictions in a police database to a complex system of reporting and control. In 2004, amendments created a public website that publishes detailed personal information about all registrants. In 2006, geographic exclusion zones were added, retroactively imposing restrictions on basic human activities like working, parenting, and finding a home. JSOF ¶¶4-26, R. 90, Pg.ID#3730-35.

After passage of the federal Sex Offender Registration and Notification Act

(SORNA), 42 U.S.C. §16901, Michigan restructured its registry. The 2011 amendments to SORA imposed extensive new reporting requirements, and retroactively classified registrants into three tiers. Tier classification determines the frequency of reporting and length of registration. Based solely on their offense and without any individualized risk assessment, plaintiffs were automatically classified as Tier III (the worst offenders) and retroactively subjected to lifetime registration. JSOF ¶¶19-29, R. 90, Pg.ID#3733-36.

2. SORA Restricts Virtually Every Facet of Human Life.

SORA imposes a bewildering array of obligations and restraints too numerous to set out here. They are instead listed in the Summary of SORA Obligations. R. 91-10; Pg.ID#4822-36.

Because plaintiffs are registered sex offenders, they must also comply with a host of other Michigan laws, federal laws, other states' laws, and local ordinances. Such restrictions have "exploded over the last twenty years." Prescott Report, R. 90-23, Pg.ID#4622. The requirement to register has "become indistinguishable … from [this] package of myriad restrictions and obligations."[1]

[1] A partial list of such laws exceeds 1,000 pages. JSOF ¶¶999-1000, R. 90, Pg.ID#3965. For example, federal law bars registrants from accessing subsidized housing (24 C.F.R. §5.856); Michigan law bars registrants from renewing their driver's licenses by mail and subjects them to different standards for termination of parental rights (M.C.L. §§257.307(9), 712A.13a(6), 712A.19a(2)(d)); and registrants are banned from parks, playgrounds, and city recreation facilities in Warren, MI (Mun. Code 22-140).

Eight key restrictions imposed directly by SORA are summarized below.

A. Housing

SORA bars registrants from living within 1,000 feet of school property. M.C.L. §28.735.

Doe #1 could not live with relatives upon his release from prison because they lived in exclusion zones. Landlords rejected him for being a registrant. He only found housing when a friend leased a unit for him. Landlords rejected Doe #2 because he was on the registry, even though he has no criminal record. (His case was dismissed under a diversion program for youthful offenders.) As a disabled veteran, he qualifies for subsidized housing, but is barred because he is a lifetime registrant. Doe #3 could not purchase a home within 1,000 feet of a school. He was forced to spend $25,000 more on a smaller home outside the prohibited zones. JSOF ¶¶910-18, R. 90, Pg.ID#3943-45.

Doe #4 lost his house to foreclosure after losing his job when his employer learned he was on the registry. He briefly lived with his mother and sister, but they were threatened with eviction because he is on the registry. He became homeless. His wife, a leasing agent, testified that she was unable to find a SORA-compliant home. *Id.* ¶¶562-64, Pg.ID#3862-64.

Doe #5 lived where he wished for 33 years after his conviction. Starting in 2010, he received federal housing assistance. When he was retroactively added to

the registry in 2012, he was forced to move. His status as a lifetime registrant jeopardizes his federal housing assistance. *Id.* ¶¶172, 928-33, Pg.ID#3761, 3947-48.

When Mary Doe was faced with vacating the home she was renting from a cousin, she was unable to find a home outside an exclusion zone. *Id.* ¶934, Pg.ID#3948-49.

B. Employment

Less than half of non-incarcerated Michigan registrants are employed. JSOF ¶937, R. 90, Pg.ID#3949. SORA bars registrants from working in exclusion zones. M.C.L. §28.734(1)(a). The fact that employer addresses are publicly posted on the registry website further discourages employment. M.C.L. §28.728(2)(d).

Doe #1 repeatedly lost employment opportunities, including garbage collection and fast-food, because he is a registrant. He could not open a home-restoration business because many customers are within exclusion zones. *Id.* ¶¶938-40, Pg.ID#3949-50.

Employers refuse to hire Doe #2 when they discover he is a registrant. He has lost jobs as a firefighter, at Home Depot, and in government. Because he does not have a criminal record (as his youthful offender charge was dismissed), employers would not know about his sealed case but for the registry. Doe #3 fears

that his status as a registrant will make it impossible to find employment if he becomes unable to work in the family business. *Id.* ¶¶942-44, Pg.ID#3950.

Doe #4 worked at an auto parts factory, but was fired after an anonymous caller informed management he was a registrant. With great difficulty he found another job, but was again immediately fired when management learned he was on the registry. He could not accept work from a staffing agency because it was within 1,000 feet of a school. *Id.* ¶¶945-50, Pg.ID#3950-52.

Mary Doe was terminated from her job in medical billing the day after her employer learned she was on the registry. She did well in an externship, but the employer would not hire her due to concerns about having the company's information posted on the registry. She believes that if her current employer learns she is on the registry, she will be fired. *Id.* ¶¶951-52, Pg.ID#3952.

C. Parenting

SORA severely restricts parenting, at great cost to both registrants and their children. Doe #1 does not take his two-year-old son to parks or playgrounds for fear of SORA noncompliance. Doe #2 does not participate in his daughter's school or sporting events. *Id.* ¶¶528-42, Pg.ID#3854-56.

Doe #3 does not attend parent-teacher conferences, sports, or school events, and does not take his children to school because the family does not know whether he could be arrested. He missed his son's birthday party at an indoor playground;

he told his son he had to work and dressed up in his work clothes, but his son knew he was lying. His wife feels like "a single parent because he can't help me." She worries about what their sons will face in middle school, where the curriculum includes searching the registry. *Id.* ¶¶543-61, Pg.ID#3856-62.

Doe #4 has been unable to live with his wife (the victim in his case)[2] and their two children because he is on the registry. The couple could not find housing together because many properties are close to schools and others do not accept registrants. Doe #4 was homeless while his wife and children lived with her parents. His wife testified that "[w]e can't really be a family" because "we're not together in the sense where we can … always have dinner together or help with my daughter's homework." Doe #4 could not help with nighttime feedings for their new baby. *Id.* ¶¶562-72, Pg.ID#3862-66.

Doe #5 is unable to attend sporting events, school plays, and similar activities for his grandchildren. *Id.* ¶574, Pg.ID#3866.

Ms. Doe was very involved in her daughter's school in Ohio, but is unable to attend school events since she moved to Michigan. She could not attend her daughter's eighth grade graduation or school plays. *Id.* ¶¶576-86, Pg.ID#3866-69.

[2] Doe #4 married his wife in June 2015. Doe #4, 2nd Decl., R. 116, Pg.ID#6012.

Plaintiffs' expert showed that 33% of registrants cannot live with family members due to residency restrictions, while 74% do not attend school events, sports events, or children's birthday parties. *Id.* ¶¶601-03, Pg.ID#3873-74.

D. Lifetime Supervision and Reporting

Plaintiffs must report in person every three months until death. M.C.L. §28.725a(3). They must provide fingerprints and palm-prints, as well as extensive personal information on their physical appearance, employment, education, housing, telephone use, internet use, vehicle use/storage, and travel. They must even report nicknames. M.C.L. §28.727(1).

Registrants must report in person "immediately" – defined as within three business days – whenever they:

- change residences;
- begin/change/discontinue employment;
- enroll/dis-enroll as a student;
- change their name;
- establish an e-mail address, instant message address, or other internet designation;
- intend to travel for more than seven days; or
- buy or begin to use a vehicle, or cease to own or use a vehicle.

M.C.L. §§28.722(g), 725(1).

The time it takes to register varies, but can be as long as two hours. A

Michigan State Police (MSP) official testified that registration lines can be "upwards of 100 people," and that there is no reason registrants must appear in person "other than that the law requires it." Plaintiffs have difficulty getting time off work to register every three months. JSOF ¶¶953-60, R. 90, Pg.ID#3952-54.

SORA's reporting, residency, employment and supervision restrictions are more onerous than what plaintiffs experienced on probation or parole. Registrants report information that parolees/probationers need not report, and must report "immediately" when certain information changes. *Id.* ¶¶976-80, Pg.ID#3958-60.

The former Legal Affairs Administrator for the Michigan Department of Corrections testified that the MDOC tailors parole/probation restrictions to each individual's circumstances, and uses individualized risk assessments to determine the frequency and nature of reporting. Lower risk parolees/probationers use phone, mail, or email to report. Parole restrictions typically last two years, can be grieved, and are often relaxed over time. SORA's restrictions last for life, cannot be challenged administratively, and have proliferated over time. *Id.* ¶¶361-64, 976-80, Pg.ID#3805-07, 3958-60.

State, federal, and local police regularly conduct sweeps to monitor registrants. Officers come to plaintiffs' homes in the early morning or late at night for random residence checks – waking their families, scaring their children, entering their homes, demanding identification, and questioning their neighbors. The police

pulled over Doe #3 when the registry incorrectly showed him as non-compliant. He begged the officer not to arrest him in front of his children. *Id.* ¶¶963-75, Pg.ID#3955-58.

E. Shaming and Harassment

Michigan's sex offender registry website labels plaintiffs as Tier III (the most dangerous) offenders, and displays their personal information, including residential address, employer address, birthdate, school, vehicle information, physical description (weight, height, etc.), and a photograph. Although the site describes registrants as "convicted sex offenders," Doe #1 never committed a sex offense and Doe #2 was never convicted. *Id.* ¶¶992-996, Pg.ID#3963-64.

Over 14 million visitors have viewed the registry online. The website provides extensive search and notification features, enabling the public to click on a registrant's page, pull up a map of his/her home, track him/her through email updates, and easily forward the person's information to others. Each registrant's page includes a "submit a tip" button for the public to send information to police. *Id.* ¶¶228-34, 967-68, 991, Pg.ID#3772-73, 3956, 3963.

Doe #4 received an anonymous death threat by mail (a print-out of his registry page with his eyes blacked out and the words "You will die"). A vigilante came to Mary Doe's home, but the police took no action. *Id.* ¶¶997-998, Pg.ID#3964-65.

F. Protected Speech

Only 2,770 registrants (out of 40,000+) were convicted of computer-related offenses. But all registrants must personally report within three days of creating a new email address, instant message address, or "another other designations used in internet communications or postings." M.C.L. §28.725(1)(f); JSOF ¶¶604-06, R. 90, Pg.ID#3974-75.

While 92% of adult Americans use email, less than 50% of all non-incarcerated Michigan registrants report having an email address. Plaintiffs do not use the internet, or limit their use, because they are unsure what to report, cannot get clear answers from law enforcement, fear prosecution if they fail to report correctly, and find it burdensome to report new accounts in person. *Id.* ¶¶638-93, Pg.ID#3882-93.

Michigan's database of registrants' internet identifiers has never been used to identify a person having online contact with a minor. *Id.* ¶¶614-15, Pg.ID#3876-77.

G. Travel

Registrants must report in person whenever they intend to travel anywhere for seven days or more. They must inform the police where they are going, where they will stay, for how long, and when they will return. M.C.L. §28.727(1)(e).

Plaintiffs therefore limit their travel to no more than six days. JSOF ¶¶985-89, R. 90, Pg.ID#3961-63.

H. Financial Penalties

Registrants must pay an annual $50 fee. M.C.L. §28.725a(6)(b).

3. SORA Is Counterproductive.

Empirical research, including that by plaintiffs' expert, Dr. Prescott, demonstrates that public registration *increases* sexual offending because registration exacerbates risk factors, such as lack of employment and housing, and prevents reintegration into the community. JSOF ¶¶479-96, R. 90, Pg.ID#3842-46.

Most people convicted of sex offenses do not recidivate. While some do pose a risk to public safety, most do not. Plaintiffs' expert Dr. Fay-Dumaine testified that "the perception in the public is … everybody is going to re-offend, but there's no data to support that." *Id.* ¶¶305-08, 313-14, Pg.ID#3789, 3791.

Actuarial risk instruments are far better at predicting recidivism risk than the offense of conviction. *Id.* ¶319, Pg.ID#3792-93. Dr. Levenson testified that law enforcement's ability to monitor high-risk persons is significantly reduced when registries are conviction-based, not risk-based. *Id.* ¶¶309-11, Pg.ID#3789-90.

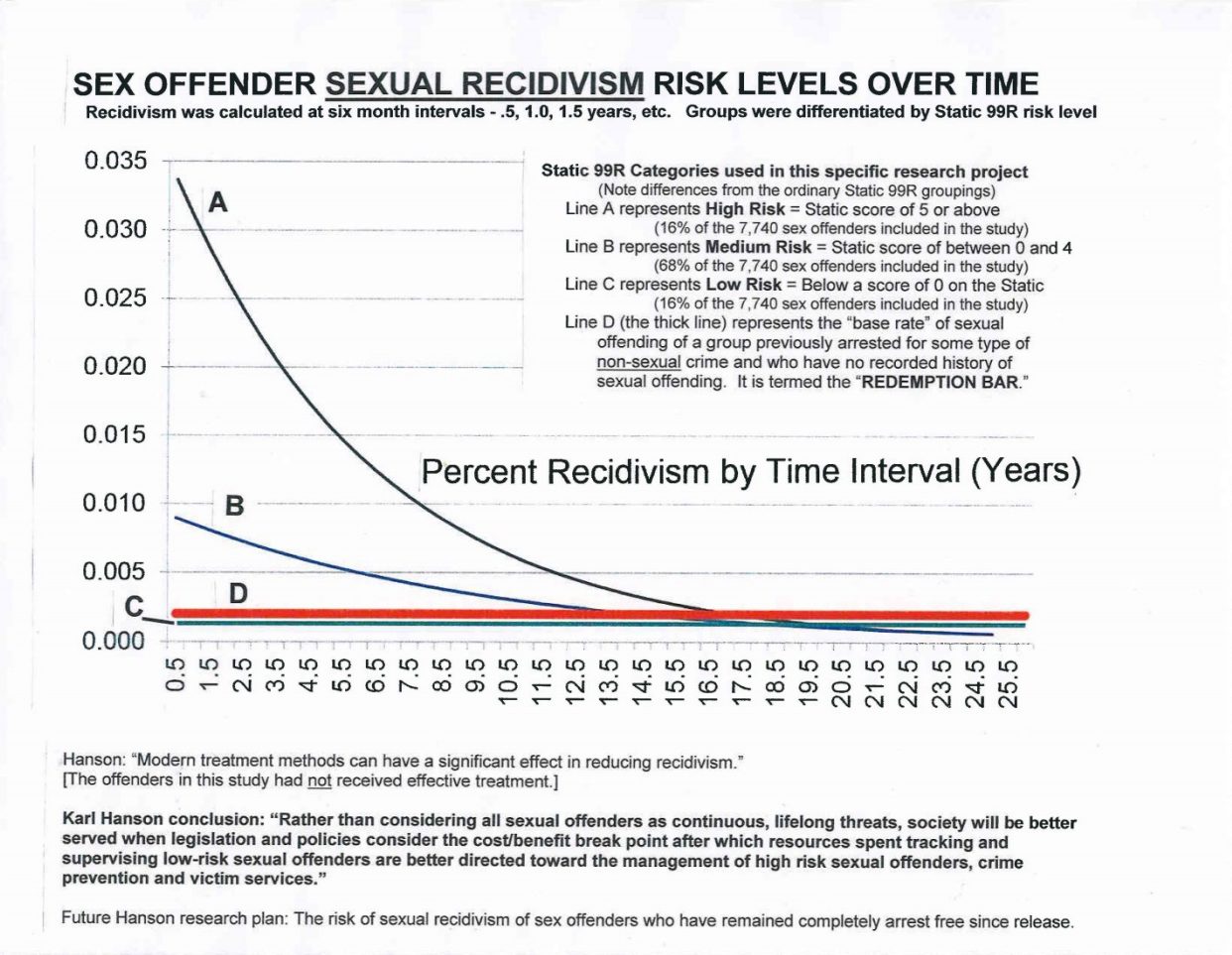
Sexual recidivism declines with age and time spent offense-free in the community. Reoffending typically occurs within the first 3-5 years, after which there is a precipitous drop in recidivism. Dr. Fay-Dumaine explained that extend-

ing registration periods to life is pointless, because reoffending after 25 years is "very unlikely to occur." *Id.* ¶¶341-48, Pg.ID#3799-3801.

SORA's tier structure determines how long people must register and how frequently they must report. Tier levels do not correspond to risk. Tier III offenders have lower recidivism rates than Tier II, but must report more often and register longer. M.C.L. §§28.725(10)-(12), 28.725a(3); JSOF ¶357, R. 90, Pg.ID#3804-05.

A New York study found 95% of sex offenses were committed by non-registrants. The risk of sexual offending is about 3% in the general male population. *Id.* ¶¶349-50, Pg.ID#3801.

Plaintiffs' experts Drs. Levenson and Fay-Dumaine explained that sex offenders who have been assessed as low-risk are less likely to commit a sex offense than the general male population. After 17 years offense-free, even high-risk offenders pose no more risk than a baseline group of non-sex offenders. The graph below shows how recidivism rates of different risk categories drop over time and how they compare to the baseline population.



Id. ¶¶349-357, Pg.ID#3801-04.

Failure to comply with registration requirements is not linked to sexual recidivism. Nor is more frequent reporting or the collection of additional information (*e.g.*, email addresses). *Id.* ¶¶507-08, Pg.ID# 3849-50.

4. Procedural History

Plaintiffs filed their original complaint in 2012. R. 1, Pg.ID#1. On defendants' motion, the district court dismissed Counts I (ex post facto), II (travel), III (work), and VI (due process/retroactivity, as applied to Does #1 and 2). The court allowed Counts IV (parenting), V (free speech), VI (due process as to retroactive

extension of registration periods), and VII (vagueness/strict liability) to proceed. 3/18/13 Opinion, R. 27, Pg.ID#669.

Doe #5 subsequently filed a complaint as an intervening plaintiff. R. 35, Pg.ID#786. After SORA was amended, Mich. Pub. Act 149 (2013), plaintiffs filed an amended complaint, adding Count IX alleging that the retroactive imposition of annual fees is both a separate ex post facto violation and, together with SORA's other burdens, renders the law as a whole invalid under the Ex Post Facto Clause. R. 46, Pg.ID#840.

The parties filed cross-motions for summary judgment following discovery. R. 58-72, Pg.ID#1107-3493. After a status conference, the parties agreed to file motions for judgment under Rule 52 on joint stipulated facts. Briefing Order, R. 85, Pg.ID#3547-49.

The district court granted judgment and permanent injunctions to plaintiffs on their vagueness claims (Count VII) and some of their internet reporting claims (Count V); declined to decide the parenting claim (Count IV); granted judgment to defendants on the claim that retroactively extending registration from 25 years to life violates due process (Count VI); and held that it lacked jurisdiction to decide whether SORA's annual fee is unconstitutional (Count IX). 3/31/15 Opinion, R. 103, Pg.ID#5875-5947.

In a supplemental opinion following additional briefing, the court held that the internet reporting requirements could not be extended retroactively from 25 years to life and that SORA's identification requirement is unconstitutional as applied to Doe #4. 9/3/15 Opinion, R. 118, Pg.ID#6015-29. On October 21, 2015, the court entered a final judgment which incorporated its previous orders, and also denied the Count IX ex post facto challenge to SORA, incorporating its reasoning from the 3/18/13 opinion. Final Judgment, R. 122, Pg.ID#6038-40.

On April 29, 2015, defendants filed an interlocutory appeal of the injunctions (case #15-1536). Plaintiffs and defendants cross-appealed the judgment on October 26, 2015 and November 20, 2015 respectively (cases #15-2346 and #15-2486). The appeals have been consolidated.

ARGUMENT SUMMARY

This Court should hold that, without an individualized assessment of risk, it is unconstitutional for the state to impose a scheme of supervision and control that:

- restricts virtually every aspect of plaintiffs' lives;
- severely constrains plaintiffs' ability to parent, travel, work, and engage in protected speech;
- applies retroactively for life; and
- is based solely on a prior conviction.

The state's position, stripped to its essence, is that once a person has been convicted of a sex offense, the Constitution does not apply: restrictions on regis-

trants, no matter how draconian, should be upheld because past convictions are proof of present dangerousness, even though the record proves otherwise.

This Court should hold that sex offender registration is not a Constitution-free zone. The Constitution limits what the state can do based solely on past convictions, especially without individualized assessments of the risk posed by registrants. Those limits have been exceeded here.

The Ex Post Facto Clause prohibits retroactive punishment. Over the last 20 years, increasingly harsh amendments to SORA have transformed what was once a regulatory law into a punitive one. Given the magnitude of the restraints imposed, SORA cannot be applied retroactively absent individualized determinations of dangerousness.

Due process protects fundamental fairness through notice and fair warning. Retroactively subjecting plaintiffs to SORA's lifetime penalties is fundamentally unfair because, when convicted, the plaintiffs did not know, and could not have expected, they would later become subject to lifetime registration. Due process also bars the state from branding Doe #1 a sex offender, when he did not commit a sex offense, and retroactively subjecting Doe #2 to lifelong public registration, when his plea agreement specifically promised privacy.

By imposing a permitting scheme for internet speech, while failing to define what speech is covered, SORA violates the First Amendment and is unconstitu-

tionally vague. The burdens SORA imposes on plaintiffs' fundamental right to parent are likewise unconstitutional.

The district court erred in dismissing plaintiffs' work and travel claims before discovery, where plaintiffs plausibly pled that SORA denies substantial opportunities for employment and unreasonably burdens and actually deters travel.

Because the exclusion zones, "loitering" prohibition, and certain reporting requirements are *facially* unconstitutional, they should be enjoined on their face, not only as applied to plaintiffs.

If the Court decides in favor of plaintiffs on the ex post facto claim, the only other questions it must address are those involving facially unconstitutional provisions (vagueness and First Amendment claims).

ARGUMENT

Standard of Review

In argument points I through V, *infra*, plaintiffs appeal from the district court's order resolving the parties' motion for judgment under Rule 52. As to that portion of the appeal,[3] legal conclusions are reviewed *de novo*. *Pressman v. Frank-*

[3] The district court dismissed plaintiffs' ex post facto challenge to the 2011 version of SORA (Count I). 3/18/13 Opinion, R. 27, Pg.ID#674-683. After the legislature amended SORA, plaintiffs filed an amended complaint adding an ex post facto challenge to the 2013 statute (Count IX), which the court denied under Rule 52. Am. Compl., R. 46, Pg.ID#911; Final Judgment, R. 122, Pg.ID#6039. Plaintiffs seek review of the Rule 52 decision, because Count IX involves a more recent iteration of the statute and subsumes the Count I claim.

lin Nat'l Bank, 384 F.3d 182, 185 (6th Cir. 2004). Findings of fact are reviewed for clear error. Fed. R. Civ. P. 52(a)(6).

In argument points VI through VIII, plaintiffs appeal from the district court's order granting in part defendants' motion to dismiss. Dismissal of a complaint for failure to state a claim is reviewed de novo. *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011). The court must treat all factual allegations as true, construe the complaint[4] in the light most favorable to plaintiffs, and determine whether the facts alleged give rise to a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

I. SORA VIOLATES THE EX POST FACTO CLAUSE.

The Ex Post Facto Clause, U.S. Constitution, art. I, § 10, cl. 1, prohibits the legislature from retroactively inflicting greater punishment than that permitted at the time of the crime. *Collins v. Youngblood*, 497 U.S. 37, 42-43 (1990). SORA violates this basic rule.

A. The Ex Post Facto Clause Was Designed to Prevent the Harms SORA Has Created.

The "proper scope" of a constitutional provision "must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate." *United States v. Brown*, 381 U.S. 437, 442

[4] Plaintiffs' complaint incorporated by reference a summary of SORA obligations, and five expert reports. Complaint ¶¶115, 235, R. 1, Pg.ID#16-17, 34.

(1965). The Framers intended the Ex Post Clause to address two problems with retroactive laws: lack of fair notice and vindictive lawmaking. *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981).

First, retroactivity is dangerous because it gives the legislature "unmatched powers … to sweep away settled expectations suddenly and without individualized consideration." *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). The Ex Post Facto Clause "assure[s] that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Graham*, 450 U.S. at 28-29. "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Id*. at 30.

Second, the Ex Post Facto Clause "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Id.* at 29. The legislature's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 266. The Framers "viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment," and adopted the Ex Post Facto Clause to shield against "those sudden and strong passions to which men are exposed." *Fletcher v. Peck*, 10 U.S. 87, 137-38 (1810) (Marshall, C.J.).

The dangers that motivated adoption of the Ex Post Facto Clause are exactly the dangers presented by SORA's retroactivity. Plaintiffs – some of whom were convicted before Michigan even created the registry – could not imagine that they would become subject to an all-encompassing lifetime registration regime. Moreover, antipathy toward sex offenders is "of the moment": there is no more despised group today, and hence no group more at risk of retributive legislation fueled by the "sudden and strong passions" which follow highly-publicized crimes.

B. As "Super-Registration" Laws Have Become More Punitive, Courts Have Barred their Retroactive Application.

The threshold question in ex post facto challenges is whether the statute in question imposes punishment. "[T]he ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal." *Burgess v. Salmon*, 97 U.S. 381, 385 (1878).

In *Smith v. Doe*, 538 U.S. 84, 100 (2003), the Supreme Court rejected an ex post facto challenge to a sex offender registration statute that imposed only "minor and indirect" consequences, concluding that the Ex Post Facto Clause did not apply because that statute did not constitute punishment. Thereafter, lower courts rejected similar challenges by finding most sex offender registration laws to be "regulatory," not punitive.

Legislatures – including in Michigan – responded as if they had a judicial blank check, acting with precisely the sort of passion that the Ex Post Facto Clause

was meant to curb. Legislators have found "super-registration schemes" popular, and the Supreme Court "has yet to signal much-needed boundaries," leading to "runaway legislation that has become unmoored from its initial constitutional grounding." Carpenter, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L.J. 1071, 1073-74 (2012).

Increasingly, though, courts are recognizing that today's "super-registries" are punitive and bear little resemblance to the limited statute upheld in *Smith*. These schemes no longer have "minor and indirect" consequences. They impose severe sanctions for a wide range of ordinary conduct. As the Ohio Supreme Court explained, distinguishing an unconstitutional registration statute from an earlier lawful version:

> No one change compels our conclusion that [the statute] is punitive. It is a matter of degree whether a statute is so punitive that its retroactive application is unconstitutional. When we consider all the changes enacted by [the new statute] in the aggregate, we conclude that imposing the current registration requirements on a sex offender whose crime was committed prior to the enactment of [the law] is punitive.

State v. Williams, 952 N.E.2d 1108, 1113 (Ohio 2011).

State courts – including in New Hampshire, Maine, Oklahoma, Ohio, Indiana, Kentucky, Maryland, and Alaska – have taken the lead, repeatedly holding that registration statutes have evolved to become punitive and can no longer be retroactively applied, at least without individualized risk determinations. *See, e.g.*, *Doe v. State*, 111 A.3d 1077, 1084, 1100-02 (N.H. 2015) (lifetime registration

"without regard to whether [registrants] pose a current risk to the public" violates ex post facto because the "statute has changed dramatically . . . [and] the punitive effects are no longer '*de minimis*'"); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009) (successive amendments converted registry law to a criminal statute); *Starkey v. Okla. Dep't of Corrs.*, 305 P.3d 1004 (Okla. 2013) (extending registration periods without individualized assessment violates ex post facto); *Williams*, 952 N.E.2d at 1112 (new law "has changed dramatically" and imposes burdens that violate ex post facto absent individualized finding of dangerousness); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (registration "without regard to … particular future risk" violates ex post facto); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009) (residency restrictions without individualized risk assessment violate ex post facto); *Doe v. Dep't of Pub. Safety and Corr. Servs.*, 62 A.3d 123 (Md. Ct. App. 2013) (retroactive registration violates ex post facto); *Doe v. State*, 189 P.3d 999, 1017 (Alaska 2008) (registration violated ex post facto absent opportunity for removal even upon clearest determination of rehabilitation). The Ninth Circuit also has found that retroactive juvenile registration violates ex post facto because it imposes "severely damaging" – not just minor and indirect – disabilities. *United States v. Juvenile Male*, 590 F.3d 924, 932 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2860 (2011).

Michigan's SORA has morphed into a punitive statute, imposing lifetime burdens based solely on offenses that are often decades old. For the first time, this

Court has before it a fully developed record which clearly establishes that Michigan's "super-registration" scheme can no longer be deemed "regulatory." As the Ninth Circuit explained, while "[i]t would be tempting to conclude … that in light of [*Smith*], sex offender registration does not constitute punishment, … the case before us presents substantially different facts and issues that significantly affect our analysis," and the statute imposes burdens that are "different both in nature and degree" from those in *Smith*. *Juvenile Male*, 590 F.3d at 931, 933; *see also Doe*, 932 A.2d at 560 (previous cases upholding registration did not preclude action where "challenger can demonstrate that, through amendments, the Legislature changed the character and effects of [the law] from civil to criminal").

Plaintiffs ask this Court to recognize that the nature of Michigan's sex offender law has fundamentally changed. SORA is substantially different from, and far more punitive than, any registration statute ever upheld by the Supreme Court or this Court.[5] The legal and factual assumptions that were dispositive in *Smith* are no longer true in Michigan. SORA's consequences are not "minor and indirect," but encompass every facet of plaintiffs' lives. The undisputed evidence

[5] *Cutshall v. Sundquist*, 193 F.3d 466, 471, 474-75 (6th Cir. 1999), upheld an early version of Tennessee's registry, where there was "no evidence that the state is likely to disclose [plaintiff's] sex offender registry information to the public," the requirement to report upon moving was "minor, involving only the completion of the appropriate forms," and the plaintiff was "free to live where he chooses, come and go as he pleases, and seek any employment he wishes." Michigan's SORA is plainly distinguishable from the Tennessee law upheld there.

shows that plaintiffs were retroactively subjected to a lifetime of in-person (and often "immediate") reporting, as well as extensive housing, occupational, parenting, travel, and speech limitations. JSOF ¶¶372-478, 528-695, 851-883, 910-1017, R. 90, Pg.ID#3808-42, 3854-94, 3933-37, 3943-70; Summary of SORA Obligations, R. 91-10; Pg.ID#4822-36. These harms stem not from the fact of conviction, but from registration. *Id.* ¶¶1002-04, Pg.ID#3966-67. Under these circumstances, SORA is punitive.

C. Because SORA Imposes Severe Restraints, Individualized Risk Assessment Is Required.

A central question in the ex post facto inquiry is whether the challenged restriction is imposed through an individualized assessment, or whether it is based solely on past criminal conduct. In *Kansas v. Hendricks*, 521 U.S. 346, 368-71 (1997), the Court held that civil commitment of certain sex offenders did not violate the Ex Post Facto Clause because commitment was based on *individualized* determinations of *current* dangerousness. The challenged statute was not punitive because it "unambiguously requires a finding of dangerousness," not just a past conviction. *Id.* at 357. Civil commitment was deemed regulatory because it was imposed through a regularly-reviewed, procedurally-safeguarded finding that the *individual* was likely to reoffend, and because the state "permitted immediate release upon a showing that the individual is no longer dangerous." *Id.* at 368-69. The regulatory, non-punitive nature of the scheme was demonstrated by the fact

that the state had "taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards." *Id.* at 364.

Under *Hendricks*, individualized review ensured that the statute served its regulatory goal of public protection. While imposing the law based solely on past convictions would violate the Ex Post Facto Clause, limiting the statute to people individually determined to be dangerous made the law non-punitive.

Whether the absence of individualized review violates the Ex Post Facto Clause depends on "[t]he magnitude of the restraint." *Smith*, 538 U.S. at 104. Whereas laws with "minor" consequences can be applied based merely on a prior conviction, *id.*, laws that impose serious consequences, as in *Hendricks*, require individual proof of dangerousness. *Hendricks*, 521 U.S at 357.

The *Smith* Court found that Alaska's registration statute did not impose restraints sufficient to make it punitive in the absence of individualized review. 538 U.S. at 104. Distinguishing *Hendricks*, the Court explained that the statute did not require in-person reporting; registrants were "free to move where they wish and to live and work as other citizens, with no supervision" and were "free to change jobs or residences;" there was "no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred;" the "Act does not restrain activities sex offenders may

pursue;" and the difficulties registrants faced "flow[ed] not from the Act's registration and dissemination provision, but from the fact of conviction." *Id.* at 100-01.

The presence of factors here that were absent in *Smith* compels a finding that SORA is punishment, absent individualized review. Over the last 20 years SORA has become a system of permanent supervision that is more onerous than probation/parole and is coupled with lifetime restraints on housing, employment, parenting, travel, and speech. Reading *Hendricks* and *Smith* together, restraints of this magnitude cannot be retroactively imposed consistent with the Ex Post Facto Clause unless there is individualized review. *See, e.g., Baker*, 295 S.W.3d at 446 (finding *Hendricks* more applicable than *Smith*; absent individual assessment the "magnitude of the restraint" makes residency restrictions punitive); *Doe*, 111 A.3d at 1100-02 (absent individualized proof of "continuing risk to the public," registration law is unconstitutional); *Letalien*, 985 A.2d at 24-26 (same for extending registration from 15 years to life); *Starkey*, 305 P.3d at 1029 (same for lifetime registration). SORA exceeds the constitutional limits on the state's ability to retroactively restrict a person's liberty without individualized review.

D. Given the Magnitude of the Restraints Now Imposed, SORA Is Punishment.

When evaluating an ex post facto claim, the first question is whether the legislature intended the statute to be civil or criminal. *Hendricks*, 521 U.S. at 361.

If the purpose is punitive, the inquiry ends and the retroactive punishment is unconstitutional. *Smith*, 538 U.S. at 92. But if the legislature's intent was regulatory, the court must determine whether the scheme is "so punitive either in purpose or effect as to negate the State's intention to deem it 'civil.'" *Hendricks,* 521 U.S. at 361. The factors set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), provide guidance on whether a purportedly civil law is in fact punitive. The most relevant factors are discussed below. *See Smith*, 538 U.S. at 97.

1. The Legislature Intended SORA as Punishment.

As originally enacted, SORA contained no statement of intent. After parts of SORA were held unconstitutional in 2002, the legislature passed M.C.L. §28.721a, which ostensibly added a civil purpose. *See Fullmer v. Mich. Dept. of State Police*, 207 F.Supp.2d 650 (E.D. Mich. 2002), *rev'd* 360 F.3d 579 (6th Cir. 2004); Mich. Pub. Act 542, Sec.1a (2002); *Senate Fiscal Agency Bill Analysis*, P.A. 542 (2002), at 3-4 (discussing legal challenges). That timing suggests SORA's "intent statement" was an attempt to insulate the statute from legal challenges.

No declaration of intent accompanied the amendments in 2006 (exclusion zone) or 2011 (retroactive tier structure/reporting). Statements by legislators, however, suggest a punitive intent. Legislators described the residency restrictions as "the price [offenders] pay" for crime, and argued that first-offense indecent exposure should result in registration to "mak[e] sure it has serious consequences for

those who commit the crime." MIRS Reports, R. 21-2, Pg.ID#539-41. *See Mikaloff v. Walsh*, 2007 WL 2572268, at*5-7 (N.D. Ohio Sept. 4, 2007) (unpub.) (finding punitive purpose for residency law where legislature previously asserted non-punitive purpose for registration but was silent on purpose of residency restrictions).

Although SORA has a civil label,

> …it would be naive to look no further, given pervasive attitudes toward sex offenders. The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.

Smith, 538 U.S. at 108-09 (Souter, J., concurring) (citations omitted).

Here, SORA ostensibly is intended to "prevent[] and protect[] against the commission of future criminal sexual acts by convicted sex offenders." M.C.L. §28.721a. But neither the legislature nor the MSP has ever sought to determine if the registry reduces recidivism, despite having the data to do so. JSOF ¶¶209-12, R. 90, Pg.ID#3768-69. *See Doe v. Sex Offender Registry Brd.*, __ N.E.3d __, 2015 WL 8484691, at *8 n.21 (Mass. Dec. 11, 2015) (questioning state's efforts to justify sex offender classifications based on recidivism, where state had "no idea" what recidivism rates are).

The fact that registration is intertwined with the criminal law is further evidence of punitive intent. SORA is triggered exclusively by criminal offenses, and

registration is recorded on the judgment. JSOF ¶¶1024-33, R. 90, Pg.ID#3971-73; Judgment, R. 93-7, Pg.ID#5305. An unregistered defendant cannot be sentenced. M.C.L. §28.724(5). Registration is handled by criminal justice agencies, including corrections, probation, parole, and police. M.C.L. §28.724. SORA imposes criminal rather than civil sanctions, and is codified in Chapter 28 of the Michigan Code, which concerns police enforcement activities. M.C.L. §§28.729, 28.734(2), 28.735(2).

2. SORA Has an Extraordinarily Punitive Effect.

Even if this Court were to find that the legislature's intent was civil, SORA is punitive *in effect*.

a. SORA Imposes Severe Obligations, Disabilities, and Restraints.[6]

Many of SORA's restrictions were never considered in *Smith* because they were not part of the Alaska statute.

[6] In 2013, the legislature added an annual fee to SORA's burdens. Plaintiffs' amended complaint alleged that those cumulative burdens violate the Ex Post Facto Clause, and that the fee is a separate violation. Am. Compl., R. 46, Pg.ID#910-11. The district court ruled that the Tax Injunction Act (TIA), 28 U.S.C. §1341, deprived it of jurisdiction over the fee claim, citing *Wright v. McClain*, 835 F.2d 143 (6th Cir. 1987). But *Wright's* analysis (and result) is inconsistent with *Hedgepeth v. Tennessee*, 215 F.3d 608 (6th Cir. 2000), which adopted the TIA test used in nearly every circuit. *See e.g., San Juan Cellular Tel. Co. v. Public Serv. Comm'n of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992). The Court need not reach the TIA issue because SORA's cumulative burdens have transformed it into a punitive law. But if the Court concludes that SORA is not punitive and reaches the TIA issue (which would merit further briefing), the Court should hold that the district court has jurisdiction to decide the fee claim because, under *Hedgepeth*, the SORA fee is not a tax.

First, unlike the statute in *Smith*, SORA bars registrants from living, working, or loitering in vast areas. Courts have focused on the impact of exclusion zones on housing and employment when striking down similar registration schemes. *See Pollard*, 908 N.E.2d at 1150 (distinguishing *Smith* because exclusion zones impose barriers that are "neither minor nor indirect," but rather create "a substantial housing disadvantage" that limits "one's freedom to live on one's own property"); *Baker*, 295 S.W.3d at 445 (finding it "difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability"); *Wallace*, 905 N.E.2d at 380 (registration is affirmative disability because it results in lost employment opportunities and housing discrimination); *Juvenile Male*, 590 F.3d at 935 (invalidating registration statute that "seriously jeopardizes the ability … to obtain employment, housing, and education"). The record below conclusively demonstrates that, unlike in *Smith*, SORA "has led to substantial occupational or housing disadvantages" and limited registrants' ability to engage in basic human activity. *Smith*, 538 U.S. at 101.

Second, plaintiffs experience a level of supervision and reporting that is at least as restrictive as they experienced on probation or parole. JSOF ¶¶361-64, 976-80, R. 90, Pg.ID#3805-06, 3958-60. As Doe #1 said, "each day it's like I'm still on parole." *Id.* at Pg.ID#3959. Plaintiffs must report *in person every three months forever*; must disclose extensive private information for internet publi-

cation; must report *immediately in person* for many minor events (like creating an internet account or "regularly" borrowing a car); and are subjected to residence and compliance sweeps conducted by police. Such intrusive monitoring is fundamentally different from the quarterly verification requirements upheld in *Smith*, which did not require in-person appearances. 538 U.S. at 101.

Numerous courts have found such intrusive reporting and supervision to be tantamount to punishment. The Maryland Court of Appeals explained that registration has "the same practical effect as placing Petitioner on probation or parole." *Doe*, 62 A.3d at 139. The Maine Supreme Court similarly noted:

> [I]t belies common sense to suggest that a newly imposed life-time obligation to report to a police station every ninety days to verify one's identification, residence, and school, and to submit to fingerprinting and provide a current photograph, is not a substantial disability or restraint on the exercise of individual liberty.

Letalien, 985 A.2d at 24-25. *See also Starkey*, 305 P.3d at 1022-23 (finding restraint where registrant must appear in person "every 90 days for life and every time he moves, changes employment, changes student status, or resides somewhere for 7 consecutive days"); *Wallace*, 905 N.E.2d at 379 (registry "imposes significant affirmative obligations and a severe stigma…, and compels affirmative post-discharge conduct … under threat of prosecution").

Third, the *Smith* Court found that the consequences suffered by registrants flowed not from the Act, "but from the fact of conviction, already a matter of

public record." 538 U.S. at 101. Here plaintiffs' harms result not from their convictions, but from SORA. JSOF ¶¶1002-04, R.90, Pg.ID#3966. It is SORA that bans plaintiffs from living, working, or "loitering" in much of the state; prohibits them from watching their children's sports events or graduations; subjects them to continuous reporting; and restricts their ability to travel or use the internet. That SORA imposes harms different from those collateral to conviction is clearest in the case of Doe #2, whose sealed adjudication is *not* "already a matter of public record." *Smith*, 538 U.S. at 101. All the harms he experiences are directly attributable to SORA.

Perhaps the most punitive aspect of SORA is that it destroys an individual's right to live like other free persons in society. It triggers countless legal barriers, and fosters private-sector discrimination and state-sanctioned ostracism. The Supreme Court has held that a similar all-encompassing regime – denaturalization – is punishment. In *Trop v. Dulles*, 356 U.S. 86 (1958), the Court said:

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. … [the individual has] lost the right to have rights.

Id. at 101-102. SORA is at least as destructive.

b. SORA Imposes Sanctions Historically Regarded as Punishment.

SORA imposes sanctions that closely resemble historical forms of punishment: probation, parole, banishment, and shaming.

First, as noted above, the in-person reporting and supervision requirements, are akin to probation and parole, which "like incarceration, [are] a form of criminal sanction." *United States v. Knights*, 534 U.S. 112, 119 (2001) (internal quotations omitted); *Morrissey v. Brewer*, 408 U.S. 471, 477-79 (1972). Residency, occupational, and travel restrictions are also typical of correctional supervision.

The *Smith* majority rejected an analogy between Alaska's statute and probation or parole because that statute did not require in-person reporting and registrants were "free to move where they wish and to live and work as other citizens, with no supervision." *Id.* at 101. By contrast, SORA requires in-person reporting and limits where registrants can live and work. In fact, as the former MDOC Legal Affairs Administrator explained, SORA imposes *more onerous* requirements than those imposed on probationers and parolees. Stapleton Rep., R. 91-4, PgID#4776, 4782-83.

Second, residency, work, and loitering restrictions are like banishment. *See* Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 Wash U. L. Rev. 101 (2007). While neither the Supreme Court nor this Court has considered whether exclusion zones resemble banishment, other courts have so held. *See, e.g.*, *Baker*, 295 S.W.3d at 444; *Starkey*, 305 P.3d at 1025-26; *Whitaker v. Perdue*, 4:06-cv-0140, at *19 (N.D. Georgia, 3/30/07) (unpub.) (Exh. A).

Finally, SORA resembles traditional shaming. "What distinguishes a criminal from a civil sanction … is the judgment of community condemnation which accompanies and justifies its imposition." Henry Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 404 (1958). The sex offender registry is a wall of shame, made accessible world-wide. As the New Hampshire Supreme Court explained, "the internet is our town square. Placing offenders' pictures and information online … holds them out for others to shame or shun." *Doe*, 111 A.3d at 1097. *See also Wallace*, 905 N.E.2d at 380.

In *Smith*, the majority rejected analogies to shaming, reasoning that any stigma stemmed from the "dissemination of accurate information about a criminal record, most of which is already public." 538 U.S. at 98. SORA, does not simply report convictions. It labels registrants by tiers, thereby singling out some registrants as more dangerous. Plaintiffs are publicly branded as Tier III, the most dangerous.

The *Smith* majority described Alaska's registry website simply as an efficient way to get conviction information, comparing it to a criminal records archive and emphasizing that the public "must take the initial step" of accessing the website. *Id.* at 99. Michigan's website does not simply list conviction data. It provides highly personal information along with extensive search and notification features (*e.g.,* one-click access to maps of registrants' homes). Unlike *Smith*, the

public need not even visit Michigan's website, but can track individual registrants through email updates. Michigan's website also facilitates shaming, providing tools for the public easily to share registrants' photos, criminal records, and personal information with others. JSOF ¶¶228-34, 991, R. 90, Pg.ID#3772-73, 3963.

Michigan's claim that the registry simply provides information on "convicted sex offenders,"[7] is inaccurate. Some registrants, like Doe #1, were not convicted of sex offenses. Others, like Doe #2, were never convicted. In such cases public registration "cannot be compared to a visit to a criminal archive, as such a visit would yield no information about [the individual's record]." *Juvenile Male*, 590 F.3d at 935.

c. SORA Serves the Traditional Aims of Punishment.

When a restriction is "imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than regulation intended to prevent future ones." *Baker*, 295 S.W.3d at 444. *See also Starkey*, 305 P.3d at 1027-28 (extending registration period without individual assessment of risk is retributive); *Letalien*, 985 A.2d at 22 (registry punitive because it applies exclusively to crimes, is not based on risk, and cannot be waived

[7] *See* Michigan Public Sex Offender Registry Welcome Page: http://www.communitynotification.com/cap_main.php?office=55242/

even if registrant is low risk); *Doe*, 189 P.3d at 1014 (when law "determines who must register based not on a particular determination of the risk the person poses to society but rather on the [conviction]," it creates a "retributive effect that goes beyond any non-punitive purpose and that essentially serves the traditional goals of punishment").

d. SORA Is Not Rationally Related to a Non-Punitive Interest.

SORA is supposed to "protect[] against the commission of future criminal sexual acts by convicted sex offenders." M.C.L. §28.721a. The record shows that by imposing barriers to community reintegration, SORA actually undermines public safety and *increases* reoffending. JSOF ¶¶ 479-96, R. 90, Pg.ID#3842-46. *See Doe v. Thompson*, Case No. 12-C-168, at 23 (Kan. Division 6, July 2013), Exh. B ("Because [registry] notification schemes can increase recidivism, they are not rationally related to public safety.").

In *Bannum, Inc. v City of Louisville*, 958 F.2d 1354 (6th Cir. 1992), this Court, applying rational basis review, invalidated a regulation restricting housing for released prisoners because the city's only justification was the unsupported assertion that prisoners are likely to reoffend. If the goal is to protect against recidivists, "then some data reflecting the extent of the danger must exist." *Id.* at 1361. "Negative attitudes", "unsubstantiated" fears, or the "desire to impede a politically unpopular group" cannot provide a rational basis for the restriction,

absent actual evidence of danger. *Id.* at 1360-61 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)).

Here defendants have offered no evidence to show that registrants, as a group, pose a serious, long-term danger of reoffending, much less evidence that the individual plaintiffs pose such a risk. Rather, plaintiffs' unrefuted expert reports establish that SORA undermines the very goals it purports to serve. *See* Prescott, Levenson, and Fay-Dumaine Reports, R. 90-23, 90-24, 90-25, Pg.ID#4612-96.

Lifetime registration is particularly irrational. The state argues that SORA's countless restrictions can be imposed forever, even though the record establishes that recidivism drops off dramatically over time. JSOF ¶¶301-71, R. 90, Pg.ID#3787-808. In *United States v. Carter*, 463 F.3d 526 (6th Cir. 2006), this Court emphasized that the passage of time matters in imposing restrictions on former offenders: a sex-offender-treatment condition could not be imposed in 2005 based on a 1988 sex offense. Because of the passage of time, the condition was not reasonably related to public protection. *Id.* at 531-32. The same is true with regard to SORA's lifetime registration requirement.

Exclusion zones, likewise, are not rationally related to public safety. The California Supreme Court, in striking down a residency law for paroled sex offenders, explained that such zones

> impose[] harsh and severe restrictions and disabilities on the affected [persons'] liberty and privacy rights … while producing conditions that

> hamper, rather than foster, efforts to monitor, supervise, and rehabilitate these persons. Accordingly, it bears no rational relationship to advancing the state's legitimate goal of protecting children.

In re Taylor, 343 P.3d 867, 879 (Cal. 2015). This Court should reach the same conclusion here.

e. SORA Is Excessive in Relation to Non-Punitive Interests.

Courts often give "greatest weight" to the question of whether a law is excessive in relation to its non-punitive purpose. *Wallace*, 905 N.E.2d at 383. While the legislature need not have made "the best choice to address the problem," "the regulatory means chosen [must be] reasonable in light of the nonpunitive objective." *Smith*, 538 U.S. at 105.

Here, SORA is excessive in relation to its avowed public safety goals because its onerous restrictions are imposed without any individualized consideration, and without *any evidence* that its conditions protect the public. As noted, courts have struck down similar "super-registration" statutes as ex post facto violations, finding them excessive, especially absent individual risk assessment. *See Wallace*, 905 N.E.2d at 384 (public safety goals did not "render as non-punitive a statute that is so broad and sweeping," absent a mechanism to seek removal "even on the clearest showing of rehabilitation"); *Doe*, 111 A.3d at 1100 (absent a "meaningful risk to the public … [lifetime registration] becomes wholly punitive"); *Baker*, 295 S.W.3d at 446 ("Given the drastic consequences … and the

fact that there is no individual determination of the threat a particular registrant poses to public safety, we can only conclude that [the law] is excessive with respect to the non-punitive purpose of public safety."); *Starkey*, 305 P.3d at 1030 (because act's "many obligations impose a severe restraint on liberty without a determination of the threat a particular registrant poses to public safety," statute is excessive in relation to non-punitive purpose); *Pollard*, 908 N.E.2d at 1153 (statute exceeds non-punitive purpose because it restricts residency "without considering whether particular offender is a danger").

SORA lacks individualized assessment. Therefore, its effect is punitive, not regulatory. The district court did not acknowledge the need for individual review, made incorrect assumptions about recidivism, and failed to recognize the punitive impact of SORA on registrants' lives. This Court should reverse.

II. RETROACTIVELY IMPOSING LIFETIME REGISTRATION VIOLATES DUE PROCESS.

The Ex Post Facto and Due Process Clauses "safeguard common interests – in particular, the interests in fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws." *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001). Retroactive criminal punishment is entirely barred. Retroactivity outside the criminal law, though not unconstitutional *per se*, is highly disfavored. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

If SORA is punishment, it necessarily violates the Ex Post Facto Clause and cannot be retroactively applied. *See supra*, Argument I. However, if this Court decides that SORA is regulatory, then its retroactive application must nonetheless meet due process standards. The due process question before this Court is not whether myriad amendments to SORA over the last 20 years can be applied retroactively, but whether one particular change – the retroactive classification in 2011 of plaintiffs[8] as Tier III offenders and the extension of their registration to life – violates due process. Before 2011, 27% of registrants (about 11,000 people) were lifetime registrants. After 2011, 72% (about 29,000 people) must register for life. JSOF ¶¶19-29, 285-93, R. 90, Pg.ID#3733-36, 3784-86.

A. Retroactive Lifetime Registration Violates Plaintiffs' Right to Fair Warning and Upsets Their Settled Expectations.

"Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). The Due Process Clause requires courts to protect "settled expectations" from being disrupted and ensure that retroactive legislation is not used as a "means of retribution against unpopular groups or

[8] The district court mistakenly believed this claim did not apply to Does #1 and 2. While both have distinct due process claims, both also had lifetime registration imposed retroactively in 2011. Am. Compl. ¶¶313, 315, R. 46, Pg.ID#899; JSOF ¶¶52-55, 72, 85, R. 90, Pg.ID#3740, 3743.

individuals." *Landgraf*, 511 U.S. at 265-66. "[W]hen addressing ex post facto-type due process concerns, questions of notice, foreseeability, and fair warning are paramount." *United States v. Barton*, 455 F.3d 649, 654-55 (6th Cir. 2006).

It is undisputed that the Does had no notice at the time of their convictions that they would later be subjected to SORA for life. Although criminal defendants are not entitled to notice of all "collateral" consequences, notice is required where consequences are both significant and "intimately related to the criminal process," even if they are "not, in a strict sense, a criminal sanction." *Padilla v. Kentucky*, 559 U.S. 356, 357 (2010). The Supreme Court has held that a law changing the immigration consequences of certain crimes could not be applied retroactively: because defendants "rely[] upon settled practice, the advice of counsel, and perhaps even the assurance in open court" regarding the consequences of a plea, the "potential for unfairness in the retroactive application of [the statute] … is significant and manifest." *I.N.S. v. St. Cyr*, 533 U.S. 289, 323 (2001). Once plea agreements are made, "it would surely be contrary to familiar considerations of fair notice, reasonable reliance, and settled expectations" to impose more severe conviction-based consequences than those considered by the defendant at the time of the plea. *Id.*

Registration under SORA, like deportation, is a "severe penalty" that is "intimately related to the criminal process." *Padilla*, 559 U.S. at 357. The record

establishes that registration is intertwined with sentencing and is a key issue in plea bargaining. Prosecutors are trained to make charging decisions that ensure registration and to leverage registration in plea negotiations. Defense attorneys bargain to avoid registration. Prosecutors sometimes relent where, as a prosecutorial trainer put it, the defendant is "a good kid from a good family and [the prosecutor doesn't] want to ruin his life." JSOF ¶¶1024-47, R. 90, Pg.ID#3971-77.

For defendants, the choice whether to plead guilty often turns on whether registration is required, for how long, and whether registration information will be publicly available. *Id.* ¶1043, Pg.ID#3976-77. Because defendants cannot make informed decisions about their cases or enter knowing and voluntary pleas if they lack notice of this sanction, courts have held that counsel who fail to advise defendants of sex offender registration are constitutionally ineffective. *See People v. Fonville*, 804 N.W.2d 878 (Mich. Ct. App. 2011); *Taylor v. State*, 698 S.E.2d 384 (Ga. Ct. App. 2010); *People v. Dodds*, 7 N.E.3d 83 (Ill. Ct. App. 2014). If today's criminal defendants are entitled to notice that they will be required to register, then it is fundamentally unfair for SORA to impose lifetime registration retroactively when such notice was not given.

The Does' criminal counsel could not, of course, have advised them that they would – years later – become subject to SORA's all-encompassing regime of

supervision and control for life. In 1991, when Doe #1 pled no contest to a non-sex offense, Michigan did not have a sex offender registry. *Id.* ¶¶37-53, Pg.ID#3737-40.

Doe #2, who in 1996 as an 18-year-old had a romantic relationship with a 14-year-old, pled under the Holmes Youthful Trainee Act (HYTA) based on the prosecutor's promise that his case would be dismissed and his record sealed. Doe #2 would not have pled guilty had he known that he would be subjected to life-time public registration – something that "grossly contradict[s]" the terms of his plea agreement. *Id.* ¶¶60-90, Pg.ID#3741-47.

When Doe #3 pled guilty in 1998, he was required to register on what was then a non-public law enforcement registry for 25 years (until he was 45). Doe #4 pled guilty in 2006 for having sex with an underage girl, who is now his wife. He was required to register for 25 years (until he was 49). Mary Doe was convicted in 2003 in Ohio, where, based on a psychological evaluation, she was assigned to the lowest risk level and required to register for ten years. *Id.* ¶¶111-112, 120, 129, 132-33, 177, 187-190, 199, Pg.ID#3750, 3752-54, 3761-66.

Doe #5 took his case to trial. *Id.* ¶¶150-54, Pg.ID#3756-57. He made that choice in 1980 without key information that could have affected his decision: losing at trial would (some 30 years later) result in lifetime registration. *Cf.* Yantus Expert Rep., R. 91-3, Pg.ID#4774 ("a defendant's decision to plead guilty or stand

trial may often hinge on whether sex offender registration will result from the conviction").

By retroactively imposing lifetime registration, Michigan has violated due process both by failing to provide "fair warning" at the time of the plaintiffs' criminal proceedings, and by upsetting "settled expectations" arising out of those proceedings. *Barton*, 455 F.3d at 654; *Landgraf*, 511 U.S. at 265. The fact that SORA reaches so far into the past and so seriously curtails plaintiffs' liberty makes its retroactive application particularly suspect. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 534 (1998) (plurality opinion). And it is beyond cavil that SORA's "consequences are particularly harsh and oppressive." *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 45 n.13 (1977).

B. Retroactive Lifetime Registration Is Subject to Heightened Scrutiny.

The district court applied heightened scrutiny to retroactive lifetime burdens on plaintiffs' First Amendment rights, but erred in failing to employ the same standard of review to retroactive lifetime burdens on other fundamental rights. *Compare* 9/3/15 Opinion, R. 118, Pg.ID#6019-20, *with* 3/31/15 Opinion, R. 103, Pg.ID#5929-34.

Since plea bargains are essentially contracts between defendants and the government, "the due process clause prohibits the [government] from annulling them" through retroactive legislation, absent compelling justification. *Lynch v.*

United States, 292 U.S. 571 (1934). *See also* Rotunda & Nowak, 2 Treatise on Const. L. §15.9(a)(vi) (due process requires "more than a rational relationship" for modifying governmental agreements).

Moreover, like other laws, retroactive laws that burden fundamental rights are "subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling governmental interest." *Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2000). The state has the burden of proving narrow tailoring. *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 340 (2010); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1132-33 (10th Cir. 2012).The state has not met that burden here.

III. SORA VIOLATES REGISTRANTS' FREE SPEECH RIGHTS.

The district court issued a mixed decision on plaintiffs' free speech claims, holding:

- The internet reporting requirements, M.C.L. §§28.725(1)(f), 28.727(1)(i), can be applied prospectively, but cannot be retroactively extended from 25 years to life.

- The requirement to report electronic identifiers "routinely used," M.C.L. §28.727(1)(i), is unconstitutionally vague.

- The requirement to report "designation[s] used in Internet communications or postings," M.C.L. §28.725(1)(f), is not unconstitutionally vague, if narrowed to apply only to "Internet designations that are *primarily* used in Internet communications or postings."

- The requirement to report new internet identifiers in person within three days, M.C.L. §28.725(1)(f), is unconstitutional.

3/31/15 Opinion, R. 103, Pg.ID#5901-06, 5918-29; 9/3/15 Opinion, R. 118, Pg.ID#6019-29.

The decision's practical effect is that registrants must report electronic identifiers for up to 25 years. (Immediate *in person* reporting is enjoined, and the legislature must clarify the frequency of identifier use that triggers reporting.)

Registration of internet identifiers is best understood as a permitting scheme: plaintiffs' ability to speak on the internet is conditioned upon registering with the government. The Supreme Court, although it has yet to decide what standard of review applies, is deeply skeptical of such speech-licensing schemes:

> It is offensive – not only to the values protected by the First Amendment, but to the very notion of a free society – that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits … is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.

Watchtower Bible & Tract Soc'y v. Village of Stratton, 536 U.S. 150, 164-66 (2002). *See American-Arab Anti-Discrimination Comm. v. Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) ("The simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with applicable regulations discourages citizens from speaking freely.").

SORA's speech-permitting requirements are so hopelessly overbroad that they fail any standard of review. SORA requires a permit for virtually *all* internet speech (political, professional, social, etc.), thereby restricting speech that has nothing to do with the state's interest in preventing internet-facilitated sex crimes. Because technological change is transforming human communication, one cannot even imagine how many identifiers plaintiffs will need to report in the decades to come. SORA's speech-permitting requirement applies to *all* registrants, although only about seven percent of registrants committed computer crimes, and even among those, recidivism risk drops off dramatically over time. JSOF ¶¶301-57, 604, R.90, Pg.ID#3787-804, 3874. *See Doe v. Marion County Prosecutor*, 705 F.3d 694, 702 (7th Cir. 2013) (internet restriction overbroad where "legislature imprecisely used the sex offender registry as a universal proxy for those likely to solicit minors").

SORA's vagueness exacerbates the overbreadth problem, especially given the serious penalties for failing to report identifiers correctly. M.C.L. §28.729 (up to 10 years' imprisonment). Vague criminal laws regulating speech are inevitably over-inclusive because the "severity of criminal sanctions may well cause speakers to remain silent rather than" risk prosecution for "arguably unlawful" activity. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 872 (1997). *See Doe v. Harris*, 772 F.3d 563, 579 (9th Cir. 2014) ("ambiguities in the statute may lead

registered sex offenders either to over-report … or underuse the Internet to avoid the difficult questions in understanding what, precisely, they must report"); *Doe v. Jindal,* 853 F. Supp. 2d 596 (M.D. La. 2012).

Plaintiffs must report all e-mail and instant message addresses, login names, "other identifiers used by the individual when using any electronic mail address or instant messaging system," and "any other designations used in internet communications or postings." M.C.L. §§28.725(1)(f), 28.727(1)(i). These requirements are incomprehensible to both registrants and law enforcement. Even MSP Sex Offender Registration Unit staff do not know whether accounts for on-line banking, news, shopping, or gaming need be reported, saying "it would be up to the prosecutor to decide." JSOF ¶¶625-37, R. 90, Pg.ID# 3879, 3881-82.

The district court tried to save the statute by limiting reporting to designations "*primarily* used in Internet communications or postings." 3/31/15 Opinion, R. 103, Pg.ID#5905-06 (original emphasis). This attempt at a narrowing construction is as incomprehensible as the statute itself. What does "primarily" mean? Is the "primary" use of a site determined by how the site is designed, or the way the registrant actually uses it? For example, if banking identifiers are mostly used to pay bills, but a registrant uses one to communicate about a loan, is that reportable? If commenting on a newspaper site is not "primarily" communicating (as the district court said), what about posting on a citizens-news site? Or blogging? Does

Doe #3 need to report his sons' homework site if he primarily uses it to communicate with the teacher, but not if he just helps his son do math? JSOF ¶¶659-61, R. 90, Pg.ID#3887-88.

Finally, although strict liability cannot be used to enforce laws burdening speech, *Dearborn*, 418 F.3d at 612-13, SORA makes registrants strictly liable for using the internet without registration. M.C.L. §28.729(2).

IV. SORA VIOLATES REGISTRANTS' FUNDAMENTAL RIGHT TO PARENT.

The district court acknowledged that the right to parent children "is perhaps the oldest of the fundamental liberty interests" and warrants deference and protection "absent a powerful countervailing interest." 3/18/13 Opinion, R. 27, Pg.ID#693-94; 3/31/15 Opinion, R 103, Pg.ID#5914 (citations omitted). The court found that the "ambiguity in the exclusion zones and in the term 'loiter'" leaves registrants "unable to determine what parenting activities are prohibited." *Id.* The court also noted that "a statute need not directly regulate family relations in order to infringe on a person's right to associate with his family." *Id.*, Pg.ID#5917-18 (citing *Johnson v. City of Cincinnati*, 310 F.3d 484, 505 (6th Cir. 2002) (striking down drug-exclusion zone which "precluded ... [plaintiff's] regular role in caring for her grandchildren"), and *Elwell v. Township of Lower*, 2006 WL 3797974, *15 (N.J. Super. Ct. 2006) (parental rights infringed by exclusion zones prohibiting "residing" and "loitering")).

Despite siding with plaintiffs on both the facts and the law, the district court said it *could not rule* on their parenting claim because SORA's vagueness made it impossible to determine to what extent SORA "prevents a registrant from accompanying his children to parks, playgrounds, movie theaters, restaurants, and other establishments," or "infringes on a registrant's ability to find a place to live with his children." 3/31/15 Opinion, R. 103, Pg.ID#5916.

The district court's non-decision is confounding. If the court does not know what parenting activities are illegal, then registrants cannot know either. If the court was unable to make a *legal* decision because SORA is unclear, registrants cannot make *parenting* decisions without risking prison if they misread the law. A law that leaves parents unsure about whether basic parenting activities are a crime cannot survive strict scrutiny. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). SORA's vagueness is a reason to *grant* judgment to plaintiffs, not to avoid decision.

V. SORA'S UNCONSTITUTIONALLY VAGUE PROVISIONS SHOULD BE ENJOINED ON THEIR FACE.

The district court was correct in holding that SORA's exclusion zones, "loitering" prohibition, and certain reporting requirements are unconstitutionally vague. 3/31/15 Opinion, R. 103, Pg.ID#5875-947. The instant appeal presents the question whether those vague provisions should have been enjoined as to all regis-

trants, not just as to plaintiffs. Plaintiff-Appellees' Brief, case #15-1536, R. 24-1, Pg.ID#72 n.15.

For the reasons plaintiffs set forth in case #15-1536, SORA's vague provisions are *facially* unconstitutional because they are equally vague for all who must obey them. *Id.*, Pg.ID#72-75. The district court erred by limiting its injunction to plaintiffs. *Id.*; *Johnson v. United States*, 135 S.Ct. 2551, 2256 (2015) (vague criminal laws should be facially invalidated); *Springfield Armory v. City of Columbus*, 29 F.3d 250, 254 (6th Cir. 1994) (district court erred in invalidating vague law only as applied, not on its face).

In addition, the district court's failure to enter a facial injunction has real costs. The unconstitutional provisions are still being applied to other registrants, and courts are being burdened with re-litigation of the very same issues. *Doe v. Rahinksy*, 1:15-cv-01140 (W.D. Mich. 2015), vividly demonstrates the problem. The registrant-plaintiff moved to a new home in September 2015 (after the district court's 3/31/15 decision holding exclusion zones unconstitutionally vague), having first confirmed with police that the proposed address was *outside* the 1,000-foot zone. When he then tried to register, the police – relying this time on a different mapping database – informed him that the new address was *within* the zone. *Id.*, Compl., at 6-8. A facial injunction will prevent such pointless and expensive repeat litigation and ensure that the state is not enforcing a facially unconstitutional law.

VI. IMPOSING SORA ON DOES #1 AND #2 VIOLATES DUE PROCESS.

A. Doe #1

Doe #1 was convicted of robbing a McDonalds in 1990. Because he threatened a 12-year-old boy, he was also convicted of kidnapping, an offense which today requires lifetime registration. JSOF ¶¶34-58, R. 90, Pg.ID#3737-41. Imposing SORA retroactively on Doe #1 violates due process.

Since Michigan's registry did not exist when Doe #1 pled, he did not have fair notice of the consequences of his plea. Had Doe #1 known that "a kidnapping conviction would result in lifetime sex offender registration, he would have gone to trial or tried to bargain for an alternative disposition that would not have resulted in registration." *Id.* ¶53, Pg.ID#3740. *See supra* Argument II; *Doe*, 62 A.3d at 133 (retroactive registration barred because no fair warning when registry did not exist at time of offense).

Doe #1 also has a liberty interest in not being publicly branded as a sex offender when he did not commit a sex offense. "We can hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling of [a person] as a sex offender." *Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997) (quoting *Vitek v. Jones*, 445 U.S. 480, 494 (1980)). Moreover, SORA's ostensible purpose is to prevent "future criminal sexual acts by convicted sex offenders." M.C.L. §28.721a. That justification does not apply to people who did not commit

sex crimes. *See, e.g., State v. Robinson*, 873 So.2d 1205 (Fl. 2004) (requiring sex offender registration for non-sex crime violates substantive due process); *State v. Small*, 833 N.E.2d 774, 782-83 (Ohio App. 2005) (same).

Finally, where an individual "was not convicted of a sex offense… he is owed procedural due process before sex offender conditions may attach." *Meza v. Livingston*, 607 F.3d 392, 401-02 (5th Cir. 2010). *Accord Renchenski v. Williams*, 622 F.3d 315 (3d Cir. 2010); *Neal*, 131 F.3d at 830; *Gwinn v. Awmiller*, 354 F.3d 1211 (10th Cir. 2004); *Kirby v. Siegelman*, 195 F.3d 1285 (11th Cir. 1999). No such process was provided here.

B. Doe #2

Doe #2 pled guilty two decades ago under the Holmes Youthful Trainee Act (HYTA), a record-sealing statute that allows youths to have their cases dismissed and sealed. M.C.L. §762.11 *et. seq.*; JSOF ¶¶59-90, R. 90, Pg.ID#3741-47. HYTA provides that "all proceedings… shall be closed to public inspection" and the individual shall "not suffer a civil disability or loss of right or privilege." M.C.L. §762.14.

The state has breached its plea agreement with Doe #2, first extracting a plea in return for a promise of privacy and then imposing lifetime public sex offender registration. *See St. Cyr*, 533 U.S. at 321 ("Plea agreements involve a *quid pro quo* between a criminal defendant and the government."). "In determining whether a

particular plea agreement has been breached, we look to what the parties … reasonably understood to be the terms of the agreement." *United States v. Skidmore*, 998 F.2d 372, 375 (6th Cir. 1993) (internal quotations omitted). Doe #2's plea "was based on [the] prosecutor's promise that his case would be dismissed under HYTA and his records sealed…. Had Mr. Doe #2 known that changes in Michigan law would result in him being subjected to life-time public registration as a sex offender, he would have taken his case to trial."[9] JSOF ¶¶71, 77, R. 90, Pg.ID#3743-44.

The Constitution "places limits on the sovereign's ability to use its law-making power to modify bargains it has made with its subjects." *Lynce v. Mathis*, 519 U.S. 433, 440 (1997). "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971); *United States v. Barnes*, 278 F.3d 644, 648 (6th Cir. 2002). Doe #2 seeks to enforce his plea agreement.

The district court held that Doe #2 could be subjected to lifetime public registration, relying on *Doe v. Mich. Dep't of State Police*, which found a rational basis for public registration of HYTA trainees. 490 F.3d 491, 501 (6th Cir. 2007).

[9] While SORA requires registration of HYTA trainees, in 1996 SORA provided that "registration is confidential and shall not be open to inspection except for law enforcement purposes." Mich. Pub. Act 295, Sec. 10 (1994).

This Court, however, did not address whether, under the *Santobello* line of cases, HYTA trainees have a right to "specific performance" of plea agreements breached by the state. *Skidmore*, 998 F.2d at 375.

Finally, the Supreme Court upheld registration in *Smith* because the negative consequences "flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Smith*, 538 U.S. at 101. That rationale does not apply to Doe #2, whose HYTA dismissal is sealed. SORA "makes public information … that would otherwise permanently remain confidential." *Juvenile Male*, 590 F.3d at 935. The harms Doe #2 suffers flow directly from SORA. JSOF ¶¶87-89, 1002, R. 90, Pg.ID#3746, 3966.

VII. PLAINTIFFS PLED A PLAUSIBLE CLAIM THAT SORA UNCONSTITUTIONALLY LIMITS THEIR EMPLOYMENT.

SORA criminalizes working within 1,000 feet of a school.[10] M.C.L. §28.734(1)(a). The complaint and incorporated expert reports – which must be accepted as true – allege that SORA severely restricts plaintiffs' employment opportunities. Compl., Prescott, Levenson & Wagner Reports, R. 1, 1-9, 1-10, 1-12; Pg.ID#1-50, 80-147, 161-82.

"Without doubt," the Fourteenth Amendment protects the "right of the individual to contract [and] to engage in any of the common occupations of life."

[10] SORA also imposes a state-mandated disincentive to hiring by requiring employer addresses to be posted on the registry. M.C.L. §28.728(2)(d).

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The opportunity to work is "not a matter of grace and favor," *Willner v. Comm. on Character and Fitness*, 373 U.S. 96, 102 (1963), since "the right to work for a living in the common occupations of the community is of the very essence of … personal freedom and opportunity." *Truax v. Raich*, 239 U.S. 33, 41 (1915).

In *Hampton v. Mow Sun Wong*, the Supreme Court invalidated regulations barring non-citizens from many federal jobs because such "ineligibility for employment in a major sector of the economy … deprives a discrete class of persons of an interest in liberty on a wholesale basis." 426 U.S. 88, 102 (1976). Similarly in *Sugarman v. Dougall*, 413 U.S. 634 (1973), the Court struck down a state law barring employment of non-citizens in civil service positions. While non-citizens could be denied employment through individualized determinations or for "an appropriately defined class of positions," a flat employment ban was unconstitutional. *Id.* at 646-47. In *Schware v. Board of Bar Examiners of New Mexico*, the Court held that criminal-history-based employment restrictions must be related to "the applicant's fitness or capacity" for particular work. 353 U.S. 232, 239, 241-43 (1957).

SORA imposes a flat geographical ban on employment, regardless of the applicant's fitness for a particular job. The district court nevertheless found *Hampton* and *Schware* inapplicable, holding that the Constitution protects only the "free-

dom to choose a particular career or profession." 3/18/13 Opinion, R. 27, Pg.ID#690. But the Supreme Court long ago rejected such a cramped view.[11] Not just lawyers and doctors, but ordinary laborers, have a constitutionally protected "right to earn a livelihood and to continue in employment unmolested." *Raich*, 239 U.S. at 38 (cook successfully challenged employment barrier which applied "in any line of business"). The district court misread *Hampton* as involving an entry-bar for specific professions. 426 U.S. at 91. In fact, the challenged regulations violated due process because they "broadly den[ied]…*substantial opportunities for employment*," not because the plaintiffs – who sought work as janitors, clerks, and educational evaluators – were barred from those occupations. 426 U.S. at 91, 116 (emphasis added). SORA similarly deprives plaintiffs of substantial opportunities for employment. *See* JSOF ¶381, R.90, Pg.ID#3810-11 (46% of Grand Rapids in exclusion zones).

The district court also reasoned that registrants can work outside the zones. 3/18/13 Opinion, R. 27, Pg.ID#691. The Supreme Court rejected that argument in *Raich*, where the state claimed that because some jobs were still available, it could require businesses to hire 80% citizens:

[11] Registrants are in fact effectively barred from many occupations because the zones exclude them from working in vast areas. SORA severely limits or entirely precludes access to occupations that are concentrated in urban areas (e.g., medical, hospitality) or that serve residential customers (e.g., construction, plumbing, landscaping).

> [T]he fallacy of this argument at once appears. If the state is at liberty to treat the employment of aliens as in itself a peril, requiring restraint regardless of kind or class of work, … the state undoubtedly has the power, if it sees fit, to make the percentage [of available jobs] less… [There is] no limit to the state's power of excluding aliens from employment if the principle underlying the prohibition is conceded.

Raich, 239 U.S. at 42-43. Likewise here, if Michigan can categorically bar registrants from working within 1,000 feet of a school, then it can expand the exclusion zones to 2,000 (or 10,000) feet.

Unless one believes that Michigan can bar registrants from working entirely, then the nature and degree of SORA's burden on employment is relevant to the constitutional inquiry. The district court erred by dismissing this claim at the pleadings stage, thereby failing to give plaintiffs the chance to develop a record to show how substantially SORA burdens employment opportunities or whether certain categories of jobs are foreclosed.

VIII. PLAINTIFFS PLED A PLAUSIBLE CLAIM THAT SORA UNCONSTITUTIONALLY LIMITS THEIR TRAVEL.

The district court dismissed plaintiffs' right to travel claim at the pleadings stage under "rational basis" review. 3/18/13 Opinion, R. 27, Pg.ID#684-690. But strict scrutiny applies because plaintiffs have alleged, and should be allowed to prove, that SORA "actually deters" and "unreasonably burden[s]" travel. *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986); *Shapiro v. Thompson*, 394 U.S. 618, 629, 638 (1969) (strict scrutiny for interstate travel); *Johnson v. Cincin-*

nati, 310 F.3d 484 (6th Cir. 2002) (strict scrutiny for localized travel); Compl. ¶¶186-201, 295-298, R. 1, Pg.ID#26-29, 43; Prescott Rep., R. 1-8, Pg.ID#91-2 (SORA substantially burdens and deters travel).

Freedom to travel is "a virtually unconditional personal right, guaranteed by the Constitution." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (citation omitted). "[T]he right to remove from one place to another according to inclination, is an attribute of … liberty … secured by the Fourteenth Amendment." *Williams v. Fears*, 179 U.S. 270, 274 (1900). People should "be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which *unreasonably burden or restrict* this movement." *Shapiro*, 394 U.S. at 629 (emphasis added).

SORA directly burdens and "actually deters" travel through its reporting requirements and "loitering" prohibition. *Soto-Lopez*, 476 U.S. at 903. A registrant who intends to travel for more than seven days must report *in person* within three days, giving the name, address, and dates for the temporary lodging. M.C.L. §§28.725(1)(e), 28.727(1)(e). SORA effectively operates as a permitting scheme, which is impermissible in the travel context for the same reasons as in the First Amendment context. *See supra*, Argument III.

There is no way for registrants to *change* their travel plans, other than by returning home to report their modified itinerary in person. Because any unfore-

seen change of plans makes registrants noncompliant, long-distance or out-of-state travel is nearly impossible. A registrant who switches hotels due to a lost reservation or overbooking could be prosecuted. If bad weather, airline delays, or a car accident interrupt the schedule, registrants are criminally liable.

Even aside from the requirement to report travel, SORA's overall reporting obligations substantially burden and deter travel. For example, regular use of a car must be reported in person "immediately." A registrant picking up an airport rental car must return home within three days to provide the description, license plate, and registration number. M.C.L. §§28.725(1), 28.727(1)(j). Mandatory in-person reporting during specified months four times a year also unreasonably restricts the length and timing of travel. M.C.L. §28.725a(3)(c).

When plaintiffs travel, they must comply with an "incredible variety" of state and local laws that are triggered by being a registrant. Because these laws are difficult to ascertain in advance and frequently criminalize innocuous behavior (e.g., library use), inadvertent non-compliance is a constant risk. *See* Prescott Report, R. 1-8, Pg.ID#91-98 (describing difficulties registrants face when traveling).

Further, SORA's "loitering" prohibition, M.C.L. §28.734(1)(b), substantially burdens plaintiffs' right "to remain in a public place of [their] choice." *Kennedy v. City of Cincinnati*, 595 F.3d 327, 335 (6th Cir. 2010) (quoting *City of*

Chicago v. Morales, 527 U.S. 41, 53-54 (1999)).

> [T]he freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this right to remove from one place to another according to inclination as an attribute of personal liberty protected by the Constitution.

Id. SORA's definition of "loiter" criminalizes innocent local travel, e.g., taking one's child to a park within an exclusion zone. M.C.L. §28.733(b). The fact that zone boundaries are unknowable exacerbates the problem. *See* case #15-1536, Plaintiffs-Appellees' Brief, Doc. 24-1. Although plaintiffs have a fundamental "right to travel locally through public spaces and roadways," *Johnson*, 310 F.3d at 498, their inability to discern the zones makes local travel impossible with their children in tow.

The district court failed to apply strict scrutiny and denied plaintiffs the chance to prove their allegations that SORA actually deters and unreasonably burdens their right to travel. This Court should reverse.

CONCLUSION

The judgment of the district court should be reversed in part and remanded for entry of judgment in favor of plaintiffs and further proceedings as appropriate. The district court's injunction should be expanded to bar enforcement of SORA's facially unconstitutional provisions as to all registrants.

Respectfully submitted,

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EXHIBIT A

Whitaker v. Perdue, 4:06-cv-0140 (N.D. Georgia, 3/30/07)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WENDY WHITAKER, et al., Plaintiffs, vs. SONNY PERDUE, et al., Defendants.	:	CIVIL ACTION NO. 4:06-CV-0140-CC

ORDER

This matter is presently before the Court on Defendants' Motion to Dismiss in Lieu of Answer [Doc. No. 34], Defendants' Motion to Dismiss Amended Complaint [Doc. No. 55], and Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint [Doc. No. 78]. The Court **DENIES** Defendants' Motion to Dismiss in Lieu of Answer and Defendants' Motion to Dismiss Amended Complaint **as moot**, insofar as Plaintiffs amended their complaint after the filing of those motions.[1] The Court will consider only Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint in this Order.

I. BACKGROUND[2]

On June 20, 2006, Plaintiffs Wendy Whitaker, Joseph Linaweaver, Janet Jenkins Allison, James Victor Wilson, Jeffery York, Dewayne Owens, Al Reginald Marks, Lori Sue Collins, and Reverend Joel Jones filed the instant class action

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[1] The Court notes, however, that Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint incorporates by reference all material contained in the previous motions to dismiss. The Court will accordingly refer to the previous motions to dismiss in this Order, as appropriate.

[2] Insofar as this matter is before the Court on Defendants' motion to dismiss, the Court has accepted the factual allegations in Plaintiffs' Second Amended Complaint as true for the purposes of this Order.

complaint challenging certain provisions of Act No. 571 (HB 1059), Ga. Laws 2006, codified at O.C.G.A. § 42-1-15 (hereinafter the "Act"). The Act provides, in pertinent part, that no individual required to register as a sex offender "shall reside or loiter within 1,000 feet of any child care facility, church, school, or area where minors congregate." § 42-1-15(a). The Act defines "areas where minors congregate" as including "school bus stops," § 42-1-12(a)(3), and "school bus stops" are defined as school bus stops "as designated by local school boards of education or by a private school." § 42-1-12(a)(19). In addition, the Act provides that no individual required to register as a sex offender "shall be employed by any child care facility, school, church, or by any business entity that is located within 1,000 feet of a child care facility, a school, or a church." § 42-1-15(b)(1).

The Act was scheduled to take effect on July 1, 2006. On June 22, 2006, Plaintiffs filed a Motion for Temporary Restraining Order, which this Court granted in part by oral ruling on June 26, 2006, and by written Order entered on June 27, 2006 [Doc. No. 16]. By this Order, the Court temporarily restrained Defendants[3] from taking any action to enforce the provision of the Act that prohibits registered sex offenders from living within 1,000 feet of a school bus stop (hereinafter the "school bus stop provision"). The Court scheduled a hearing on Plaintiffs' Motion for Preliminary Injunction and instructed Plaintiffs to produce information regarding the number and location of school bus stops

[3] The original Defendants in this case were Sonny Perdue, in his official capacity as Governor of the State of Georgia; Thurbert Baker, in his official capacity as Attorney General of the State of Georgia; Scot Dean, in his official capacity as Chief of Probation, Cedartown, Polk County, Georgia; and Robert Sparks, in his official capacity as Sheriff of Polk County. Defendants Perdue and Baker have been the only Defendants to address the substantive constitutional challenges to the Act. Subsequent references to "Defendants" and "parties" in this Order include only Defendants Perdue and Baker, unless otherwise noted.

before the hearing. On June 29, 2006, the Court provisionally certified, for the duration of the temporary restraining order, a class of Plaintiffs consisting of all persons who registered as sex offenders on or before July 1, 2006, and who reside within 1,000 feet of a currently-designated school bus stop or a school bus stop so designated in the future.

On July 11, 2006, the Court held an evidentiary hearing on Plaintiffs' Motion for Preliminary Injunction. That same day, the Court entered an Order extending the temporary restraining order for an additional ten days or until the Court ruled on the Motion for Preliminary Injunction [Doc. No. 38]. After hearing evidence and oral argument at the hearing, the Court ordered the parties to submit briefing on the proper interpretation of the phrase "school bus stop," as used in the Act. The parties complied with the Court's request, and on July 25, 2006, the Court entered an Order denying without prejudice Plaintiffs' Motion for Preliminary Injunction on the grounds that the motion was premature, insofar as the evidence failed to establish that any school bus stop had been designated by local school boards of education, as provided in the Act. The next day, on July 26, 2006, Plaintiffs filed a Motion for Temporary Restraining Order [Doc. No. 58], alleging that the District Attorney of the Augusta Judicial Circuit, which encompasses Burke, Columbia, and Richmond counties, had announced an intention to enforce the school bus stop provision and that the Columbia County local school board of education had officially designated school bus stops. That same day, Plaintiffs filed a motion to amend their complaint to assert claims against the Sheriffs of Burke, Columbia, and Richmond counties [Doc. No. 59], which the Court granted on July 27, 2006. On July 28, 2006, the Court held a hearing to consider Plaintiffs' Motion for Temporary Restraining Order and also heard argument on Plaintiffs' Motion for Class Certification [Doc. No. 46]. At

that hearing, the Columbia County Sheriff, Clay Whittle, indicated his willingness to consent to an injunction regarding the enforcement of the school bus stop provision while the Court considered the constitutionality of that provision. On July 28, 2006, the Court entered an Order denying Plaintiffs' Motion for Temporary Restraining Order as to the Sheriffs of Burke and Richmond counties, insofar as it appeared that the local school boards of education in those counties had not designated school bus stops, and directing Plaintiffs and the Sheriff of Columbia County to file a consent order reflecting the agreement reached at the hearing. That same day, the Court entered an Order certifying, for the duration of this litigation, a Plaintiff class consisting of all persons who are registered, who are required to register, or who in the future
will be required to register as sex offenders under Georgia law. On August 24, 2006, this Court entered an Order certifying, for the duration of this litigation, a Defendant class consisting of all Sheriffs in the State of Georgia and naming the Sheriff of Columbia County as the class representative.

Plaintiffs estimate that there are approximately 11,000 registered sex offenders in Georgia, 9,000 of whom live in the community. (Second Am. Compl. [Doc. No. 75], ¶ 2.) Plaintiffs Wendy Whitaker, Joseph Linaweaver, Janet Jenkins Allison, James Victor Wilson, Jeffery York, Dewayne Owens, Al Reginald Marks, and Lori Sue Collins are registered sex offenders. When Ms. Whitaker was 17, she engaged in a single consensual act of oral sex with a 15-year-old male while on school property; she pled guilty to charges of sodomy and received a sentence of 5 years probation. (Id. at ¶ 10.) Plaintiff Joseph Linaweaver is on the sex offender registry because, when he was 16, he participated in single consensual act of oral sex with a 14-year-old girl; he pled guilty to sodomy and received a sentence of 5 years probation. (Id. at ¶ 15.) Plaintiff Janet Allison was convicted

of being party to a crime of statutory rape and party to a crime of child molestation after her 15-year-old daughter became pregnant and Ms. Allison allowed her daughter's boyfriend (and future husband) to move into their household; she received a sentence of 15 years probation. (Id. at ¶ 18.) Plaintiff James Wilson pled guilty to sexual abuse in the first degree for inappropriately touching an adult female college friend while highly intoxicated at a freshman party; he was sentenced to 5 years probation. (Id. at ¶ 22.) Plaintiff Jeffery York pled guilty to one count of sodomy for engaging in a consensual act of oral sex with a 15-year-old male when he was 17 years old; he was sentenced to 5 years probation. (Id. at ¶ 26.) Plaintiff Dewayne Owens was convicted of incest when he was 13 years old, for allegedly having sex with his sister; he was found to have violated the terms of his probation in 2004 and was incarcerated with a tentative parole date of December 2006, assuming that he provided a home plan to the Board of Pardons and Paroles. (Id. at ¶¶ 29-30.)[4] Plaintiff Al Marks pled guilty to child molestation after being charged with hand-to-genital and mouth-to-genital sexual contact with a 7-year-old male son of a family friend when he was 14 years old; he was sentenced to probation. (Id. at ¶ 32.) Plaintiff Lori Collins was convicted of statutory rape for having consensual sex with a 15-year-old male when she was 39 years old; she served three years in prison and since her release has been living in a faith-based halfway home. (Id. at ¶¶ 37-38.)

Plaintiff alleges that the Act will force thousands of registered sex offenders from their homes, jobs, and churches. (Id. at ¶ 1.) Ms. Whitaker, whose current residence is within 1,000 feet of where a school bus stops to pick up a child, has not been able to find another affordable residence in the Augusta

[4] The Court has no information regarding whether Mr. Owens was in fact paroled in December 2006.

area (which is where her husband works) that is not within 1,000 feet of a school bus stop. (Id. at ¶¶ 12-13.) Mr. Linaweaver was notified of the Act by the Columbia County Sheriff on June 1, 2006; he has been unable to find anywhere in the Augusta area to meet the Act's requirements and has not found employment that complies with the Act's restrictions. (Id. at ¶ 16.) Ms. Allison was informed by an officer with the Lumpkin County Sheriff's Office that her residence is within 1,000 feet of a school bus stop and that she must leave her home. (Id. at ¶ 19.) Ms. Allison and her family searched for a new home in White, Pickens, Dawson, Lumpkin, and Gilmer counties without success. (Id.) Mr. Wilson is the co-owner of a home that is within 1,000 feet of a school bus stop, and his place of employment is within 1,000 feet of a church. (Id. at ¶ 22.) Mr. Wilson searched the metro-Atlanta area for a residence that complies with the Act's provisions; Mr. Wilson found only a motel in an industrial area that may meet the Act's requirements. (Id. at ¶ 24.) Mr. York received two letters from the Polk County Sheriff's Office stating that his home may be within 1,000 feet of a school bus stop. (Id. at ¶ 27.) Mr. Owens, who is incarcerated, may be unable to qualify for parole because he cannot afford accommodations himself and the residences of his family members and the accommodations available in halfway houses do not comply with the Act's requirements. (Id. at ¶ 30.) Mr. Marks was informed by the Cobb County Sheriff's Office that his home is within 1,000 feet of a school bus stop and that he must leave the residence. (Id. at ¶ 34.) Mr. Marks and his family have searched for a residence that complies with the Act for six weeks, but have unable to find housing. (Id. at ¶ 35.) Ms. Collins was notified by the Rockdale County Sheriff's Office that she would need to leave Door of Hope in Rockdale County because a school bus stop was located within 1,000 feet of the residence. (Id. at ¶ 39.) Ms. Collins searched for a new home for three weeks without

success before moving to the Door of Hope in Polk County. (Id. at ¶¶ 39-42.) Because the Door of Hope in Polk County conducts religious programs and services, however, the residence may not be suitable under the Act. (Id. at ¶ 43.)

Plaintiff Reverend Joel Jones, who is not a member of the Plaintiff class in this case, is a minister and serves on the Board of Directors of the Door of Hope Ministry in Rockdale County, which is a faith-based halfway house that ministers to women who have been released from prison, including Plaintiff Collins. (Id. at ¶ 45.) Plaintiff Jones alleges that his spiritual beliefs compel him to provide assistance and spiritual leadership to people released from prison and jail. (Id.) The Second Amended Complaint alleges that the Door of Hope in Rockdale County "will no longer be able to house women on the registry because residents engage in religious worship and because the ministry's . . . location is within 1,000 feet of a school bus stop." (Id.)

Plaintiffs contend that the Act is unconstitutional because it violates (1) U.S. Const. art. I, § 10, prohibiting *ex post facto* laws, Bills of Attainder, and laws that impair the obligation of contracts; (2) the procedural component of the Due Process Clause; (3) the substantive component of the Due Process Clause and the right to family privacy; (4) the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2006) ("RLUIPA"); (5) the Free Exercise Clause and the right to freedom of association; (6) the Takings Clause; (7) the right to interstate and intrastate travel; and (8) the Eight Amendment's prohibition on cruel and unusual punishment.[5] Plaintiffs request that the Court declare certain portions of the Act unconstitutional and permanently enjoin the enforcement of those provisions. Defendants Perdue and Baker have moved to dismiss Plaintiffs'

[5] Plaintiffs also seek a declaration that the Act is vague and overbroad.

Second Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. STANDARD OF REVIEW

Pursuant to Rule 12(b)(6), a defendant may seek to dismiss a complaint for failure to state a claim upon which relief can be granted. "A motion to dismiss should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief. 75 Acres, L.L.C. v. Miami-Dade County, 338 F.3d 1288, 1293 (11th Cir. 2003) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). "In evaluating such a motion, [the court] accept[s] the factual allegations in the complaint as true and . . . construe[s] them in the light most favorable to the plaintiff." 75 Acres, 338 F.3d at 1293 (citing Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003)). A court evaluating a Rule 12(b)(6) motion may not consider matters outside the pleadings unless the court treats the motion to dismiss as a motion for summary judgment under Federal Rule of Civil Procedure 56 and gives all parties "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b); see also Moss v. W & A Cleaners, 111 F. Supp.2d 1181, 1185 (M.D. Ala. 2000).

Federal Rule of Civil Procedure 12(b)(1) provides that a defendant may move for dismissal on the grounds that a court lacks subject matter jurisdiction. Rule 12(b)(1) motions may involve facial or factual attacks on a court's subject matter jurisdiction. The Eleventh Circuit recently summarized the court's inquiry when, as here, a standing challenge is raised in a motion to dismiss:

> When standing is questioned at the pleading stage . . . general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. We accept as true all material allegations contained in the complaint and construe the complaint in a light most favorable to the complaining

> party. Moreover, in the context of a Rule 12(b)(1) challenge to standing, we are obligated to consider not only the pleadings, but to examine the record as a whole to determine whether we are empowered to adjudicate the matter at hand.

Elend v. Basham, 471 F.3d 1199, 1208 (11th Cir. 2006) (citation and internal marks omitted). With this standard in mind, the Court will proceed to consider the merits of Defendants' arguments.

III. LEGAL ANALYSIS

A. Standing

Defendants first assert that Plaintiffs lack standing in the instant case because they cannot show actual injury. (Brief in Support of Defs.' Motion to Dismiss in Lieu of Answer [Doc. No. 34-2] (hereinafter "Defs.' Brief"), p. 6.) Defendants argue that Plaintiffs lack standing to challenge that portion of the Act that prohibits registered sex offenders from residing or loitering within 1,000 feet of a church, § 42-1-15(a), because Plaintiffs are not prohibited from attending church and no Plaintiff is currently in violation of the residency requirement pertaining to churches. Defendants further contend that Plaintiffs cannot challenge that portion of the Act that prohibits sexually dangerous predators from being employed within 1,000 feet of an area where minors congregate, § 42-1-15(b)(2), because no Plaintiff is a sexually dangerous predator. Defendants finally argue that certain Plaintiffs lack standing to challenge the school bus stop provision.

The standard that this Court uses to evaluate whether Plaintiffs have standing is well-settled. As stated by the Eleventh Circuit,

> First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the

injury will be "redressed by a favorable decision." Doe v. Pryor, 344 F.3d 1282, 1285 (11th Cir. 2003) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 550, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (citations, footnote, and some internal marks omitted)). Importantly, as previously noted, insofar as the instant case is before the Court on a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct may suffice," and the Court "presume[s] that general allegations embrace those specific facts that are necessary to support the claim." Id. (citation and internal marks omitted). The Court "may consider affidavits and other factual materials in the record." Nat'l Ass'n of State Utility Consumer Advocates v. Federal Communications, 457 F.3d 1238, 1251 (11th Cir. 2006). In addition, the Court does not consider Plaintiffs' likelihood of success on the merits when evaluating standing. Warth v. Seldon, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

The Court notes that "[i]n order to bring a claim on behalf of other similarly situated persons, the named plaintiff must have standing to bring the claim." Cummings v. Baker, 130 Fed. Appx. 446, 449 (11th Cir. 2005) (citation omitted); see also Jackson v. Okaloosa County, 21 F.3d 1531, 1536 (11th Cir. 1994) ("In order for this court to have jurisdiction over the claims before us, at least one named plaintiff must have standing for each of the claims."). In the instant case, the Second Amended Complaint does not indicate that any of the named Plaintiffs are classified as sexually dangerous predators, and the Court has not uncovered any such evidence elsewhere in the record. Plaintiffs do not dispute that they lack standing to challenge the enforcement of residency restrictions applicable only to sexually dangerous predators and state that those restrictions are not challenged in this case.

As to Plaintiffs' claims regarding the portion of the Act that prohibits

registered sex offenders from living or working within 1,000 feet of a church, the Court finds that Plaintiffs Victor Wilson and Lori Collins have standing to challenge the constitutionality of that portion of the Act. According to the allegations of the Complaint, Mr. Wilson has received an offer of full-time employment from an accounting firm at which he previously worked while pursuing a college degree. (Second Am. Compl. ¶ 21.) The accounting firm is located within 1,000 feet of a church. (Id. at ¶ 23.) Therefore, if the Act is enforced, Mr. Wilson will have to resign his current position and will be unable to accept the firm's full-time employment offer. Mr. Wilson satisfies the requirements of imminent injury-in-fact caused by the operation of the Act, for which the instant action seeking injunctive relief provides a remedy. Ms. Collins lived at the Door of Hope residential ministry in Rockdale County until June 2006, when she moved to the Door of Hope residential ministry in Polk County after being informed that her former residence was within 1,000 feet of a school bus stop. (Id. at ¶¶ 37, 42.) The Door of Hope in Polk County conducts religious programs and services and hosts religious events, prayer, and worship. (Id. at ¶ 43.) As previously noted, the Act prohibits anyone registered as a sex offender from living within 1,000 feet of a church. § 42-1-15(a). "Church" is defined as "a place of public religious worship." § 42-1-12(a)(7). If the Act is enforced, Ms. Collins likely will have to abandon her current residence.[6] She satisfies the requirements of imminent injury-in-fact caused by the operation of the Act, for which the instant action seeking injunctive relief provides a remedy.

Defendants do not challenge the standing of Plaintiff Jones to bring a claim under RLUIPA. However, Plaintiffs address this issue in their response brief and

[6] Whether the Door of Hope would be considered to be a place of public religious worship is not a proper determination at this stage of the proceedings.

the Court finds it appropriate to consider Mr. Jones' standing here. Mr. Jones is a minister and serves on the Board of Directors of the Door of Hope residential ministry in Rockdale County. (Second Am. Compl. ¶ 45.) Door of Hope operates a halfway house that ministers to women who have been released from prison. (Id.) As previously noted, Door of Hope in Rockdale County is located within 1,000 feet of a school bus stop and its residents engage in religious worship. (Id.) Plaintiff argues that, because of the Act, Mr. Jones cannot provide a residence for registered sex offenders. Standing to assert a claim under RLUIPA is determined "by the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000cc-2(a). RLUIPA prevents governments from imposing a "substantial burden" on the religious exercise of a person or a religious assembly by imposing a land use regulation, unless that land use regulation is necessary to further a compelling state interest. 42 U.S.C. § 2000cc(a)(1). In addition, governments may not impose land use regulations that treat religious institutions on less than equal terms with secular institutions. 42 U.S.C. § 2000cc(b)(1). A land use regulation is defined as a zoning or landmarking law "that limits or restricts a claimant's use or development of land . . . if the claimant has an ownership, leasehold, easement, servitude or other property interest in the regulated land." 42 U.S.C. § 2000cc-5(5). The term "claimant" is in turn defined to mean "a person raising a claim or defense under this Act." 42 U.S.C. § 2000cc-5(1). Plaintiffs do not allege that Mr. Jones has an ownership interest in the Door of Hope in Rockdale County. The Court has been unable to locate any authority holding that a minister or church board member has standing to assert claims under RLUIPA where that minister does not own a property interest in the property at issue. The Court therefore cannot determine whether Mr. Jones has standing to pursue a claim under RLUIPA, and the Court would ordinarily permit Plaintiffs an opportunity to

amend their complaint to sufficiently allege standing. However, in the instant case, the Court finds that even if Mr. Jones had standing to pursue claims under RLUIPA, Plaintiffs fail to state a RLUIPA claim, see infra, and any such amendment accordingly would be futile.

As to Plaintiffs' standing to challenge that portion of the Act that prohibits anyone on the sex offender registry from residing within 1,000 feet of a school bus stop, Defendants argue that Plaintiff Whitaker has a suitable housing option that complies with the Act; that Plaintiff Linaweaver found suitable housing but his rental application was rejected because of his status as a convicted felon; that Plaintiff Allison has "failed to negate the fact that there is available housing;" that Plaintiff Wilson has found suitable housing; that Plaintiff York has not been threatened with prosecution if he fails to move; that Plaintiff Owens is currently incarcerated and has not been denied parole based on the Act; that Plaintiff Marks' allegation that he has not found housing for himself and his parents is insufficient; and that Plaintiff Collins has found suitable housing.[7] Defendants argue that Plaintiffs do not have the right to live where they want. This argument, however, plainly reaches into the merits of this case and is not an appropriate consideration when evaluating standing.

As an initial matter, the Court disagrees with Defendants' position that all named Plaintiffs who have located housing that complies with the Act's requirements (according to Defendants, Plaintiffs Whitaker, Linaweaver, Wilson and Collins fall within this category) have not suffered an injury-in-fact sufficient to satisfy standing requirements. Defendants do not explain why the forced

[7] Defendants also argue that Mr. Jones does not have standing to challenge the school bus stop provision because he is not a registered sex offender. The Court agrees with this position.

relocation of those individuals pursuant to a potentially unconstitutional legislative enactment would not constitute an injury-in-fact. The mere fact that Plaintiffs are able to comply with the Act's residency restrictions does not remove the injury associated with that compliance. In addition, the Court is unpersuaded by Defendants' argument that Plaintiffs Allison and Marks lack standing to bring this challenge because their allegations that they have not found housing are insufficient or because they have failed to "negate" that housing is available. Defendants cite no authority for this position and have cited nothing to indicate that Plaintiffs are obligated to come forward with any evidence regarding the nature and extent of housing options in order to support standing in this case.

Finally, Defendants contend that Plaintiff York lacks standing because he has not been threatened with prosecution if he fails to move. Defendants more generally take the position that, "[u]ntil each Plaintiff has shown they have been actually injured by the imposition of the [Act] as to each individual Plaintiff, their 'fear' of prosecution is speculative at best." (Defs.' Brief, p. 9.) Defendants are essentially arguing that the injury is hypothetical. The Court does not find this position persuasive. As an initial matter, the Court agrees with Plaintiffs' conclusion that the prior Orders in this case have effectively halted the enforcement of the school bus stop provision. It is undisputed that Plaintiffs, with the exception of Mr. Jones, are registered sex offenders who are subject to the Act. Before this lawsuit was filed, Plaintiffs Linaweaver, Allison, York, Marks, and Collins were notified by local Sheriffs' offices that they will need to relocate to comply with the school bus stop provision. Plaintiff Collins has already relocated to a residence to comply with the school bus stop provision, but that residence may not comply with the requirement that registered sex offenders not reside within 1,000 feet of a church. Plaintiffs Whitaker and Wilson have become aware

that their current residences are within 1,000 feet of where a school bus stops to pick up a child and have been searching for other residences. Plaintiff Owens cannot afford to pay for a residence and all available residences of family members and all halfway houses are within 1,000 feet of where a school bus stops to pick up a child. Mr. Owens therefore cannot submit an acceptable home plan to the parole board. These Plaintiffs have suffered or are in imminent danger of suffering an actual injury occasioned by the enforcement of the school bus stop provision. These injuries are caused by the operation of the Act, and an injunction barring the enforcement of the Act would provide a remedy to Plaintiffs. Defendants' standing challenge speaks more directly to the merits of Plaintiffs' constitutional claims than to this Court's subject matter jurisdiction.

B. *Ex Post Facto* Prohibition

Article I, § 10 of the United States Constitution provides that states may not pass *ex post facto* laws. *Ex post facto* laws impose retroactive punishment; in other words, they increase the punishment for criminal acts after they have been committed. Defendants argue that the Act is regulatory rather than punitive, precluding a finding that the Act is an unconstitutional *ex post facto* law. This Court disagrees. While the Court recognizes that residency restrictions have been upheld in other cases, the Act at issue in the instant case imposes more severe residency restrictions than those evaluated in those opinions.

The Supreme Court reviewed the framework used to evaluate an *ex post facto* challenge in Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). Pursuant to that framework, this Court first considers whether the Act was intended to establish civil or criminal proceedings. Smith, 538 U.S. at 92. "If the intention of the legislature was to impose punishment, that ends the inquiry." Id. If the legislature intended to enact a civil, nonpunitive regulatory scheme,

however, the Court further examines whether the Act is "so punitive either in purpose or in effect as to negate [the State's] intention to deem it civil." Id. (citation and internal marks omitted).

The Court "considers the statute's text and its structure to determine the legislative objective." Id. (citation omitted). The Court must give "considerable deference" to the legislature's stated intent. Id. at 93. In this case, as in Smith, the legislature stated its intention with regard to the registration requirement: "The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes." HB 1059, § 1. In the instant case, however, the legislature did not include any statement specifically addressing its intention as to the residency restrictions. Indeed, the residency restrictions are not included in the list of strategies purportedly implemented by the legislature in Section 1 of HB 1059. The Court's inquiry into legislative intent, therefore, is not aided by the stated intention of the legislature in the instant case.[8]

As to the prior residency restrictions, the Georgia Supreme Court stated:

> The Statute is designed to safeguard against encounters between minors and a convicted sex offender by requiring at least a 1,000 foot distance between places where the former congregate and the latter resides. While not every convicted sex offender will be a recidivist, the statute aims to lessen the potential for those offenders inclined toward recidivism to have contact with, and possibly victimize, the youngest members of society.

Mann v. State, 278 Ga. 442, 443-444, 603 S.E.2d 283, 286 (2004). Defendants interpret the above statement as a finding of legislative intent. Even if the Court

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[8] Plaintiffs argue that the Court must accept, as true, their allegations that the intent of the Act was to punish registered sex offenders by removing them from Georgia. (Pls.' Resp. to Defs.' Motion to Dismiss [Doc. No. 88], p. 10.) The Court considers Plaintiffs' allegation as to this issue to be conclusory and does not find that it is bound by this conclusion in addressing Defendants' motion to dismiss.

were to agree with Defendants' interpretation of this language,[9] the Court does not find this statement controlling in the instant case, which challenges subsequent revisions to the residency requirements.[10]

"Other formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent." Smith, 538 U.S. at 94 (citation omitted). The Act is codified in Title 42 of the Georgia Code, which is entitled "Penal Institutions." It appears in Chapter 1, "General Provisions," at Article 2, "Sexual Offender Registration Review Board." Other matters addressed in Title 42 include correctional institutions, conditions of detention, probation, pardons and paroles, and transfer of prisoners. The provisions in Title 42 appear to relate exclusively to criminal administration, but they do not appear punitive. See Smith, 538 U.S. at 95. As for enforcement procedures, the Act does not appear to provide any specific enforcement procedures; it merely provides that registered sex offenders who fail to comply with the Act "shall be guilty of a felony and shall be punished by imprisonment for not less than ten nor more than 30 years." O.C.G.A. § 42-1-15(d). With the exception of the harsh penalty imposed for those offenders who fail to comply with the Act, the Court agrees with Defendants' position that "[n]othing on the face of the Act as a whole or the specific statute in question suggests that it is anything but a regulatory scheme designed to protect the

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[9] This statement appears in the Georgia Supreme Court's analysis of the state interest underlying the residency restrictions, in connection with evaluating a takings challenge to the former statute. Accordingly, legislative intent was not directly at issue in that case.

[10] As Defendants note, the residency restrictions in effect prior to the 2006 amendment have been found not to constitute an *ex post facto* law, and this Court will not consider these restrictions here. See Doe v. Baker, No. 1:05-CV-2265-TWT (N.D. Ga. 2006).

public." (Defs.' Brief, p. 11.)

The Court next determines whether, assuming that the legislature's intent was to establish civil, nonpunitive residency restrictions, the effect of the Act is nonetheless so punitive in effect as to negate the legislative intent. The Court recognizes that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." Smith, 538 U.S. at 92. In undertaking this inquiry, the Court considers the "guideposts" described in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). Smith, 538 U.S. at 97 (noting that the factors are "neither exhaustive nor dispositive"). The following factors are evaluated to determine if a statute is punitive: (1) whether the statute "has been regarded in our history and traditions as punishment;" (2) whether it "imposes an affirmative disability or restraint;" (3) whether it "promotes the traditional aims of punishment;" (4) whether it "has a rational connection to a nonpunitive purpose;" and (5) whether it "is excessive with respect to this purpose." Id.

The Court first evaluates whether the Act has been regarded in our history and traditions as punishment. "[A] State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." Id. Banishment has been regarded historically as a punishment, id. at 98, and Plaintiffs argue that the Act sufficiently resembles banishment to support a finding that this factor weighs in their favor. Defendants argue that the Act does not effectively banish registered sex offenders because the Act does not mandate that those individuals be "permanently expelled from their community and prevented from returning," which is the historic definition of banishment. (Defs.' Brief, p. 13.) Because the Act addresses only residency and loitering and does not impact any other activities in "restricted" areas, Defendants

contend that the Act cannot be considered banishment.

While the Court acknowledges that the Eighth Circuit found this position persuasive in Doe v. Miller, 405 F.3d 700 (8th Cir. 2005), the Court disagrees with its application in the instant case.[11] In particular, the Court finds that it could reasonably conclude, when presented with evidence regarding the availability of housing and the areas impacted by the Act, that the Act "sufficiently resembles banishment to make this factor weigh towards finding the law punitive." Miller, 405 F.3d at 724 (Melloy, J., dissenting). The Court agrees with Judge Melloy's opinion that a statute found to be substantially similar to banishment could support a finding of punitive effect. In this case, Plaintiffs may be able to establish that they are effectively excluded from many communities in Georgia by operation of the Act. If the Court required Plaintiffs to prove banishment as historically defined in order to pursue an *ex post facto* challenge, the Georgia legislature could prohibit sex offenders from living anywhere in the State of Georgia without raising a question of punitive effect relevant to an *ex post facto* determination. This position goes too far. The Act may be found to sufficiently resemble banishment so as to support a finding that it is punitive in effect.

The Court next considers whether the law imposes an affirmative disability or restraint. "Here, we inquire how the effects of the Act are felt by those subject to it." Smith, 538 U.S. at 99-100. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." Id. at 100. In the instance case,

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[11] The Miller decision considered several constitutional challenges to an Iowa statute prohibiting certain registered sex offenders from living within 2,000 feet of a school or a registered child care facility. The statute considered in Miller included a grandfather clause that permitted registered sex offenders to retain residences established prior to the effective date of the statute, even if those residences did not comply with the new statutory requirements. See Miller, 405 F.3d at 719. The Act at issue in this case, however, does not include a grandfather provision.

unlike Smith, the Act imposes a physical restraint on the available residences of registered sex offenders. See also Miller, 405 F.3d at 721 (statute imposed affirmative disability or restraint). The Act at issue in this case does not leave registered sex offenders "free to change jobs or residences." Smith, 538 U.S. at 100. Registered sex offenders are not "free to move where they wish and to live and work as other citizens, with no supervision." Id. at 101. Moreover, school bus stops are inherently transient and may be designated by local school boards of education at any time under the Act, significantly limiting the permanency of residences that can be established by registered sex offenders and impairing their ability to form relationships in their chosen communities. On its face, the Act does not require that any notice be provided to a sex offender who is in violation of the Act's requirements and does not provide any specified time period within which that person can locate a new residence that complies with the Act. The Court cannot agree with Defendants' argument that the residency restriction "is a minor and indirect effect of a conviction for a sexual offense." (Defs.' Brief, p. 16.)

Thirdly, the Court evaluates whether the Act promotes the traditional aims of punishment. The parties do not dispute that one of the purposes of the Act is deterrence, a traditional aim of punishment. Consistent with Smith, the Court recognizes that "[a]ny number of governmental programs might deter crime without imposing punishment." Smith, 538 U.S. at 102. While the Court does not rely on this factor alone to conclude that Plaintiffs state an *ex post facto* claim, the Court does consider this factor to weigh in favor of finding the law punitive in effect.

Finally, the Court considers whether the Act has a rational connection to a nonpunitive purpose and whether it is excessive as to that purpose. "The Act's rational connection to a nonpunitive purpose is a 'most significant' factor in our

determination that the statute's effects are not punitive." Smith, 538 U.S. at 102 (citation omitted). Plaintiffs admit that the Act has a rational connection to a nonpunitive purpose but contend that the Act is excessive. The Act is rationally connected to the nonpunitive purpose of protecting the public, particularly children, from the risk that a registered sex offender will reoffend by limiting the ability of registered sex offenders to reside and work near (and thereby presumably to reduce their opportunity to access) children.

Plaintiffs argue that the Act is excessive because it fails to differentiate between people on the sex offender registry – it treats everyone the same, regardless of whether the person engaged in a consensual act or a violent offense. Plaintiffs additionally allege that the Act may actually foster recidivism by creating instability in housing and employment. Defendants disagree, noting that a perfect or close fit between the Act and its goals is not required and arguing that the legislature acted properly in this case. The Court acknowledges that a close or perfect fit is not required; however, the Court nonetheless finds that the Act's failure to distinguish among sex offenders and failure to identify those registered sex offenders who are most likely to reoffend, when coupled with the fact that the instability created by the Act may be harmful to the public, could support a finding that the Act is excessive.

In addition to the factors set forth in Smith, the Court additionally finds it appropriate to consider the consequences of violating the Act. The sanction of residing within 1,000 feet of a school bus stop is particularly severe. The Act provides that any registered sex offender who "knowingly" violates the Act's provisions "shall be guilty of a felony and shall be punished by imprisonment for not less than ten nor more than 30 years." O.C.G.A. § 42-1-15(d). This harsh sanction supports a finding that the Act is punitive in effect.

In short, the Court finds that, when taken in the light most favorable to Plaintiffs, the allegations in the Second Amended Complaint are sufficient to raise a question regarding whether the Act impermissibly increases the punishment for previously-committed crimes. The Court acknowledges the obvious fact that some individuals required to register as sex offenders have committed serious, violent offenses. However, to the extent that the Act is ultimately found to be punitive in effect, it is the function of the criminal laws of the state, and not residency restrictions imposed after the sentence has been determined and fulfilled, to punish those individuals for this conduct.

Plaintiffs state a claim that the Act violates the *ex post facto* prohibition. Defendants' motion to dismiss this portion of Count 1 of Plaintiffs' Second Amended Complaint is **DENIED**. See Gibbs v. Buck, 307 U.S. 66, 76, 59 S. Ct. 725, 83 L. Ed. 1111 (1939) ("Where the [case] makes an attack upon the constitutionality of a state statute, supported by factual allegations sufficiently strong, as here, to raise 'grave doubts of the constitutionality of the Act' in the mind of the trial court, the motion to dismiss for failure to state a cause of action should be denied.").

C. Eighth Amendment

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. Defendants argue that the Act does not violate the Eighth Amendment because it is not punitive, and, even if the Act is punitive, the punishment imposed by the Act is not severe enough to constitute cruel and unusual punishment. Plaintiffs do not address the Eighth Amendment in their response brief, and the Court deems the Eighth Amendment claim to be abandoned. See Local Rule 7.1B; Roberts v. City of Hapeville, No. 1:05-CV-1614-

WSD, 2007 U.S. Dist. LEXIS 10508 (N.D. Ga. Feb. 15, 2007); City of Lawrenceville v. Ricoh Electronics, Inc., 370 F. Supp. 2d 1328, 1333 (N.D. Ga. 2005).

Even if Plaintiffs had not abandoned this claim, the Court finds that the Act does not impose cruel and unusual punishment within the meaning of the Eighth Amendment. A punishment will be found to be cruel and unusual if it is barbaric or excessive. Coker v. Georgia, 433 U.S. 584, 591-92, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) (plurality). "[A] punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." Id. The Court finds no support for the position that the Act's residency restrictions or the requirement that Plaintiffs register as sex offenders satisfies this standard. Count 8 of Plaintiffs' Second Amended Complaint is **DISMISSED**.

D. Procedural Due Process

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. Defendants argue that the Act does not violate the procedural requirements of due process because the triggering event for the imposition of the Act's residency restrictions is the conviction of a sexual offense or crime against a child and no individualized determination of dangerous is required. According to Defendants, because the Act does not provide for an exemption from its requirements, additional procedures are unnecessary, insofar as any fact other than the requirement that an individual register as a sex offender is irrelevant under the statute. Plaintiffs argue that they have a constitutionally protected interest in life, liberty, and property, which encompasses their homes and professions, and that in order to deprive them of

these interests, adequate procedures must be employed.

The Court finds Connecticut Department of Public Safety v. Doe, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003) to be instructive here. In Connecticut, the Supreme Court considered a due process challenge to Connecticut's sex offender registry statute. The plaintiff in that action, a convicted sex offender subject to the state's registration statute, argued that the registration requirement deprived him of a liberty interest, in the form of his reputation, without notice or an opportunity to be heard. Connecticut, 538 U.S. at 6. The Supreme Court assumed that the plaintiff had been deprived of a liberty interest but found that "due process does not entitle him to a hearing to establish a fact that is not material under the Connecticut statute." Id. at 7. The residency requirements "turn on an offender's conviction alone – a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." Id. (citation omitted).

The Supreme Court stated,

> In short, even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of all sex offenders – currently dangerous or not – must be publicly disclosed. Unless respondent can show that that substantive rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise. . . . States are not barred by principles of "procedural due process" from drawing . . . classifications.

Id. at 7-8 (emphasis removed and citation omitted); see also Doe v. Miller, 405 F.3d 700, 709 (8th Cir. 2005) ("Thus, the absence of an individualized hearing in connection with a statute that offers no exemptions does not offend principles of procedural due process.").

Similarly, in this case, Plaintiffs argue that prior to being forced to leave their residences, they should have an opportunity to challenge the "appropriateness of such an eviction." (Pls.' Resp. to Defs.' Motion to Dismiss, p. 21.) Plaintiffs argue that the Act is defective because it fails to provide for

"individualized consideration of dangerousness." (Id.) For the reasons stated in Connecticut, Plaintiffs' procedural due process challenge cannot succeed.[12] Count 2 of Plaintiffs' Second Amended Complaint is **DISMISSED**.

E. Substantive Due Process

The substantive component of the due process clause protects certain fundamental rights from infringement, regardless of the procedures provided, unless the infringement satisfies the strict scrutiny analysis. U.S. CONST. amend. XIV; see Doe v. Moore, 410 F.3d 1337 (11th Cir. 2005). Defendants contend that Plaintiffs do not have a legitimate liberty interest that can be described as a fundamental right. Plaintiffs disagree, arguing that the Act impermissibly burdens their fundamental right to live with their families.

Fundamental rights protected by substantive due process are those rights "that are so 'implicit in the concept of ordered liberty' that 'neither liberty nor justice would exist if they were sacrificed.'" Moore, 410 F.3d at 1342 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 152, 82 L. Ed. 288 (1937); McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc)). "When a state enacts legislation that infringes fundamental rights, courts will review the law under a strict scrutiny test and uphold it only when it is 'narrowly tailored to serve a compelling state interest.'" Id. at 1343 (quoting Reno v. Flores, 507 U.S.

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[12] Plaintiffs do not address Connecticut in their response brief. Instead, Plaintiffs rely on Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) to support their position. The Matthews decision addressed the issue of whether procedural due process required that the recipient of Social Security disability benefits payments be afforded an opportunity for an evidentiary hearing prior to the payments' termination; the Court found that it did not. Plainly the existence of a continuing disability would be relevant to a determination of whether the disability benefits payments should continue. In contrast, in this case, the dangerousness of the registered sex offender is not a statutory prerequisite for the application of the residency restrictions.

292, 302, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993)). A substantive due process claim is analyzed by "first crafting a 'careful description of the asserted right.'" Id. (quoting Flores, 507 U.S. at 302, 113 S. Ct. at 1447). "Second, we must determine whether the asserted right is one of those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Id. (citations and internal marks omitted).

The Court begins with a careful description of the fundamental right at issue. In the instant case, as noted, Plaintiffs allege that the Act interferes with their fundamental right to live with their families. Fundamental rights that have received protection under substantive due process include "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." Washington v. Glucksberg, 521 U.S. 702, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); see also Roberts v. United States Jaycees, 468 U.S. 609, 617-618, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) ("[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."). The Supreme Court has expressed a reluctance to "expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Glucksberg, 521 U.S. at 720. The Eleventh Circuit has additionally noted that the Supreme Court "has not created a broad category where any alleged infringement on privacy and liberty will be subject to substantive due process protection." Moore, 410 F.3d at 1344. Consistent with the Moore decision, the Court begins by defining the scope of the claimed fundamental right in this case by referencing the

Act itself. Id.

Under this formulation, the right at issue in this case could be described as the right of a person registered as a sex offender under Georgia law to reside with his or her family in a location within 1,000 feet of a school bus stop and/or a church. Such a narrowly-defined right plainly would not be fundamental within the meaning of substantive due process jurisprudence. The Court is not satisfied, however, that the right as stated above is the only appropriate description of the right at issue in this case. As this case proceeds and the factual background is more fully developed, the contours of the right at issue may emerge in sharper focus. The Act may reach deeper into intimate family relationships and choices regarding child rearing and marriage than is immediately apparent. While the Court does not disagree with Defendants' assertion that there is no right to live where you want, the Court suspects that a different right ultimately may be at issue in this case. At this stage of the litigation, the Court cannot find that there are no circumstances under which Plaintiffs' substantive due process claim might succeed. The Court acknowledges, however, that this claim presents a close question.

Because the Court has not defined the claimed fundamental right in this case, the Court cannot proceed to determine if that right is indeed fundamental by evaluating whether the right is deeply rooted in the history and tradition of this Nation such that it is implicit in the concept of ordered liberty. The Court finds that Plaintiffs state a claim for a substantive due process violation, and Defendants' motion to dismiss Count 3 of Plaintiffs' Second Amended Complaint is hereby **DENIED**.

F. Takings Clause

The Fifth Amendment provides that private property may not be taken for public use without just compensation. U.S. CONST. amend. V, XIV. Defendants argue that the Act does not take Plaintiff Wilson's property,[13] it merely limits his ability to live there. Defendants contend that the Act does not restrict Mr. Wilson from owning, visiting, conducting business upon, leasing, selling, or otherwise using or enjoying the property. Plaintiffs argue that the Act is a partial regulatory taking because it prevents them "from living in their homes and forc[es] many to sell their property." (Pls.' Resp. to Defs.' Motion to Dismiss, p. 35.)[14]

The Supreme Court recognized that a regulatory taking could violate the Fifth Amendment in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922) (noting that "if regulation goes too far, it will be recognized as a taking"). The Court has not provided specific guidance for determining when a regulation "goes too far," instead relying on "essentially ad hoc, factual inquiries." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (quoting Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631(1978)). Certainly, where a regulation "denies all economically beneficial or productive use of land," a categorical finding that the land has been taken is

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[13] Defendants correctly note that Mr. Wilson is the only named Plaintiff who is alleged to own real property. Accordingly, Mr. Wilson is the only named Plaintiff who would have standing to assert a takings challenge to the Act, and the only named Plaintiff who can establish the possession of a property interest. See Givens v. Alabama Dep't of Corrections, 381 F.3d 1064 (11th Cir. 2004). For purposes of consistency, however, the Court will continue to use the term "Plaintiffs" in this section.

[14] The Court notes that the instant case plainly does not involve a physical taking, or a direct appropriation of property, as to which little analysis is required. Lucas, 505 U.S. at 1014.

appropriate. Lucas, 505 U.S. at 1015. Where, as here, no per se rule applies, the Court must engage in a factual inquiry, as described in Penn Central. The Court examines "[t]he economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." Penn Central, 438 U.S. at 124. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Id.

Plaintiffs contend that the Act has forced many property owners from their homes and that it "significantly diminishes the value of [P]laintiffs' homes and disrupts their investment-backed expectations." (Pls.' Resp. to Defs.' Motion to Dismiss, p. 36.) Specifically, Plaintiffs argue that, because they are barred from living in their residences, the economic value of the residence is reduced. Plaintiffs contend that, even though they may be able to sell or lease their property, they will be unable to obtain a fair value for the property because they will be required to vacate quickly. Defendants argue that the economic impact of the Act is minimal because Plaintiffs may continue to own the property or they may sell the property; in either case, the economic value of the land is not reduced. This Court agrees with Defendants' position and finds that the economic impact of the Act is fairly minimal. Plaintiffs are not forced to sell their homes and are not otherwise deprived of the homes' value because of the Act. The Act limits their ability to use the property as a residence.

The Court next considers the extent to which the Act interferes with Plaintiffs' reasonable investment-backed expectations regarding the property. Defendant argues that Plaintiffs' investment in their homes is not diminished in

that the economic value of the home is not reduced. Plaintiffs contend that they invested in their property in accordance with the expectation that the property could be used as a residence. At the time Plaintiffs purchased their homes, Plaintiffs doubtlessly expected that the properties could be used as residences and likely invested in the property for the purpose of establishing a residence. Because the Act prohibits Plaintiffs from using the property for this purpose, it interferes with their reasonable expectations. The Court notes, however, that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." Andrus v. Allard, 444 U.S. 51, 65-66, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979). Accordingly, although the Act interferes with Plaintiffs' reasonable investment-backed expectations, this factor does not weigh strongly in their favor.

Finally, Plaintiffs do not seriously dispute that the State has a strong interest in preventing sexual abuse and that the purpose of the Act is to limit contact between registered sex offenders and children, thereby reducing the potential for recidivism among sex offenders. While Plaintiffs urge the Court to determine how much of an interest the State has in requiring Plaintiffs to move from their homes, the Court finds that such a determination is not supported by law. The nature of the state's interest is "critical in determining whether a taking has occurred." Vesta Fire Ins. Corp. v. State of Florida, 141 F.3d 1427, 1433 (11th Cir. 1998). This factor weighs in favor of Defendants.

After weighing these factors, the Court concludes that Plaintiffs' takings claim cannot succeed. "The standard for whether regulation effects a taking is whether the landowner has been denied all or substantially all economically viable use of his land." Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1072 (11th Cir. 1996) (noting that "[t]he standard is not whether the landowner has been

denied those uses to which he wants to put his land"). Plaintiffs have not been denied all or substantially all economically viable use of their properties. Accordingly, the Court finds that Plaintiffs have failed to state a claim pursuant to the Takings Clause. Count 6 of Plaintiffs' Second Amended Complaint is **DISMISSED**.

G. RLUIPA

As previously noted, RLUIPA prevents governments from imposing a "substantial burden" on the religious exercise of a person or a religious assembly by imposing a land use regulation, unless that land use regulation is necessary to further a compelling state interest. 42 U.S.C. § 2000cc(a)(1). In addition, governments may not impose land use regulations that treat religious institutions on less than equal terms with secular institutions. 42 U.S.C. § 2000cc(b)(1). Defendants argue that Plaintiffs' RLUIPA claims cannot succeed because the Act does not regulate land use; rather, it limits the residences of registered sex offenders. Defendants contend that land belonging to religious institutions is not substantially burdened in the exercise of religion because a sex offender cannot live there.

Although Plaintiffs correctly fault Defendants for failure to comply with the Local Rules of this Court by not citing any authority to support their position that Plaintiffs' RLUIPA claims must be dismissed, the Court nonetheless finds that Plaintiffs' RLUIPA claims cannot succeed because the Act is not a land use regulation, as defined in RLUIPA. A land use regulation is defined as a zoning or landmarking law "that limits or restricts a claimant's use or development of land . . . if the claimant has an ownership, leasehold, easement, servitude or other property interest in the regulated land." 42 U.S.C. § 2000cc-5(5). "[A] government agency implements a 'land use regulation' only when it acts pursuant to a 'zoning

or landmarking law' that limits the manner in which a claimant may develop or use property in which the claimant has an interest." Prater v. City of Burnside, 289 F. 3d 417, 434 (6th Cir. 2002). Zoning laws may be generally defined as those rules that regulate "uses and development by means of zones or districts." Artistic Entertainment, Inc. v. City of Warner Robins, 331 F.3d 1196, 1205 (11th Cir. 2003) (citations and internal marks omitted) (discussing the definition of a zoning ordinance under Georgia law). The Act cannot be considered a zoning law, in accordance with the plain meaning of that term. Moreover, the Court notes that zoning is traditionally a local government function, rather than a state-wide exercise.

The Court has found only one interpretation of the term "landmarking law" in its research of published federal cases. In that case, the Western District of New York concluded that "[l]andmarking laws generally involve the 'regulation and restriction [of] certain areas as national historic landmarks, special historic sites, places and buildings for the purposes of conservation, protection, enhancement and perpetuation of those places of natural heritage.'" Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 254 (W.D. N.Y. 2005) (quoting N.Y. Village L. § 7-700.) Plainly, the Act does not fall within this definition. Even if the Court were inclined to define the term "landmarking law" more broadly than the New York district court, the Act could not be fairly described as a landmarking law.[15]

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[15] Plaintiffs, citing Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004), argue that the "equal terms" provision of RLUIPA does not require a showing that the law regulates land use. The Court does not read Midrash to support Plaintiff's argument. While the "substantial burden" provision of RLUIPA describes the scope of its application in terms that do not appear in the "equal terms" provision, both provisions prohibit only the imposition or implemental of a "land use regulation." Plainly if no land use regulation has been imposed by the government, RLUIPA simply does not afford relief. Such is the case here.

The Court notes that Plaintiffs have not taken the position that the Act should be considered a landmarking law. Accordingly, insofar as RLUIPA applies only to zoning or landmarking laws, Plaintiffs' RLUIPA claims cannot succeed. Count 4 of Plaintiffs' Second Amended Complaint is hereby **DISMISSED**.

H. Free Exercise Clause[16]

States may not pass laws that prohibit the free exercise of religion. U.S. CONST. amends. I, XIV. Defendants argue that Plaintiffs are not prohibited from participating in religious activities on church property but are merely prohibited from living within 1,000 feet of a church. Defendants contend that the Act does not restrict Plaintiffs' ability to exercise their religious beliefs. Plaintiffs argue that the Act's prohibition on living or working within 1,000 feet of a church imposes an unequal burden on secular and religious organizations, in violation of the Free Exercise Clause. Plaintiffs urge the application of strict scrutiny and submit that there is no justification to support treating secular halfway houses differently from religious halfway houses.

The Free Exercise Clause protects both religious beliefs and religious practices. Generally, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (citation omitted). As to the neutrality requirement, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." Lukumi, 508 U.S. at 532. "Although a law

[16] The Court notes that Defendants have not moved to dismiss Plaintiffs' claim that the Act violates the right to freedom of association, U.S. CONST. amend. I.

targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." Id. at 533. To determine the object of a law, the Court begins by considering the text itself. Id. In the instant case, the Act prohibits registered sex offenders from living or working within 1,000 feet of a church. According to Lukumi, "a law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." Id. The Act does not refer to a religious practice without a secular meaning – indeed, it does not refer to a religious practice at all.

As to the second requirement of the Free Exercise Clause, the Supreme Court has stated that "laws burdening religious practice must be of general applicability." Lukumi, 508 U.S. at 542 (citing Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 879-881, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)). Where a law has "the incidental effect of burdening religious practice," "categories of selection are of paramount concern." Id. The Free Exercise Clause guarantees "that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." Id. at 543. To establish a Free Exercise Clause violation, a plaintiff must demonstrate "a substantial burden on the observation of a central religious belief or practice." Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989). The Court finds that the Act's provision prohibiting registered sex offenders from residing within 1,000 feet of a church does not impose a substantial burden on religious practices. Plaintiffs' argument that the law treats faith-based halfway houses differently from secular halfway houses is unpersuasive. The Act does not preclude sex offenders from residing in faith-based halfway houses, it only provides that those

halfway houses cannot be located on church grounds or within 1,000 feet of a church. Plaintiffs do not allege any particular religious belief that would mandate the location of a halfway house on church property. The Act similarly does not preclude Mr. Jones from providing spiritual leadership and assistance to people released from prison. It does not limit registered sex offenders from attending church or worship services and does not limit Mr. Jones' activities in counseling and ministering to recently-released registered sex offenders. It only provides that Mr. Jones may not house these individuals on church grounds or within 1,000 feet of a church. The Court does not find this restriction to impose a substantial burden on religious practices such that strict scrutiny would be required.

In contrast to the residency provision, however, the Court finds that Plaintiffs potentially state a claim for violation of the Free Exercise Clause as to that portion of the Act that prohibits Plaintiffs from working within 1,000 feet of a church. This provision would effectively exclude all registered sex offenders from serving as clergy or ministers in religious organizations. This provision may operate as a substantial burden on religious practice that does not survive scrutiny; however, the Court does not read Plaintiffs' Second Amended Complaint as alleging that any named Plaintiff seeks employment in a religious organization such that a named Plaintiff would have standing to assert this claim. The Court will nonetheless provide Plaintiffs an opportunity to amend their complaint to adequately allege standing as to this claim.

Plaintiffs additionally contend that the Act violates "the ministerial exception of the Free Exercise Clause" because it interferes with employment decisions of churches. (Plfs.' Resp. to Defs.' Motion to Dismiss, p. 33.) The ministerial exception has been described as "a rule adopted by several circuits that civil rights laws cannot govern church employment relationships with ministers

without violating the free exercise clause because they substantially burden religious freedom." Hankins v. Lyght, 441 F.3d 96, 100 (2d Cir. 2006). It has been applied almost exclusively as a bar to discrimination suits against churches and religious organizations – it is an exception to employment discrimination claims. See Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000) (finding that the Free Exercise Clause prohibits "a church from being sued under Title VII by its clergy"). The Court's research has failed to reveal any authority for applying the ministerial exception to invalidate a state statute. Plaintiffs' Free Exercise claim that is based on the portion of the Act that prohibits registered sex offenders from living within 1,000 feet of a church is **DISMISSED**. The Court will, however, permit Plaintiffs an opportunity to amend their complaint to state a claim that the portion of the Act that prohibits registered sex offenders from working within 1,000 feet of a church violates the Free Exercise Clause.

I. Right to Interstate or Intrastate Travel

Defendants argue that, because the Act does not restrict Plaintiffs from traveling to other states or moving around in any local community for socializing, shopping, or working, the Act does not violate the right to interstate or intrastate travel. (Defs.' Brief, p. 31.) Plaintiffs have failed to respond to Defendants' argument as to this claim, and, accordingly, have abandoned it. See Local Rule 7.1B; Roberts v. City of Hapeville, No. 1:05-CV-1614-WSD, 2007 U.S. Dist. LEXIS 10508 (N.D. Ga. Feb. 15, 2007); City of Lawrenceville v. Ricoh Electronics, Inc., 370 F. Supp. 2d 1328, 1333 (N.D. Ga. 2005). Even if Plaintiffs had not abandoned this claim, the Court finds that it is without merit. See Saenz v. Roe, 526 U.S. 489, 499, 119 S. Ct. 1518, 1524, 143 L. Ed. 2d 689 (1999); Doe v. Moore, 410 F.3d 1337, 1348-49 (11th Cir. 2005); Doe v. Miller, 405 F.3d 700, 711-12 (8th Cir. 2005). Count 8 of

Plaintiffs' Second Amended Complaint is **DISMISSED**.

J. Bill of Attainder

Article I, § 10 of the United States Constitution provides that states may not pass bills of attainder. Pursuant to this clause, legislatures may not pass "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." United States v. Brown, 381 U.S. 437, 448-48, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965). Defendants argue that because the Act does not inflict punishment, it cannot be an unconstitutional bill of attainder.

Three requirements must be met before a legislative act will be considered an unconstitutional bill of attainder: "specification of the affected persons, punishment, and lack of a judicial trial." Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 847, 104 S. Ct. 3348, 82 L. Ed. 2d 632 (1984). In this case, the first requirement is met, insofar as the Act specifically affects only registered sex offenders. See § 42-1-15(e) (noting that the residency restrictions apply only to individuals required to register as sex offenders under Georgia law).

The definition of punishment in the Bill of Attainder context is set forth in Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 277, 53 L. Ed. 2d 867 (1977). The Court first considers whether the Act "falls within the historical meaning of legislative punishment," in the context of the history of bills of attainder Nixon, 433 U.S. at 475. Such historical punishments include death, imprisonment, banishment, confiscation of property, and employment or vocational restrictions. Id. at 473-74. The Court next looks beyond historical experience to consider whether the law "reasonably can be said to further

nonpunitive legislative purposes." Id. at 475-76 (citations omitted). The Court finally considers whether "the legislative record evinces a congressional intent to punish." Id. at 478. The Court ultimately applies the same analysis here as it applied in connection with Plaintiffs' *ex post facto* challenge. See United States v. O'Neal, 180 F.3d 115, 122 n.7 (4th Cir. 1999) (noting that "it is apparent that the Court applies the same test for 'punishment' for at least the Ex Post Facto, Double Jeopardy, and Bill of Attainder Clauses, and for substantive due process"); see also Flemming v. Nestor, 363 U.S. 603, 612, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960) (applying the same analysis of punishment to *ex post facto* and bill of attainder challenges). For the reasons stated in connection with this Court's analysis of Plaintiffs' *ex post facto* challenge to the Act, the Court finds that, when the allegations in the Second Amended Complaint are viewed in the light most favorable to Plaintiffs, the Act could be found to inflict punishment.

The Court finally must consider whether the Act inflicts punishment without a judicial trial. In the instant case, the Act imposes residency restrictions based on an individual's status as a registered sex offender. The triggering event for the operation of the Act is the requirement of registration. Prior to imposing the registration requirement, each Plaintiff was afforded a judicial trial (or was provided the opportunity to challenge the charges that ultimately required registration as part of a judicial proceeding). The Court accordingly cannot find that the Act constitutes punishment that is imposed without the protections of a judicial trial. Plaintiffs do not specify what would be shown at trial that would be relevant to the application of the Act. For this reason, Plaintiffs' bill of attainder challenge must fail, and the Court **DISMISSES** this claim, which is contained in Count 1 of Plaintiffs Second Amended Complaint.

K. Impairment of Contractual Obligations

Article I, § 10 of the United States Constitution provides that states may not pass any law that impairs the obligations of contracts. Defendants argue that Plaintiffs' claim that the Act impairs the obligation of contracts by forcing them to break leases cannot succeed because Plaintiffs cannot show a substantial impairment. Plaintiffs have not responded to this argument, and the Court accordingly finds that Plaintiffs have abandoned this claim. See Local Rule 7.1B; Roberts v. City of Hapeville, No. 1:05-CV-1614-WSD, 2007 U.S. Dist. LEXIS 10508 (N.D. Ga. Feb. 15, 2007); City of Lawrenceville v. Ricoh Electronics, Inc., 370 F. Supp. 2d 1328, 1333 (N.D. Ga. 2005).[17]

Even assuming that Plaintiffs did not abandon this claim, the Court finds that it is due to be dismissed. To determine whether a change in the law improperly impairs contractual obligations, the Court considers whether that change "has operated as a substantial impairment of a contractual relationship." General Motors Corp. v. Romein, 503 U.S. 181, 186, 112 S. Ct. 1105, 1109, 117 L. Ed. 2d 328 (1992) (internal marks and citations omitted). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." Romein, 503 U.S. at 186. As the Supreme Court has explained, "it is well settled that the prohibition against impairing the obligation of contracts is not to be read

[17] In addition, Plaintiffs do not clearly state a claim based on the impairment of contracts in their complaint. Although the phrase is mentioned in the heading associated with Count 1 of Plaintiffs' Second Amended Complaint, it is not referenced in any paragraphs in the text of that Count. The Court does not consider the inclusion of a phrase in a heading sufficient to state a claim as to that issue. Furthermore, Plaintiffs have not included any specific factual allegations addressing the contracts they are alleging to have been impaired by the Act, although Count 1 asserts that Plaintiffs will be forced to break their leases.

literally." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 502, 107 S. Ct. 1232, 1251, 94 L. Ed. 2d 472 (1987) (citation omitted).

The Court finds that, to the extent that Plaintiffs allege they are parties to lease agreements, Plaintiffs could establish the existence of a contractual relationship. To the extent the Act operates to restrict Plaintiffs' ability to reside in premises leased for that purpose, the contracts are impaired. The Act "alter[s] contractual rights or obligations," National R. Passenger Corp. v. Atchison, T. & S.F.R. Co., 470 U.S. 451, 472, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985), because Plaintiffs may no longer reside at the leased premises, even though the lease presumably would include the right to reside at the property. The Court accordingly must consider whether the impairment is substantial.

"The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." Energy Reserves Group v. Kansas Power & Light Co., 459 U.S. 400, 411, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983) (citation omitted). If contractual obligations are only minimally altered, the claim must fail, and no additional analysis is required. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978). "Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." Id. In the instant case, the Act's alteration of Plaintiffs' contractual right to use leased premises as residences is a substantial impairment requiring an examination of the nature and purpose of the legislation.

"If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem." Energy Reserves, 495 U.S. at 411-12. "[I]t is to be accepted as a

commonplace that the Contract Clause does not operate to obliterate the police power of the States;" "[t]he police power [] is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." Flanigan's Enterprises, Inc. v. Fulton County, Georgia, 242 F.3d 976 (11th Cir. 2001) (citations and internal marks omitted) (Fulton County Code provision prohibiting the sale and consumption of alcoholic beverages in adult entertainment establishments did not unconstitutionally impair the obligations of contracts where the defendants' leases provided that the premises be used for topless nudity bar and required the maintenance of a liquor license). In the instant case, the Act has a legitimate public purpose – to lessen the potential for registered sex offenders who are inclined towards recidivism to have contact with children. The Court must next "satisfy itself that the legislature's adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." Keystone, 480 U.S. at 505 (citations and internal marks omitted). "[W]e have repeatedly held that unless the State is itself a contracting party, courts should properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." Id. (internal marks and citations omitted). The Act survives scrutiny under this standard, and the Court will **DISMISS** this claim from Count 1 of Plaintiffs' Second Amended Complaint.

L. Overbreadth/Vagueness

The Due Process Clause of the Fourteenth Amendment requires that state legislative enactments be neither impermissibly vague nor overbroad. A statute is unconstitutionally vague if it either "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or "authorize[s]

and even encourage[s] arbitrary and discriminatory enforcement." City of Chicago v. Morales, 527 U.S. 41, 56, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999).[18] A law must provide "fair warning" of proscribed conduct so that citizens (or, in this case, registered sex offenders) can conform their conduct to the law. Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 503, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1983); Morales, 527 U.S. at 58. A statute is unconstitutionally vague "only if the enactment is impermissibly vague in all of its applications." Hoffman Estates, 455 U.S. at 495. A statute that is overbroad similarly will not survive against a constitutional challenge. "Under the overbreadth doctrine, a statute that prohibits a substantial amount of constitutionally protected [conduct] is invalid on its face." United States v. Williams, 444 F.3d 1286, 1296 (11th Cir. 2006); see also Houston v. Hill, 482 U.S. 104, 114, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

Although Defendants contest Plaintiffs' ability to assert claims that the Act is vague and/or overbroad, the Court notes that the only mention of these claims in Plaintiffs' Second Amended Complaint is in Plaintiffs' prayer for relief. The claims are not addressed in the listed Counts of Plaintiffs' Second Amended Complaint. As such, to the extent that Plaintiffs assert claims based on these theories, Plaintiffs have failed to adequately allege these claims. Plaintiffs have not set forth their basis for alleging that Act is vague and overbroad. In particular, Plaintiffs failed to allege the particular portions of the Act that Plaintiffs contend are vague and to identify the constitutionally protected conduct that forms the grounds for their overbreadth challenge. The Court will permit Plaintiffs to

[18] The Court notes that the Morales court considered a vagueness challenge to a criminal law; however, the Court finds nothing to indicate that the same analysis would not apply in this case, where a violation of the Act's residency restrictions is punishable as a felony with a minimum sentence of ten years.

amend their complaint to correct these pleading deficiencies and **DENIES**, at this time, Defendants' motion to dismiss these claims.

IV. CONCLUSION

Defendants' Motion to Dismiss in Lieu of Answer [Doc. No. 34] and Defendants' Motion to Dismiss Amended Complaint [Doc. No. 55] are **DENIED** as moot. Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint [Doc. No. 78] is **GRANTED in part and DENIED in part**, as stated herein. The Court will permit Plaintiffs to amend their complaint within twenty (20) days of the date of this Order to assert a claim that the provision of the Act that prohibits registered sex offenders from working within 1,000 feet of churches violates the Free Exercise Clause and to assert vagueness and overbreadth claims, as provided in this Order.

SO ORDERED this 30th day of March, 2007.

s/ CLARENCE COOPER

CLARENCE COOPER
UNITED STATES DISTRICT JUDGE

EXHIBIT B

Doe v. Thompson, Case No. 12-C-168 (Kan. Division 6, July 2013)

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX

JOHN DOE, Plaintiff, v. KIRK THOMPSON, DIRECTOR OF THE KANSAS BUREAU OF INVESTIGATION, and FRANK DENNING, JOHNSON COUNTY, KANSAS SHERIFF, Defendants.	)	Case No. 12-C-168

MEMORANDUM DECISION AND ORDER

This matter comes before the Court on the parties' Motions for Summary Judgment pursuant to K.S.A. 60-256(c). After careful consideration, the Court finds and concludes as follows:

UNCONTROVERTED FACTS

1. On February 19, 2003, Plaintiff John Doe pled guilty to indecent liberties with a child/touching in Johnson County, Kansas, in violation of K.S.A. 21-3503(a)(1). At the time of his conviction, Doe became obligated to register with the Kansas Bureau of Investigation (KBI) as a sex offender for ten (10) years, or until 2013.
2. The Legislature amended the Kansas Offender Registration Act (KORA) in 2011. Under the amendments, offenders convicted of indecent liberties with a child/touching must register for twenty-five (25) years.

3. On June 15, 2011, the KBI informed Doe that the 2011 amendments to the KORA applied retroactively. Under the amendments, Doe has the following statutory duties:
    a. to register for 25 years from the date of his conviction (until 2028);
    b. to report in person four times per year in each jurisdiction in which he resides, works, or attends school;
    c. to register in person within three days of changing residences, jobs, or schools,
    d. at each in-person reporting, to pay a $20 reporting fee and submit to an updated photograph;
    e. to provide the following information on his registration form: address, phone numbers, vehicle and watercraft and aircraft information, professional licenses, palm prints, email address, online identities, membership in online social networks, and travel and immigration documents;
    f. to provide law enforcement with notice of any international travel; and
    g. to suffer a penalty of a severity level 6, person felony for a first conviction for violation of the KORA.
4. Members of the public can access Doe's registration information by searching for his name, city, or address on the Johnson County Sheriff's website. The website's "Share & Bookmark" feature allows users to share registry information via email, Google, Delicious, Stumble Upon, Windows Live, Facebook, Twitter, MySpace, Digg, and Reddit.
5. Members of the public can also access Doe's registration information from the KBI website. The website allows users to locate offenders on an interactive map or sign up for email notification about registered offenders living in Kansas.

6. The KBI does not actively search for offenders who have completed their registration requirements but are now subject to the extended registration requirements under the 2011 amendments to the KORA. The KBI instructs sheriffs' offices that offenders convicted on or after April 14, 1994, are subject to registration under the 2011 amendments to the KORA, but the KBI does not verify that the sheriffs' offices contact all offenders who are required to register.
7. The Johnson County Sheriff's Office does not use its internal databases to indentify non-compliant offenders whose registration periods had expired but were extended by the 2011 amendments to the KORA.
8. On February 15, 2012, Doe filed a Petition for Declaratory Judgment, requesting that this Court declare that KBI Director Kirk Thompson and Johnson County Sheriff Frank Johnson cannot enforce Doe's 25-year registration period because it violates the *ex post facto* clause of the United States Constitution.
9. On November 9, 2012, Doe and his wife, Jane Doe, submitted affidavits to the Court describing how Doe's registration has negatively impacted their lives. John Doe made the following statements in his affidavit:
    a. Doe is required to renew his driver's license every year, and his registered offender number is displayed on the license. He uses his driver's license often, and he is concerned that people who view the number will deny him services or discriminate against him.
    b. Doe lost a job because his manager was concerned that his registration status would "expose the company to public relations liabilities and issues related to employees' concerns for workplace safety." While other employees had felony

convictions, they were not terminated because they were not on the registry. In addition, prospective employers told Doe to come back when he was "off the list." Doe has started his own business but fears it will fail if he is "outed" to his customers.

c. Doe's former landlords told him that they could not rent to him because other potential tenants could access the sex offender registration maps and would not want to live near a sex offender. Doe's current neighbors have told him that they worry that his registration status has lowered property values in the neighborhood.

d. The registration requirements have caused Doe to feel "a strong sense of shame" and hopelessness.

e. Shortly after Doe moved into his home, "it was defaced with threats."

f. Doe was removed from the site council, which reviews the school's budget and plans for education enhancements at his children's school, because of his registration status.

g. Doe was not allowed to visit a neighbor at the hospital because of his registration status.

10. Jane Doe made the following statements in her affidavit:

a. The registration requirements have "substantial, recurring consequences" for the Doe family. The family is "shunned" by its community, and lives under stigma of the "sex offender" label.

b. Jane Doe is rarely granted the opportunity to address people's concerns about her husband's registration status.

c. The Does worry about the impact of registration on their children. The children have been teased by their peers about their father's registration status. Other parents have instructed their children to avoid the Doe children, and the Doe children have been excluded from social activities because of their father's reputation as a sex offender.

11. On November 9, 2012, both parties filed Motions for Summary Judgment. The Court held a hearing on the Motions on March 1, 2013.

STANDARD OF REVIEW

Summary judgment is appropriate if "the pleadings, the discovery and disclosure material on file, and any affidavits or declarations show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." K.S.A. 60-256(c)(2). "The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought." *Miller v. Westport Ins. Corp.*, 288 Kan. 27, 32, 200 P.3d 419 (2009). "In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case." 288 Kan. at 32. Summary judgment must be denied if reasonable minds could draw different conclusions from the evidence. 288 Kan. at 32.

DISCUSSION AND CONCLUSIONS OF LAW

The KORA

The KORA is an offense-based offender registration scheme that requires sex, drug, and violent offenders to register with law enforcement. K.S.A. 22-4902(a), 22-4905. Offenders must register in person and pay a $20 fee four times per year in the county or location of

jurisdiction in which the offender resides, maintains employment, or is attending a school. See K.S.A. 22-4905(b), (k). The KORA applies retroactively, and offenders must register for fifteen (15) years to life depending on the severity of the crime and whether it is a subsequent offense. K.S.A. 22-4906. A first violation of the registration requirements is a level 6 person felony with a sentence of 32-36 months imprisonment, and subsequent violations carry increasingly harsher penalties. K.S.A. 21-6804(a); 22-4903(c). Offenders cannot petition for relief from registration requirements for any reason. K.S.A. 22-4908. The KORA requires that offenders notify law enforcement and the KBI of any plans to travel outside of the United States. K.S.A. 22-4905(o). Offenders also must renew their driver's licenses annually. K.S.A. 22-4905(l). Their licenses are marked with the letters "RO" and a distinguishing number to "readily indicate to law enforcement officers that such person is a registered offender." See K.S.A. 8-243(d). In addition, Kansas courts consider registration status when making child custody determinations. See K.S.A. 23-3203(h), (j).

Furthermore, registry information is published on the internet. Offenders' names, photographs, physical descriptions, addresses, schools, license plate numbers, convictions, and professional licenses, designations, and certifications are posted on websites created by registering law enforcement agencies and the KBI. K.S.A. 22-4909(a)-(b). Some registering law enforcement agencies' websites including the Defendant Johnson County's site, allow users to forward registry information to friends and relatives via social media sites like Facebook, Myspace, and Twitter.

The KORA violates the ex post facto *clause.*

In his Motion for Summary Judgment, Doe asserts that the 2011 Amendments to the KORA, which apply retroactively and increase his offender registration requirement from 10

years to 25 years, violate the *ex post facto* clause of the U.S. Constitution. Art I, § 9, cl. 3 ("No . . . ex post facto law shall be passed"). The *ex post facto* clause of the United States Constitution "forbids the application of any new punitive measure to a crime already consummated," to protect citizens' "individual dignity, freedom, and liberty." *Kansas v. Hendricks*, 521 U.S. 346, 370, 117 S. Ct. 2072 (1997); *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996). Interpretation of the Kansas Constitution is not at issue here because the Kansas Constitution does not contain a corresponding prohibition against *ex post facto* laws.

In considering whether a retroactive law violates the *ex post facto* clause, the Court must first determine whether the legislature meant for the retroactive law to establish civil or criminal proceedings. *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140 (2003). If the legislature meant to impose punishment, the retroactive law violates the *ex post facto* clause. *Smith*, 538 U.S. at 92. If, however, the legislature meant to impose a civil, regulatory scheme, the law is only unconstitutional if it is "so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Smith*, 538 U.S. at 92 (internal punctuation omitted).

This Court is certainly well aware of the long held position that in determining a statute's Constitutionality under the separation of powers doctrine, "this Court presumes statutes are constitutional and resolves all doubts in favor of a statute's validity." *Brennan v Kansas Insurance Guaranty Association*, 293 Kan 446, 450, 264 P.3d 102 (2011). Further, this Court must interpret the statute in a way that makes it constitutional if there is any reasonable construction that would maintain the legislature's apparent intent. The Court has considered this case with those legal requirements in mind.

Doe next argues that the KORA violates controlling Kansas law as stated in *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996). In *Myers*, the Kansas Supreme Court considered

Kansas' 1994 offender registration scheme, the Kansas Sex Offender Registration Act (KSORA), and found that retroactive public disclosure of offender information was effectively a punitive and, thus, an unconstitutional measure. *Myers*, 260 Kan. at 671.

The Defendants, however, contend that Doe's claims are barred by statute and controlling United States Supreme Court precedent. The Defendants argue that K.S.A. 22-4908 bars this Court from granting an order relieving Doe of further registration. K.S.A. 22-4908 (stating that "[n]o person required to register as an offender pursuant to the Kansas offender registration act shall be granted an order relieving the offender of further registration under this act").

The Defendants further contend that *Smith* prevents Doe from arguing that the KORA is unconstitutional under the *ex post facto* clause. In *Smith,* the United States Supreme Court upheld the registration and public notification provisions of a retroactive Alaska offender registration scheme. The Defendants argue that the statute at issue in *Smith* was substantially similar to the KORA; thus, *Smith* should foreclose Doe's *ex post facto* claims. This Court is bound by the United States Supreme Court's interpretation of the Constitution. *Trinkle v. Hand*, 184 Kan. 577, 579, 337 P. 2d 665, 667 (1959). However, all offender registration laws are not immune from *ex post facto* challenges after *Smith*. If an offender registration scheme is distinguishable from the Alaska law at issue in *Smith,* it may fall outside the reach of *Smith* precedent. This Court finds that the KORA is significantly different from the Alaska statute considered in *Smith*. Since *Smith*, Kansas offender requirements have become increasingly severe, and the advent of social media has significantly changed the landscape for dissemination of offender information. Consequently, this Court considers Doe's *ex post facto* claims and finds that the KORA is unconstitutional because it is effectively a punitive measure.

a. The Legislature enacted the KORA as a civil statutory scheme.

A retroactive law violates the *ex post facto* clause if the legislature intended that the law impose punishment. *Smith*, 538 U.S. at 92. Thus, this Court must consider the KORA's text and structure to determine the Legislature's objective in enacting it. See *Smith*, 538 U.S. at 92. Doe argues that the legislature intended the KORA to be a criminal statutory scheme because it: (1) has no express statement of purpose, (2) is codified as a criminal procedure statute, and (3) is a complete regulatory scheme with safeguards for the criminal process. The Court finds, however, that the Legislature intended to enact a civil scheme.

1. Express statement of purpose

In deciding whether the Legislature intended for the KORA to be civil or criminal, this Court "must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Hudson v. U.S.*, 522 U.S. 93, 99, 118 S. Ct. 488 (1997). The KORA does not contain an express statement of purpose. However, in *Myers*, the Kansas Supreme Court found that the legislative history of the 1994 KSORA implied that Kansas' offender registration statutes served a non-punitive purpose—public safety. 260 Kan. at 681. The "overriding concern" behind the KSORA was "promotion of public safety with public access to information on the criminal history of released sex offenders." 260 Kan. at 679.

Doe argues that the Legislature intended that the KORA serve a different purpose than the KSORA. Legislative history from 2011 suggests the Legislature passed the KORA at least in part to secure federal funding through compliance with the Adam Walsh Act, a federal offender registration Act. See Shawn P. Yancy, *The History and Future of Offender Registration in Kansas*, J. KAN. BAR ASS'N (October 2012). Doe contends that the purpose behind the KORA is to preserve federal grant money rather than to protect public safety. Yet, the Court finds that

the Adam Walsh Act was enacted to protect public safety. See 42 U.S.C. 3751(a)(1) (the federal funding attached to the Adam Walsh Act is authorized for criminal justice purposes); 42 U.S.C. 16901 ("[i]n order to *protect the public* from sex offenders . . . Congress in this chapter establishes a comprehensive national system for the registration of . . . offenders") (emphasis added). Furthermore, in passing the KORA, the Legislature likely maintained the public safety purpose behind Kansas' offender registration laws. See Testimony of Sgt. Al Deathe before the House Com, Corrections and Juvenile Justice, Feb. 17, 2011 (stating that "the changes requested in this bill serve the sole purpose to become "substantially compliant" with the Adam Walsh Act *and to better perform the intent of this law*") (emphasis added). Thus, while the KORA does not contain an express statement of purpose, the legislature has impliedly indicated that the statute is non-punitive.

2. Codification as a criminal procedure statute

Doe further argues that the Legislature intended that the KORA serve a punitive purpose because the Legislature placed the entire offender registration scheme within Kansas' criminal procedure code. See K.S.A. 22-4901 *et seq.* The *Smith* Court, however, stated that "the location and labels of a statutory provision do not by themselves, transform a civil remedy into a criminal one." *Smith*, 538 U.S. 94. The legislature may label both civil and criminal sanctions as "penalties." *U.S. v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 n.6, 104 S. Ct. 1099 (1984). However, as suggested by an Ohio appellate court "where the legislature chooses to codify a statute suggests its intent." *Bertram v State*, 2009 WL 3154902 (Ohio App. 11 Dist). In *Smith*, the Supreme Court held that statutory placement was not dispositive of legislative intent because many statutes in Alaska's criminal procedure code did not involve criminal punishment. *Smith*, 538 U.S. 84, 94-95 (listing non-punitive criminal law provisions such as procedures for

disposing of recovered and seized property, protecting the confidentiality of victims and witnesses, etc.). Here Kansas' criminal procedure code also includes provisions that do not involve criminal punishment. See e.g., K.S.A. 22-3302 (providing the procedure for determining whether a defendant is competent). Therefore, the KORA's placement in Kansas' criminal procedure code is also not dispositive of the Legislature's intent.

3. A complete statutory scheme

In addition, Doe argues that the Legislature intended to make the KORA a punitive scheme because the KORA is a complete statutory scheme. By contrast, in *Smith*, the Alaska Legislature did not codify registration procedures but, instead, vested the Alaska Department of Public Safety with the authority to implement procedures. 538 U.S. 84, 96. The Alaska Act also did not require the Department of Public Safety to implement any safeguards associated with the criminal process, leading to an inference that the legislature intended the Act to be civil and administrative. 538 U.S. 84, 96. Doe argues that because the KORA outlines offender registration and notification procedures and provides safeguards associated with the criminal process, this Court can infer that the Legislature intended for the KORA to be a punitive statutory scheme. See K.S.A. 22-4905, 22-4913(a) (providing a procedural safeguard by stating that "cities and counties shall be prohibited from adopting or enforcing any ordinance, resolution or regulation establishing residential restrictions for offenders").[1]

This Court does not agree. The Alaska Legislature's decision to delegate procedural decisions to the Department of Public Safety strengthened the Supreme Court's conclusion that the Alaska offender registration scheme was civil. It does not follow that the legislature intended for the statutory scheme to be criminal when it chooses not to delegate, particularly because "the

[1]K.S.A. 22-4904, which states that the court or correctional facility must provide the offender with notice of registration requirements, is not a procedural safeguard for offenders. In *Smith*, the Court stated that notice is an important part of a civil regulatory scheme and does not establish that a statute is punitive. 538 U.S. 84, 95-96.

location and labels of a statutory provision do not by themselves, transform a civil remedy into a criminal one." *Smith*, 538 U.S. 94. The Kansas Legislature's decision to codify the registration and notification procedures as criminal procedure provisions instead of having an agency create the procedures does not conclusively establish a punitive scheme. Moreover, because the Kansas Supreme Court has found that the KSORA, which also did not delegate procedural decisions to a state agency, served a remedial purpose, this Court does not infer that the comprehensive nature of the KORA renders it punitive. See L. 1994, ch. 107, § 3; April 14; *Myers*, 260 Kan. at 681. Thus, the Court finds that the Legislature did not intend for the KORA to be punitive.

b. The KORA is punitive in effect.

Because the Kansas legislature likely meant to impose a civil, regulatory scheme, the Court must next determine whether the KORA is "so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Smith*, 538 U.S. at 92 (internal punctuation omitted). The Court determines whether the KORA is punitive in effect under the framework of the *Mendoza-Martinez* factors. *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169, 835 S. CT. 554 (1963). The factors, which are "neither exhaustive nor dispositive," but simply "useful guideposts" are the following:

> "[1] [w]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as punishment, [3] whether it comes into play only on a finding of *scienter*,[4] whether its operation will promote the traditional aims of punishment-retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned."

Myers, 260 Kan. at 681. The U.S. Supreme Court has stated that five of the factors provide significant guidance as to whether a statute has a punitive effect--affirmative disability or

restraint, retribution and deterrence, rational connection to a nonpunitive purpose, excessiveness, and traditional punishment and shaming. *Smith*, 538 U.S. at 97.

Doe argues that the KORA is distinguishable from the laws at issue in *Smith*. This Court agrees and finds that the KORA violates the *ex post facto* clause. The traditional punishment and shaming factor does not suggest that the KORA has a punitive effect because the *Smith* court found that offender registration statutes do not serve a retributive purpose and that a statute can deter crime without imposing punishment. The other four factors suggest, however, that the KORA has a punitive purpose because the KORA provisions are generally harsher than those analyzed in *Smith*.

1. Affirmative disability or restraint

In analyzing affirmative disability or restraint, the Court considers "how the effects of the act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith*, 538 U.S. at 100. Imprisonment is the paradigmatic affirmative disability or restraint. *Smith*, 538 U.S. at 100 (stating that occupational disbarment fell short of being an affirmative disability or restraint) (citing *Hudson v. United States*, 522 U.S. 93, 104, 118 S. Ct. 488 (1997); *De Veau v. Braisted*, 363 U.S. 144, 80 S. Ct. 1146 (1960); *Hawker v. New York*, 170 U.S. 189, 18 S. Ct. 573 (1898)). The KORA subjects offenders to affirmative disability or restraint via in-person reporting, housing and occupational problems, and registration fees.

A. In-person registration

The KORA requires that an offender register in person four times per year in each county where the offender lives, works, and attends school. K.S.A. 22-4905. These registration requirements resemble parole or probation. They impose on offenders' time and serve as a

physical restraint 12 times per year for offenders who live, work and attend school in different counties. See K.S.A. 22-4905(a). Further, the KORA reporting requirements are more burdensome than the mail-in registration considered by the *Smith* Court. *Smith*, 538 U.S. at 101. Other states have also found that quarterly reporting obligations constitute affirmative restraints akin to supervision. See e.g., *State v. Letalien*, 985 A.2d 4, 18 (Me. 2009), which distinguished in-person reporting from the reporting requirements in *Smith*:

> "[The defendant] asserts that the Alaska statute is distinguishable because it does not contain provisions similar to those in [the Maine offender registration statutes] requiring quarterly, in-person verification procedures. We agree. These provisions, which require lifetime registrants, under threat of prosecution, to physically appear at their local law enforcement agencies within five days of receiving a notice by mail, place substantial restrictions on the movements of lifetime registrants and may work an "impractical impediment that amounts to an affirmative disability." *See Doe*, 2007 ME 139, ¶ 32, 932 A.2d at 562. The majority in *Smith* concluded that the procedure at issue, which did not require updates to be made in person, did not amount to a form of "supervision." 538 U.S. at 101, 123 S. Ct. 1140. Here, however, quarterly, in-person verification of identity and location of home, school, and employment at a local police station, including fingerprinting and the submission of a photograph, for the remainder of one's life, is undoubtedly a form of significant supervision by the state. In this respect, [the Maine registration scheme] imposes a disability or restraint that is neither minor nor indirect."

Because in-person, quarterly reporting restricts offenders' time and freedom, it is an affirmative disability or restraint.

B. Occupational and housing problems

Public dissemination of registry information subjects offenders to affirmative disability or restraint because it often causes them occupational and housing problems. In *Smith*, the Court rejected arguments that registries subject offenders to substantial housing and occupational disadvantages. The Court reasoned that because convictions are public record, offenders could suffer the same disadvantages as a result of routine background checks by landlords and employers. See *Smith*, 538 U.S. at 100. The Court stated that "the fact of conviction," and not dissemination of registry information, was the cause of the occupational and housing disadvantages. *Smith*, 538 U.S. at 101. Here, however, social science research confirms that the

registry is the cause of significant employment and housing disadvantages. The Court takes judicial notice of these studies and finds that public dissemination of registry information serves as an affirmative disability or restraint.

Regarding employment, social science research suggests that employment difficulties associated with registration are pervasive. See Richard Tewksbury & Elizabeth Ehrhardt Mustaine, *Stress and Collateral Consequences for Registered Sex Offenders*, J. OF PUB. MANAGEMENT & SOCIAL POL., 215, 221 (Fall 2009) (finding that 35% of Kansas and Oklahoma registered sex offenders participating in the study had lost a job as a consequence of registration); Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Assessing the Impact in Wisconsin*, National Institute of Justice 1, 10 (2000) (finding that 57% of Wisconsin sex offenders who participated in the study reported loss of employment as a consequence of public notification of registry information).

One study stated that the employment search is often "fraught with rejections and dead-ends, when potential employers learn that [registrants] are convicted, *registered* sex offenders." Richard Tewksbury & Matthew Lees, *Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences*, 26 SOCIOLOGICAL SPECTRUM 309, 319-20 (2006) (emphasis added). As a result, registrants expect bottom-of-the ladder jobs, regardless of their education level. Tewksbury & Lees, 26 SOCIOLOGICAL SPECTRUM at 321.

Regarding housing, research shows that offenders experience difficulties with housing as a collateral consequence of being registered. See Tewksbury & Mustaine, J. of Pub. Management & Social Pol., at 216, 226; Zevitz & Farkas, National Institute of Justice at 11. For example, twenty-five (25) out of thirty (30) registered offenders interviewed in Wisconsin reported that they had been excluded from their residence as a consequence of registration.

Zevitz & Farkas, National Institute of Justice at 10. Thus, offenders often become "nomadic lepers" because the stigma of registration is a large barrier to housing and employment. See William Edwards & Christopher Hensley, *Contextualizing Sex Offender Management Legislation and Policy: Evaluating the Problem of Latent Consequences in Community Notification Laws*, 45 INT'L J. OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 83, 89 (2001). These barriers are more burdensome than occupational disbarment because occupational disbarment only prevents a person from working in a certain field, whereas the barriers offenders face under the KORA create housing and employment difficulties everywhere. The barriers ostensibly hamper offenders' abilities to meet their basic needs and, therefore, subject offenders to affirmative disability or restraint.

C. Registration fees

Under the KORA, offenders must pay at least $20 each quarter (with three listed exceptions), paying up to a maximum of $240 per year (between $2,000 and $6,000 over twenty-five (25) years). See K.S.A. 22-4905(k). This is a substantial cost that offenders likely feel day-to-day, particularly if they have employment difficulties as a result of registration.

KORA registration fees are also significantly higher than other states' fees that have been deemed non-punitive. See e.g., *People v. Foster*, 87 A.D.3d 299, 309, 927 N.Y.S.2d 92 (N.Y. App. Div. 2011) (finding that a sex offender registration fee [$50 for first offense, $1050 for second offense] levied at sentencing was revenue-generating measures rather than punishment"); *Horner v. Governor***,** 157 N.H. 400, 404, 951 A.2d 180 (N.H. 2008) (finding that the $34 annual charge serves a regulatory purpose and defrays the costs of maintaining the sex offender registry). The KORA's quarterly registration fees impose a significant burden on offenders and subjects offenders to affirmative disability or restraint.

D. Registry information

Doe also asserts that the information offenders are required to provide to law enforcement and registration's impact on parental rights subject offenders to affirmative disability or restraint. The Court finds, however, that these are minor and indirect burdens that do not serve to make the KORA punitive. While Doe is required to provide law enforcement with more than 21 pieces of information at registration, much of that information is likely to change infrequently, making the information reported a much smaller burden than the frequency of reporting.

E. Child Custody Determinations

When making child custody determinations, Kansas courts must consider whether a parent is subject to the KORA registration requirements or residing with someone who is subject to the KORA requirements. See K.S.A. 23-3202(h), (j). This statutory mandate is likely a minor disability though because registration status is only one of many factors the court considers in a custody proceeding, and child custody statutes do not indicate that registration status is a dispositive factor in child custody arrangements. Therefore, only quarterly, in-person reporting, occupational and housing problems, and registration fees subject offenders to affirmative disability or restraint.

2. Retribution and Deterrence

If a statutory scheme serves the traditional aims of punishment—retribution and deterrence—it is more likely to effectively serve as punishment. Doe contends that this Court should follow Kansas Supreme Court precedent in *Myers* and find that unlimited public notification promotes deterrence and retribution. See *Myers*, 260 Kan. at 695. The *Smith* Court, however, held that a governmental program can deter crime without imposing punishment and

that designating deterrent programs as criminal would "severely undermine the Government's ability to engage in effective regulation." *Smith*, 538 U.S. at 102.

The *Smith* Court also found that Alaska's broad registration categories, in which the length of registration is calculated by the extent of wrongdoing rather than the risk of recidivism, did not serve a retributive purpose because they were reasonably related to the danger of recidivism. *Smith*, 538 U.S. at 102. Following *Smith*, the KORA cannot be punitive merely because its provisions may deter potential offenders or because the length of registration is an offense-based calculation. See K.S.A. 22-4906.

3. Traditional Shaming and Punishment

The Court must next consider whether the KORA resembles traditional punishment. The *Smith* Court stated that at this stage, "[a] historical survey can be useful because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." *Smith*, 538 U.S. at 97. In colonial times, offenders were held up "face-to-face" with the community, shamed, or expelled. See *Smith*, 538 U.S. at 98. Here the Court finds that the KORA's web notification provisions and drivers' license notations resemble the traditional, colonial punishments.

A. Website notification provisions

Doe argues that the KORA provisions for state- and county-sponsored websites that provide the public with registry information resemble historical punishments. In *Smith*, the U.S. Supreme Court determined that Alaska's offender registry notification websites did not resemble early shaming punishments because the purpose behind the websites was public safety, and humiliation was only a "collateral consequence" of a valid statutory scheme. 538 U.S. at 99. The websites at issue here are distinguishable in two ways from those in *Smith*.

First, the Johnson County Sheriff's website includes tools for sharing registrant information that were not available in *Smith*. In *Smith*, the Court analogized a visit to the state offender registry website to a visit to an official archive of criminal records. 538 U.S. at 99. The individual seeking the information had to "take the initial step" of going to the website, finding the registry, and looking up the information. 538 U.S. at 99. In Doe's case, a citizen may obtain registry information without taking any initial steps to receive it. Today, a person who visits the Johnson County Sheriff's website can forward registration information via social media sites like Facebook, Myspace, and Twitter to friends and relatives who never requested the information. Unlike the official archives, the websites do not merely make information available for public viewing.

In addition, Doe's case is distinguishable because citizens can now use the county-sponsored notification website to comment on registration entries and shame offenders. In *Smith*, the Court noted that the Alaska-sponsored websites did not resemble historical shaming punishments because citizens could not publicly disparage offenders. "The State's Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record." 538 U.S. at 99. In Doe's case, however, many citizens have the opportunity to do just that. When citizens use the Johnson County website to post registry information on social media websites, social media users can then comment about the registry posting. In short, citizens can use the county-sponsored website to create a virtual forum for public shaming, which closely resembles traditional punishment.

Doe also argues that third-party websites and cell phone and tablet applications, such as offendex.com and cjonline.com, resemble historical punishment because they also allow users to comment on registry entries. The Court does not take these websites and applications into

consideration because they are not authorized by the KORA. Moreover, even if the KORA did not contain web notification provisions, third-parties could still create shaming websites using conviction information available as part of the public record.

b. The "RO" notation on driver's licenses

The statutory provisions requiring that offenders' driver's licenses be marked with the letters "RO" and a distinguishing number also resemble historical punishments. See K.S.A. 8-243(d) (stating that a "driver's license issued to a person required to be registered under K.S.A. 22-4901 *et seq.*, and amendments thereto, shall be assigned a distinguishing number by the division which will readily indicate to law enforcement officers that such person is a registered offender").

The Defendants argue that the notation on the driver's license does not serve a traditional shaming function because people do not necessarily know what the notation means and Doe does not have to use his driver's license as his form of identification. However, if the legislature did not intend for offenders to carry and use their licenses as identification on a daily basis, the statute would not serve its purpose of "readily indicat[ing] to law enforcement officers that such person is a registered offender." Offenders regularly display their driver's licenses to many people outside of law enforcement, so the offender is frequently brought face-to-face with other community members who view the driver's license and may ask questions about the "RO" notation on it. Thus, the notation on the license is a visible badge of past criminality in line with traditional punishment.

4. Rational connection to a non-punitive purpose

Next, the KORA is not likely to have a punitive effect if it is rationally connected to its alleged nonpunitive purpose, which is public safety. *Smith*, 538 U.S. at 102. The U.S. Supreme

Court has deemed the rational connection factor the "most significant factor" in the *ex post facto* analysis. *Smith*, 538 U.S. at 102. The "rational connection" standard is not demanding; a statute does not have a punitive effect "simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 U.S. at 103*; Doe v. Miller*, 405 F.3d 700, 721 (8th Cir. 2005). Doe argues that the KORA is not rationally related to protecting public safety because numerous studies suggest that offender registries do not actually protect the public, and the KORA registration requirements do not apply to all offenders residing in Kansas. The Court finds that while there is not a particularly close fit between the KORA and public safety, the registration portion of the KORA satisfies the rational connection standard set out in *Smith*. The registration provisions are rationally related to public safety because they assist law enforcement and consequently reduce recidivism. The notification provisions, however, are not rationally connected to public safety because they may actually increase recidivism.

A. Offender registration provisions

Doe argues that recidivism rates are lower than previously thought, suggesting that the Department of Justice ("DOJ") studies that the *Smith* Court relied on are now outdated. See *Smith*, 538 U.S. at 103. The DOJ studies provided estimated, rather than actual, rates of recidivism (52%) for a high-risk sample of civilly committed offenders. Doe contends that general recidivism rates are much lower—about 5 to 14% within three to six years of the offense. Jill Levenson, *Sex Offender Recidivism, Risk Assessment, and the Adam Walsh Act*, 10(1) SEX OFFENDER L. REP. 1, 12 (2009). Doe further asserts that registries do not actually reduce recidivism or deter sex crimes. See Amy Baron-Evans, *Rethink Misguided Sex Offender Registration and Notification Act*, 20(5) Fed. Sent'g Rep., 357, 359 (2008); Levenson, 10(1) SEX OFFENDER L. REP. at 10 (2009) (citing Geneva Adkins, David Huff, & Paul Stageberg, *The Iowa*

Sex Offender Registry and Recidivism, Iowa Dep't of Human Rights (2000) in which Iowa sex offenders who were required to register had a recidivism rate of 3% and those who were not required to register had a recidivism rate of 3.5%).

In response, the Court takes judicial notice of a recent, comprehensive study showing that the registration provisions of offender registration schemes increase public safety to some degree. See J. J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J. L. ECON. 161, 192 (2011). Prescott and Rockoff undertook the study to provide a more complete picture of offender registration and notification than the smaller studies cited by Doe, which suggested offender registration and notification laws had little meaningful impact on the overall number of sex offenses. See Prescott & Rockoff, 54 J. L. ECON. at 163-64. The researchers found that placing registration information in the hands of local law enforcement decreased recidivism. See Prescott & Rockoff, 54 J. L. ECON. at 181 (finding that registration laws reduced the annual number of sex offenses reported per 10,000 people by .098 crime [approximately 1.07%]). Because Prescott and Rockoff found decreases in recidivism, there is a rational connection between the registration provisions of the KORA and public safety, even if the changes in recidivism are small and do not suggest a perfect fit between offender registration schemes and public safety.

B. Offender notification provisions

Nevertheless, the offender notification provisions are not rationally related to public safety. The Prescott and Rockoff study described a potential trade-off with offender notification provisions. Prescott and Rockoff found that the threat of notification and its associated costs deterred potential criminals, reducing the frequency of crime by 1.17 crimes per 10,000 people per year (approximately 12.8%), but the psychological, social, and financial costs of notification

led to increased recidivism for convicted offenders. Prescott & Rockoff, 54 J. L. ECON. at 165, 168, 181, 185 (citing William Edwards & Christopher Hensley, *Contextualizing Sex Offender Management Legislation and Police: Evaluating the Problem of Latent Consequences in Community Notification Laws*, 45 INT'L J. OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY, 83 (2001); Robert Freeman-Longo, *Prevention or Problem*, 8 SEXUAL ABUSE: A J. OF RESEARCH & TREATMENT, 91 (1996); Robert Prentky, *Community Notification and Constructive Risk Reduction*, 11 J. OF INTERPERSONAL VIOLENCE 295 (1996); Lois Presser & Elaine Gunnison, *Strange Bedfellows: Is Sex Offender Notification a Form of Community Justice?*, 45(3) CRIME DELINQ., 299 (1999)). Because notification schemes can increase recidivism, they are not rationally related to public safety. The increases in deterrence are undermined by the fact that the very notification schemes that are meant to protect the public from possible recidivism are likely to increase recidivism.

C. Underinclusive registration requirements

Doe also argues that the KORA is not rationally related to public safety because the KORA does not reach all offenders in Kansas. The KORA does not require registration by offenders who completed their initial registration period before the 2011 amendments to the KORA and have not re-entered the justice system. Moreover, Kansas law enforcement does not try to locate offenders who were never on the registry but are required to register. As a result, the KORA does not reach every person who could possibly threaten public safety. This discrepancy is a common shortcoming of most legislation. State government has limited resources to apply to public safety, and the law does not require a perfect fit between the KORA and the nonpunitive aims it seeks to advance. Thus, Doe's argument fails. Only the KORA

notification provisions, which increase offender recidivism, lack a rational connection to public safety.

5. Excessiveness

The Court must finally consider whether the KORA appears excessive in relation to its nonpunitive purpose. *Myers*, 260 Kan. at 681. The Court considers "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith*, 538 U.S. at 105. Doe contends that the KORA is excessive in relation to public safety because it (1) does not account for offenders' individual risks of recidivism, (2) has long offender registration periods, (3) has lengthy sentences for failing to comply with registration requirements, (4) does not allow courts to provide offenders with relief from registration requirements, and (5) ostracizes offenders.

Doe's first argument fails because under controlling precedent, offense-based schemes which do not account for individual determinations of future dangerousness cannot violate the *ex post Facto* clause. In *Smith*, the Court held that a state's "determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *ex post facto* Clause." 538 U.S. at 104. However, the Court finds Doe's remaining arguments persuasive and very significant to the Court's determination of whether the KORA is punitive in effect. Here the remedial statute has placed so many requirements on offenders that it has become punitive.

A. Duration of Registration

Doe's 25-year registration period is excessive. It is significantly longer than the registration period at issue in *Smith*, and recent studies indicate the risk of recidivism decreases over time. The *Smith* Court found that a 15-year registration for a single, nonaggravated sex crime was not excessive, but under the KORA, a similar offense requires an additional 10 years

of registration. K.S.A. 22-4906(b)(1)(E); *Smith*, 538 U.S. at 90, 104 (citing AL 12.63.010(d)(1), 12,63.020(a)(2)).

Additionally, the *Smith* Court relied on empirical research indicating that sex offenders reoffend as many as 20 years after release. *Smith*, 538 U.S. at 104 (citing National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, *Child Sexual Molestation: Research Issues* 14 (1997)). Studies now show that recidivism decreases as offenders age. One recent study stated that

> "after the age of 45, the risk for sexual reoffending drops precipitously. In addition, our data indicate that after 20 years in the community offense free, the risk of reoffending is extremely low."

Rebecca E. Swinburne, et al., *Predicting Reoffense for Community-Based Sexual Offenders: An Analysis of 30 Years of Data*, Sexual Abuse: A J. of Research and Treatment 11-12 (2012). Another study found that three-quarters of sex offenders had not reoffended after 15 years. See Levenson, 10(1) SEX OFFENDER L. REP. at 12. Thus, research suggests that Doe's registration period is increasing as his risk for recidivism declines. A 25-year registration period exceeds the amount of time necessary to protect public safety.

B. Consequences for failing to satisfy registration requirements

The consequences of failing to meet registration requirements are also excessive when compared to the public safety goals of the KORA. An offender violates the KORA if the offender fails to comply with any and all provisions of the act. See K.S.A. 22-4903(a). An offender's first conviction for violating the act results in a level 6 person felony with a sentence of 32-36 months imprisonment. K.S.A. 21-6804(a); 22-4903(c)(1)(A). An offender who registers quarterly for many years and does not have any changes in personal information may be incarcerated for more than 2.5 years for failing to register in person just one time. Such consequences are excessive in relation to public safety, especially when compared to the Alaska

statute considered in *Smith*, in which failing to comply with registration requirements was a Class A Misdemeanor with a sentence not to exceed one year. AL 11.56.835, 11.56.840, 12.55.135(a).

C. No relief from registration requirements

In addition, the KORA forbids courts from relieving offenders of their registration duties. Under the KORA, "[n]o person required to register as an offender pursuant to the Kansas offender registration act shall be granted an order relieving the offender of further registration under this act." K.S.A. 22-4908. As shown above, research now shows that an offender's risk of recidivism decreases over time. Without a mechanism for challenging long registration periods, offenders who are compliant with the registration requirements and have a low risk of recidivism suffer consequences that outweigh the minimal increases in public safety created by registration.

D. Stigma

The stigma that results from the KORA also makes it excessive in relation to its public safety goals. In *Smith*, the Court held that the potential for wide dissemination of offender information on the internet did not make Alaska's passive registration scheme excessive. However, the effects of offender stigma and ostracism are likely greater now than they were when *Smith* was decided. As explained in section b(3)(A), county offender registration websites are no longer passive. They now allow users to share offender information through social media sites. As explained by the Indiana Supreme Court, aggressive notification schemes stigmatize offenders and put them and their families at risk: "[i]t appears to us that through aggressive notification of their crimes, the Act exposes registrants to profound humiliation and community-wide ostracism. Further the practical effect of this dissemination is that it often subjects offenders to 'vigilante justice' which may include lost employment opportunities, housing

discrimination, threats, and violence." *Wallace v. State*, 905 N.E.2d 371, 380 (2009). Because the current internet notification schemes are more aggressive than they were when *Smith* was decided, offenders are at a greater risk of suffering ostracism and even vigilante acts by members of the community.

Thus, the duration of registration, consequences for failing to register, denial of relief from registration requirements, and the stigma associated with registration are not reasonable in light of the KORA's public safety goals. While the KORA was likely adopted as a remedial statute, its provisions are now so burdensome that they exceed what is necessary for public safety. The provisions are distinguishable from those considered in *Smith* and have become "so punitive either in purpose or effect as to negate the State's intention" to deem the KORA a civil statute. *Smith*, 538 U.S. at 92.

In conclusion, the legislature likely enacted the KORA as a non-punitive statutory scheme. There is evidence that both the KORA and earlier versions of Kansas' offender registration statutes were enacted to protect public safety. Nevertheless, the Court's examination of the KORA's effects under the *Mendoza-Martinez* factors leads to the determination that the KORA is effectively punitive. The KORA imposes affirmative disabilities and restraints in the form of in-person reporting multiple times per year, registration fees of at least $80 per year, and notification provisions that lead to housing and occupational problems for offenders. The KORA also resembles traditional punishments. Social media and the KORA notification provisions have created a forum for publicly shaming offenders. Moreover, the notification provisions of the KORA are not rationally connected to its public safety purpose. While the notification provisions may deter potential offenders, research has shown that offender notification provisions decrease public safety by increasing recidivism.

Finally, the KORA is excessive in relation to its alleged purpose of protecting public safety. The KORA requires offenders to register for long periods of time, incarcerates violators for up to three years upon a first violation, does not offer relief from registration for any reason, and has a notification scheme that ostracizes offenders. These provisions have become oppressive to the point of punishment. Therefore, the KORA's retroactive application assigns a new punitive measure to a crime already consummated, in violation the *ex post facto* clause.

The Court finds that John Doe is subject to affirmative disability or restraint due to the KORA's increased in-person reporting, problems created for Mr. Doe in obtaining and maintaining housing and jobs and the punitive registration fees. The Court also finds that the KORA's web notification provisions and drivers license notations subject Mr. Doe to punishment akin to traditional colonial punishments. The increased notification period of fifteen (15) years is not rationally connected to its public safety purpose and may actually decrease public safety by increasing recidivism. Finally, if Mr. Doe misses a registration requirement he may be incarcerated for up to three years for his first violation. He has no method to obtain relief from registration or the notification scheme. The KORA's current provisions subject Mr. Doe to punishment under any definition.

This Court is aware of the emotion elicited by the KORA. Any person with children, grandchildren, sisters, brothers or nephews and nieces understands that emotion. However, people controlled by this act also have relatives that are affected by the act. The increased requirements that are in effect, increased punishment, do not and cannot survive the revealing light of our constitution. We must protect the individual rights of all people to insure the protection of our own individual rights, no matter what our emotions might tell us.

CONCLUSION

After careful review, this Court GRANTS the Plaintiff's Motion for Summary Judgment and DENIES the Defendants Motion for Summary Judgment. The Court hereby enters a declaratory judgment, requiring the Defendant's to immediately terminate Mr. Doe's additional fifteen (15) year registration requirement. Additionally, all information publicly displayed which is required by the KORA will be immediately deleted. This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

Dated this____day of July, 2013.

_____
Larry D. Hendricks
District Judge

CERTIFICA OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in pick-up bin this _____ day of _____, 2013, to the following:

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