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

RESPONSE AND REPLY (THIRD) BRIEF OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES

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I. SORA VIOLATES THE EX POST FACTO CLAUSE.

Defendants' argument – that SORA is a civil regulatory scheme whose burdens can be imposed retroactively – rests on four premises:

1. Because early versions of SORA were upheld in 1998 and 1999, the statute as it exists today must be constitutional. Defs' Brief, Doc. 42, Pg.ID#30.

2. SORA's burdens can be imposed solely based on past convictions, without individualized review. *Id.*, Pg.ID#41.

3. SORA has only "minor and indirect" consequences, and therefore *Smith v. Doe*, 538 U.S. 84 (2003), should be mechanically applied. *Id.,* Pg.ID#39.

4. SORA is intended to serve a valid public safety purpose, and therefore the state can retroactively impose whatever restrictions it wants, even though the record unequivocally establishes that those restrictions do not serve, and actually undermine, public safety. *Id.*, Pg.ID#45.

Defendants entirely ignore the issue of whether SORA is excessive in relation to any non-punitive goal. Defendants' arguments are contradicted by the factual record and misstate the applicable law.

A. SORA Has Changed from a Regulatory Regime to a Punitive One.

Defendants claim that because early versions of SORA were deemed civil, the current statute is necessarily constitutional. Defs' Brief, Doc. 42, Pg.ID#30. Defendants misrepresent the legislative and judicial history.

First, and most astoundingly, defendants claim that SORA has "changed very little." *Id.*, Pg.ID#31. That is untrue. As the chart below shows, SORA has been amended repeatedly to impose ever more draconian restrictions on plaintiffs.[1] Joint Statement of Facts (JSOF) ¶¶4-26, R. 90, Pg.ID#3730-35.

[1] Defendants argue that registration requirements have been reduced or eliminated for some individuals. Defs' Brief, Doc. 42, Pg.ID#15-16. None of those changes apply to plaintiffs. SORA's restrictions on them have only increased, and it is *their* case that is before this Court.

The legislature's decision to eliminate registration requirements for children under the age of 14, and for individuals convicted of consensual teen sex, recognizes that SORA's increasingly severe consequences should not be imposed on people who are not dangerous. As the Michigan Court of Appeals explained, "the 2004 amendment [eliminating registration for youth adjudicated under the Holmes Youthful Trainee Act] was motivated, in part, by concerns that the reporting requirements are needlessly capturing individuals who do not pose a danger to the public, and who do not pose a danger of reoffending." *People v. Dipiazza*, 778 N.W.2d 264, 270 (Mich. Ct. App. 2009). Plaintiffs, likewise, are individuals who do not pose a danger to the public and do not pose a danger of reoffending, but who are nonetheless subjected to SORA's burdens for life.

The 2011 elimination of registration for "Romeo and Juliet" offenders also reflected a recognition that youth involved in consensual relationships are not predators. Mich. Pub. Act 17-18 (2011). Non-registration in consensual teen sex cases depends on the couple's age difference. M.C.L. §§28.722(w)(iv), 28.728c(14). Does #2 and #3 missed the age cut-off by one month and ten months, respectively. JSOF ¶¶86, 121, R. 90, Pg.ID#3745-46, 3752. As a result, they must register for life.

SORA LEGISLATIVE HISTORY OVERVIEW[2]

1994: SORA enacted
- confidential, non-public, law enforcement database
- no regular reporting requirements
- revealing registry information is a crime & a tort (treble damages)
- 25 year inclusion in database, except repeat offenders

1996:
- allowed limited public inspection of registry information

1999:
- created internet registry
- required quarterly or annual in-person registration
- required fingerprinting and photographs
- increased penalties for SORA violations
- expanded categories of people required to register

2002:
- added new in-person reporting for higher educational settings

2004:
- registrants' photos posted on internet
- imposed registry fee, and made it a crime not to pay the fee

2006:
- criminalized working within 1000 feet of school
- criminalized living within 1000 feet of school
- criminalized "loitering" within 1000 feet of school
- increased penalties
- created public email notification system

2011:
- created SORNA 3-tier system
- classified registrants retroactively into tiers based solely on offense
- tier level determines length of registration and frequency of reporting
- retroactively extended registration to life for Tier III registrants
- offense pre-dating registry results in registration if convicted of any new felony ("recapture" provision)
- in-person reporting for vast amount of information like internet identifiers
- "immediate" reporting for minor changes like travel plans & email accounts

2013:
- imposed annual fee

[2] *See* JSOF ¶¶4-26, R. 90, Pg.ID#3730-35

SORA has morphed from what was initially a confidential law-enforcement database of conviction information to a comprehensive system of supervision and control. Under the current iteration of SORA, plaintiffs will forever be:

- banned from living or working in many areas;
- subjected to ongoing supervision;
- required to report frequently in person;
- restricted from maintaining normal family relationships;
- constrained in using the internet;
- limited in traveling;
- identified publicly and falsely as among the most dangerous convicted sex offenders; and
- subjected to a vast array of state-imposed restrictions encompassing virtually every facet of their lives.

Neither the Supreme Court nor this Court have ever upheld a statute with such extensive burdens.

Second, defendants contend that *Smith*, 538 U.S. 84, is controlling. Defs' Brief, Doc. 42, Pg.ID#28. But SORA looks nothing like the "first-generation" registration statute upheld in *Smith*.

Third, defendants argue that "[b]ecause [SORA's] amendments have already been individually upheld as civil, they cannot be punitive in the aggregate." Defs' Brief, Doc. 42, Pg.ID#30. But the 1998 and 1999 trial court decisions in *Akella v. Michigan Department of State Police*, 67 F. Supp. 2d 716 (E.D. Mich. 1999), and

Lanni v. Engler, 994 F. Supp. 849 (E.D. Mich. 1998), on which defendants rely, did not address any of the burdens added over the last 17 years.[3]

Finally, defendants mischaracterize plaintiffs' challenge as "chiefly directed towards amendments to SORA in 2011." Defs' Brief, Doc. 42, Pg.ID#30, 34. Plaintiffs' argument is not directed just at the 2011 amendments. Rather, plaintiffs argue that the myriad amendments to SORA over the past two decades have *cumulatively* transformed what was once a regulatory statute into a punitive one. While the 2006 and 2011 amendments (adding exclusion zones, classifying registrants into offense-based tiers, and imposing retroactive lifetime registration) are particularly harsh, plaintiffs' challenge is to the current statute as a whole.

Plaintiffs have to comply with every single part of SORA's complex scheme, not just with individual amendments in isolation. Even assuming that some SORA provisions could withstand scrutiny standing alone, the cumulative weight of SORA's many burdens are what make it punitive.

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[3] Cases upholding other "first-generation" registration statutes against ex post facto challenges are likewise inapposite. As the New Hampshire Supreme Court recently explained, "cases from other jurisdictions that examine earlier versions of these laws are not particularly helpful to our analysis." *Doe v. State*, 111 A.3d 1077, 1084 n. 3 (N.H. 2015). The U.S. Supreme Court has yet to decide whether contemporary registration statutes survive ex post facto review. *Carr v. United States*, 560 U.S. 438, 442 (2010) (declining to address whether SORNA's requirements violate the Ex Post Facto Clause); *United States v. Juvenile Male*, 131 S.Ct. 2860, 2862 (2011) (same, for mootness). This case, therefore, is one of first impression.

The flexible nature of the *Mendoza-Martinez* factors evidences the Supreme Court's recognition that there is a sliding scale between purely remedial and purely punitive statutes, so that changes to a law over time can tip the balance from one to the other. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). The New Hampshire Supreme Court found that the current version of its registry statute violated the Ex Post Facto Clause:

> The statute has changed dramatically since [it was previously upheld], to the point where the punitive effects are no longer '*de minimis*.' No one amendment or provision is determinative, but the aggregate effects of the statute lead us to our decision. Although there is a presumption in favor of a statute's constitutionality, here this presumption has been overcome because we are convinced that the punitive effects clearly outweigh the regulatory intent of the act.

Doe v. State, 111 A.3d 1077, 1100 (N.H. 2015). *See also State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011) (although sex offender statute had previously been upheld, amendments rendered it unconstitutional).

Defendants begin their brief by invoking the question: are we there yet? Defs' Brief, Doc. 42, Pg.ID#13. The answer is: yes, we are.

B. SORA's Burdens Cannot Be Imposed Without Individualized Review.

Defendants argue that SORA is regulatory despite its lack of individualized review. They rely on *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 8 (2003), for the proposition that "treatment of sex offenders as a group does not indicate a punitive purpose." Defs' Brief, Doc. 42, Pg.ID#41. Defendants conflate

two different lines of constitutional analysis. *Connecticut* is a procedural due process case, not an ex post facto case, and it says nothing about whether imposing consequences based solely on a prior conviction is punitive.

Plaintiffs' right to an individualized determination of dangerousness before being placed on the registry is rooted in the Ex Post Facto Clause, which prohibits retroactive punishment. As *Kansas v. Hendricks*, 521 U.S. 346 (1997), makes clear, a central question in determining whether a statute is punitive is whether it is based solely on a prior conviction. The Court found the statute to be non-punitive because it "unambiguously requires a [contemporary] finding of dangerousness." *Id.* at 357. Past convictions were considered "solely for evidentiary purposes." *Id.* at 371.

The absence of individualized review is particularly relevant to the question of whether a statute serves the historical goals of punishment and whether it is excessive in relation to any non-punitive goal. As Justice Souter explained in his concurrence in *Smith*:

> The fact that the Act uses past crime as a 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.

538 U.S. at 109 (Souter, J., concurring). *See also id.* at 116 (Ginsburg, J., dissenting) (Alaska's SORA violates the Ex Post Facto Clause because "past crime alone,

not current dangerousness, is the 'touchstone' triggering [its] obligations"; act is also excessive in relation to its non-punitive purposes because it applies without "any determination of a particular offender's risk of reoffending"); *id.* at 113 (Stevens, J, concurring in *Connecticut Department of Public Safety* and dissenting in *Smith*) (although there was no procedural due process right to a hearing, conviction-based registration violates the Ex Post Facto Clause because "a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty, is punishment;" registration is distinguishable from civil commitment in *Hendricks* because there it was "clear that a conviction standing alone did not make anyone eligible for the burden imposed").

The *Smith* Court held that individualized review was unnecessary because Alaska's "first-generation" registry statute imposed only "minor and indirect" consequences. 538 U.S. at 100. But modern courts reviewing today's "super-registration" statutes are reaching the opposite conclusion. As noted, the New Hampshire Supreme Court recently struck down a registry statute that required people to "be registered *for life* without regard to whether they pose a current risk to the public." *Doe*, 111 A.3d at 1100 (original emphasis).

> We find the lifetime duration of the registry in particular to be excessive, when considered with all of the act's other impositions. If in fact there is no meaningful risk to the public, then the imposition of such requirements becomes wholly punitive.

Id. See also Starkey v. Okla. Dep't of Corrs., 305 P.3d 1004, 1027 (Okla. 2013) (where Act serves the traditional aims of punishment because it "determines who must register based solely on the criminal statute [violated] and not any individual determination of risk," registration "begins to look far more like retribution for past offenses than a regulation intended to prevent future ones").

C. SORA Imposes Severe Consequences.

Defendants argue that SORA does not impose affirmative disabilities or restraints. Alternatively, they argue that any restraints are "minor and indirect." Defs' Brief, Doc. 42, Pg.ID#34. Yet even a cursory reading of the Joint Statement of Facts,[4] much less a full review of the entire record, shows that SORA imposes restraints and disabilities on virtually every aspect of plaintiffs' lives. R. 90, Pg.ID#3723-3990.

1. Exclusion Zones Severely Harm Plaintiffs.

SORA's exclusion zones make it a crime for plaintiffs to live, work, or parent in large parts of the state. *Compare Smith*, 538 U.S. at 100 (no affirmative disability because "Act does not restrain activities … but leaves [registrants] free

[4] Defendants' brief gives the impression that they have not read, much less stipulated to, the Joint Statement of Facts, a 261-page summary of the record. *See* R. 90. Defendants have good reason to avoid the record, because it is devastating to their claims. Defendants' efforts to pretend the record does not exist, however, cannot magically make it go away.

to change jobs or residences;" "no evidence that the Act has led to substantial occupational or housing disadvantages").

Defendants attempt to distinguish the multiple cases that hold residential exclusion zones impose affirmative restraints and are akin to banishment. Defs' Brief, R. 42, Pg.ID#35-37. Defendants' case descriptions are misleading. (*See e.g., id*. at 36, inaccurately describing *Commonwealth v. Baker*, 295 S.W.3d 437, 445 (Ky. 2009) ("[w]e find it difficult to imagine that being prohibited from residing in certain areas does not qualify as an affirmative disability"), as turning on whether statute requires registrants to move if a new school is opened near their home).

Defendants argue that exclusion zones cannot be banishment because they do not result in *total* exclusion from the community. Defs' Brief, R. 42, Pg.ID#40. That is not the standard. The *Mendoza-Martinez* test "inquires only whether the act is *analogous* to a historical punishment, not whether it is an exact replica." *Doe*, 111 A.3d. at 1097.

Defendants have no support for their argument in the record, which shows that SORA's exclusion zones severely restrict where plaintiffs can live, work, and parent. All plaintiffs have had severe difficulty finding SORA-compliant housing. Doe #1 could not live with family members. Doe #4 could not live with his wife

and children. Doe #5 was forced to move from his home when he was added to the registry.[5] JSOF ¶¶910-34, R. 90, Pg.ID#3943-49.

Similarly, plaintiffs' employment prospects are crippled because of their inclusion on SORA. Employers refuse to hire them. If plaintiffs do get hired, they are fired when employers learn of their registration status. Plaintiffs are unable to accept offered employment because the jobs are in exclusion zones. It is unsurprising that less than half of non-incarcerated registrants report having any employment. JSOF ¶¶935-952, R. 90, Pg.ID#3949-52.

SORA's impact on parenting is severe. *See* 3/18/13 Opinion, R. 27, Pg.ID#693 (SORA's loitering prohibition "appears to prevent Plaintiffs from engaging in a plethora of activities closely related to the upbringing of their children"). Plaintiffs are unable to participate in events that are most central to their children's lives: graduations, sporting events, school plays, and birthday parties. JSOF ¶¶528-86, R. 90, Pg.ID#3854-69. Defendants do not even try to explain away these real world consequences.

[5] Although defendants claim that *State v. Pollard*, 908 N.E.2d 1145, 1150 (Ind. 2009), is distinguishable on the grounds that the registrant there was forced to leave his home, that is precisely what happened to Doe #5 here. JSOF ¶¶928-29, R. 90, Pg.ID#3947.

2. SORA's Supervision and Reporting Are Similar to Probation and Parole.

Defendants' approach to the supervision of registrants is incoherent. Defendants claim that SORA supervision is unlike probation or parole. Defs' Brief, Doc. 42, Pg.ID#38-39. Yet defendants repeatedly insist that SORA is justified by the need to "monitor offenders during the course of their registration period." *Id.* at Pg.ID#16-17, 26, 42, 45, 66. This is the same function as probation, parole, or GPS monitoring. *See* MDOC Policy Directive 6.03.105 (discussing "monitoring" of probationers and parolees through electronic supervision);[6] *People v. Cole*, 817 N.W.2d 497, 498 (Mich. 2012) (holding that lifetime GPS "monitoring" of sex offenders is part of the criminal sentence).

Although defendants try to distinguish registration from probation and parole, their assertions conflict with both the record and the text of SORA. Defs' Brief, Doc. 42, Pg.ID#38-39. Not only did plaintiffs report that supervision under SORA is more onerous than they experienced on probation or parole, JSOF ¶¶976-80, R. 90, Pg.ID#3958-60, but the former MDOC Legal Affairs Administrator explained that SORA:

> requires more information to be reported in shorter time periods; SORA automatically imposes restrictions on employment or residency that are imposed on probationers/parolees only on an individualized basis; SORA requirements apply for 15 years to life, while parole restrictions typically

[6] *Available at:* http://www.michigan.gov/documents/corrections/ 06_03_105_ 498762_7.pdf (last visited Jan. 16, 2016).

> last two years; and SORA requirements do not decrease over time and cannot be contested, whereas probation/parole conditions are frequently relaxed during the course of supervision and can be challenged through MDOC grievance procedures.

Stapleton Expert Report, R. 91-4, Pg.ID#4776.

Defendants claim that "[r]eporting only requires the preparation and submission of a form with the required information." *Id.* at Pg.ID#39. But registrants must report *in person*, often within three days of a triggering event (*e.g.*, traveling for more than seven days). M.C.L. §§28.725(1); 28.727(1). *Compare Smith*, 538 U.S. at 101 (emphasizing that statute did not require in-person registration). Lines to register can be upwards of 100 people and registration can takes several hours; some registrants must travel to report because not all police stations handle registration. JSOF ¶¶953-57, R. 90, Pg.ID#3952-54.

Defendants assert that "no restrictions on conduct are imposed." Defs' Brief, Doc. 42, Pg.ID#39. Yet the record is clear that plaintiffs are barred from living, working, or even entering exclusion zones with their children, cannot travel freely, and must inform the government about their internet communication. M.C.L. §§28.725(1), 28.727(1), 28.734, 28.735; JSOF ¶¶528-86, 604-695, 910-1004, R.90, PgID#3854-69, 3874-94, 3943-3967. SORA's restrictions permeate virtually every decision that plaintiffs and their families make about what they can and cannot do. As Doe #3's wife explained, "anything we want to do we have to think of [the registry] first." JSOF ¶800, R. 90, Pg.ID#3916.

Defendants' insist that there is "no continuing supervision." Defs' Brief, Doc. 42, Pg.ID#39. Not only must plaintiffs report to law enforcement every three months for the rest of their lives, but police conduct regular sweeps that include random residence checks, sometimes in the early morning or late at night, banging on doors and demanding identification. JSOF ¶¶965-73, R. 90, Pg.ID#3955-58.

Defendants maintain that SORA's penalties are minimal. Defs' Brief, Doc. 42, Pg.ID#39. But SORA violations are punishable by up to ten years' imprisonment. M.C.L. §28.729(a)(c). The record shows SORA is aggressively enforced. Some 10,000 felony-level and almost 7,000 misdemeanor SORA violation charges had been brought by mid-2013. JSOF ¶963, R. 90, Pg.ID#963. This number is staggering when one considers that there are between 27,000-28,000 non-incarcerated registrants. *Id.* ¶213, Pg.ID#3769. Given SORA's complexity, vagueness, and ever-changing nature, plaintiffs reasonably fear that they will become part of this statistic during their lifetime.

3. SORA Is The Cause of The Harms Plaintiffs Suffer.

Defendants argue that any harms plaintiffs suffer are attributable to their convictions, not to SORA. Defs' Brief, Doc. 42, Pg.ID#40. Defendants rely heavily on language in *Smith* stating that "[a]lthough the public availability of the information may have a lasting and painful impact on the convicted sex offender, those consequences flow not from the Act's registration and dissemination pro-

visions, but from the fact of conviction, already a matter of public record." Defs' Brief, Doc. 42, Pg.ID#40 (citing *Smith*, 538 U.S. at 101). That statement does not apply to SORA's exclusion zones, because simply having a conviction would not prevent someone from working, living, or parenting in much of the state. Nor does a conviction normally lead to a lifetime of in-person (and often immediate) reporting on everything from internet postings to travel plans.

Even *Smith's* description of the information disseminated under the Alaska statute does not apply here. SORA does not simply provide "public record" information, but labels plaintiffs as Tier III offenders, the worst of the worst. JSOF ¶993, R. 90, Pg.ID#3964. The state publicly brands plaintiffs as dangerous and encourages the public to track them through email alerts. JSOF ¶¶229-35, R. 90, Pg.ID#3772-74.

In *State v. Briggs*, 199 P.3d 935, 948 (Utah 2008), the Utah Supreme Court held that publication of registrants' preferred "primary" and "secondary" victim "targets" was unconstitutional because the state "may not publish information implying that [a registrant] is currently dangerous unless it proves as much at a hearing where [the registrant] has notice and an opportunity to be heard…." *Id.* at 948. Tier designation is likewise a statement of current dangerousness that requires an individual determination to pass constitutional muster. The harm comes not

from plaintiffs' convictions, but from SORA's labeling of plaintiffs as especially dangerous, a label which plaintiffs cannot contest.

Doe #5's case is instructive. Convicted in 1980, he was not required to register until 2012, when SORA was retroactively imposed on him. For over 30 years he could live and work where he wanted. Now, because of SORA, he cannot. JSOF ¶169, R. 90, Pg.ID#3759-60.

The record also shows that time and again, notwithstanding their convictions, plaintiffs were able to access housing or employment, but subsequently lost that housing or employment when the landlord or employer learned they were on the sex offender registry. *Id.* ¶1004, Pg.ID#3966-67. Thus, to the extent that the plaintiffs experience negative effects from having a criminal record, "the registry, particularly because it is publicly available online, increases these effects exponentially." *See Doe*, 111 A.3d at 1095-96 (collecting cases).

The distinction between conviction consequences and SORA consequences is clearest in the case of Doe #2, who does not have a conviction and whose youthful adjudication is sealed. He lived without any restrictions for 15 years, and twice served in the military. In 2010, when law enforcement informed him that he was subject to supervision as a sex offender, Doe #2's life suddenly changed. JSOF ¶¶64-94, R. 90, Pg.ID#3741-47. He cannot attend his daughter's games and field trips. *Id.* ¶¶534-42, Pg.ID#3855-56. Landlords (who cannot see any information

about his dismissed youthful adjudication on a background check) refuse to rent to him. Because of the registry, he cannot obtain subsidized housing, for which he would otherwise qualify as a disabled veteran. *Id.* ¶¶914-917, Pg.ID#3944-45. Employers refuse to hire him when they find out he is on the registry, even though he need not list his dismissed case on job applications. He was denied admission to a medical assistant program, and could not pursue his chosen occupation as a cardio-vascular stenographer. *Id.* ¶¶942, 981-2, Pg.ID#3950, 3960-61. He restricts his internet use because "I don't know what brings me into conflict with the registration requirements, so to feel safe I cut out as much Internet activity as I can." *Id.* ¶651, Pg.ID#3885. Every consequence he experiences is exclusively due to SORA.

D. SORA Is Not Rationally Connected to a Non-punitive Purpose.

The record shows that public registration is counterproductive and may increase recidivism. Defendants are therefore left to cast about for an alternative to SORA's stated purpose of "preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." M.C.L. §28.721a.

Defendants focus on the final sentence of M.C.L. §28.721a, which states: "The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger." Defendants derive three alternative purposes from this language.

First, SORA might "further[] the purpose of monitoring persons." *Id.* at Pg.ID#42. As discussed above, "monitoring" is what the state does with probation and parole. Lifetime "monitoring" is only rational if a person is dangerous. The record shows that lifetime "monitoring" is irrational because the likelihood of reoffending drops dramatically over time. JSOF ¶341, R. 90, Pg.ID#341.

Second, SORA might "assist[] law enforcement by providing a database of potential suspects as an investigative tool." Defs' Brief, Doc. 42, Pg.ID#42. Defendants do not explain how this goal is different from protecting against future crime, why people should be in the database if they are not dangerous, how exclusion zones further this interest, or why anything other than a private law enforcement data base (*i.e.,* SORA as originally enacted in 1994) is needed.

Finally, defendants argue that SORA data might help researchers in studying recidivism. *Id.*, Pg.ID#42-43. That may be true, but a boon to social science research cannot possibly justify the burdens SORA places on registrants.

E. SORA Is Excessive in Relation to Any Non-punitive Purpose.

1. Defendants Fail to Address Whether SORA Is Excessive.

The *Mendoza-Martinez* test – unlike the defendants' brief, Doc. 42, Pg.ID#26 – does not end with a non-punitive purpose. A critical factor under the test is whether the statutory regime "appears excessive in relation to the alternative [civil] purpose assigned." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69

(1963). *See Smith*, 538 U.S. at 116 (Ginsburg, J., dissenting) ("What ultimately tips the balance for me is the Act's excessivenesss in relation to its non-punitive purpose."); *Wallace v. State*, 905 N.E.2d 371, 383 (Ind. 2009) (courts often give "greatest weight" to excessiveness factor) (collecting cases).

For many courts, the excessiveness of modern "super-registration" statutes tips the balance of the *Mendoza-Martinez* factors to a finding of punishment. The Indiana Supreme Court said:

> [W]e think it significant for this excessiveness inquiry that the Act provides no mechanism by which a registered sex offender can petition the court for relief from the obligation of continued registration and disclosure. Offenders cannot shorten their registration or notification period, even on the clearest proof of rehabilitation. Thus the non-punitive purpose of the Act, although of unquestioned importance, does not serve to render as non-punitive a statute that is so broad and sweeping.

Wallace, 905 N.E.2d at 384. *See also Doe*, 111 A.3d at 1100 (lifetime registration "without regard to whether [registrants] pose a current risk to the public" is excessive); *Starkey*, 305 P.3d at 1030 (imposition of "severe restraint on liberty without a determination of the threat a particular registrant poses to public safety" is excessive).

Defendants do not even address this factor, and their failure to discuss excessiveness is telling. There is no defensible reason, in the record or elsewhere, to impose lifetime registration absent individualized review.

2. This Court Must Base Its Decision on the Record.

Defendants do not – and cannot – point to anything in the record showing that registries work. Defendants do not – and cannot – point to anything in the record showing that exclusion zones are useful. Defendants do not – and cannot – point to anything showing that plaintiffs are dangerous, much less that they will be dangerous forever. Defendants' silence speaks volumes.

Instead, defendants ask this Court to rely on the same discredited myths and stereotypes that forged super-registries in the first place, resulting in "retroactive legislation as a means of retribution" against the most unpopular group of our day. *Fletcher v. Peck*, 10 U.S. 87, 137-38 (1810) (Marshall, C.J.); *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994).[7] This Court is obligated to make a decision based on the record before it. What the record unequivocally shows is that SORA is irrational and excessive, retroactively imposing enormous burdens on registrants who are not dangerous, while providing little or no benefit to the public.

Defendants argue that the legislature was entitled to act upon the myth of

[7] Even the Supreme Court fell into this trap in *Smith*, 538 U.S. at 103 (describing sex offender recidivism rates as "frightening and high"). *See* Ira Ellman, *The Supreme Court's Crucial Mistake About Sex Crime Statistics*, Casetext (July 28, 2015) (explaining that the Court's statement was not based on scientific research, and that the Court's assertion about those rates is false) (attached as Exhibit B to Pls' Brief in Case No. 15-1536, Doc. 24-3). Whatever the Supreme Court may have believed when *Smith* was decided in 2003, "time and our state of knowledge … have changed." *Doe v. District Attorney*, 932 A.2d 553, 569 (Me. 2007).

never-ending dangerousness.[8] Defs' Brief, Doc. 40, Pg.ID#42-45. But defendants' argument reduces the *Mendoza-Martinez* test to only *one factor*, that is, whether there is a rational connection to a non-punitive purpose. *Mendoza-Martinez* is a *multi-factor* test, precisely because ex post facto analysis is not the same thing as rational basis review. The Ex Post Facto Clause is a bulwark against the way in which the legislature's "responsivity to political pressures" can lead to arbitrary and vindictive legislation targeting unpopular groups. *Landgraf*, 511 U.S. at 266. For that reason, legislatures do not get to do retroactively what they might be able to do prospectively.

Moreover, SORA fails under even the *one factor* of the *Mendoza-Martinez* test that assesses whether the statute has a rational connection to a non-punitive purpose. If SORA's purpose is public safety, that purpose is not served by a regime that increases recidivism, destabilizes registrants, and expends scarce resources on supervising non-dangerous individuals for life.

In *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354 (6th Cir. 1992), this Court addressed what evidence is needed when the government asserts recidivism risk as a justification for its actions. The Court struck down a zoning ordinance

[8] Defendants note that the legislature found that sex offenders have high recidivism rates. Defs' Brief, Doc. 42, Pg.ID#45, citing 3/18/13 Opinion, R. 27, Pg.ID#682. But neither the defendants nor the district court have pointed to anything in the record or in SORA's legislative history to suggest that the legislature engaged in any fact-finding on recidivism rates.

which imposed different requirements for community training centers (CTCs) housing released prisoners, rejecting the city's unsupported assertion that such persons were likely to commit crimes:

> The city presented one major justification for the different treatment of CTCs; that the occupants of a CTC are more likely to commit crimes than a person never having been convicted of a crime; and, therefore; CTCs present a danger, or at least a perceived danger, to the community in which they operate…. The city's expert witness found that literature on the topic was inconclusive. The city was able to present the district court with no evidence supporting its contention that CTCs present a danger to the community. *If the city's goal was to protect its residents from recidivists, then some data reflecting the extent of the danger must exist in order to render the different treatment of CTCs rationally related to that goal*.

Id. at 1360-61 (emphasis added).

Here Michigan asserts a goal of protecting residents from recidivists, but has failed to provide anything to show that SORA is rationally related to this goal. *See In re Taylor*, 343 P.3d 867, 879 (Cal. 2015) (holding that residency restrictions imposed on parolees with sex offenses are not rationally related to state's goal of protecting children because trial record showed that exclusion zones were counter-productive).

3. The Record Shows that SORA Is Irrational and Excessive.

Classifying plaintiffs as the most dangerous Tier III registrants and making them register for life without an individualized assessment of risk is irrational and excessive. Specifically, the record shows that:

- Recidivism risk varies significantly between registrants. Individuals who do

reoffend usually do so within the first three to five years. Recidivism drops off dramatically over time, so that lengthy registration periods are pointless. JSOF ¶¶305-316, 341-57, R. 90, Pg.ID#3789-91, 3799-804.

- The vast majority of sex offenses against children (approximately 93%) are committed by family members or acquaintances, not strangers. *Id.* ¶312, Pg.ID#3790.

- The vast majority of sex offenses (approximately 95%) are committed by individuals who are not registrants. *Id.* ¶349, Pg.ID#3801.

- The baseline risk for sexual offending is about 3% in the general male population. Low-risk sex offenders have a lower risk level than the baseline population. Over time, even high-risk sex offenders drop below the baseline. *Id.* ¶¶350-57, Pg.ID#3801-805.

- Individualized risk assessments are far better at predicting recidivism risk than the offense of conviction. *Id.* ¶319, Pg.ID#3792-93.

- Tier classifications do not correspond to risk. *Id.* ¶¶357-60. Pg.ID#3804-05.

- Public registries are likely to increase rather than decrease recidivism. *Id.* ¶¶480-96, Pg.ID#3843-46.

- Exclusion zones have no impact on or may even increase recidivism. *Id.* ¶¶497-507, Pg.ID#3846-49.

- Failure to comply with registration requirements does not predict sexual recidivism; more onerous or more frequent registration requirements do not lower recidivism. *Id.* ¶¶507-08, Pg.ID#3849-50.

- Registries that are conviction-based rather than risk-based include many people who are not dangerous, compromising law enforcement's ability to monitor, and the public's ability to identify, those who are truly dangerous. *Id.* ¶¶309-10, Pg.ID#3789-90.

Defendants ask this Court to ignore that record and instead rely on false assumptions about people convicted of sex offenses. Defendants do not cite a

single paragraph in the record to support their arguments that registrants are forever dangerous, that SORA promotes public safety, or that exclusion zones work. Instead, defendants make a spurious attack on the large body of research on which plaintiffs' experts reported. Defs' Brief, Doc. 42, Pg.ID#43-46. That attack fails.

Defendants focus their criticism on the Static-99, a widely used actuarial risk-assessment tool. *Id.*; JSOF ¶322-22, R. 90, Pg.ID#3793. Almost none of the record evidence outlined above depends on the accuracy of the Static-99. Research showing that exclusion zones are ineffective or counterproductive is not based on the Static-99. The fact that recidivism drops off dramatically after three to five years is not based on the Static-99. The Static-99 has no bearing on the fact that almost all sex offenses are committed by non-registrants, or on the fact that Tier III registrants recidivate less often than Tier II registrants.[9] The Static-99 *is* marginally relevant to data on low-risk versus high-risk recidivism rates, but only because the "risk level" is determined (actuarially) by the Static-99.

According to defendants, plaintiffs claim the state is constitutionally obligated to use the Static-99. Defs' Brief, Doc. 42, Pg.ID#44. That of course is nonsense. Plaintiffs' only claim is that they are constitutionally entitled to an

[9] It is true that sex crimes are underreported. JSOF ¶346, R. 90, Pg.ID#3800. But because that impacts data on offenses by both registrants and non-registrants, underreporting does not affect the validity of comparisons between those two groups.

individualized risk assessment before SORA's extraordinary burdens are retroactively imposed on them for life.

States with risk-based rather than conviction-based registries use different risk-assessment procedures. New Jersey, New York, Massachusetts, Minnesota, Vermont, and Oregon all require adversarial hearings. *See e.g.* N.J. Rev. Stat. §2C:7-8 (2013); N.Y. Correction Law §168-l (McKinney 2011); Mass. G.L. c.6 §§178C-178Q (2015); Minn. Stat. §§243.166, 244.052 (2015); Or. Rev. Stat. §§181.800, 181.801, 181.821 (2015); Vt. Stat. Ann. tit. 13, §§5401, 5405a, 5411b (Supp. VI 2015). The MDOC, in making release decisions for registrants, uses a combination of statistical tools and psychological evaluations. *See* Mich. Admin. R. 791.7715(5); JSOF ¶361, R. 90, Pg.ID#3805-06.

Defendants real objection is to individualized risk assessment. They argue that because one cannot know with absolute certainty who will reoffend, plaintiffs should be subject to SORA's burdens for life. But that concept was rejected by the Supreme Court in *Hendricks*, 521 U.S. at 370-71. Individualized risk assessments are part and parcel of the criminal justice system, from bail to parole. Every judge knows pre-trial release decisions are not an exact science. That uncertainty, however, does not justify depriving individuals of their liberty without an individualized determination of risk. Given the magnitude of the burdens SORA imposes, the same is true here.

Defendants complain that research about the predictive value of the Static-99 is based on whether individuals are convicted of new offenses, not whether they committed new offenses.[10] Defs' Brief, Doc. 45, Pg.ID#43. But researchers can never know what was *not* reported, proven, or admitted, which is why subsequent *convictions* are what recidivism rates measure. By comparing the predictive value of actuarial instruments (like the Static-99) to the predictive value of conviction-based risk calculation, researchers ensure that they are comparing apples to apples. The comparison shows that actuarial risk assessments are "far better at predicting recidivism risk than the offense of conviction." JSOF ¶319, R. 90, Pg.ID#3792-93.

Although the state criticizes the Static-99, the state itself uses it for parole purposes. As the former MDOC Legal Affairs Administrator explained, Michigan relies on the Static-99:

> for assessing the likelihood of sex offenders to commit new sex offenses after release … [because] [it has] proven to have greater accuracy in predicting risk than either basing risk on the offense of conviction or basing risk on a parole or probation agent's subjective assessments of the offender. Actuarial instruments used to assess risk look at both static risk factors, *i.e.*, factors that cannot be changed, such as the offense of conviction, and dynamic risk factors, *i.e.*, factors that change over time, such as age, marital status, behavior, attitudinal changes, *etc.* Accordingly, not only may individuals with the same offense have very different risk levels, but *individuals*

[10] The *scoring* of the Static-99 is not limited to convictions, but includes charged sex offenses, with the "score" for the category of past sex offenses being the higher of the two. Fay-Dumaine Dep., R. 90-13, Pg.ID#4323. Indeed, when a new offense occurs within an institutional setting like the MDOC (as confirmed by a disciplinary finding), that new offense *will* be counted for purposes of the Static-99. *Id.* at Pg.ID#4324.

> *with more serious offenses may have lower risk levels than individuals with lesser offenses*, especially as time passes**.**

Stapleton Expert Report, R. 91-4, Pg.ID#4778 (original emphasis).

In sum, plaintiffs have met their burden[11] of showing that SORA is punishment because it (a) severely limits plaintiffs' ability to direct the upbringing of their children, find housing and employment, travel, and engage in free speech; (b) subjects plaintiffs to supervision that is more onerous than what they experienced while serving sentences on probation/parole; and (c) publicly and falsely identifies them as the most dangerous sex offenders on the registry. The harms suffered by plaintiffs flow not from the fact of conviction, but from registration. The record further shows that: (a) public registration and geographic restrictions are likely to increase, rather than decrease recidivism, and are therefore counterproductive to their avowed public safety goals; (b) the reporting requirements, tier classifications, and geographic restrictions bear no reasonable relationship to risk; and (c) lifetime registration is unwarranted.

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[11] Plaintiffs must demonstrate by the "clearest proof" that the statute is punitive. *Smith*, 538 U.S. at 92 (internal quotations omitted). *But see id.* at 107 (Souter, J., concurring) ("clearest proof" standard should be used "only when the evidence of legislative intent clearly points in the civil direction"). The "clearest proof" requirement simply restates the presumption of constitutionality afforded legislative enactments. *Doe*, 111 A.3d at 1094. *See also United States v. Juvenile Male*, 590 F.3d 924, 931 (9th Cir. 2009) ("clearest proof" requirement means "that the terms of the statute, the legal obligations it imposes, the practical and predictable consequences of those obligations, our society experience in general, and the application of our own reason and logic, establish conclusively that the statute has a punitive effect").

If this Court looks at the actual record, rather than the myths defendants propound, all of the *Mendoza-Martinez* factors point to punishment.

II. RETROACTIVELY IMPOSING LIFETIME REGISTRATION VIOLATES DUE PROCESS.

A. Because Registration Is Central to Plea Decisions, Retroactive Lifetime Registration Violates Plaintiffs' Right to Fair Notice.

As explained in plaintiffs' opening brief (and more fully in the *amicus curiae* brief of the Criminal Defense Attorneys of Michigan, *et. al.*, Doc. 38), sex offender registration, like deportation, is "intimately related to the criminal process" and central to the choices criminal defendants make. *Padilla v. Kentucky*, 559 U.S. 356, 365-67 (2010). It is therefore fundamentally unfair to impose lifetime registration retroactively on people who did not have fair notice of that extraordinarily severe consequence and who made plea or trial decisions based on the law in effect at the time.[12]

Defendants argue that registration is not "so intertwined" with plea bargaining that lifetime registration is unfair. Defs' Brief, Doc. 42, Pg.ID#48-49. Defendants' argument is again based on what they wish the facts to be, not what the facts are. Anne Yantus, managing attorney for the Plea Unit of the State Appellate Defender Office, unequivocally explains:

[12] The only case cited by defendants, *Doe v. Nebraska*, 734 F. Supp. 2d 882, 932-33 (D. Neb. 2010), does not address plaintiffs' argument here, which turns on the lack of fair warning, and criminal defendants' reliance interest, when making plea choices.

> a defendant's decision to plead guilty or stand trial may often hinge on whether sex offender registration will result from the conviction…. [S]ex offender registration is a critical issue for criminal defendants who are charged with sex crimes. The questions of whether a defendant must register, for how long, and whether registration is public or private are often pivotal in resolving cases through plea negotiations.

Yantus Expert Report, R. 91-3, Pg.ID 4774.

Defendants try to explain away training materials used by the Prosecuting Attorneys Association of Michigan (PAAM) showing how to leverage registration in plea negotiations. *See* 2013 Training, R. 92-9, Pg.ID#5041; 2011 Training, R. 92-10, Pg.ID#5055. Notwithstanding the clear affirmative nature of the materials, defendants argue that the materials were intended to be used to counsel against making registration a bargaining chip. Defs' Brief, Doc. 42, Pg.ID#48. But even if that were true, prosecutors clearly recognize that registration is a key subject of negotiation. *See e.g.,* Tanner Dep., R. 90-22, Pg.ID#4606.

The state suggests that sex offender consequences are unlike immigration consequences, which entitle criminal defendants to notice. *Padilla*, 559 U.S. at 372-73. In fact, registration consequences are more "intimately related to the criminal process" than immigration consequences. *Id.* at 365. Registration must occur before sentencing, and is reflected on the judgment. JSOF ¶¶1024-25, R. 90, Pg.ID#3971-72. That is not true for immigration consequences.

The state argues that because immigration consequences typically involve further proceedings, while sex offender registration flows automatically from the

old conviction, notice is required for immigration consequences, but not for registration. That distinction does nothing to advance defendants' argument. If notice is required for immigration cases – where additional proceedings can result in relief from the consequences of the conviction – it surely should be required where people have *no* opportunity to challenge the result or get further relief from similarly severe harms.

Finally, defendants argue that "[f]or the same reasons discussed above that sex offender registration does not amount to punishment, its consequences are not so 'harsh and oppressive' [as] to constitute a violation of Due Process." Defs' Brief, Doc. 42, Pg.ID#49 (citing *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977)). Whether sanctions constitute "punishment" is the test for an ex post facto violation, not for a due process violation. If SORA is punishment, the Ex Post Facto clause categorically bars its retroactive imposition. Only if registration is *not* punishment under the *Mendoza-Martinez* test must this Court reach the due process question.

While the cumulative impact of SORA's many amendments is at the core of plaintiffs' ex post facto argument, plaintiffs' due process challenge is focused on one specific change: the retroactive imposition of *lifetime* registration. Retroactively imposing lifetime registration, when plaintiffs received no notice of that consequence at the time of their plea decisions, is "particularly harsh and oppressive."

U.S. Trust Co., 431 U.S. at 17 n.13. *See also E. Enters. v. Apfel*, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring and dissenting) (due process "incorporate[s] our settled tradition against retroactive laws of great severity").

Plaintiffs do not suggest that every change to SORA would meet this standard, only that retroactive classification as Tier III *lifetime* registrants does. By analogy, a state may not retroactively extend a prisoner's sentence to life, even though it can retroactively change some conditions of confinement. Moreover, even changes to the conditions or degree of confinement violate due process if they are not already within the sentence imposed. *See Vitek v. Jones*, 445 U.S. 480, 493-94 (1980) (transfer of prisoner to a mental institution required individualized hearing because the restrictions on liberty were coupled with the "stigmatizing consequences" of being labeled mentally ill). The state's retroactive classification of plaintiffs as Tier III offenders, coupled with the imposition of SORA's lifetime burdens, is comparable.

In *United States v. Barton*, this Court explained that whether retroactive changes affecting criminal defendants violate due process depends in part on whether "the change in question would [or would] not have had an effect on anyone's behavior." 455 F.3d 649, 655 (6th Cir. 2006). "[T]he reason why providing notice is important" is that "notice, foreseeability, and, in particular, the right to fair warning" are "core due process concepts." *Id.* at 654. Because regis-

tration is critically important in plea decisions, and clearly *does* affect the choices criminal defendants make, retroactively imposing lifetime registration violates the core due process protections of notice, foreseeability, and fair warning.

B. Retroactive Lifetime Registration Is Subject to Heightened Review.

As explained in plaintiffs' opening brief, retroactive lifetime registration is subject to heightened review. Pls' Brief, Doc. 32-1, Pg.ID#56. Defendants' argument for rational basis review is wrong because it fails to recognize the fundamental rights at stake. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The district court correctly recognized that "'government actions that burden the exercise of … fundamental rights or liberty interests are subject to strict scrutiny.'" 3/31/2015 Opinion, R.103, Pg.ID#5930 (citing *Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2007)). The district court erred in finding that the only fundamental right at issue is free speech. SORA also affects the fundamental right to parent, travel, and work.

Defendants rely on *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 17 (1977), to argue that the Contracts Clause does not prohibit states from enacting legislation with retroactive effect. Defs' Brief, Doc. 42, Pg.ID#50-51. *U.S. Trust* actually says that legislative changes must have "the effect of impairing a contractual obligation" in order for a retroactive law to be

invalid. 431 U.S. at 17. Here, SORA impairs the contractual obligations inherent in plea agreements.

Defendants fail to distinguish *Lynch v. United States*, 292 U.S. 571 (1934). There the Supreme Court found that government insurance policies "creat[ed] vested rights," and that due process barred the government from annulling those contracts through retroactive legislation. *Id.* at 577, 579. The government failed to prove that there "were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power." *Id.* at 579-80. Here too the government has failed to prove that there are "supervening conditions" that justify altering the plea agreements it made.

C. Retroactive Lifetime Registration Fails Any Standard of Review.

While defendants assert that rational basis review applies, they fail to explain (assuming a rational basis standard) how retroactively imposing *lifetime* registration on people who have not offended for decades is rational. On this point, the Massachusetts Supreme Court said that while the state has a valid interest in protecting the community,

> it is nearly impossible to conclude that this interest and the statute's defined purposes are served by imposing, without any opportunity for classification "on an individualized basis," a registration requirement on a person who committed a single sexual offense more than twenty-four years before the board's imposition of the requirement, and whose demonstrable record since that time contains no evidence whatsoever of [sexual crimes].

Doe v. Sex Offender Registry Bd., 882 N.E.2d 298, 306-07 (Mass. 2008).

The question is not whether it is rational to impose lifetime registration on people convicted today, but whether it is rational to impose such burdens *retroactively*. Because due process "protects the interests in fair notice and repose that may be compromised by retroactive legislation[,] a justification sufficient to validate a statute's prospective application under the clause may not suffice to warrant its retroactive application." *Landgraf*, 511 U.S. at 266. "[T]he retroactive application of the legislation" must be *separately* justified. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976).

The district court found that retroactive lifetime registration was justified by three legislative purposes: public safety, conformity with federal law, and national uniformity of registration laws. 3/31/15 Opinion, R. 103, Pg.ID#5934-39. Those interests do not justify requiring plaintiffs to comply with all of SORA's burdens for life, whether under heightened scrutiny or rational basis review.

First, retroactive lifetime registration does not serve the goal of public safety. The unrefuted record establishes that recidivism risk drops dramatically over time so that lifetime registration is pointless; that public registration and exclusion zones are actually detrimental to public safety; and that reporting requirements and

tier classifications bear no reasonable relationship to risk. JSOF ¶¶301-316, 319-311, 336-339, 341-371, 479-508, R. 90, Pg.ID#3787-793, 3797-808, 3842-850.

The district court itself found that the record disproves lifetime danger: "a convicted sex offender who has not re-offended in twenty-five years is less likely to commit a sex offense than someone who was previously arrested for a non-sex offense." 9/3/2015 Opinion, R. 118, Pg.ID#6022. Yet in upholding retroactive lifetime registration, the district court deferred to the legislature's assumption of lifetime danger. As noted above, even under rational basis review, unsupported assertions that former offenders are dangerous cannot justify restrictions without "some data reflecting the extent of the danger." *Bannum*, 958 F.2d at 1361.

Second, SORA's exclusion zones, annual fees, and various immediate reporting requirements are not part of the federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. §16901. Their retroactive application cannot evidence a legislative desire to conform to federal law. JSOF ¶265, R. 90, Pg.ID#3780.

The record also does not support a finding that potential loss of federal funds justifies retroactive lifetime registration. The record establishes that the funding lost is insignificant compared to the costs of SORNA compliance. Research by the National Conference of State Legislatures showed that in every state the cost of

SORNA implementation was greater than the loss of federal funding. *Id.* ¶¶247-50, Pg.ID#3776-77.

Even assuming that SORNA compliance would save Michigan money, a legislature is "without power to reduce expenditures by abrogating contractual obligation." *Lynch*, 292 U.S. at 580. If Congress could not abrogate contracts despite the "great need of economy" in the Great Depression, *id.* at 580, Michigan cannot vitiate its plea agreements in order to get federal grants. *Cf. Plyler v. Doe*, 457 U.S. 202, 227 (1982) (financial concerns cannot justify denying rights); *Little v. Streater*, 452 U.S. 1, 16 (1981).

Third, national uniformity is not advanced by retroactive lifetime registration because the great majority of states have declined to implement SORNA. JSOF ¶246, R. 90, Pg.ID#3776. Further, registrants (even in jurisdictions that have implemented SORNA) remain subject to thousands of conflicting and inconsistent state and local sex offender laws. *Id.* ¶1000, Pg.ID3965. Lifetime registration does nothing to simplify this "incredible variety in the procedures and substantive obligations across the states." Prescott Rep, R. 90-23, Pg.ID#4623. It only forces plaintiffs to comply with them forever.

In sum, as Justice Scalia and Justice Story commented a century apart, retroactive laws offend "fundamental notions of justice" and "neither accord with sound legislation nor with the fundamental principles of the social compact."

Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring); 2 J. Story, Commentaries on the Constitution §1398 (5th ed. 1891). Retroactively imposing lifetime registration denies plaintiffs fair notice and upsets their settled expectations. It is fundamentally unfair and violates due process.

III. SORA VIOLATES PLAINTIFFS' FREE SPEECH RIGHTS.

A. SORA's Internet Reporting Requirements Are Unconstitutionally Vague.

SORA requires reporting of electronic mail or instant message addresses, "all login names and 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). SORA does not inform registrants or law enforcement officials what this means. The record below establishes that understanding this obligation is impossible. Registrants have no idea what they must report, while police and prosecutors interpret SORA inconsistently. Plaintiffs limit their internet use, or avoid the internet entirely, rather than risk prosecution under a strict liability standard for failing to properly register. JSOF ¶¶620-95, R. 90, Pg.ID#3877-94.

The district court believed it could "alleviate [SORA's] ambiguity" by confining reporting to only those internet designations "that are *primarily* used for internet communications and postings." 3/31/2015 Opinion, R.103, Pg.ID#5905 (original emphasis). That "solution" does not cure the defect. By using the adverb

"primarily," the court added a term that is itself ambiguous and requires registrants to quantify, *for every site requiring an identifier*, how much they are "communicating" and how much they are not. Police and prosecutors, meanwhile, may not know whether a given identifier is reportable because they do not know how the identifier is being used.

Defendants seek to discount this new layer of vagueness, arguing registrants "will know at the time they click their mouse whether their actions were primarily to communicate with another person." Defs' Brief, Doc. 42, Pg.ID#70. That is not true. A school website may both disseminate information about school athletics and serve as an interactive bulletin board for each team.[13] If a father gets scheduling information for his son's soccer team, must he register? Will the prosecutor view the *receipt* of information as a registrable form of internet communication? Must the father register if he posts a request for his son to get a ride to practice? Is the father *primarily* communicating if he clicks on a group calendar to show his son is available for a game? Does it matter if, instead of a group calendar function, the coach sends a message on the site to ask about the son's availability and the

[13] It is not clear from the district court's description, 3/31/2015 Opinion, R. 103, Pg.ID#5904-05, whether this hypothetical website is more like a newspaper or e-commerce website (typically not registrable, says the district court, "even though registrants may post comments at the end of online newspaper accounts, or 'chat' with Amazon representatives"), or more like a gaming site (typically registrable, says the district court, even though the registrant may be the only player in the game).

father responds? How often does the father need to contact the coach (or, if it counts, check the calendar) before he is *primarily* communicating? Neither law enforcement nor registrants can discern when a registrant is "primarily" communicating. There is no objective standard upon which they can rely.

The district court's adoption of "primarily" is also at odds with its own holding that the similarly slippery adverbs ("regularly" and "routinely") make SORA's reporting requirements unconstitutionally vague. 3/31/2015 Opinion, R. 103, Pg.ID#5897-99 (citing *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553 (6th Cir. 1999)).

B. SORA's Requirement to Report Internet Identifiers Chills Online Speech.

Requiring plaintiffs to report their internet identifiers violates their First Amendment rights. This is an independent claim that does not depend on whether the law's provisions are vague (although vagueness exacerbates the law's chilling effect). Defendants argue that lifetime reporting of a vast array of internet identifiers survives First Amendment scrutiny. Defs' Brief, Doc. 42, Pg.ID#61-70.

Defendants claim *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150 (2002), is distinguishable because the plaintiffs there had to get a permit before speaking, but plaintiffs here can report their speech after it occurs.[14]

[14] Defendants do not appeal the injunction of "immediate" internet reporting, conceding that forcing registrants to report their speech within three days is

Defs' Brief, Doc. 42, Pg.ID#61-62. *Watchtower Bible* does not suggest that a permitting scheme requiring handbillers to report after they go door-to-door, rather than before, would be permissible. Indeed, the Court emphasized that permitting schemes are dangerous "[e]ven if the issuance of permits … is a ministerial task that is performed promptly." 536 U.S. at 166.

Next defendants argue that SORA's lifetime internet restrictions are subject to intermediate scrutiny. Defs' Brief, Doc. 42, Pg.ID#64-65. That claim is dubious. *See* Center for Democracy & Technology *Amicus* Brief, Doc. 41, Pg.ID#29-39. While the district court found that intermediate scrutiny applies because SORA's internet reporting provisions "restrict speech without reference to the [speech's] content," 3/31/2015 Opinion, R. 103, Pg.ID#5921-22, the Supreme Court recently narrowed the definition of what is "content neutral." In *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the Court held that an ordinance distinguishing directional signs from other more substantive signs is content-based. In the same way, the district court here appears to permit internet use for "e-commerce" communication (for example, chatting with an Amazon agent) but not for talking with fellow

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unconstitutional. *Id.*, Pg.ID#62. That restriction also involved reporting after, rather than before, speaking.

gamers about game strategy. After *Reed*, it is hard to see how such a distinction is content neutral.

Even under intermediate scrutiny, however, the state must "demonstrate that the recited harms are real … and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 644 (1994). The state cannot meet that burden here: it asserts an interest in using identifiers to solve internet crimes, but concedes that police have never requested a single internet identifier from the SORA database. JSOF ¶614, R. 90, Pg.ID#3876.

Defendants rely on unsupported speculation in a Department of Justice document claiming that a database of internet identifiers could help in investigating and deterring crime. SMART Guidelines, R. 94-1, Pg.ID#5531. But defendants cannot point to any actual evidence that internet reporting deters crime. To the contrary, the evidence shows that reporting of such information does not impact recidivism. JSOF ¶508, R.90, Pg.ID#3849-50. Moreover, as the district court explained, simply asserting that such a database is useful does not prove it is narrowly tailored:

> [R]equiring persons arrested for any crime, all American citizens, or all persons present in the United States to register their Internet identifiers could aid law enforcement in investigating and deterring online sex offenses. If every American were required to register his email address, law enforcement would have an even more robust database to search when an Internet alias was use to commit an online offense.

9/3/2015 Opinion, R. 118, Pg.ID#6024.

Even assuming intermediate scrutiny applies, the state has failed to meet its burden of proving narrow tailoring. For example, the state has not proven why plaintiffs should report identifiers used for political speech, why all registrants must report identifiers although only a tiny fraction committed online crimes, or why identifiers should be reported for *life*. The only justification the state offers – that plaintiffs are so inherently dangerous that they must report every primarily communicative identifier forever – is based on myths about registrants that are demolished by the record below. Defendants can ignore the record, but this Court cannot.

Lastly, defendants claim that registrants have ample alternative channels for communication because "all channels of Internet communication remain available." Defs' Brief, Doc. 42, Pg.ID#66. That assumes away the very problem at issue: reporting requirements chill registrants' internet speech. To the extent defendants point to other venues (writing books, distributing pamphlets), the caselaw is clear that dramatically different forms of communication aimed at different audiences are not ample alternatives. *See Saieg v. City of Dearborn*, 641 F.3d 727, 740 (6th Cir. 2011); *Bery v. City of New York*, 97 F.3d 689, 698 (2d Cir. 1996).

C. SORA Restrains Anonymous Speech.

Defendants argue that registrants can confidently use the internet for communication, knowing that their internet designations will be visible only to the 8,000 law enforcement officials who can access the non-public registry. JSOF ¶699, R. 90, Pg.ID#3894. In other words, registrants should have no qualms about being "outed" by the state because only law enforcement will ever know their identifiers. Defs' Brief, Doc. 42, Pg.ID#67-68.

That is exactly the promise the state made when plaintiffs pled guilty. They were told that their records would be sealed, or that their registration would be kept private for use only by law enforcement, or that the public registry would be limited to the fact of their conviction, or that their registration would be for a limited time, etc. The state serially broke each of those promises as SORA morphed into a lifetime public super-registry that gives everyone instant online access to every registrant's name, crime, photo, race, height, weight, eye color, hair color, tattoos, home address, work address, vehicle model, license plate, and tier level, and that enables the public (with a single mouse-click) to "track this offender" or to "tell a friend." Indeed, in this very action the state continues to maintain that it can make whatever changes to SORA it wants, and can apply those changes retroactively without constitutional limit. *See United States v. Stevens*, 559 U.S. 460, 480 (2010) (when First Amendment rights are at stake, the courts will not

uphold a statute "merely because the Government promise[s] to use it responsibly").

In concluding that SORA does not violate plaintiffs' right to anonymous speech, the district court relied on a provision in the current version of SORA that excludes internet identifiers from inclusion on the public website. 3/31/2015 Opinion, R. 103, Pg.ID#5926. But M.C.L. §28.728(3) does not bar any other methods of disseminating registrants' internet information, and defendants have provided no policies limiting the purposes for which registrants' identifier information may be used or with whom it may be shared.

Defendants erroneously rely on *Connection Distributing Company v. Holder*, 557 F.3d 321 (6th Cir. 2009), to argue that registering identifiers does not infringe on anonymous speech. *Connection Distributing* dealt with a record-keeping regulation that only applied to pornographic speech (rather than to all online speech), and was reviewed under the "secondary effects" doctrine. *Id*. at 328. The plaintiffs in *Connection Distributing* had to provide age verification when posting pornographic content. They did not have to register (as here) if they penned a political blog, joined a forum on French cuisine, or accessed a class bulletin board for college chemistry. SORA, unlike *Connection Distributing*, plainly applies to the type of traditional protected anonymous speech discussed in cases like *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995).

D. Retroactively Imposing Internet Reporting Is Unconstitutional.

Since lifetime reporting of internet identifiers is unconstitutional prospectively, it is necessarily unconstitutional retroactively. Defendants, argue that its retroactive application is subject to rational basis review, while urging intermediate scrutiny is appropriate to review the statute prospectively. Defs' Brief, Doc. 42, Pg.ID#53-55. This argument fails because courts must review retroactive laws more carefully than prospective ones. *Landsgraf*, 511 U.S. at 166.

IV. SORA VIOLATES PLAINTIFFS' RIGHT TO PARENT.

Plaintiffs alleged that SORA's exclusion zones substantially interfere with their ability to participate in the upbringing and education of their children. Am. Compl. R. 46, Pg.ID#897-98. The district court conceded that

> ambiguity in the exclusion zones and in the term "loiter" leave[s] registrants of ordinary intelligence unable to determine what behavior is prohibited by SORA. Due to SORA's vagueness, it is unclear whether a registrant may visit a public library or attend a parent-teacher conference where minors are present without risking arrest from law enforcement.

3/31/2015 Opinion, R. 103, Pg.ID#5916. The district court nevertheless declined to decide the issue in light of the vagueness of the exclusion zones. *Id.*, Pg.ID#5918. As noted in plaintiffs' opening brief, the vaguer the zones, the *greater* the limitation on plaintiffs' ability to interact with their children, because plaintiffs must over-police themselves or risk prosecution.[15] Pls' Brief, Doc. 32-1, Pg.ID#62-63.

[15] Upon reading plaintiffs' full depositions, what is most striking is how much SORA limits their relationships with their children. These are ordinary parents

In *Johnson v. Cincinnati*, 310 F.3d 484, 505 (6th Cir. 2002), this Court held that a geographic exclusion zone violated a grandmother's substantive due process rights when it "precluded her from her regular role in caring for her grandchildren." *Id*. The exclusion zone in *Johnson*, like the exclusion zones at issue here, did not completely prevent the grandmother from interacting with her grandchildren. But it prevented her from important parenting activities like walking her grandchildren to and from school. *Id.* Therefore, although the grandmother was free to interact with her grandchildren outside the exclusion zone, the ordinance still violated her fundamental rights.[16] *Id.*

Here, instead of addressing the exhaustive record detailing how the exclusion zones inhibit plaintiffs' ability to participate in the upbringing and education of their children, defendants ignore it. They argue that the exclusion zones do not "limit the curriculum" or prevent plaintiffs' children from "attending a school of

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trying to do their best for their kids. But they live in constant fear of a SORA violation, which would lead to incarceration and separation from their children. Registrant-parents avoid any conduct that law enforcement might construe as a violation, at great cost to their families. Plaintiffs' and Spouses Deps., R. 90-2 – 90-9, Pg.ID#3998-4218.

[16] Although *Johnson* is almost exactly on point, defendants instead rely on *Does v. Miller*, 405 F.3d 700, 709-10 (8th Cir. 2005). *Miller* is inapplicable because SORA's "loitering" provision impacts plaintiffs' ability to participate in their children's education and upbringing much more directly than the Iowa residency statute in *Miller*.

their choice." Defs' Brief, Doc. 42, Pg.ID#76. Plaintiffs have not complained about curricular limitations or schools of choice.

Plaintiffs' complaint is that they are barred, without any individualized justification, from their children's graduation ceremonies, sporting events, school plays, recitals, family nights, class projects, trips, etc. Mary Doe was banned from her daughter's 8th grade graduation ceremony. S.F. described her son crying as he asked why other dads come to watch their kids' games but his father does not. JSOF ¶¶577, 555, R. 90, Pg.ID#3867, 3860-61. Surely these restrictions (combined with the additional self-imposed restrictions necessitated by the vagueness of SORA's "loitering" definition and the unknowability of the exclusion zone boundaries) amount to at least as significant a limitation on familial rights as the one held unconstitutional in *Johnson*.

Defendants argue that if plaintiffs prevail, there would be no limit to the scope of the right to parent. They ask, "Would parents have a right to eat with their child during [school] lunch?" Defs' Brief, Doc. 42, Pg.ID#76. Such considerations plainly did not stop the Supreme Court from recognizing that parenting is a fundamental right, or stop this Court from applying that right to the exclusion zone in *Johnson.* Moreover, plaintiffs are not asking for some exception to regular school rules. They are only asking to be allowed to participate in their children's education in the same way as other parents.

Defendants argue that the parenting claim should not be decided until the vagueness question is resolved. But the law is actually clear here on several points that are central to the parenting claim. First, there is no parental exemption to the prohibition on observing or contacting one's own children within an exclusion zones. M.C.L. §§28.733(b), 28.734(1)(b). Thus registrant-parents are committing a crime if they observe or contact *their own* children anywhere in those zones. Second, Michigan's Attorney General has ruled that registrant-parents cannot participate in activities (*e.g.,* school plays or sporting events) on school grounds. Attorney General Letter, Doc. 93-17, Pg.ID#5343-46.

SORA's exclusion zones are not narrowly tailored to serve a compelling state interest.[17] "[W]hen constitutional rights are at issue, strict scrutiny requires legislative clarity and evidence." *Johnson*, 310 F.3d at 504. Defendants present no evidence that exclusion zones protect children. To the contrary, the record shows the exclusion zones are either counterproductive or have no impact.[18] JSOF ¶¶497-

[17] The district court noted that the right "is limited by an equal[ly] compelling governmental interest in the protection of children, particularly where the children need to be protected from their own parents." 3/31/2015, R. 103, Pg.ID#5915, quoting *Kottmyer v. Maas,* 436 F.3d 684, 690 (6th Cir. 2006). There is absolutely nothing in the record here to suggest plaintiffs pose any danger to their children.

[18] Indeed, the Department of Justice itself recently reported:

> the evidence is fairly clear that residence restrictions are not effective. In fact, the research suggests that residence restrictions may actually increase offender risk by undermining offender stability and the ability of the offen-

507, R. 90, Pg.ID#3846-49.

Michigan's exclusion zones are not narrowly tailored. They are one size fits all, and it is Extra Large. There is simply no individualized consideration of risk. *See Johnson*, 310 F.3d at 506 ("combination of the broad sweep of the Ordinance and the lack of individualized consideration prior to exclusion" unconstitutionally limited familial rights).

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

Defendants do not argue that an as-applied injunction of SORA's unconstitutionally vague provisions is proper. Instead they argue that SORA is not vague, an argument that addresses only the merits, not the remedy. Defendants also argue that the district court opinion *could* be interpreted as imposing a facial injunction. Defs' Brief, Doc. 42, Pg.ID#78-79. If so, then the opinion needs clarification, since both state and local law enforcement are continuing to enforce the enjoined provisions. *See Doe v. Rahinsky*, 1:15-cv-01140 (W.D. Mich. Nov. 4, 2015) (naming state and local law enforcement as defendants in SORA vagueness challenge).

> der to obtain housing, work, and family support. There is nothing to suggest this policy should be used at this time.

Department of Justice, *Adult Sex Offender Management*, at 4 (July 2015), *available at*: http://www.smart.gov/pdfs/AdultSexOffenderManagement.pdf (last visited Jan. 16, 2016).

Meanwhile, the costs of failing to enter a facial injunction are steadily mounting. As this brief was being finalized, plaintiffs' counsel learned that yet another vagueness challenge to SORA's exclusion zones had been filed. *See Doe v. Nowicki*, 2:16-cv-10162 (E.D. Mich. Jan. 19, 2016) (plaintiff forced to resign a job he had held for two years after police decided his employment address was inside an exclusion zone, even though plaintiff had continuously registered that address with the police every three months).

V. DOES #1 AND 2 HAVE UNIQUE CLAIMS THAT DEFENDANTS FAIL TO ADDRESS.

Defendants' discussion of Does #1 and #2 fails to address, or even acknowledge, their unique claims, which are grounded in the fact that Doe #1 is not a sex offender and Doe #2 was never convicted. Defendants' argument that retroactive lifetime registration is rational, which is addressed in section II, *supra*, is simply not responsive to the ways in which Does #1 and #2 are different from the other plaintiffs.

A. Doe #1 Is Not a Sex Offender.

The state here is not disseminating "accurate information about a criminal record." *Smith*, 538 U.S. at 98. Rather, the state is publicly proclaiming that Doe #1 is a sex offender, when he is not.

People who are not convicted of sex offenses are entitled to due process before the state can label them as sex offenders and impose sex offender conditions

on them. *See Renchenski v. Williams*, 622 F.3d 315, 327-28 (3d Cir. 2010); *Meza v. Livingston*, 607 F.3d 392, 401-02 (5th Cir. 2010); *Neal v. Shimoda*, 131 F.3d 818, 829-30 (9th Cir. 1997); *Gwinn v. Awmiller*, 354 F.3d 1211, 1217-19 (10th Cir. 2004); *Kirby v. Siegelman*, 195 F.3d 1285, 1292 (11th Cir. 1999). The state does not dispute the authority of these cases, which recognize that labeling someone a sex offender is extraordinarily stigmatizing. *See also Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Vitek v. Jones*, 445 U.S. 480, 494 (1980).

B. Doe #2 Was Never Convicted and Was Promised Privacy under His Plea Agreement.

Doe #2's charges were dismissed under the Holmes Youthful Trainee Act (HYTA). M.C.L. §762.14(2). For Doe #2, the state's promise that "all proceedings…shall be closed to public inspection" was a significant inducement to plead guilty. M.C.L. §762. 14(4); JSOF ¶¶71, 77, R. 90, Pg.ID#3743-44.

Defendants cite *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 501 (6th Cir. 2007), but it did not address the argument that a defendant is entitled to specific performance of his plea, and is inapplicable here. *State Police* had to reconcile competing statutory imperatives: HYTA's provision that adjudication information be sealed, and SORA's provision that such information be published. *Id.* at 501 (finding that although the interaction of SORA and HYTA did not violate substantive due process, it created "inconsistency" and imposed harms that are "troubling and noteworthy").

When Doe #2 pled guilty in 1996, the statutory regime was quite different. At that time SORA itself promised that "registration is confidential and shall not be open to inspection except for law enforcement purposes." Mich. Pub. Act 295, Sec. 10 (1994). Thus, at the time Doe #2 made his plea bargain, *both* HYTA and SORA promised confidentiality. It is that promise that Doe #2 seeks to enforce.

Defendants question Doe #2's testimony that his decision to plead guilty was premised on the record-sealing benefits of HYTA. But Michigan courts have recognized that HYTA's record-sealing provisions are central to the bargain between the defendant and the state. In *People v. Palma*, 25 Mich. App. 682 (1970), the court vacated the defendant's plea as involuntary because the defendant had erroneously been told that he would be granted HYTA and have no record. *See also People v. Bobek*, 217 Mich. App. 524, 527, 531 (1996).

Defendants also claim that Doe #2 is not entitled to specific performance of his plea agreement because he got what he bargained for since his "record" is sealed. Defs' Brief, Doc. 42, Pg.ID#43-44. To see whether plea bargains have been breached, however, courts "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).

When Doe #2 pled, he reasonably understood that if he completed probation his case would be dismissed, he would not have a conviction, and the state would

keep all information about the dismissed charges confidential. M.C.L. §762.14; JSOF ¶¶71, 77, R. 90, Pg.ID#3743-44. The "bargain" did not anticipate that he would be labeled as a convicted sex offender on a public registry accessible world-wide for life.

VI. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' RIGHT TO WORK CLAIM WITHOUT DISCOVERY.

Plaintiffs' allegations that SORA denies substantial opportunities for work must be taken as true on appeal of a motion to dismiss. Defendants characterize the right at issue as the pursuit of a "specific occupation," ignoring the long-standing judicial recognition that people have a right to use their labor to earn a living. Defs' Brief, Doc. 42, Pg.ID#79-80. *See Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (the term "liberty" is "deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; … to live and work where he will; to earn his livelihood by any lawful calling; [and] to pursue any livelihood or avocation").

Defendants mischaracterize *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), as a case about restricting access to a specific occupation or profession. Defs' Brief, Doc. 42, Pg.ID#81. In fact, the law at issue covered a vast range of jobs and violated due process precisely because it "broadly den[ied]… substantial opportunities for employment" and restricted employment "on a wholesale basis." *Hampton*, 426 U.S. at 103, 116. Plaintiffs have alleged just such a wholesale denial of employment here. Complaint ¶301, R. 1, Pg.ID#43

Even assuming that the right is limited to pursuit of specific occupations, plaintiffs have also alleged that SORA "substantially interferes with the plaintiffs' ability to engage in the common occupations of life." Complaint ¶300, R. 1, Pg.ID#43. Plaintiffs were denied discovery, and hence the opportunity to prove these allegations. Still, discovery on plaintiffs' other claims provides some idea of the type of evidence that discovery could reveal. *See e.g.,* JSOF ¶983, R. 90, Pg.ID#3961 (SORA prevented Doe #2 from pursuing occupation as a cardio-vascular stenographer); Wagner 2nd Expert Report, R. 91-2, Pg.ID#4733 (exclusion zones likely bar employment as a bus driver, mail carrier, or construction worker).

Defendants' argument that there is no right to private employment confuses *property* interests in government employment with *liberty* interests in seeking work. Defs' Brief, Doc. 42, Pg.ID#80-82. The distinction between private and government employment arises in the context of *procedural* due process for *property* interests in government jobs. *See e.g., Bd. of Regents v. Roth*, 408 U.S. 564, 576-77 (1972) (due process challenge to termination of government job). The Constitution does not require due process when a private employer terminates an employee. In contrast, one's *liberty* interest in seeking employment is not limited to government work. One has just as much of a right to pursue employment in a law firm as one does to pursue employment as a federal judge. Because plaintiffs'

liberty rights, not *property* rights, are at issue here, the distinction between private and government employment does not apply.

Cutshall v. Sundquist, 193 F.3d 466 (1999), on which defendants oddly rely, supports plaintiffs' argument. In upholding Tennessee's "first-generation" registry statute against a procedural due process challenge, this Court emphasized that "the Act does not limit the ability of registrants to seek and obtain any type of employment" and "in no way infringes upon [plaintiff's] ability to seek, obtain and maintain a job." *Id.* at 479-80. The plaintiff was thus "free to … seek any employment he wishes." *Id.* at 474. While sex offender registration did make the plaintiff "less attractive to other employers," *id.* at 479, that alone – without a state-imposed barrier to employment – was insufficient to trigger procedural protections.

Precisely the factors that led the *Cutshall* Court to find due process protections unnecessary are present here. Plaintiffs are not free to seek any employment they wish. They can only seek employment outside the exclusion zones, which they allege both deprives them of substantial opportunities for employment and bars them from whole sectors of the economy. This violates their fundamental liberty interest in employment.[19]

[19] Plaintiffs do not question the government's right to regulate the conditions of employment or to regulate who may be employed in particular occupations. *See Dent v. West Virginia*, 129 U.S. 114, 121-22 (1889) (upholding licensing of doctors). But to be constitutional, such regulations must be related to "the applicant's fitness or capacity to practice" the profession. *Schware v. Bd. of Bar*

Finally, defendants argue that SORA's *lifetime* barrier on employment in much of the state survives strict scrutiny because it is narrowly tailored to the state's interest in preventing crimes against children. Defs' Brief, Doc. 42, Pg.ID#82. While the state's interest is indisputably important, banning plaintiffs for life from employment within exclusion zones is not narrowly tailored to that goal.

SORA's lack of narrow tailoring comes into sharp relief when contrasted with the permissible restrictions on the occupational liberty of parolees and probationers. In the federal system, courts may impose occupational restrictions on probationers, but those restrictions must "bear[] a reasonably direct relationship to the conduct constituting the offense." 18 U.S.C. §3563(b)(5).

The "reasonably direct relationship" standard is less rigorous than "narrow tailoring," and the liberty interests of probationers are limited by the fact that they are still serving their sentences. Nevertheless, federal courts regularly strike down unreasonable occupational restrictions and "carefully scrutinize unusual and severe conditions, such as one requiring the defendant to give up a lawful livelihood."

Exam'rs of N.M., 353 U.S. 232, 239 (1957). Restrictions based on a person's criminal history must take into account the nature and age of the offense. *Id.* at 241-43. While setting standards for entry into particular occupations is permissible, "broadly denying…substantial opportunities for employment" is not. *Hampton*, 426 U.S. at 116.

United States v. Doe, 79 F.3d 1309, 1319 (2d Cir. 1996) (invalidating requirement that tax fraud defendant notify tax clients of his conviction). *See also United States v. Russell*, 600 F.3d 631, 637-38 (D.C. Cir. 2010) (vacating computer-use prohibition on child pornographer as unreasonable because of impact on employment); *United States v. Wittig*, 528 F.3d 1280, 1287-89 (10th Cir. 2008) (condition barring bank-fraud defendant from being employed as executive without court approval was unreasonable).

Nor can occupational restrictions evade scrutiny by being described as geographical restrictions. *See United States v. Cooper*, 171 F.3d 582, 585 (8th Cir. 1999) (vacating condition barring defendant, who had been convicted of transporting explosives, from employment as truck driver if it involved absence from home for more than 24 hours, and rejecting government's argument that the condition was "not an occupational restriction, but rather a geographical limitation that … ensures effective monitoring … by the probation office"). *Id.* at 585.

These cases show that courts engage in careful, individualized review when evaluating occupational restrictions imposed as part of ongoing criminal supervision. Yet plaintiffs – although ostensibly free – are barred for life from working in large geographic areas and certain sectors of the economy without any individualized inquiry and regardless of whether their convictions are relevant to the work in question.

VII. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' TRAVEL CLAIM WITHOUT DISCOVERY.

In *Johnson v. Cincinnati*, 310 F.3d 484 (6th Cir. 2003), this Court applied strict scrutiny to strike down an ordinance barring people with drug convictions from "drug exclusion zones" because it violated their fundamental right to localized travel. While the Court found public safety to be a compelling interest, it held that the ordinance was not narrowly tailored because it applied "without any particularized finding that a person is likely to engage in recidivist … activity." *Id.* at 503. While "general evidence" supported the proposition that people arrested for drug activity returned to their neighborhoods and repeated their offense, such evidence

> is insufficient to override an individual's interest in localized travel…. [W]e find that due process … demands some individualized consideration before an individual's right to localized travel can be restricted.

Id. at 503-504.

SORA likewise restricts both interstate and local travel without any "particularized finding" that a person is likely to recidivate. Registrants cannot venture into exclusion zones with their children without risking prosecution, and, because of the travel reporting requirement, face prosecution if their travel plans inadvertently change. M.C.L. §§28.725(1)(e), 28.734(1)(b). SORA is not narrowly tailored because it restricts plaintiffs' freedom of movement (for life) based solely on their conviction, without any determination of current dangerousness.

The *Johnson* Court also found the Cincinnati ordinance to be an overbroad limitation on travel because it restricted both "wholly innocent conduct" and "socially beneficial action" (caring for grandchildren). 310 F.3d at 503. SORA's "loitering" prohibition does exactly the same thing, preventing registrant-parents from entering exclusion zones to take their children to the playground, or for that matter, to the dentist.

The district court dismissed plaintiffs' claim at the pleading stage, stating that travel problems "can be easily avoided with minimal prospective planning on the part of the registrant." 3/18/2013 Opinion, R. 27, Pg.ID#688. But no amount of "planning" can open the exclusion zones to registrants with children in tow. Moreover, where non-registrants face inconvenience or delay from unexpected travel glitches, registrants face prison because they are strictly liable for SORA's reporting requirements.

"A state law implicates the right to travel when it actually deters such travel." *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903-04 (1986). A person's right to travel cannot be "inhibited by statutes, rules, or regulations which unreasonably burden or restrict" this fundamental freedom. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). Here plaintiffs have set out detailed allegations about how SORA actually deters them from traveling and unreasonably burdens their travel. Complaint ¶¶186-201, R. 1, Pg.ID#26-29. Because those allegations must

be taken as true on a motion to dismiss, the district court erred by dismissing the claim at the pleading stage.

CONCLUSION

For the reasons above, this Court should hold that Michigan's super-registry is punishment. SORA cannot be imposed retroactively for life and cannot restrict plaintiffs' fundamental rights without an individualized determination of current dangerous.

Respectfully submitted,

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This brief will be served on January 19, 2016, on all counsel of record via the Court's ECF system.

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