UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

John Doe 1–5,

Plaintiff-Appellant,

v.

Gretchen Whitmer, Richard Dale Snyder, Joseph Gaspar, Kriste Kibbey Etue

Defendant-Appellees.

No. 22-1925

On appeal from the Eastern District of Michigan Case No. 2:21-cv-11903

CORRECTED BRIEF OF PLAINTIFF-APPELLANTS JOHN DOE 1–5

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Clauses or Amendments:

Statutes:

Federal Rules:

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellants respectfully request oral argument in this matter because the determination of the issues presented may have far reaching consequences by either expanding or maintaining the current scope of immunity afforded to state officials. Furthermore, this case is important as it presents an opportunity for this Court to further clarify the doctrine of "supervisory liability" under 42 U.S.C. § 1983.

The opportunity to address these issues in greater detail to this Court, and to respond to the inquiries of the Court, will aid the Court in its decision-making process.

I. STATEMENT OF JURISDICTION

The Federal District Court for the Eastern District of Michigan has jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. § 1331 because Plaintiffs' claims arise under 42 U.S.C. § 1983 and the First and Fourteenth Amendments of the United States' Constitution. Specifically, Plaintiffs' claims arise from the unconstitutional enforcement of an old version Michigan's Sex Offender Registration Act (hereinafter "SORA").

This Court has jurisdiction over Plaintiffs' appeal pursuant to 28 U.S.C. § 1291 because Plaintiffs appeal a final judgment from the Federal District Court below (hereinafter "District Court"). Specifically, on September 8, 2022, the District Court granted Defendants' motion to dismiss Plaintiffs' claims against all Defendants on the basis of qualified immunity and Eleventh Amendment Immunity and granted Defendants' motion to dismiss with respect to Defendants Snyder and Whitmer based on an alleged failure of Plaintiffs to state a viable claim of supervisory liability against them. (Order on Motion to Dismiss, RE 18). On September 22, Plaintiffs filed their Motion for Reconsideration, (Motion for Reconsideration, RE 19), which the District Court denied on October 12, 2022. (Order on Reconsideration, RE 22). On October 13, 2022 – within the time provided for by Fed. R. App. P. 4(a)(1)(A) and 4(a)(4) – Plaintiff filed their notice of appeal. (Notice of Appeal, RE 23).

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal presents three discrete questions. First, did the District Court err by holding that all Defendants are entitled to Eleventh Amendment immunity where they were sued in their individual capacities for monetary damages only. Second, did the District Court err by holding that Defendants Snyder and Whitmer could not be held liable under a theory of supervisory liability where they had the same knowledge of ongoing unconstitutional conduct and tacitly acquiesced or implicitly authorized the continuation of that unconstitutional conduct. Finally, whether the District Court erred by holding that all Defendants were entitled to qualified immunity on Plaintiffs' Fourteenth Amendment void for vagueness claims.

III. STATEMENT OF THE CASE

a. Facts Relevant to Issues Presented

This case arises from the decades of enforcement of Michigan's prior Sex Offender Registration Act ("Old SORA"). In 2006 and again in 2011, the Michigan Legislature amended SORA to include numerous additional burdens on registrants including geographic restriction zones, new registration requirements, and new reporting requirements. In 2015, several provisions of Old SORA were declared unconstitutionally vague in violation of the Fourteenth Amendment and violative of the First Amendment by the Federal District Court in Eastern District of Michigan. *Does #1–5 v. Snyder*, 101 F.Supp.3d 672 (E.D. Mich. 2015) ("Does I"). On appeal, this Court held that the retroactive application of the 2006 and 2011 SORA

amendments violated the Ex Post Facto Clause and did not consider the lower court's ruling on plaintiffs' First or Fourteenth Amendment claims. *Does #1–5 v. Snyder*, 834 F.3d 696, 705–06 (6th Cir. 2016) *cert den.* 138 S.Ct. 55 (2017). In 2016, a class action with essentially identical claims was filed culminating with a finding that Michigan's SORA was so constitutionally defective that it could not even be saved through severance. *Doe v. Snyder*, 449 F.Supp.3d 719 (E.D. Mich. 2020) ("Does II"); *Does v. Whitmer*, No. 2:16-cv-13137, 2021 U.S. Dist. LEXIS 161623 (E.D. Mich. Aug. 26, 2021). Despite the blatant unconstitutionality of Old SORA Defendants continued the enforcement of Old SORA causing significant injuries to Plaintiffs' and the putative class.

The two provisions of Old SORA that are most relevant to this appeal are the student safety zone exclusion area and the retroactive imposition of additional burdens on people convicted before the 2006 and 2011 amendments were enacted. The student safety zone exclusion area was found in several different areas of Old SORA. MCL §§ 28.734(1)(a)–(b), 28.735(1) (repealed effective Mar. 24, 2021) all prohibited persons subject to SORA from working, loitering, or living within a "student safety zone" which in turn was defined as:

> A building, facility, structure, or real property owned, leased, or otherwise controlled by a school, other than a building, facility, structure, or real property that is no longer in use on a permanent or continuous basis, to which either of the following applies: (i) It is used

> to impart educational instruction. (ii) It is for use by students not more than 19 years of age for sports or other recreational activities.
>
> MCL § 28.733 (repealed effective Mar. 24, 2021).

Persons who were found in violation of the student safety zone provisions were subject to misdemeanor or felony charges and imprisonment of up to two years and a fine of up to $2,000. MCL §§ 28.734(2), 28.735(2) (repealed effective Mar. 24, 2021).

The retroactive imposition of additional burdens, which this Court addressed in *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016), arises from the drastic increase in the obligations imposed on registrants in the 2006 and 2011 amendments. These restrictions include the aforementioned student safety zone exclusion areas (2006 amendments), in person registration requirements for changes in address, phone number, or internet identifiers and a tiering scheme that resulted in some registrants being required to report multiple times a year for the rest of their lives. (2011 amendments). Convictions for the 2011 in-person reporting requirements could result in felony charges and up to ten years of imprisonment and a $10,000 fine. MCL § 28.729 (as amended effective July 1, 2011).

Plaintiffs in this case were all convicted of criminal offenses that subjected them to the restrictions of Old SORA. Each Plaintiff was required to register annually at a cost of $50. Plaintiffs John Doe 1, 2, 4, and 5 were required to register, in person,

four times a year while Plaintiff John Doe 3 was required to register twice annually. Furthermore:

- Plaintiff John Doe 1 was denied a job in 2019 because of a failure to register conviction and because the job was potentially within the unconstitutional school safety zone exclusion area.
- Plaintiff John Doe 3 was accosted twice a year at his home by local Sheriffs who demanded information on his living situation and other personal information such as his phone numbers, email address, and online usernames.
- Plaintiff John Doe 4 was forced to leave his apartment in 2018 because it was allegedly within the unconstitutional school zone exclusion area. As a result, Plaintiff John Doe 4 was forced to live in a hotel for two and a half months in 2018 at a cost of $1200 per month. Plaintiff John Doe 4 also sustained three failure to register convictions, the most recent being in 2019. These convictions led to significant losses in wages and a deprivation of liberty for seven months imprisonment and two years of probation.
- Plaintiff John Doe 5 was prevented from purchasing a home in 2020 because it was allegedly within an unconstitutional school zone exclusion area. Furthermore, Plaintiff was prevented from obtaining employment because the job was allegedly within an unconstitutional school safety zone exclusion area.

Complaint, RE 1, PageID.4–5, 12–14.

Throughout this time, Defendants were subjected to numerous lawsuits, many in their official capacities, regarding the ongoing enforcement of Old SORA. Despite the knowledge of the ongoing enforcement of Old SORA, Defendants tacitly approved or acquiesced in the ongoing enforcement of the unconstitutional SORA provisions.

b. Procedural History of the Case

On August 17, 2021, Plaintiffs filed this action in the Federal District Court for the Eastern District of Michigan. (Complaint, RE 1). On November 11, 2021, Defendants filed their Motion to Dismiss in Lieu of an Answer. (Motion to Dismiss, RE 12). After a full briefing on the matter, the District Court granted Defendants' motion. (Order on Motion to Dismiss, RE 18). On September 22, 2022, Plaintiffs filed their Motion for Reconsideration, (Motion for Reconsideration, RE 19), which the Court denied on October 10, 2022. (Order Denying Reconsideration, RE 22). Plaintiffs timely filed their Notice of Appeal, RE 23.

IV. SUMMARY OF THE ARGUMENT

a. The District Court Erred by Holding that all Defendants are Entitled to Sovereign Immunity

The caselaw is unambiguous that states and their agencies may not be sued in federal courts under 42 U.S.C. § 1983 without their consent. The caselaw is equally unambiguous that state officials may be sued in federal court under 42 U.S.C. § 1983

regardless of their consent. Plaintiffs in this case sued the Defendants in their individual capacities for their personal conduct and the District Court erred by holding that the real Defendant in this case was the State of Michigan and therefore the Eleventh Amendment stripped it of jurisdiction over Plaintiffs' claims.

b. The District Court Erred by Holding that Defendants Snyder and Whitmer could not be Held Liable for their Roles in Perpetuating the Unconstitutional Enforcement of SORA

It is undisputed that in claims brought pursuant to 42 U.S.C. § 1983, defendants can only be held liable for their own unconstitutional conduct. However, state officials in supervisory positions can be found liable for the unconstitutional conduct of their subordinates where they tacitly approve of and acquiescence in that conduct. In this case, Defendants Snyder and Whitmer were aware of pervasive and ongoing unconstitutional conduct by their subordinates and tacitly approved of and acquiesced in that conduct by failing to issue communications, directives, orders or take other action to stop their subordinates from violating Plaintiffs' clearly established constitutional rights.

c. The District Court Erred by Holding that all Defendants were Entitled to Qualified Immunity on Plaintiffs' Fourteenth Amendment Void for Vagueness Challenge

The judicial varnish of qualified immunity provides that state officials are immune from constitutional claims brought under 42 U.S.C. § 1983 if they did not violate an individual's constitutional rights or if those rights were not clearly

established at the time of the violation. Generally, a plaintiff is required to identify a case with a similar fact pattern to establish that the constitutional right was clearly established. However, it is unnecessary that there be a case on point if no reasonable state official could have believed that their conduct was constitutional. In this case, the general principles of void for vagueness coupled with the complete inability of *anyone* to understand what the law required of them put the unconstitutionality of Old SORA beyond debate. Furthermore, prior to time period covered in Plaintiffs' lawsuit, SORA had already been declared unconstitutional.

V. ARGUMENT

a. Applicable Standard of Review

Given the procedural posture of this case, no facts are disputed, and this Court is presented exclusively with pure issues of law, which it reviews *de novo*. *Lee v. Willey*, 789 F.3d 673, 678 (6th Cir. 2015).

b. The District Court Erred by Holding that all Defendants are entitled to Sovereign Immunity

This District Court eschewed long-established and unambiguous precedent when it determined that Defendants were entitled to sovereign immunity. The Supreme Court has clearly established that a defendant is only entitled to sovereign immunity when they are state officials sued in their official capacities for monetary relief. *See, e.g.*, *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974) ("[W]e see that petitioners allege facts that demonstrate they are seeking to impose individual and personal liability

on the *named defendants* for what they claim . . . was a deprivation of federal rights by these defendants . . . [plaintiffs' claims] are not barred by the Eleventh Amendment."); *Hafer v. Melo*, 502 U.S. 21, 31 (1991) ("We hold that state officials, sued in their individual capacities, are 'persons' within the meaning of § 1983. The Eleventh Amendment does not bar such suits, nor are sate officers absolutely immune from personal liability under § 1983 by virtue of the 'official' nature of their acts."); *Lewis v. Clarke*, 581 U.S. 155, 166 (2017) ("Nor have we ever held that a civil rights suit under 42 U.S.C. § 1983 against a state officer in his individual capacity implicates the Eleventh Amendment and a State's sovereign immunity from suit.").

The District Court appears to have concluded that Defendants are entitled to sovereign immunity for three equally incorrect reasons. First, the District Court noted that, in the introduction to their Complaint, Plaintiffs alleged "for years after [*Does I on appeal*] the State of Michigan continued to subject tens of thousands of registrants to retroactive punishments, due process violations and 1st Amendment infringements under SORA." (Order on Motion to Dismiss, RE 18, PageID.243) (quoting Complaint RE 1, PageID.3).[1] Second, the District Court reasoned that the State Treasury *might* end up paying any damages award. (Order on Motion to

[1] The quotation is not exact, and the District Court's opinion incorrectly attributes it to RE 1, PageID.4, rather than PageID.3.

Dismiss, RE 18, PageID.243). Finally, the District Court seems to have incorporated a claim preclusion or waiver analysis. (Order on Motion to Dismiss, RE 18, PageID.244).

However, before addressing the three errors that led to the District Court's erroneous holding that all Defendants are entitled to sovereign immunity it is critical to address an error unique to Defendants Etue and Gaspar. Specifically, the District Court concluded that Plaintiffs properly pled a theory of supervisory liability against Defendants Etue and Gaspar, (Order on Motion to Dismiss, RE 18, PageID.238–240),[2] yet still determined they were entitled to Eleventh Amendment immunity. (Order on Motion to Dismiss, RE 18, PageID.242–247). This is not possible. Either Plaintiffs properly pled individual liability against Defendants Etue and Gaspar, or they did not. If Plaintiffs properly pled their claims of supervisory liability against Defendants Etue and Gaspar, as the District Court held and Plaintiffs agree, then their only claim to immunity is qualified. *See Hutsell v. Sayre*, 5 F.3d 996, 1003 (6th Cir. 1993) ("This leaves plaintiff's claim against the officers in their individual and personal capacities, for which the Eleventh Amendment provides no immunity.") (citations omitted). The District Court's determinations that Defendants Etue and Gaspar can be held liable for their personal involvement in the violation of Plaintiffs'

[2] Neither party appeals the District Court's determination of the supervisory liability of Defendants Etue and Gaspar.

constitutional rights, (Order on Motion to Dismiss, RE 18, PageID.238–240), but that "[c]learly, Plaintiffs complain that the State of Michigan harmed them", (Order on Motion to Dismiss, RE 18, PageID.243), are mutually exclusive and that error must be corrected.

The seminal case on qualified immunity for persons in positions such as Governor, is *Scheuer v. Rhodes*, 416 U.S. 232 (1974). That case, discussed extensively in *Hafer v. Melo*, 502 U.S. 21, 29–30 (1991) upon which both the District Court and Plaintiffs relied,[3] held that the governor of Ohio could be sued in his individual capacity under § 1983 for his involvement in the deployment of the Ohio National Guard to Kent State the Eleventh Amendment notwithstanding. *Scheuer*, 416 U.S. at 237–38. The District Court relied upon *Hafer supra* and *Lewis v. Clarke*, 137 S. Ct. 1285 (2017) for its prefatory discussion of Eleventh Amendment immunity. (Order on Motion to Dismiss, RE 18, PageID.242–243).

In this case Plaintiffs sued Defendants in their individual capacities, (RE 1, PageID.5): Plaintiffs pled and argued that Defendants implicitly approved or tacitly authorized the ongoing violations of their constitutional rights. (Complaint, RE 1, PageID.11–12); (Response to Motion to Dismiss, RE 15, PageID.187–195). Whether Defendants can be held liable therefore should turn on whether they were sufficiently involved in the violation of Plaintiffs' constitutional rights and whether

[3] (ECF No. 18, PageID.242); (ECF No. 15, PageID.195).

they are entitled to qualified immunity[4] – not whether Plaintiffs inadvertently sued the State of Michigan. *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974). Plaintiffs' theory of the case is that, at a *minimum*, Defendants: 1) knew that SORA was unconstitutional; 2) knew that SORA continued to be enforced against Plaintiffs by their subordinates over a period of nearly a decade (during their respective tenures as state officials); and 3) turned a blind eye to those violations of Plaintiffs' constitutional rights. Yet the District Court concluded that somehow, despite the clear allegations against Defendants in their individual capacities for their personal conduct, the State of Michigan was the real party in interest and therefore Defendants were entitled to sovereign immunity. (Order on Motion to Dismiss, RE 18, PageID.242).

Apparently from out of a concern that the State of Michigan will indemnify Defendants, the District Court reasoned that because "[a] damages award for the state's unconstitutional enforcement of a law would *likely* be paid from the state treasury . . . [it] is not one that could be implemented by these Defendants in their individual capacities." (Order on Motion to Dismiss, RE 18, PageID.243) (emphasis added). Without explanation, the District Court relied on *Turker v. Ohio Dep't of Rehab., & Corr.*, 157 F.3d 453 (6th Cir. 1998) to support its conclusion. While *Turker* mentions sovereign immunity, it does so only in passing, before proceeding

[4] Two issues discussed *infra*.

to the issue in dispute in that case, whether an Ohio plaintiff waived their right to file a federal § 1983 by filing a claim under the Ohio Court of Claims Act. *Id*. at 456–459. Moreover, in *Lewis* the Supreme Court explicitly addressed the relationship between indemnification and sovereign immunity holding, "[a]n indemnification statute such as the one at issue here does not alter the analysis. Clarke may not avail himself of a sovereign immunity defense." *Lewis*, 281 U.S. 155, 168 (2017).

The final error in its sovereign immunity analysis, the District Court *sua sponte* raised the issue of estoppel and/or claim preclusion reasoning that holding that because "Plaintiffs make no persuasive argument why—given the remedy in *Does I and* [sic.] *II* agreed to by the State of Michigan—these Defendants should be liable in their individual capacities for any potential damages award." (Order on Motion to Dismiss, RE 18, PageID.244). This reasoning by the District Court is a clear error warranting reversal for several reasons. First, no party had raised the issue of claim preclusion or waiver prior to the District Court's opinion. *Cf. Advanced Concrete Tools, Inc.*, 525 Fed. App'x 317, 319–20 (6th Cir. 2013) (noting that while courts have the authority to *sua sponte* "enter summary judgment on grounds not advanced by either or any party . . . [it] is only permitted where 'the losing party was on notice that [it] had to come forward with *all* of [its] evidence.'"). Second, sovereign

immunity is a jurisdictional issue,[5] and claim preclusion is a form of *res judicata*, which is a judicial doctrine founded in comity, efficiency, and finality. *See Dubac v. Green Oak Twp.*, 312 F.3d 736, 744 (6th Cir. 2002). Thus, claim preclusion has no bearing on Defendants' claim of sovereign immunity. Third, it is not within the discretion of any court to require a plaintiff with a legally cognizable injury and proper cause of action to provide a "persuasive argument" of why they should be permitted to bring their damages claims to a court of competent jurisdiction.[6] However, to the extent that this Court determines that Plaintiffs *do* need to provide a reason why they filed their lawsuit, notwithstanding the injunctive relief granted in the *Does I* and *Does II* cases, Plaintiffs have two points. First, as the Supreme Court stated in *Marbury v. Madison*, 5 U.S. 137 (1803) "[t]he very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury." *Id.* at 163. Second, nothing changed for Plaintiffs after *Does I* because that case was not a class action and Defendants refused to accept that Old SORA was constitutionally defective and the Defendants in *Does II* were sued in their official capacity for injunctive relief only. If the *Does II* plaintiffs sought monetary relief from the defendants in that case, their claims would have properly been barred by Eleventh Amendment immunity.

[5] U.S. CONST. amend. XI.
[6] Assuming they have properly pled injury, causation, redressability.

For these reasons, the District Court erred in granting Defendants sovereign immunity and this Court should reverse the opinion and order granting Defendants' Motion to Dismiss in Lieu of an Answer.

c. The District Court Erred by Holding that Defendants Snyder and Whitmer could not be Held Liable for their Roles in Perpetuating the Unconstitutional Enforcement of SORA

The caselaw is clear – there is no *respondeat superior* under § 1983 – defendants to § 1983 claims can only be held liable for their own unconstitutional conduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009). However, officials in supervisory positions can be held liable for their role in constitutional violations even if they were not present if they "implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Peatross v. City of Memphis*, 818 F.3d 233, 242 (6th Cir. 2016) (multiple citations omitted).

Cases from this Court illustrate that in cases such as this, supervisory liability must be predicated on deliberate indifference to pervasive and ongoing constitutional violations committed by a defendant's subordinates. For example, in *Peatross*, this Court affirmed the district court's decision that a police chief could be held for the unconstitutional shooting of Mr. Vanterpool because of his failure to train his subordinates to avoid using excessive force, failing to investigate allegations of excessive force, and an attempted cover-up related to a use of excessive force. *Peatross*, 818 F.3d at 242–243.

In *Doe v. City of Roseville*, 296 F.3d 431 (6th Cir. 2002) this Court explained what the plaintiff would have needed to show to survive a motion to dismiss:

> [I]t is not enough for the plaintiff to show that the defendant supervisors were sloppy, reckless or negligent in the performance of their duties. Rather, we said '[a] plaintiff must show that, in light of the information the defendants possessed, the teacher who engaged in sexual abuse showed a strong likelihood that he would attempt to sexually abuse other students, such that the failure to take adequate precautions amounted to deliberate indifference to the constitutional rights of students.' *Doe v. Claiborne County*, 103 F.3d 495, 513 (6th Cir. 1996). Put another way, we said, the plaintiff must show that the 'defendants' conduct amounted to a tacit authorization of the abuse.' *Id.*
>
> *Id.* at 439.

The District Court correctly concluded that Defendants Etue and Gaspar can be held liable for their roles in the violation of Plaintiffs' unconstitutional rights. (Order on Motion to Dismiss, RE 18, PageID.238–240).[7] However, when confronted with nearly identical allegations against Defendants Snyder and Whitmer, the District Court concluded that they could not be held liable. (Order on Motion to Dismiss, RE 18, PageID.240–241).

In their Complaint, Plaintiffs alleged:

> 40. Specifically, Defendants Gasper and Etue were both aware of the Act's unconstitutionality, based on several Federal Court rulings, and its continued enforcement by their subordinates. Despite knowing of these ongoing constitutional violation [sic.], Defendants Gasper and Etue failed to terminate the unconstitutional application of SORA by their subordinates.

[7] An issue not appealed by either party.

> 41. The failure of Defendants Gasper and Etue to issue any directive, policy, memoranda, or other form of communication instructing their subordinates that the enforcement of the 2006 and 2011 SORA amendments was unconstitutional, despite the knowledge that it was, encouraged and implicitly authorized the continued violations of Plaintiffs' rights by the Michigan State Police and other law enforcement agencies.
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> 42. The same is true of Defendants Snyder and Whitmer. Both Defendants Snyder and Whitmer were aware that SORA was unconstitutional, based on several Federal Court rulings, and that it was still being enforced by the Michigan State Police. Despite knowledge of this ongoing constitutional violation, Defendants Snyder and Whitmer failed to terminate the unconstitutional application of SORA by their subordinates or issue and [sic.] executive order, policy directive, or other communication instructing the Michigan State Police and other law enforcement agencies that the continued enforcement of the 2006 and 2011 SORA Amendments was unconstitutional.
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> (Complaint, RE 1, PageID.11–12).

Plaintiffs have clearly alleged that Defendants Snyder and Whitmer were aware that Old SORA was unconstitutional and that their subordinates continued to enforce it for years yet tacitly acquiesced in the continued enforcement of the unconstitutional provisions by failing to instruct their subordinates to terminate its enforcement, issue any communication to relevant law enforcement agencies regarding the unconstitutionality of Old SORA, or take *any* other action.

In *Peatross*, the police chief was on notice of the excessive force being employed by his subordinates through 54 shootings in a four-year period. *Peatross*, 818 F.3d at 238. Here, tens of thousands of putative plaintiffs were subjected to the unconstitutional requirements of Old SORA over the course of a decade.

(Complaint, RE 1, PageID.3). Much like the police chief in *Peatross* who was warned of the pattern of unconstitutional uses of force in his department, Defendants had concrete knowledge that the unconstitutional provisions of Old SORA continued to be enforced if for no other reason than their respective offices were subject to a never-ending barrage of lawsuits related to the enforcement of Old SORA over the years. *See, e.g.*, *Does I*, 101 F. Supp. 3d 672 (E.D. Mich. 2015); *Taylor v. Snyder*, No. 1:16-cv-14445, 2018 U.S. Dist. LEXIS 219977 (E.D. Mich. Oct. 22, 2018); *Man Lewis v. Snyder*, No. 1:17-cv-10808, 2018 U.S. Dist. LEXIS 114316 (E.D. Mich. June 6, 2018); *Roe v. Snyder*, 240 F. Supp. 3d 697 (E.D. Mich. 2017); *Mullins v. Whitmer*, No. 1:20-cv-602, U.S. Dist. LEXIS 237248 (W.D. Mich. Nov. 24, 2020). Furthermore, Defendants took no action to curb the ongoing unconstitutional enforcement of SORA leaving it instead to individual plaintiffs to bring lawsuits seeking declaratory, injunctive, and/or monetary relief.

Considering the facts in the light most favorable to Plaintiffs, Defendants Snyder and Whitmer both tacitly acquiesced in, and approved of, the violation of Plaintiffs' constitutional rights and therefore can be held personally liable for those violations.

d. The District Court Erred by Holding that all Defendants were Entitled to Qualified Immunity on Plaintiffs' Fourteenth Amendment Void for Vagueness Challenge

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This is broken down into two discrete questions that courts may consider in any order. *Pearson supra* at 236. First, if there was no constitutional violation, a defendant is entitled to qualified immunity. Second, if the constitutional right in question was not clearly established at the time, the defendants are also entitled to qualified immunity. *Id.* at 232. The sole issue on appeal here is whether the District Court correctly concluded that it was not clearly established as of August 17, 2018, that the school zone exclusion area provisions of Old SORA were unconstitutionally vague. (Order on Motion to Dismiss, RE 18, PageID.248–249).

Generally, a party seeking to overcome a claim of qualified immunity must present a case with similar facts demonstrating that the conduct in question was unconstitutional. *Guertin v. Michigan*, 912 F.3d 907, 932 (6th Cir. 2019). However, it is not always necessary that there is a case on point. *Id*. ("We do not require a prior, 'precise situation,' a finding that 'the very action in question has previously been held unlawful, or a 'case on point.' Instead, the test is whether 'existing

precedent must have placed the . . . constitutional question beyond debate.'") (multiple citation omitted) (alterations original). A right is clearly established for purposes of qualified immunity when, "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand what he is doing violates that right." *Baynes v. Cleveland*, 799 F.3d 600, 611 (6th Cir. 2015) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). As the Supreme Court has recognized, "The easiest cases don't even arise . . ." *United States v. Lanier*, 520 U.S. 259, 271 (1997) *accord Guertin v. Michigan*, 912 F.3d 907, 933 (6th Cir. 2019).

Considering the undeniable inability of anyone to determine how to conform their conduct to the law or for state officials to consistently enforce the law, it is unnecessary to identify an identical case. At a general level, the Supreme Court has explained:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined . . . we insist that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.
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> *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

At a more granular level, in *Colautti v. Franklin*, 439 U.S. 379 (1979), the Supreme Court found a statute imposing criminal liability on doctors who performed abortions unconstitutionally vague because "it condition[ed] criminal liability on confusing and ambiguous criteria." *Id.* at 394. Specifically, the statute in question had two ambiguities regarding the use of the terms "viable" and "may be viable" and

would "subject[] the physician to potential criminal liability without regard to fault." *Id.* Furthermore, the ambiguity of the terms "viable" and "may be viable" were compounded by the fact that "viable" was defined in the statute but "may be viable" was not. *Id.* at 392. In this case, analogous to the missing definition for "may be viable", Old SORA's student safety zone provisions lacked the necessary information to comply with the language of the statute by failing to provide registrants and those enforcing the scheme with the knowledge of what properties engaged the exclusion zone.

As of August 17, 2018, the unconstitutionality of criminal statutes that were incomprehensible was clearly established. *United States v. Kernell*, 667 F.3d 746, 750 (6th Cir. 2012) ("A criminal statute is unconstitutionally vague if it 'defines an offense in such a way that ordinary people cannot understand what is prohibited or if it encourages arbitrary or discriminatory enforcement.'") (quoting *United States v. Krumrei*, 258 F.3d 535, 537 (6th Cir. 2001)). In this case, Plaintiffs were told they could not live, work, or loiter within 1,000 feet of a school building which was defined as:

> A building, facility, structure, or real property owned, leased, or otherwise controlled by a school, other than a building, facility, structure, or real property that is no longer in use on a permanent or continuous basis, to which either of the following applies: (i) It is used to impart educational instruction. (ii) It is for use by students not more than 19 years of age for sports or other recreational activities.
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> MCL § 28.733 (repealed effective Mar. 24, 2021).

However, Plaintiffs were not provided with a list of properties meeting the criteria above, instructed regarding where on the property the 1,000 feet was to be measured from, or instructed whether the 1,000 feet was to be measured (as the crow flies or in road miles). As the Federal District Court for the Eastern District of Michigan found in 2015, "Michigan has not provided a list of school properties or parcel data to registrants or law enforcement." *Does I*, 101 F. Supp. 3d 672, 683 (E.D. Mich. 2015) (citing the record). The Court further recognized that no one knew how the 1,000 feet was to be measured and from where. *Id.* at 684 ("SORA does not provide sufficiently definite guidelines for registrants and law enforcement to determine from where to measure the 1,000 feet distance used to determine the exclusion zones, and neither the registrants nor law enforcement have the necessary data to determine the zones even if there were a consensus about how they should be measured."). None of these facts changed in the years after 2015.

In *Guertin*, this Court held that it was unnecessary for the plaintiffs to point to another case where state actors had created a water crisis and then lied to the people consuming that water, causing them to consume lead and other harmful contaminants. *Guertin*, 912 F.3d at 933. In this case, the Defendants operated the machinery that enforced the unconstitutional Old SORA, despite knowing that none of the registrants or persons enforcing the Act could possibly know where the school zone exclusion areas were or how the 1,000-foot exclusion zone was to be measured.

Here, as in *Guertin*, "[a]ny reasonable official should have known" that continued enforcement of a statutory provision that was impossible to comply with is unconstitutional under clearly established precedent.

There is also the issue of what "clearly established" means in different contexts. Plaintiffs submit that when it comes to void for vagueness, it is beyond question that a statute is unconstitutionally vague that any reasonable person can recognize that people of ordinary intelligence are incapable of understanding what the law requires of them. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Hill v. Colo.*, 530 U.S. 703, 732 (2000) ("A statute can be impermissibly vague . . . if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.") (citing *Chicago v. Morales*, 527 U.S. 41, 56–57 (1999)); *Columbia Natural Resources v. Tatum*, 58 F.3d 1101, 1105 (6th Cir. 1995) ("A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.") (citation and quotation omitted). Thus, in a case like this where no one can plausibly claim that the statute was capable of comprehension, it is not necessary to find another statute that uses a similar combination of words just like it was unnecessary for the plaintiff in *Hope v. Pelzer*, 536 U.S. 730 (2002) to identify another case where a prisoner had

been handcuffed to a hitching post rather than merely shackled to a fence or cells for extended periods of time. *Id.* at 742–743.

Even if Old SORA specifically defined from where on a property the 1,000 feet was to be measured and if the measurement was to be in road miles or as the crow flies, the statute would remain unconstitutionally infirm because that knowledge alone would not provide registrants or those enforcing Old SORA with the information necessary to comply with the statute. How was a registrant to know if a property was leased or "otherwise controlled" by a school? How was a registrant to know whether a nearby park that a school sports team practiced at was "otherwise controlled" by a school? This was apparently such a difficult proposition that neither Defendants nor the State of Michigan were never able to generate a document with the information.

Without the ability to understand what the law required of them, Plaintiffs were forced to guess and over police themselves to try and stay out of prison. Plaintiffs were often unable to obtain work or housing because it *might* be within a student safety exclusion zone. Some Plaintiffs who thought they were in compliance with the statute were subsequently forced to move because they were told that they were within a student safety exclusion zone.

Because no reasonable state official could have believed that the student safety exclusion zone was understandable for those subjected to it or for those enforcing it,

it was clearly established as unconstitutionally vague as of August 17, 2018, and the District Court erred in granting Defendants' Motion to Dismiss in Lieu of an Answer on the basis of qualified immunity for Plaintiffs' void for vagueness claim.

VI. CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court REVERSE the judgment of the District Court (Order on Motion to Dismiss, RE 18) on the issues of sovereign immunity, personal liability as to Defendants Snyder and Whitmer, and Defendants claim for qualified immunity related to Plaintiffs' Fourteenth Amendment void for vagueness claims and remand for further proceedings.

Dated: December 15, 2022.

By: /s/ Paul Matouka
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document complies with the type-volume limits set forth in Fed. R. App. P. 32 and the Appendix provided by the Sixth Circuit on Length Limits Stated in the Federal Rules of Appellate Procedure. Specifically, the contents of this brief, excluding those items identified in Fed. R. App. P. 32(f), is less than 30 pages.

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2022, I caused the above document(s) to be electronically filed with the Clerk of the Court using the CM/ECF System, which will provide electronic copies to counsel of record.

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ADDENDUM

Designation of Relevant Lower Court Records

- Complaint, RE 1, PageID.1–35;
- Motion to Dismiss, RE 12, PageID.72–111;
- Response to Motion to Dismiss, RE 15, PageID.181–206;
- Order on Motion to Dismiss, RE 18, PageID.220–251;
- Motion for Reconsideration, RE 19, PageID.252–277;
- Order Denying Reconsideration, RE 22, PageID.292–293.

Addendum

Unpublished Cases

John Does v. Whitmer

United States District Court for the Eastern District of Michigan, Southern Division

August 26, 2021, Decided; August 26, 2021, Filed

File No. 2:16-cv-13137

Reporter
2021 U.S. Dist. LEXIS 161623 *

JOHN DOES #1-6, on behalf of themselves and all others similarly situated, Plaintiffs, v. GRETCHEN WHITMER, Governor of the State of Michigan, and COL. JOSEPH GASPAR, Director of the Michigan State Police, in their official capacities, Defendants.

Counsel: **[*1]** For John Doe, 3-6, John Doe 1, Plaintiffs: Daniel S. Korobkin, American Civil Liberties Union Fund of Michigan, Detroit, MI; Miriam J. Aukerman, American Civil Liberties Union of Michigan, West Michigan Regional Office, Grand Rapids, MI; Paul D. Reingold, University of Michigan, Ann Arbor, MI; Alyson L. Oliver, Troy, MI.

For John Doe #2, John Doe#3, John Doe #4, John Doe #5, John Doe #6, Plaintiffs: Alyson L. Oliver, Troy, MI; Daniel S. Korobkin, American Civil Liberties Union Fund of Michigan, Detroit, MI; Miriam J. Aukerman, American Civil Liberties Union of Michigan, West Michigan Regional Office, Grand Rapids, MI; Paul D. Reingold, University of Michigan, Ann Arbor, MI.

For Richard Snyder, COL. KRISTE ETUE, Defendants: Joseph T. Froehlich, LEAD ATTORNEY, Michigan Attorney General, Complex Litigation Division, Lansing, MI; Jared D. Schultz, Michigan Departmetn of Attorney General, Lansing, MI; John S. Pallas, Michigan Department of Attorney General, Appellate Division, Lansing, MI; Mark E. Donnelly, Michigan Department of Attorney General, Complex Litigation Division, Lansing, MI.

Edward Burley, Interested Party, Pro se, MANISTEE, MI.

Curwood L. Price, Interested Party, Pro se, Detroit, **[*2]** MI.

Judges: Hon. Robert H. Cleland, United States District Judge. Mag. J. David R. Grand.

Opinion by: Robert H. Cleland

Opinion

AMENDED FINAL JUDGMENT

Whereas Plaintiffs filed a complaint in August 2016 and subsequently filed amended complaints challenging the constitutionality of the version of *Michigan's Sex Offenders Registration Act, Mich. Comp. Laws § 28.721 et seq.*, in effect at the time ("pre-2021 SORA" or "old SORA");

Whereas this Court on September 11, 2018, entered a stipulated order certifying a primary class of all people required to be registered under Michigan's pre-2021 SORA, and two "ex post facto" subclasses of individuals with offenses predating January 1, 2006, and April 12, 2011, R. 46;

Whereas this Court on May 23, 2019, entered a stipulated order declaring the 2006 and 2011 SORA amendments to be unconstitutional as to the ex post facto subclasses, R. 55;

Whereas this Court on February 14, 2020, issued an opinion and order granting Plaintiffs' motions for summary judgment as to Counts I through IV of the second amended complaint, and ordered Defendants to provide notice of the Court's ruling to all registrants, and all law enforcement officials and prosecuting attorneys tasked with the enforcement of SORA, R. 34;

Whereas this Court on April 6, 2020, subsequently entered **[*3]** an interim order suspending both enforcement of the old SORA and entry of the final judgment during the COVID-19 pandemic, R. 91;

Whereas the Michigan Legislature thereafter passed, and the Michigan governor signed, Michigan Public Act 295 of 2020 (HB 5679), which repealed certain provisions and amended other provisions of the old SORA and which took effect on March 24, 2021 ("new SORA")[1] ;

Whereas this Court on June 21, 2021, issued an opinion and order granting in part Plaintiffs' Motion for Judgment and Amended Motion for Judgment, R. 121;

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[1] As used in this judgment, the "new SORA" refers to the version of *Michigan's Sex Offenders Registration Act, M.C.L. § 28.721 et seq.*, in effect as of March 24, 2021, including both sections that were and were not amended by Public Act 295 of 2020.

Whereas this Court entered a final judgment on August 4, 2021, R.124, based on a proposed judgment provided by the parties;

Whereas the parties have informed the Court that there were two errors in the judgment they had presented, namely an incorrect effective date for the 2011 SORA amendments, and an error related to a statutory citation; and

Whereas the parties stipulate to amendment of the judgment and the subclass definition to reflect the correct effective date of the 2011 SORA amendments;

This Court now enters an amended final judgment as follows:

1. IT IS ORDERED that the definition of the "2006-2011 ex post facto subclass" is amended to be defined as members of the primary **[*4]** class who committed their offense or offenses requiring registration on or after January 1, 2006, but before July 1, 2011, and who have committed no registrable offense since.[2]

2. IT IS ORDERED that Plaintiffs' motion for declaratory relief (R. 62) is GRANTED. Michigan's pre-2021 SORA is DECLARED to be punishment. Thus, the ex post facto application of the 2006 and 2011 amendments is DECLARED unconstitutional, the 2011 amendments are DECLARED not severable from the pre-2021 SORA, and the pre-2021 SORA is therefore DECLARED NULL AND VOID as applied to conduct that occurred before March 24, 2021 to members of the ex post facto subclasses (defined as all people who are or will be subject to registration under SORA, who committed their offense or offenses requiring registration prior to July 1, 2011, and who have committed no registrable offense since). This declaration does not prevent the enforcement of any provision in the new SORA (as defined above and whose constitutionality was not at issue in this litigation) for conduct that occurs on or after March 24, 2021, against any registrant, including members of the ex post facto subclasses.

3. IT IS FURTHER ORDERED **[*5]** that Plaintiffs' motion for injunctive relief (R. 62) is GRANTED. Defendants and their agents are permanently ENJOINED from enforcing ANY provision in the pre-2021 SORA against members of the ex post facto subclasses, for conduct that occurred before March 24, 2021. As the Legislature has now amended SORA, and as this litigation did not address the constitutionality of the new SORA (as defined above), this injunction does not enjoin enforcement of any provision in the new SORA (as defined above) against members of the ex post facto subclasses.

4. IT IS FURTHER ORDERED that Plaintiffs' motion for partial summary judgment (R. 75) is GRANTED. The following provisions of the pre-2021 SORA are DECLARED unconstitutional, and Defendants and their agents are permanently ENJOINED from enforcing them against any registrant for any violation that occurred before March 24, 2021:

(a) Provisions Void for Vagueness:

i. the prohibition on working within a student safety zone, *Mich. Comp. Laws §§ 28.733-734*;

ii. the prohibition on loitering within a student safety zone, *Mich. Comp. Laws §§ 28.733-734*;

iii. the prohibition on residing within a student safety zone, *Mich. Comp. Laws §§ 28.733*, *28.735*;

iv. the requirement to report "[a]ll telephone numbers . . . routinely used by the individual," *Mich. Comp. Laws § 28.727(1)(h)* **[*6]** ;

v. the requirement to report "[t]he license plate number, registration number, and description of any motor vehicle, aircraft, or vessel . . . regularly operated by the individual," *Mich. Comp. Laws § 28.727(1)(j)*.

(b) Provisions Void for Strict Liability:

i. under the Due Process Clause of the U.S. Constitution, the old SORA must be interpreted as incorporating a knowledge requirement.

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[2] Throughout this case, the parties have used April 12, 2011 as the effective date of the 2011 amendments based on the parties' joint understanding that this was the correct effective date. That understanding was in turn based on the fact that the header to the 2011 public act lists April 12, 2011 as the statute's effective date. *See* 2011 Mich. Pub. Acts No. 17 at 1, https://www.legislature.mi.gov/documents/2011-2012/publicact/pdf/2011-PA-0017.pdf. However, that effective date applies only to the first enacting section of the public act, which amended *Mich. Comp. Laws § 28.725a*. *See id.* at 10. The remaining amendments made by the public act, which addressed several other sections of the statute, went into effect July 1, 2011. *See id.*; 2011 Mich. Pub. Acts No. 18 at 8, https://www.legislature.mi.gov/documents/2011-2012/publicact/pdf/2011-PA-0018.pdf . The error came to the attention of the parties in reviewing the new statute, which uses July 1, 2011 as the relevant date demarcating obligations that are not imposed on pre-2011 registrants. *See, e.g.*, *Mich. Comp. Laws § 28.727(1)(i)* (requiring registration of email addresses only for individuals required to be registered after July 1, 2011). The Court finds that it is appropriate to correct this error, as the Court's legal analysis bars retroactive enforcement of the old SORA to individuals whose offenses pre-date the 2011 amendments, and the vast majority of those amendments were, in fact, effective on July 1, 2011.

(c) Provisions Void under the *First Amendment*:

i. the requirement to "report in person and notify the registering authority . . . immediately after . . . [t]he individual . . . establishes any electronic mail or instant message address, or any other designations used in internet communications or postings," *Mich. Comp. Laws § 28.725(1)(f)*;

ii. the requirement to report "[a]ll telephone numbers . . . routinely used by the individual, *Mich. Comp. Laws § 28.727(1)(h)*;

iii. the requirement to report "[a]ll electronic mail addresses and instant message addresses . . . routinely used by the individual," *Mich. Comp. Laws § 28.727(1)(i)*;

iv. the retroactive incorporation of the lifetime registration's requirement to report "[a]ll electronic mail addresses and instant message addresses assigned to the individual . . . and all login names or other identifiers used by the individual when using any electronic mail address or instant messaging system," *Mich. Comp. Laws § 28.727(1)(i)*.

As this litigation did not address the constitutionality **[*7]** of the new SORA (as defined above), this injunction does not enjoin enforcement of any provision in the new SORA (as defined above).

5. IT IS FURTHER ORDERED that enactment of the new SORA does not moot this case. Absent this judgment, registrants could face prosecution for conduct that occurred before March 24, 2021, under provisions of the old SORA that have been found unconstitutional, or whose enforcement was barred while the Interim Order, R. 91, was in effect.

6. IT IS FURTHER ORDERED (consistent with this Court's Interim Order Delaying Entry of Final Judgment, Preliminarily Enjoining Reporting Requirements, and Directing Publication, R. 91, and this Court's Opinion and Order holding that registrants cannot be held strictly liable for old SORA violations, R. 84, which are incorporated by reference), that Defendants and their agents are permanently ENJOINED from enforcing registration, verification, school zone, and fee violations of the old SORA that occurred from February 14, 2020, until March 24, 2021. The Interim Order, R. 91, is hereby terminated. (This injunction does not prevent the enforcement of the new SORA (as defined above) for conduct that occurred on or after March **[*8]** 24, 2021.)

7. IT IS FURTHER ORDERED that Defendants shall PROVIDE NOTICE of this judgment to all registrants and to all law enforcement officials and prosecuting attorneys tasked with the enforcement of SORA within the period of time stated in the court-approved notice process. Within 7 days of entry of this judgment the parties shall submit for the Court's approval a joint proposed process for notice and proposed notices for registrants, prosecutors and law enforcement. If the parties cannot agree, they shall provide their respective proposed notice process and proposed notices.

8. IT IS FURTHER ORDERED that to enable post-judgment monitoring, Defendants shall provide class counsel with a class list and information about class members, consistent with this Court's June 21, 2021, Opinion and Order, R. 121. The parties have informed the Court that, given the complexities associated with obtaining certain types of data, the parties need time to assess the capabilities of the SORA database to generate such data, and then time to discuss what information will be provided, in what format, and on what timeline. Therefore, the parties shall have 7 days to submit a proposed order, or if they **[*9]** cannot agree, their respective proposed orders, regarding the provision of a class list plan for the Court's approval.

9. IT IS FURTHER ORDERED that any non-public information about individual registrants contained in the class list shall be confidential and shall not be further disclosed by class counsel, except that class counsel are authorized to share such information as needed to resolve an individual class member's situation, including with that class member and his/her counsel. Such information about individual registrants shall not be used for any purpose other than to represent the individual class members or the class.

10. IT IS FURTHER ORDERED that provision of the above information pursuant to paragraphs 8 and 9 shall not be deemed a violation of any law or regulation that might otherwise be read to protect the confidentiality of such information, including *Mich. Comp. Laws. §§ 28.214*, *28.728*, *28.730*.

11. IT IS FURTHER ORDERED that, in the interests of judicial economy and the conservation of resources that might otherwise be expended on litigation as to attorneys' fees and costs, the matter of attorneys' fees is referred to the magistrate judge for a settlement conference. Within 60 days after the conclusion of **[*10]** all appeals in this case, Plaintiffs will present a demand for fees and costs, with appropriate documentation, to Defendants, and Defendants will have 21 days to respond, after which, if the parties have not reached agreement, the magistrate judge will hold a settlement conference. If the parties are unable to resolve the attorney fee issues, the magistrate judge shall notify the Court that negotiations and mediation have failed, and Plaintiffs will

then have 60 days to file a petition for fees and costs. For purposes of this order, "the conclusion of all appeals" means the latest of:

(a) the expiration of 30 days to file a notice of appeal to the United States Court of Appeals for the Sixth Circuit of any final order of this Court, including this one and any final order of this Court after remand, in the event the case is remanded by a higher court;

(b) the expiration of time to file a petition for certiorari to the United States Supreme Court following a final decision by the Sixth Circuit on appeal from any final order of this Court;

(c) the denial of a petition of certiorari by the United States Supreme Court; or

(d) the disposition of this case by the United States Supreme Court, **[*11]** if the Supreme Court grants a petition for certiorari.

Rather than file a separate bill of costs, the parties shall include the taxable items with the other costs for which they seek an award on the schedule established in this order.

12. IT IS FURTHER ORDERED that the Court retains jurisdiction to ensure compliance with its orders and to resolve any post-judgment issues, including attorneys' fees and any issues related to notice.[3]

SO ORDERED.

/s/ Robert H. Cleland

Hon. Robert H. Cleland

U.S. District Judge

Dated: August 26, 2021

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[3] Parties shall first meet and confer regarding any issue that may require an amended judgment. If the parties cannot agree, a motion to modify the judgment may be filed under *Fed. R. Civ. Pro. 60(b)*. *See* R. 121, PageID.2457 n.3.

Man Lewis v. Snyder

United States District Court for the Eastern District of Michigan, Northern Division

June 6, 2018, Decided; June 6, 2018, Filed

CASE NO. 1:17-cv-10808

Reporter
2018 U.S. Dist. LEXIS 114316 *

MAN LEWIS, JR., Plaintiff, v. RICHARD SNYDER and COLONEL KRISTE K. ETUE, Defendants.

Subsequent History: Adopted by, Objection overruled by, Summary judgment granted, in part, summary judgment denied, in part by, Dismissed by, in part *Lewis v. Snyder, 2018 U.S. Dist. LEXIS 113841, 2018 WL 3359098 (E.D. Mich., July 10, 2018)*

On remand at, Judgment entered by *Lewis v. Whitmer, 2020 U.S. Dist. LEXIS 41108 (E.D. Mich., Mar. 10, 2020)*

Appeal dismissed by *Lewis v. Whitmer, 2020 U.S. App. LEXIS 42642 (6th Cir., Apr. 3, 2020)*

Counsel: **[*1]** Man Lewis, Jr., Plaintiff, Pro se, Saginaw, MI.

For Richard Snyder, Governor of the State of Michigan, Colonel Kriste K. Etue, Director of Michigan State Police, Defendants: Adam P. Sadowski, LEAD ATTORNEY, Jared D. Schultz, John S. Pallas, Michigan Department of Attorney General, Lansing, MI; Adam L.S. Fracassi, Michigan Attorney General, Lansing, MI.

Judges: Patricia T. Morris, United States Magistrate Judge. DISTRICT JUDGE THOMAS L. LUDINGTON.

Opinion by: Patricia T. Morris

Opinion

REPORT AND RECOMMENDATION ON MOTIONS FOR SUMMARY JUDGMENT

(Docs. 21, 25)

I. RECOMMENDATION

For the reasons that follow, **IT IS RECOMMENDED** that Plaintiff's Motion for Summary Judgment (Doc. 21) be **GRANTED IN PART** as to the retroactive application of *SORA*'s 2006 and 2011 Amendments, that Defendant's Motion for Summary Judgment (Doc. 25) be **GRANTED IN PART**, that relief be granted Plaintiff in accordance with the analysis set forth below, and that the remainder of Plaintiff's Complaint be **DISMISSED**.

II. REPORT

Plaintiff Man Lewis, Jr. ("Plaintiff")—who proceeds *pro se* and *in forma pauperis*—filed this *§ 1983* lawsuit on March 13, 2017, against Defendants Richard Snyder and Colonel Kriste K. Etue ("Defendants"). (Doc. 1). In it, he admits to three prior criminal convictions: (1) a **[*2]** 1978 conviction for procuring or inducing a person to engage in prostitution, *M.C.L. 750.455*; (2) a 1983 conviction for attempted criminal sexual conduct in the third degree, *M.C.L. 750.520d*; and (3) a 1983 conviction for criminal sexual conduct in the first degree, *M.C.L. 750.520b*. (Doc. 1 at 3). As a result of these convictions, he must comply with *Michigan's Sex Offender Registration Act ("SORA")*, *M.C.L. § 28.723, et seq.* In his view, however, because SORA emerged after his convictions, it constitutes an ex post facto law and is unconstitutional as applied to him. He seeks a declaration that the Act—"specifically, the retroactive application of the [2006 and 2011] amendments"—is unconstitutional as applied to him, and he wants this Court to enjoin Defendants from enforcing it against him. (Doc. 1 at 1-2). *See generally M.C.L. § 28.723, et seq.*; Mich. Pub. Acts 121, 127 (2005) (the 2006 amendments); Mich. Pub. Acts. 17, 18 (2011) (the 2011 amendments) Defendant filed a Response and Cross-Motion for Summary Judgment on March 25, 2018, (Doc. 25), to which Plaintiff replied, (Doc. 26). In his Reply, Plaintiff appears cognizant that Defendants move for summary judgment, and therefore I construe the filing also as a Response to Defendant's Motion. Accordingly, this case is ripe **[*3]** for report and recommendation.

In making his argument, Plaintiff draws heavily on the Sixth Circuit's opinion in *Does #1-5 v. Snyder, 834 F.3d 696 (6th Cir. 2016)*, *reh'g denied* (Sept. 15, 2016), which held, among other things, that:

> Michigan's SORA imposes punishment. . . . [T]he fact

> that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the *Ex Post Facto clause*. . . . The retroactive application of SORA's 2006 and 2011 amendments to Plaintiffs is unconstitutional, and it must therefore cease.

Id. at 705-06. *See generally* (Doc. 1).

Plaintiff's instant Motion outlines particular harms caused by SORA's registration requirements. He avers, for instance, that police officers and members of the general public have harassed him after finding his address and photograph on the registry. (Doc. 21 at 9-10). His registration status also causes significant "mental stress" because he encounters seemingly insurmountable difficulty securing housing or employment. (*Id.* at 10-17).[1] Defendant's Motion concedes that SORA's 2006 and 2011 amendments should not apply to Plaintiff, but maintains that the registration requirements predating these amendments do not constitute ex post facto punishment, and therefore **[*4]** should continue to retroactively apply. (Doc. 25).

The Constitution prohibits states from passing "any . . . ex post facto Law," codifying the foundational principle that criminal punishment must not issue without prior notice. *U.S. Const. art. I, § 10, cl. 1*; *see Calder v. Bull, 3 U.S. 386, 390, 1 L. Ed. 648, 3 Dall. 386 (1798)* ("[T]he plain and obvious meaning and intention of the prohibition is this; that the Legislatures of the several states, shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it."). In determining whether a law punishes, the Supreme Court employs a two-part test: (1) "whether the legislature intended a civil or criminal consequence," and; (2) if the legislature intended a civil consequence, whether the "law's substance" is punitive. *Smith v. Doe, 538 U.S. 84, 107, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003)*. The following factors guide this Court's evaluation of the latter prong:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative **[*5]** purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). The Supreme Court's opinion in *Smith v. Doe*—which addressed whether the retroactive reach of a similar Alaskan sex-offender registration scheme violated the *Constitution's Ex Post Facto clause*—is uniquely instructive to the analysis that follows. *See generally 538 U.S. at 89-91*. In general, "states are free to pass retroactive sex-offender registry laws and . . . those challenging an ostensibly non-punitive civil law must show by the 'clearest proof' that the statute in fact inflicts punishment." *Does #1-5*, *834 F.3d at 705*.

Plaintiff agrees with the Sixth Circuit's rationale in *Does #1-5* that the Michigan legislature did not intend SORA to be punitive. *See* (Doc. 1 at 8) (acknowledging that SORA "evinces no punitive intent"). The only remaining issue, therefore, is whether, as applied to Plaintiff, SORA's registration requirements, *M.C.L. §§ 28.723-30*, impose ex post facto punishment under the guise of civil regulation.

At the outset, I note that Plaintiff offers no legal authority for the proposition that retroactive application of SORA's registration **[*6]** requirements, as established prior to its 2006 and 2011 amendments, violate the Constitution or any law. *See Hall v. Washington, No. 16-CV-11812, 2018 U.S. Dist. LEXIS 65843, 2018 WL 1875598, at *4 (E.D. Mich. Apr. 19, 2018)* (observing that *Does #1-5* "only addressed whether the retroactive application of certain SORA amendments constituted an ex post facto punishment in contravention of the Constitution"); *cf. Spencer v. Snyder, No. 1:16-CV-1465, 2016 U.S. Dist. LEXIS 187546, 2016 WL 9110367, at *3 (W.D. Mich. Dec. 29, 2016)*, *R. & R. adopted*, *No. 1:16-CV-1465, 2017 U.S. Dist. LEXIS 87763, 2017 WL 2472599 (W.D. Mich. June 8, 2017)* (dismissing the plaintiff's case because he "failed to identify . . . any authority holding or supporting the proposition that the retroactive application of the registration fee provision violates the *ex post facto clause* or any other law or constitutional provision"). As the Supreme Court reasoned in *Smith*, sex-offender registries are a relatively novel development lacking the historically-recognized trademarks of punishments such as incarceration, shaming, or banishment. *Smith, 538 U.S. at 98* ("Our system does not treat

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[1] Though Plaintiff's Complaint mentions the 1999 and 2004 amendments to SORA in passing, it focuses on the unconstitutionality of retroactive application of SORA's 2006 and 2011 amendments. His instant Motion also highlights factual scenarios which appear more relevant to the registration requirements imposed by Section II of SORA. *See M.C.L. § 28.723-30*. As such, I read Plaintiff's Complaint and Motion as challenging SORA's 2006 and 2011 amendments as well as the registration requirements predating those amendments in *M.C.L. § 28.723-30*. *E.g., Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (pro se filings must be liberally construed).

dissemination of truthful information in furtherance of a legitimate governmental objective as punishment."). Like the Alaskan scheme addressed in *Smith*, registrants remain free to live and work as they please. *Id. at 102*. Although Michigan's SORA requires in-person registration, and therefore may arguably impose an affirmative duty upon registrants, *see M.C.L. § 28.725*, the regulatory **[*7]** scheme at issue remains sufficiently distinct from superficially analogous punitive schemes such as probation or supervised release, for registrants retain agency over their own life choices and activities. *See Smith, 538 U.S. at 87* ("While registrants must inform the authorities after they change their facial features, borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so."); *Snyder, 834 F.3d at 703* (distinguishing SORA from the Alaskan scheme in *Smith* because of the 2006 and 2011 amendments, but not the registration requirement); *cf. Hatton v. Bonner, 356 F.3d 955, 964 (9th Cir. 2004)* (finding an in-person registration requirement did not, alone, impose an affirmative disability or restraint on registrants). Although Plaintiff blames SORA for his housing and occupational difficulties, there is no evidence on record that such disadvantages "would not have otherwise occurred through the use of routine background checks by employers and landlords." *Smith, 538 U.S. at 100*. Indeed, Plaintiff's conviction is, in itself, public information that other citizens could discover without the convenience of a registry. Most importantly, SORA is linked to the rational, nonpunitive purpose of promoting public safety by easing the public's access to relevant information **[*8]** about those convicted of certain dangerous crimes. *See id. at 102-03*. Like the Alaskan scheme *Smith* upheld, the burden SORA imposes is not excessive in relation to the aim of promoting this nonpunitive purpose.

In sum, the *Mendoza-Martinez* factors militate against a finding that SORA's registration requirements constitute punishment. *Accord, e.g., Doe v. Bredesen, 507 F.3d 998, 1007 (6th Cir. 2007)* (collecting cases and noting "that our sister circuits have likewise consistently and repeatedly rejected ex post facto challenges to state statutes that retroactively require sex offenders convicted before their effective date to comply with . . . registration, surveillance, or reporting requirements"). Their retroactive application to Plaintiff does not, therefore, violate the Constitution's prohibition on ex post facto laws.

For these reasons, I conclude that Plaintiff's Motion for Summary Judgment (Doc. 21) be **GRANTED IN PART** as to the retroactive application of *SORA*'s 2006 and 2011 Amendments, that Defendant's Motion for Summary Judgment (Doc. 25) be **GRANTED IN PART**, that relief be granted Plaintiff in accordance with the analysis set forth above, and that the remainder of Plaintiff's Complaint be **DISMISSED**.

III. REVIEW

Pursuant to *Rule 72(b)(2) of the Federal Rules of Civil Procedure*, "[w]ithin 14 days after being served with a copy **[*9]** of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy." *Fed. R. Civ. P. 72(b)(2)*. *See also 28 U.S.C. § 636(b)(1)*. Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed.2d 435 (1985)*; *Howard v. Sec'y of Health & Human Servs., 932 F.2d 505 (6th Cir. 1991)*; *United States v. Walters, 638 F.2d 947 (6th Cir. 1981)*. The parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. *Willis v. Sec'y of Health & Human Servs., 931 F.2d 390, 401 (6th Cir. 1991)*; *Smith v. Detroit Fed'n of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987)*. Pursuant to *E.D. Mich. LR 72.1(d)(2)*, a copy of any objections is to be served upon this magistrate judge.

Date: June 6, 2018

/s/ Patricia T. Morris

Patricia T. Morris

United States Magistrate Judge

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Mullins v. Whitmer

United States District Court for the Western District of Michigan, Southern Division

November 24, 2020, Decided; November 24, 2020, Filed

Case No. 1:20-cv-602

Reporter
2020 U.S. Dist. LEXIS 237243 *; 2020 WL 7390496

THOMAS FRANKLIN MULLINS, Plaintiff, v. GRETCHEN WHITMER, Governor of the State of Michigan and JOSEPH GASPER, Director of the Michigan State Police, Defendants.

Counsel: **[*1]** Thomas Franklin Mullins, plaintiff, Pro se, Portage, MI.

For Gretchen Whitmer, Governor of the State of Michigan, in her official and individual capacity, Joseph Gasper, Director of the Michigan State Police, in his official and individual capacity, defendants: Jessica Mullen, MI Dept Attorney General (Labor/Unemployment-Detrt), Labor Division-Unemployment Unit, Detroit, MI; Joseph T. Froehlich, MI Dept Attorney General (State Operations), State Operations Division, Lansing, MI.

Judges: SALLY J. BERENS, UNITED STATES Magistrate Judge. Hon. Hala Y. Jarbou.

Opinion by: SALLY J. BERENS

Opinion

REPORT AND RECOMMENDATION

Plaintiff, Thomas Mullins, a convicted sex offender subject to Michigan's Sex Offender Registration Act, *see* Mich. Comp. Laws § 28.721 et seq. (SORA), filed a pro se civil rights complaint against Defendants Governor Gretchen Whitmer and Col. Joseph Gasper, Director of the Michigan State Police, in their official and individual capacities, seeking monetary, declaratory and injunctive relief. Mullins claims that Defendants applied amendments to SORA to him retroactively in violation of the Ex Post Facto clause of the United States Constitution.

This matter is now before the Court on Defendants' motion to dismiss or to transfer the case to the Eastern District of Michigan, where Mullins is a **[*2]** member of a pending class action, *John Does #1-6 v. Snyder, et al.*, No. 2:16-cv13137 (E.D. Mich.), which seeks the same injunctive relief Mullins seeks in this case. (ECF No. 15.) Mullins has not responded to Defendants' motion. Also before the Court is Mullins's motion for summary judgment. (ECF No. 17.) Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that Defendants' motion be **GRANTED** and the case **dismissed**. I further recommend that Mullins' motion for summary judgment be **DENIED**.

I. Background

In 1993, Mullins was convicted of two counts of Criminal Sexual Conduct, Mich. Comp. Laws § 750.520, in the Allegan County Circuit Court and sentenced to a term of imprisonment. SORA had not been enacted when Mullins was convicted and sentenced. SORA was enacted in 1994 and became effective on October 1, 1995. Mullins subsequently completed his parole and was placed on the Michigan Sex Offender Registration. Under SORA as originally enacted, Mullins was required to register as a sex offender only one time and to pay a one-time $50.00 registration fee. (ECF No. 1 at PageID.3-4.)

In 2006, SORA was amended to include geographic exclusion zones, which prohibit sex offenders from working, living, and "loitering" within 1,000 feet of a school. In **[*3]** 2011, SORA was amended again and applied retroactively to Mullins. The 2011 amendment created a tiered classification system, pursuant to which Mullins's registration requirement was increased from a period of 10 years to lifetime. The 2011 amendment also required Mullins to register quarterly and pay a $50.00 fee each time he registered. (*Id.*)

In August 2016, the Sixth Circuit held in *Does #1-5 v.* Snyder, 834 F.3d 696 (6th Cir. 2016) ("*Does I*"), that the 2006 and 2011 amendments to SORA constituted punishment and, therefore, retroactive application violated the Ex Post Facto clause. In 2016, shortly after the Sixth Circuit decided *Does I*, a group of Plaintiffs filed a class action complaint in the Eastern District of Michigan seeking to have SORA declared unconstitutional and unenforceable. *John Does #1-6 v. Snyder, et al.*, No. 2:16-cv13137 (E.D. Mich.) ("*Does II*"). On September 11, 2018, the *Does II* court entered a stipulated order certifying the class under Federal Rule of Civil Procedure 23(b)(2). (*Does II* Sept. 11, 2018 Order, ECF No. 15-3.) Mullins is a member of two classes under the

September 11, 2018 Order: (1) the "primary class," which includes "all people who are or will be subject to registration under Michigan's Sex Offenders Registration Act"; and (2) the "pre-2006 **[*4]** ex post facto subclass," which includes "members of the primary class who committed their offense or offenses requiring registration before January 1, 2006, and who have committed no registrable offense since." (*Id.* at PageID.133.)

II. Motion Standard

A *Rule 12(b)(6)* motion to dismiss for failure to state a claim on which relief may be granted tests the legal sufficiency of a complaint by evaluating its assertions in a light most favorable to Plaintiff to determine whether it states a valid claim for relief. *See In re NM Holdings Co., LLC, 622 F.3d 613, 618 (6th Cir. 2000)*.

Pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a claim must be dismissed for failure to state a claim on which relief may be granted unless the "[f]actual allegations [are] enough to raise a right for relief above the speculative level on the assumption that all of the complaint's allegations are true." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. As the Supreme Court more recently held, to survive a motion to dismiss, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. This plausibility standard "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* If the complaint simply pleads facts that are "merely **[*5]** consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* As the Court further observed, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id. at 678-79*.

When resolving a motion to dismiss pursuant to *Rule 12(b)(6)*, the Court may consider the complaint and any attached exhibits, public records, items appearing in the record of the case, and exhibits attached to the defendant's motion to dismiss provided they are referenced in the complaint and central to the claims therein. *See Bassett v. Nat'l Collegiate Athletic Ass'n., 528 F.3d 426, 430 (6th Cir. 2008)*.

III. Discussion

A. *Eleventh Amendment* Immunity

Mullins seeks to recover from Defendants the registration fees, other than the initial fee, that he has been required to pay for quarterly registration under the SORA amendments. Defendants argue that the *Eleventh Amendment* bars Mullins's claim against them in their official capacities for money damages. Although Mullins did not respond to Defendants' motion to dismiss, he states in his reply in support of his motion for summary judgment that he has not requested monetary relief against Defendants in their official capacities. (EF No. 22 at PageID.190.)

As Mullins admits that he **[*6]** is not seeking damages against Defendants in their official capacities, any official-capacity claim against them for damages may be deemed abandoned. Even if not abandoned, any such claim is subject to dismissal. An official capacity suit is no different than a suit against the state itself. *See Matthews v. Jones, 35 F.3d 1046, 1049 (6th Cir. 1994)* ("A suit against an individual in his official capacity is the equivalent of a suit against the governmental entity.") Because the *Eleventh Amendment* prohibits suits for damages against states in federal court, *see Quern. v. Jordan, 440 U.S. 332, 342, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979)*, damage claims against state officials in their official capacities are also barred by the *Eleventh Amendment*. S*ee Ernst v. Rising, 427 F.3d 351, 358 (6th Cir. 2005)* (noting that *Eleventh Amendment* immunity "applies to actions against state officials sued in their official capacity for money damages") (citing *Lapides v Bd. of Regents, 535 U.S. 613, 616, 623, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002))*.

B. Individual Capacity Damage Claims

Defendants further argue that Mullins's claim for damages against them in their individual capacities must be dismissed because Plaintiff fails to allege that they were personally involved in the alleged constitutional violations, and there is no factual basis for supervisory liability. That is, Plaintiff only alleges that Defendants are high-level state officials responsible for the overall operation of the State of Michigan and the Michigan **[*7]** State Police, including implementation of the SORA amendments.

It is well established in the Sixth Circuit that, to state a cognizable claim under Section 1983, a plaintiff must allege personal involvement by each of the named defendants. *See Copeland v. Machulis, 57 F.3d 476, 481 (6th Cir. 1995)*. Liability under Section 1983 must be based on more than merely the right to control employees. *Polk Co. v. Dodson, 454 U.S. 312, 325-26, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981)*; *Monell v. Department of Soc. Servs. of the City of*

New York, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Thus, Section 1983 liability cannot be premised upon mere allegations of respondeat superior. *Monell, 436 U.S. at 691*; *Polk, 454 U.S. at 325*. A party cannot be held liable under Section 1983 absent a showing that the party personally participated in, or otherwise authorized, approved, or knowingly acquiesced in, the allegedly unconstitutional conduct. S*ee, e.g., Leach v. Shelby Co. Sheriff, 891 F.2d 1241, 1246 (6th Cir. 1989)*; *Hays v. Jefferson, 668 F.2d 869, 874 (6th Cir. 1982)*.

Because Mullins does not allege that Defendants were personally involved in collecting and enforcing the SORA registration fee against Mullins, his claims against them for damages must be dismissed.

C. Declaratory and Injunctive Relief

Defendants argue that, because Mullins is a member of the class in *Does II*, the Court should dismiss the case or, alternatively, transfer it to the Eastern District of Michigan where *Does II* is pending. The district court in *Does II* certified the class pursuant to *Federal Rule of Civil Procedure 23(b)(2)*, which "allows class treatment when 'the party opposing the class has acted or refused **[*8]** to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.'" *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)* (quoting *Fed. R. Civ. P. 23(b)(2)*). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Id. at 361* (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, *84 N.Y.U. L. Rev. 97, 132 (2009)*). A *Rule 23(b)(2)* class is considered "mandatory" because "potential class members do not have an automatic right to notice or a right to opt out of the class." *Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 645 (6th Cir. 2006)*.

In certifying the *Doe II* class and subclasses, the district judge found that "prosecuting separate actions by or against individual class members would create a risk of 'inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class.'" (ECF No. 15-3 at PageID.134 (quoting *Fed. R. Civ. P. 23(b)(1)(A)*).) The court also found the requirements of *Rule 23(b)(2)* satisfied because the parties opposing class certification—the same parties in this case, the Governor of Michigan and the Director **[*9]** of the Michigan State Police—"acted or refused to act on grounds that apply generally to the class, so that final injunctive relief would be appropriate respecting the class as a whole if plaintiffs prevail in demonstrating that those actions or inactions violate plaintiffs' rights." (*Id.*) Because Mullins seeks the same relief in this case that is at issue in *Does II*, allowing Mullins to maintain this case individually would be contrary to the purposes of *Federal Rule of Civil Procedure 23(b)(2)*. Moreover, Mullins, as a member of the *Does II* class, has already received the relief sought in this case. On February 20, 2020, that court issued an opinion and order granting the relief Plaintiff seeks in this case. In particular, the court stated:

> IT IS ORDERED that Plaintiffs' motion for declaratory and injunctive relief (ECF No. 62) is GRANTED. Michigan's SORA is DECLARED NULL AND VOID as applied to members of the ex post facto subclasses (any registrant whose offense requiring them to register, and who has not committed a subsequent offense, occurred prior to April 12, 2011). Defendants and their agents will be ENJOINED from enforcing ANY provision of SORA against the ex post facto subclasses.

Doe v. Snyder, 449 F. Supp. 3d 719, 737-38 (E.D. Mich. 2020).

Dismissal of this action would **[*10]** be consistent with the result in *Spencer v. Gasper, No. 1:19-cv-201, 2020 U.S. Dist. LEXIS 177775, 2020 WL 5757383 (W.D. Mich. Sept. 28, 2020)*. The plaintiff in *Spencer* was in the same position as Mullins—a convicted sex offender who was also part of the ex post facto subclass in *Does II*. Chief Judge Jonker concluded that dismissal was appropriate because *Rule 23(b)(2)* "exists in order to ensure against inconsistent judgments." *Id.* at *2. Judge Jonker further noted that the district judge presiding over *Does II* had dismissed two individual actions, even though the plaintiffs had argued that they sought a different, or broader, form of relief than the class. *Id.* (citing *Doe v. Michigan*, No. 19-10364 (E.D. Mich. Sept. 16, 2019), and *Cain v. Michigan*, No. 19-10243 (E.D. Mich. June 5, 2019)).

In his summary judgment reply, Mullins argues that he is not a member of the class in *Does II*, has never received notice of the class action, and he may opt out of the class. As explained above, however, Mullins *is* a member of the *Does II* class and, because the class is certified as a *Rule 23(b)(2)* class, Mullins was not entitled to notice, nor may he opt out of the class. Mullins also cites *Coates v. Snyder*, No. 1:17-cv-1064 (W.D. Mich.), in which Magistrate Judge Kent entered a stipulated final judgment **[*11]** granting the individual plaintiff injunctive relief similar to that sought by Mullins in this case. The key distinction between this case and *Coates* is that the *Does II* class had not been certified at the time the *Coates*

stipulated final judgment was entered. In other words, unlike Mullins, the plaintiff in *Coates* was not a member of the *Does II* class when the stipulated final judgment was entered.

IV. Conclusion

For the foregoing reasons, I recommend that Defendants' motion to dismiss (ECF No. 15) be **granted** and that this case be **dismissed**. I further recommend that Plaintiff's motion for summary judgment (ECF No. 17) be **denied**.

NOTICE

OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within 14 days of the date of service of this notice. *28 U.S.C. § 636(b)(1)(C)*. Failure to file objections within the specified time waives the right to appeal the District Court's order. *See Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *United States v. Walters, 638 F.2d 947 (6th Cir. 1981)*.

Dated: November 24, 2020

/s/ Sally J. Berens

SALLY J. BERENS

U.S. Magistrate Judge

Taylor v. Snyder

United States District Court for the Eastern District of Michigan, Northern Division

October 22, 2018, Decided; October 22, 2018, Filed

CASE NO. 1:16-cv-14445

Reporter
2018 U.S. Dist. LEXIS 219977 *

JAMES TAYLOR, III, Plaintiff, v. RICHARD SNYDER, and KRISTE ETUE, Defendants.

Subsequent History: Adopted by, Summary judgment granted by, in part, Dismissed by *Taylor v. Snyder, 2019 U.S. Dist. LEXIS 10592 (E.D. Mich., Jan. 23, 2019)*

Prior History: *Taylor v. Snyder, 2017 U.S. Dist. LEXIS 139784 (E.D. Mich., Aug. 9, 2017)*

Counsel: **[*1]** James Taylor, III, Plaintiff, Pro se, Saginaw, MI.

For Richard Snyder, Governor of the State of Michigan, Kristie Etue, Director of the Michigan State Police, Defendants: Adam P. Sadowski, LEAD ATTORNEY, Michigan Department of Attorney General, Lansing, MI; Adam L.S. Fracassi, Michigan Attorney General, Lansing, MI.

Judges: Patricia T. Morris, United States Magistrate Judge. DISTRICT JUDGE THOMAS L. LUDINGTON.

Opinion by: Patricia T. Morris

Opinion

REPORT AND RECOMMENDATION ON MOTIONS FOR SUMMARY JUDGMENT (R. 40, 43)

I. RECOMMENDATION

For the reasons that follow, **IT IS RECOMMENDED** that Plaintiff's Motion for Summary Judgment (R.40) be **GRANTED IN PART** as to the retroactive application of SORA's 2006 and 2011 Amendments, that Defendant's Motion for Summary Judgment (R.43) be **GRANTED IN PART**, that relief be granted Plaintiff in accordance with the analysis set forth below, and that the remainder of Plaintiff's Complaint be **DISMISSED**.

II. REPORT

Plaintiff James Taylor, III ("Plaintiff")—who proceeds *pro se* and *in forma pauperis*—filed this *§ 1983* lawsuit on December 21, 2016, against Defendants Richard Snyder and Kriste K. Etue ("Defendants"). (R.1). In it, he admits to a 2008 prior criminal sexual conduct — second degree conviction in violation of *M.C.L. 750.520c*. (R.1 at **[*2]** PageID.4.) As a result of this conviction, and since the offense was actually committed in 2005, he must comply with *Michigan's Sex Offender Registration Act ("SORA"), M.C.L. § 28.723, et seq.* He seeks a declaration that the Act, specifically, the retroactive application of the 2006 and 2011 amendments, is unconstitutional as applied to him, and he wants this Court to enjoin Defendants from enforcing it against him. (R.1 at PageID.18). *See generally M.C.L. § 28.723, et seq.*; Mich. Pub. Acts 121, 127 (2005) (the 2006 amendments); Mich. Pub. Acts. 17, 18 (2011) (the 2011 amendments) Defendant filed a Response and Cross-Motion for Summary Judgment on August 1, 2018. R.43.) Accordingly, this case is ripe for report and recommendation.

In making his argument, Plaintiff draws heavily on the Sixth Circuit's opinion in *Does #1-5 v. Snyder, 834 F.3d 696 (6th Cir. 2016)*, *reh'g denied* (Sept. 15, 2016), which held, among other things, that:

> Michigan's SORA imposes punishment. . . . [T]he fact that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the *Ex Post Facto clause*. . . . The retroactive application of SORA's 2006 and 2011 amendments to Plaintiffs is unconstitutional, and it must therefore cease.

Id. at 705-06. (R.1, 40). Defendants **[*3]** concede that "the Sixth Circuit opinion is binding precedent and Defendants would agree that the 2006 and 2011 amendment to SORA cannot be applied to Plaintiff at this time." (R.43 at PageID.217.)

For these reasons, I conclude that Plaintiff's Motion for

Summary Judgment (R.43) be **GRANTED IN PART** as to the retroactive application of SORA's 2006 and 2011 Amendments, that Defendants should be enjoined from enforcing the same against Plaintiff, and that Defendant's Motion for Summary Judgment (R. 43) be **GRANTED IN PART**, such that Plaintiff's relief be granted with Defendant's caution that the judgment in this case should clarify that Plaintiff must still comply with other requirements under SORA but that Plaintiff would not be subject to any requirements contained exclusively in the 2006 and 2011 amendments.

III. REVIEW

Rule 72(b)(2) of the Federal Rules of Civil Procedure states that "[w]ithin 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy." *Fed. R. Civ. P. 72(b)(2)*; see also *28 U.S.C. § 636(b)(1)*. Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn, 474 U.S. 140, 155, 106 S. Ct. 466, 88 L. Ed. 2d 435*; *Howard v. Sec'y of Health & Human Servs., 932 F.2d 505, 508 (6th Cir. 1991)*; *United States v. Walters, 638 F.2d 947, 950 (6th Cir. 1981)*. The **[*4]** parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. *Willis v. Sullivan, 931 F.2d 390, 401 (6th Cir. 1991)*; *Smith v. Detroit Fed'n of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987)*. According to *E.D. Mich. LR 72.1(d)(2)*, a copy of any objections is to be served upon this magistrate judge.

Any objections must be labeled as "Objection No. 1," "Objection No. 2," etc. Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. *Fed. R. Civ. P. 72(b)(2)*; *E.D. Mich. LR 72.1(d)*. The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," etc. If the Court determines that any objections are without merit, it may rule without awaiting the response.

Date: October 22, 2018

/s/ Patricia T. Morris

Patricia T. Morris

United States Magistrate Judge

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