No. 22-1925

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

John Doe 1-5,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Victoria Roberts

BRIEF FOR DEFENDANTS-APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested; the briefs adequately discuss the legal arguments.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over the federal questions alleged in the complaint. 28 U.S.C. § 1331. On September 8, 2022, the District Court entered its opinion and order granting Defendants' motion to dismiss. (Opinion and Order 09/08/2022, R. 18, Page ID #220–35.) Relying on Fed. R. Civ. P 59, Plaintiffs requested the District Court reconsider the September 8, 2022 Opinion and Order. (Rule 59 Motion 09/22/2022, R. 19, Page ID #252.) The District Court denied Plaintiffs' Rule 59 Motion for reconsideration. (Order 10/12/2022, R. 22, Page ID # 292.) On the same day, Plaintiffs filed a timely notice of appeal. (Notice of Appeal, R. 23, Page ID # 294.) Accordingly, the Sixth Circuit has proper appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. The Eleventh Amendment bars all claims seeking relief under any theory of liablity in federal court where a state is the real party in interest. The District Court found that the real party in interest here is the State of Michigan, not Defendants in their individual capacities, regardless of the label that Plaintiffs affixed to their lawsuit. Does the Eleventh Amendment apply to claims against the State of Michigan?

2. Under §1983, there is no supervisory liability – a person is only liable for the person's own actions and a failure to act is not sufficient to establish liablity. Plaintiffs claim Defendants failed to stop their subordinates from violating the Plaintiffs' constitutional rights. Can Defendants be held liable under § 1983?

3. Qualified immunity shields government officials from liablity if their conduct does not violate clearly established statutory or constitutional rights. There was no clearly established right related to the enforcement of the Sex Offenders Registration Act that was violated by Defendants. Are Defendants entitled to qualified immunity?

INTRODUCTION

This is a money damages case arising under 42 U.S.C. § 1983 where a class of Plaintiffs is seeking compensation for alleged violations of the 14th Amendment, the 1st Amendment and the Ex Post Facto Clause of the U.S. Constitution. Plaintiffs seek to hold the current and former Governor, and the current and former head of the Michigan State Police, individually liable for not stopping the enforcement of the 2006 and 2011 amendments of the Sex Offenders Registration Act (SORA). According to Plaintiffs, the Defendants should have made sure that no one in the State of Michigan enforced the SORA amendments against them based on a non-binding district court opinion from 2015, which was subsequently reversed on other grounds by this Court, and based on this Court's decision in 2016, which was subject to conflicting state precedent until 2021.

This Court should affirm the District Court's dismissal. Plaintiffs' claims were barred by the Eleventh Amendment; there is no supervisory liability for Defendants; and Defendants are entitled to qualified immunity.

While the District Court ruled in part to dismiss the claims on the issues of supervisory liability and qualified immunity, it granted the State Defendants' motion to dismiss in full based on Eleventh Amendment sovereign immunity. The gravamen of the complaint here is against the State of Michigan and the state officials in their official capacities, the pleadings notwithstanding. In suing the former and current Governor and the former and current MSP Director in their individual capacities, the complaint relies on the 2015 district court's opinion finding discrete portions of Michigan's SORA unconstitutional and this Court decision in *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016) finding the 2006 and 2011 amendments to Michigan's SORA unconstitutional as retroactive punishment for the five named plaintiffs. But the complaint itself then expressly identified the real entity it believed at fault for continuing to enforce the law despite the rulings:

> *[T]he State of Michigan* continued to subject tens of thousands of registrants to retroactive punishments, Due Process violations and First Amendment infringements under SORA.

(Complaint, R. 1, Page ID #3, 10) (emphasis added). Consistent with this, the District Court ruled that "the state is the real party in interest" in dismissing the complaint. That is correct. This Court should affirm.

STATEMENT OF THE CASE

A. The lower court case.

Plaintiffs filed this class action lawsuit against Governor Gretchen Whitmer, former Governor Richard Snyder, Col. Joseph Gasper, and retired Col. Kriste Etue in their individual capacities. (Complaint, R. 1, Page ID #5.) The complaint included three counts under 42 U.S.C. § 1983: (I) Violation for Vagueness of the Fourteenth Amendment Due Process Clause; (II) Violation of the First Amendment; and (III) Violation of the Ex Post Facto Clause. (*Id.* at Page ID # 18–23.) Plaintiffs also requested the District Court award money damages from the allegedly "unconstitutional retroactive provisions of SORA [the 2006 and 2011 amendments] that they, and all others similarly situated, were subjected to beginning from the 2006 amendments until the present day (or when reporting is no longer required)." (*Id.* at Page ID #4.) Plaintiffs admitted that the State is the real defendant here: "[y]et for years after *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *the State of Michigan* continued to subject tens of thousands of registrants to retroactive punishments, Due Process violations and First Amendment infringements under SORA." (*Id.* at Page ID #3, 10) (Emphasis added.)

Plaintiffs alleged the following provisions of SORA were unconstitutionally vague in violation of the Fourteenth Amendment Due Process Clause: (A) prohibition on working, loitering, and residing within a student safety zone; (B) requirement to report all telephone numbers, e-mail addresses, and instant message addresses routinely used; and (C) "requirement to report '[t]he license plate number, registration number, and description of any motor vehicle, aircraft, or vessel . . . regularly operated.' " (Complaint, R. 1, Page ID #18–20.)

Plaintiffs further alleged "the following provisions of SORA violated the First Amendment:" (A) "requirement 'to report in person and notify the registering authority. . . immediately after. . . [t]he individual. . . establishes any [e-mail] or [IM] address, or any other designations used in internet communications or postings;' " and (B) "retroactive incorporation of the lifetime registration requirement to report 'all [e-mail] addresses and [IM] addresses. . . and all login names or other identifies used by the individual . . . when using any [e-mail] address or [IM] system.' " (*Id.* at Page ID # 20–22.)

Plaintiffs also alleged that the "retroactive application of the 2006 and 2011 amendments violated the Ex Post Facto Clause of the U.S. Constitution." (*Id.* at Page ID # 22, 23.)

Plaintiffs' Complaint further alleged Governor Whitmer is, and former Governor Snyder was, responsible for enforcing state law and supervising the MSP; thus, the complaint claimed that they are individually liable for constitutional violations resulting from MSP enforcing SORA. (*Id.* at Page ID # 5, 6, 11, 12.) Plaintiffs alleged the MSP is responsible for enforcing SORA; thus, the complaint claimed that the Director of the MSP is individually liable for unconstitutional enforcement of SORA. (*Id.* at Page ID # 5, 6, 11.)

Plaintiffs seemed to have alleged that Defendants knew certain provisions of the SORA violated the Fourteenth Amendment for vagueness, the First Amendment, and the Ex Post Facto Clause, based on Federal court rulings in 2015 and 2016 (*Does I*).[1] (Complaint, R. 1, Page ID # 2, 3, 10, 11, 12, 19, 21, 22.) Plaintiffs further alleged Defendants knew these allegedly unconstitutional provisions were

[1]Plaintiffs admit "[t]he Sixth Circuit did not reach the issues decided by [the district court] in its twin 2015 decisions." (Complaint, R. 1, Page ID # 3–9.)

being enforced but "failed to" stop the enforcement "by their subordinates" (the MSP and other law enforcement agencies). (*Id.* at Page ID #11, 12.) And Plaintiffs alleged Defendants "failed to" "instruct[] their subordinates that the enforcement . . . was unconstitutional," and, in the case of Gasper and Etue, such failure was tantamount to "encourag[ing] and implicitly authoriz[ing] the continued violations" by their subordinates. (*Id.*)

In lieu of filing an answer, Defendants moved the District Court pursuant to Fed. R. Civ. P. 12(b)(6) for an order dismissing the claims made against them. (Motion to Dismiss, 11/01/2021, R. 12, Page ID # 73.) Defendants provided four reasons why Plaintiffs' claims should be dismissed.

First, Defendants argued that they are entitled to Eleventh Amendment immunity because the State of Michigan is the real defendant here, not individuals Gretchen Whitmer, Richard Snyder, Joseph Gasper, and Kriste Etue. (*Id.* at Page ID # 90.) Defendants explained that artful pleading cannot circumvent the true gravamen of the complaint. (*Id.* at Page ID # 90–91.)

Second, Defendants argued that Plaintiffs failed to plead the requisite actions on behalf of Defendants for liability under § 1983. (*Id.* at Page ID # 94.) Defendants noted that Plaintiffs did not plead that Defendants played any role in violating a single registrant's constitutional rights. (*Id.* at Page ID # 97–98.)

Third, Defendants argued that qualified immunity bars Plaintiffs' claims because Plaintiffs did not plead that Defendants violated their constitutional rights, let alone their clearly established constitutional rights. (*Id.* at Page ID # 98–106.)

And fourth, Defendants argued that even if Plaintiffs' allegations are true, dismissal is still appropriate because Plaintiffs' claims prior to August 17, 2018 are barred by the applicable statute of limitations. (Motion to Dismiss, 11/01/2021, R. 12, Page ID # 107–109.)

The District Court granted Defendants' 12(B)(6) motion and dismissed Plaintiffs' class action lawsuit. (Opinion and Order 09/08/2022, R. 18, Page ID # 220.) Agreeing with Defendants, the District Court determined that dismissal is proper based on sovereign immunity, ruling that "the state is the real party in interest, and it is entitled to invoke sovereign immunity." (*Id.* at Page ID #242–244). The

District Court further determined that many of Plaintiffs' claims are barred by the statute of limitations. (*Id.* at Page ID #234–235.) The District Court also found that Defendant Whitmer and Defendant Snyder had no direct supervisory authority over enforcement of the SORA and thus cannot be liable under 26 U.S.C. §1983. (*Id.* at Page ID #240–241.) The District Court also determined that Defendants are entitled to qualified immunity on Plaintiffs' Fourteenth Amendment and First Amendment claims because the law was not clearly established. (*Id.* at Page ID #244–250.)

After the District Court issued its Opinion and Order, Plaintiffs filed a motion for reconsideration. (Rule 59 Motion 09/22/2022, R. 19, Page ID # 252.) The District Court quickly dispatched with Plaintiffs' motion. It found that the motion simply rehashed arguments presented in opposition to Defendants' motion to dismiss. (Order Denying Rule 59 Motion, 10/12/2022, R. 22, Page ID # 292-293.)

B. The appeal.

After the District Court issued its order denying Plaintiffs' Motion for Reconsideration, Plaintiffs filed a notice of appeal. (Notice of Appeal, R. 23, Page ID # 294.) Plaintiffs do not address the District Court's

ruling that the statute of limitations bars Plaintiffs' claims prior to August 17, 2018. Plaintiffs limit the issues on appeal to the District Court's ruling on Plaintiff's sovereign immunity, qualified immunity, and §1983 supervisor liablity claims.

STANDARD OF REVIEW

The standard of review on a motion to dismiss filed under Rule 12(b)(6) is de novo. *Ziegler v. IBP Hog Mkt., Inc.*, 249 F.3d 509, 512 (6th Cir. 2001). The complaint must be construed in the light most favorable to plaintiffs, the factual allegations must be accepted as true, and the court determines whether there is any set of facts that would entitle plaintiff to relief. *Mixon v. Ohio*, 193 F.3d 389, 399–400 (6th Cir. 1999).

SUMMARY OF ARGUMENT

The District Court correctly ruled that Defendants are entitled to Eleventh Amendment immunity. Also, Plaintiffs did not plead the requisite actions on behalf of Defendants for liability under § 1983. Moreover, qualified immunity bars Plaintiffs claims because Plaintiffs did not plead that Defendants violated their clearly established

constitutional rights. For these reasons, the District Court did not err when it dismissed Plaintiffs' lawsuit. This Court should affirm.

ARGUMENT

I. The Eleventh Amendment bars all of Plaintiffs' claims.

A. The State of Michigan is the real party in interest.

In a thinly veiled effort to circumvent Eleventh Amendment immunity, Plaintiffs sued Defendants individually. As the District Court noted, Plaintiffs cannot avoid application of the Eleventh Amendment through artful pleading. (Opinion and Order 09/08/2022, R. 18, Page ID # 242–243). The U.S. Supreme Court has established that in the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). This inquiry turns on functional reality, not labels. *In re Ohio Execution Protocol Litigation*, 709 Fed. App'x 779, 784 (6th Cir. 2017). A court does not "simply rely on the characterization of the parties in the complaint." *Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017).

Instead, a court "must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.*; *see, e.g.*, *Ex Parte New York*, 256 U.S. 490, 500–02 (1921). If an action is in essence against a State–even if the State is not a named party–then the State is the real party in interest and is entitled to invoke the Eleventh Amendment's protection. *Lewis*, 137 S. Ct. at 1291.

Here, Defendants, sued in their individual capacities, are alleged to have violated Plaintiffs' constitutional rights under the Fourteenth Amendment, First Amendment, and the Ex Post Facto Clause. (Complaint, R. No. 1, Page ID # 5, 18–23.) Specifically, Plaintiffs alleged that Governor Whitmer is, and former Governor Snyder was, responsible for enforcing state law and supervising the MSP; thus, the Plaintiffs allege that they are individually liable for any constitutional violations resulting from MSP enforcing the SORA. (*Id.* at Page ID # 5, 6, 11, 12.) Plaintiffs also alleged that MSP is responsible for enforcing the SORA; thus, the Plaintiffs allege that the director of the MSP is individually liable for any unconstitutional enforcement of the same. (Complaint, R. No. 1, Page ID # 5, 6, 11.)

Plaintiffs purportedly sued individuals Gretchen Whitmer, Richard Snyder, Joseph Gasper, and Kriste Etue. But Plaintiffs really sued the State of Michigan. In other words, the real party in interest here is not Gretchen Whitmer, Richard Snyder, Joseph Gasper, or Kriste Etue – it is the office of the Governor and the Department of State Police. In fact, Plaintiffs admitted in their complaint that the State of Michigan is the real defendant here: "[y]et for years after *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), ***the State of Michigan continued*** to subject tens of thousands of registrants to retroactive punishments, Due Process violations and First Amendment infringements under SORA." (*Id.* at Page ID # 3, 10) (emphasis added).

Naming government officials individually in a lawsuit is not sufficient to convert an action against the state entity into one against the official in a personal capacity. The distinction is "more than just a pleading device." *Hafer v. Melo*, 502 U.S. at 27 (citing *Will*, 491 U.S. at 71). Regardless of how a plaintiff designates the action, a suit should be regarded as an official-capacity suit when the "judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to

restrain the Government from acting, or to compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963)) (internal citations omitted). Common sense dictates that individuals Gretchen Whitmer, Richard Snyder, Joseph Gasper, and Kriste Etue—as distinct from in their official capacities— could not have supervised the MSP or enforced the SORA, as Plaintiffs have alleged. (Complaint, R. No. 1, Page ID #5, 6, 11, 12.) Thus, any relief granted in this action would necessarily run not against Gretchen Whitmer, Richard Snyder, Joseph Gasper, and Kriste Etue, the individuals, but against the Governor, former Governor, Director of the Michigan State Police, and former Director of the Michigan State Police in their official capacities and "restrain the Government from acting. . . ." *Dugan*, 372 U.S. at 620. In short, Plaintiffs in substance filed sued against the State of Michigan.

B. The Eleventh Amendment bars Plaintiffs' claims for damages for a suit against the State.

"Absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court." *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). This immunity extends to State officials who are sued for damages in their official

capacity. *Id.* As the Supreme Court has explained, "[t]hat is so because . . . a judgment against a public servant in his official capacity imposes liability on the entity that he represents." *Id.* (quotations omitted and alteration adopted). This sovereign immunity extends to any suit brought by a private party where the payment of liability must be made from public funds in the state treasury, regardless of the actual party being sued. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). As explained in *Dugan v. Rank*:

> The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act."

Dugan v. Rank, 372 U.S. 609, 620 (1963) (quoting *Larson v. Domestic & Foreign Commerce Corp,* 337 U.S. 682, 704 (1949)).

Here, as already noted in the preceding section, the real party in interest is the State of Michigan, or the Defendants in their official capacities. Regardless of the label that Plaintiffs have affixed to their lawsuit, the Defendants in their individual capacities are not the real parties in interest. Sovereign immunity bars Plaintiffs from seeking money damages in any amount where the state is the real party in

interest. Not only that, § 1983 actions do not lie against a State or State officials. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71 (1989).

Neither a State nor its officials acting in their official capacities are "persons" [subject to suit] under § 1983." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). "Obviously, state officials literally are persons." *Id.* (internal citations omitted). "But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Id.* "As such, it is no different from a suit against the State itself." *Id.*

Form cannot dictate substance. And Plaintiffs cannot avoid application of the Eleventh Amendment through the artful use of labels. On that basis alone, the complaint was appropriately dismissed by the District Court. This Court should affirm.

II. There is no supervisory liablity under § 1983.

Even if the District Court interpreted Plaintiffs' claims against Defendants to be individual capacity claims, which they are not, those claims were still subject to dismissal. The District Court agreed with Defendants in part and dismissed the Governor and former Governor on

this ground, but it denied the motion with respect to the Michigan State Police Director and former Director. (Opinion and Order 09/08/2022, R. 18, Page ID #235–41.)

In the context of § 1983 claims, "a plaintiff must plead that each Government-official defendant, *through the official's own individual actions*, has violated the Constitution." *Iqbal*, 556 U.S. at 676 (emphasis added); *Murphy v. Grenier*, 406 F. App'x 972, 974 (6th Cir. 2011) ("Personal involvement is necessary to establish section 1983 liability.") Indeed, § 1983 liability "must be based on the actions of that defendant in the situation that the defendant faced, and not based on any problems caused by the errors of others"). *Burley v. Gagacki*, 729 F.3d 610, 619 (6th Cir. 2013) (quoting *Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010) (noting that each defendant must be "personally involved" in the unconstitutional action).

Further, in § 1983 suits, "where masters do not answer for the torts of their servants — the term 'supervisory liability' is a misnomer." *Iqbal*, 556 U.S. at 677. Vicarious liability is inapplicable to § 1983 suits. Id. at 676. "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of

respondent superior." *Id*. "Absent vicarious liability, each Government official, his or her title notwithstanding, *is only liable for his or her own misconduct*." *Id* at 677 (emphasis added). Thus, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id*. at 676. "A plaintiff must therefore show how each defendant 'directly participated in the alleged misconduct, at least by encouraging, implicitly authorizing, approving or knowingly acquiescing in the misconduct, if not carrying it out himself.' " *Gardner v. Evans*, 920 F.3d 1038, 1051 (6th Cir. 2019) (quoting *Flagg v City of Detroit*, 715 F.3d 165, 174 (6th Cir. 2013)).

Moreover, "merely claim[ing] that the [defendants] were aware of alleged [violations], but did not take appropriate action . . . is insufficient to impose liability on supervisory personnel under § 1983." *Poe v. Haydon*, 853 F.2d 418, 429 (6th Cir. 1988) (internal quotations and citations omitted). "Liability under § 1983 must be based on active unconstitutional behavior and cannot be based upon 'a mere failure to act.' " *Sheehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) (citing

Salehpour v. University of Tennessee, 159 F.3d 199, 206 (6th Cir.1998), cert. denied, 526 U.S. 1115 (1999)).

In *Pilot v. Snyder*, the plaintiff filed a complaint against the State of Michigan, former Governor Snyder, and former Attorney General Schuette alleging, inter alia, § 1983 liability. No. 15-13191, 2016 WL 3548218, at *1 (E.D. Mich. June 30, 2016), aff'd, No. 16-2044, 2017 WL 4014975 (6th Cir. May 11, 2017). The plaintiff's claims stemmed from his 2004 state felony convictions. *Id*. The plaintiff argued that Snyder and Schuette were "liable due to their 'inactiveness to timely review the Felony and set [aside] the Felony." (*Id*. at page ID # 116.) The plaintiff further argued that "Snyder and Schuette, while not in office at the time of his 2004 conviction, can be liable because they are successors in office to the previous Governor and Attorney General for Michigan." *Id*. The district court held that the plaintiff "failed to allege any personal involvement by Defendants Snyder and Schuette that could support a § 1983 claim against these individuals in their personal capacity." *Id*. (citing *Iqbal*, 556 U.S. at 676). The district court granted the state defendants' motion to dismiss. *Id*. at 3.

The same applies to the case at bar here. Plaintiffs alleged that Governor Whitmer is, and former Governor Snyder was, responsible for enforcing state law and supervising the MSP, claiming that they were individually liable for any constitutional violations resulting from MSP enforcing the SORA. (Complaint, R. 1, Page ID # 5, 6, 11, 12.) Plaintiffs also alleged that the MSP is responsible for enforcing the SORA, claiming that the director of the MSP was individually liable for any unconstitutional enforcement of the SORA. (*Id* at Page ID # 5, 6, 11.) Plaintiffs further alleged Defendants knew enforcement of the 2006 and 2011 SORA amendments was unconstitutional based on non-binding Federal court decisions in 2015 and 2016. (*Id.* at Page ID # 2, 3, 10, 11, 12.) Plaintiffs further alleged Defendants knew these allegedly unconstitutional provisions were being enforced but "failed to" stop enforcement "by their subordinates." (*Id.* at PageID.11, 12) (emphasis added.) And finally Plaintiffs allege Defendants "failed to" "instruct[] their subordinates that the enforcement . . . was unconstitutional," and, in the case of Gasper and Etue, such failure was tantamount to "encourag[ing] and implicitly authoriz[ing] the continued violations" by their subordinates. (*Id.*)

Even assuming Plaintiffs' allegations are true, Plaintiffs have not pled that any of the defendants, through their "*own individual actions*," violated Plaintiffs' constitutional rights. *See Iqbal*, 556 U.S. at 676. (emphasis added). Rather, Plaintiffs merely allege that Defendants failed to act, which is not sufficient to establish § 1983 liability. *See Poe*, 853 F.2d at 429; *see* also *Sheehee*, 199 F.3d at 300. Thus, Defendants cannot be liable under § 1983. For this additional reason, dismissal of Plaintiffs' lawsuit was appropriate.

III. Defendants are entitled to qualified immunity.

Plaintiffs' brief on appeal fails to move the needle on qualified immunity. In order to prevail on any claim brought against Defendants in their individual capacities pursuant to 42 U.S.C. § 1983, Plaintiffs "must establish that a person acting under color of state law deprived [them] of a right secured by the Constitution or laws of the United States." *See Waters v. City of Morristown*, 242 F.3d 353, 358–59 (6th Cir. 2001). They must also overcome the defense of qualified immunity, which shields 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."

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Here, Defendants are entitled to qualified immunity as a matter of law because Plaintiffs cannot demonstrate a violation of clearly established constitutional rights. The District Court agreed with Defendants in part, ruling that the 2015 opinion did not create clearly established law, but it ruled that the "Ex Post Facto [c]laim [w]as [c]learly [e]stablished by August 25, 2016." (Opinion and Order 09/08/2022, R. 18, Page ID #248–49.)

The doctrine of qualified immunity is not merely a defense to liability, but also a shield for public officials against the burdens of litigation and trial. *Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009) (collecting cases). "Accordingly, we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson*, 555 U.S. at 231 (cleaned up). Qualified immunity is designed to "spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

In determining whether Defendants are shielded from civil liability by qualified immunity, this Court must employ a two-step

analysis: "(1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and (2) whether that right was clearly established." *Estate of Carter v. City of Detroit*, 408 F.3d 305, 310–11 (6th Cir. 2005) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Courts may exercise their sound discretion in deciding which of the two prongs should be addressed first in light of circumstances in the particular case at hand. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Defendants presumptively receive immunity for acts committed in the course of their duties as the executive of the State of Michigan and Director of the Michigan State Police. "[G]overnment officials who perform discretionary functions generally are shielded 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." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This "objective reasonableness" standard focuses on whether the defendants reasonably could have thought their actions were consistent with the rights that the plaintiffs claim have been violated. If the government officials have acted in a manner reasonably

consistent with the plaintiffs' rights, qualified immunity protects the officials from civil suit resulting from those actions.

Thus, throughout the analysis, the burden is on Plaintiffs to show that Defendants are not entitled to qualified immunity. *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006) ("Once the qualified immunity defense is raised, the burden is on the plaintiff to demonstrate that the officials are not entitled to qualified immunity."). The relevant inquiry is whether it would be clear to a government actor that the government actor's "conduct was unlawful in the situation [the official] confronted." *Saucier*, 533 U.S. at 202.

This Court has substantially tightened the requirements for avoiding the affirmative defense of "qualified immunity" in a 42 U.S.C. § 1983 claim. A plaintiff must identify a case with a similar fact pattern that would have given " 'fair and clear warning' [to the defendant] about what the law requires." *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 993 (6th Cir. 2017) (quoting *White v. Pauly*, 137 S. Ct. 548 (2017)). In *Arrington-Bey*, this Court noted that the Supreme Court has "reminded us" that existing precedent must clearly establish the unlawfulness of the particular conduct, and a high

level of generality will not do. *Id*. at 992–93. In other words, "existing precedent . . . [must have] placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

Defendants are entitled to qualified immunity on both prongs of the analysis.

A. Plaintiffs cannot demonstrate a violation of their constitutional rights by Defendants.

As an initial point, Plaintiffs have not identified any constitutional violations committed by Defendants. Additionally, even if there were a constitutional violation, Plaintiffs' claims fail on the "clearly established" prong of the analysis.

B. Plaintiffs have not demonstrated that their alleged constitutional rights were clearly established.

In counts I and II, Plaintiffs raise Fourteenth and First Amendment claims, but there is not a single binding case from the U.S. Supreme Court or the Sixth Circuit holding that enforcement of the 2006 and 2011 SORA amendments is a violation of Plaintiffs' constitutional rights under Due Process and the First Amendment. There is likewise no existing precedent or established authority that

would have made it clear to Defendants that they could be subjected to money damages liability under § 1983 by failing to stop the enforcement of the 2006 and 2011 SORA amendments by their subordinates. Plaintiffs cannot carry their heavy burden in demonstrating violation of a "clearly established" right. Defendants are entitled to qualified immunity on this basis alone.

In *Does I*, the plaintiffs argued "that portions of the SORA [were] unconstitutionally vague, that its requirements should not be construed as creating strict liability offenses, that SORA violate[ed] the right to free speech guaranteed by the First Amendment, and that it violate[d] the Fourteenth Amendment by imposing oppressive restrictions on Plaintiffs' ability to parent, work, and travel." *Does #1-5 v. Snyder*, 834 F.3d 696, 698 (6th Cir. 2016). The "[p]laintiffs also contended that [the old] SORA's retroactive application to them—specifically, the retroactive application of the amendments that went into effect starting in 2006 or later — amount[ed] to an Ex Post Facto punishment prohibited by the Constitution." *Id.* In 2015, the district court held "that SORA was not an Ex Post Facto law and that most of its provisions did not violate the Constitution's guarantee of due process,"

but also held that "some of SORA's provisions were unconstitutionally vague, that those who are required to register under that law cannot be held strictly liable for violating its requirements, and that its retroactive requirement that sex offenders register on-line aliases for life violated the First Amendment." *Id*. at 698, 699.

On appeal, this Court did not address the Fourteenth or First Amendment issues but reversed and remanded on the Ex Post Facto claim. *Id*. at 706. The district court's 2015 non-precedential opinions regarding the Fourteenth and First Amendments were reversed by the Sixth Circuit's 2016 opinion, which reserved the due process, vagueness, strict liability, and First Amendment challenges to SORA for "another day because none of the contested provisions may now be applied to the plaintiffs in this lawsuit, and anything we would say on those other matters would be dicta." *Does #1-5*, 834 F.3d at 706. Plaintiffs in their complaint admit that "[t]he Sixth Circuit did not reach the issues decided by this Court [i.e., the district court,] in its twin 2015 decisions." (Complaint, R. 1, Page ID # 3, 9.) Questions that the Sixth Circuit expressly reserved for another day, *i.e.*, whether certain provisions of the SORA violated the Fourteenth and First

Amendments, should not serve as a basis to pierce qualified immunity here.

"[T]his Court's rulings in *Does I* does not mean that Plaintiffs' rights were clearly established." *Doe v. Curran*, No. 18-11935, 2020 WL 127951, at *7 (E.D. Mich. Jan. 10, 2020). (Motion to Dismiss 11/01/21, R. 12, page ID # 119.) "A single district court opinion is not enough to pronounce a right is clearly established for the purposes of qualified immunity." *Hall v. Sweet*, 666 F.App'x 469, 481 (6th Cir. 2016); *see also Clark v. Stone*, 998 F.3d 287, 303 (2021). "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 n. 7 (2011). "Otherwise said, district court decisions – unlike those from the courts of appeals – do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity." *Id.* In fact, the large volume of lawsuits surrounding SORA "demonstrate that the contours of Plaintiffs' asserted rights are anything but clear." *Doe v. Curran*, No. 18-11935, 2020 WL 127951, at *7 (E.D. Mich. Jan. 10, 2020).

As for the Sixth Circuit's ruling regarding Ex Post Facto, this ruling, as well as the *Does I* stipulated final judgment on remand, applies only to the five unnamed Plaintiffs who filed the lawsuit. (Motion to Dismiss 11/01/21, R. 12-4, page ID # 127.) And to add another layer of confusion, it was not until July 27, 2021, that the Michigan Supreme Court, in *People v. Betts*, held that "the 2011 SORA, when applied to registrants whose criminal acts predated the enactment of the 2011 SORA amendments, violates the constitutional prohibition on ex post facto laws." No. 148981, 2021 WL 3161828, at *20 (Mich. July 27, 2021). The controlling ruling for the Michigan courts until that decision held that Michigan's SORA was *not* punishment, and that it did not violate the Ex Post Facto Clause. *People v. Temelkoski*, 859 N.W.2d 743, 761 (Mich. Ct. App. 2014), ("SORA does not violate the Ex Post Facto Clause or amount to cruel or unusual punishment because it does not impose punishment."), *rev'd on other grounds*, 905 N.W.2d 593 (Mich. 2018).

"A right is not considered clearly established unless it has been authoritatively decided by the United States Supreme Court, the Court of Appeals, or the highest court of the state in which the alleged

constitutional violation occurred." *Durham v. Nu'Man*, 97 F.3d 862, 866 (6th Cir. 1996) (citing *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988)). Again, Plaintiffs cannot carry their heavy burden in demonstrating violation of a "clearly established" right.

Further, to the extent Plaintiffs allege that *Does II* established their rights here, the amended final judgment in *Does II* was not entered until August 26, 2021.[2] (Motion to Dismiss 11/01/21, R. 12-5, page ID # 133.) In this 2021 final judgment, the district court held, in pertinent part, that "the ex post facto application of the 2006 and 2011 amendments is DECLARED unconstitutional," "Defendants and their agents are permanently ENJOINED from enforcing any provision in the pre-2021 SORA against any members of the ex post facto subclasses," certain provisions of the old SORA are declared unconstitutional under the Fourteenth and First Amendments, and "Defendants and their agents are permanently ENJOINED from enforcing them." (*Id.*)

[2] The holdings in the district court's February 14, 2020 opinion and order became "effective and enforceable only after the entry of a final judgment, at the time specified in that final judgment." (Motion to Dismiss 11/01/21, R. 12-6, page ID # 144.)

The district court's decision in *Does II* does not make Plaintiffs' rights clearly established. And even if it did, it did not make clear that Defendants in their individual capacities had to ensure that no police agency in the state enforce these laws. Plaintiffs' claims should be dismissed.

Plaintiffs argue Defendants are not entitled to qualified immunity because they failed to prevent unconstitutional enforcement of the old SORA by their subordinates (MSP and other law enforcement agencies), which amounted to deliberate indifference to and/or implicit authorization, approval, or knowing acquiescence in the unconstitutional conduct. Plaintiffs primarily rely on three cases to support their argument, all of which are distinguishable.

Doe v. City of Roseville, which presents "disturbing" facts, demonstrates how narrow § 1983 supervisory liability is. 296 F.3d 431, 440 (6th Cir. 2002). The plaintiff sued a former principal, among others, for the sexual abuse a teacher subjected her to. *Id.* at 433–34. The plaintiff alleged the teacher molested other students and the defendants "failed to take action" and "attempted to cover up his history," which violated her constitutional rights. *Id.* at 434. Years prior, the principal

received several complaints that the teacher sexually abused students. *Id*. In response to one report, the principal warned the teacher, but did not document or report the incident, and later destroyed any notes she might have had. *Id*. In response to other reports, she told the students to stop talking about it, not to tell anyone, and if they continued talking, the teacher "would get in a lot of trouble, go to jail and die there." *Id*. The Court held the facts did not demonstrate the information the principal had " '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.' " *Id*. at 440 (citing *Doe v. Claiborne County*, 103 F.3d 495, 513 (6th Cir. 1996)). The Court also held "[n]othing [the principal] did or did not do encouraged," "constituted participation in," "authorized, approved or knowingly acquiesced" in plaintiff's abuse. *Id*. The Court noted its task was to decide whether the principal was "confronted with conduct that was 'obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences,' or with 'such a widespread pattern of constitutional violations,' that [her] actions demonstrated deliberate indifference to the danger of [the teacher]

sexually abusing students." *Id.* at 440–41 (citing *Braddy v. Florida Dep't of Labor & Employment Sec.,* 133 F.3d 797, 802 (11th Cir. 1998) and *Claiborne County*, 103 F.3d at 513). The Court stated it could not "weave the threads of such a pattern on the loom of hindsight," and the alleged facts did not show "anything more than negligence." Id. at 441.

Under *Peatross v. City of Memphis*, Plaintiffs must "plausibly allege" Defendants " 'did more than play a passive role in the alleged violations or show mere tacit approval of the goings on.' " 818 F.3d 233, 243 (6th Cir. 2016) (citing *Gregory v. City of Louisville*, 444 F.3d 725, 751 (6th Cir. 2006)). In *Peatross,* the director of a local police department was sued after his officers killed someone. *Id.* at 236–37. It was alleged the Director, in addition to failing to act, "attempted to cover-up the unconstitutional conduct of his subordinates by exonerating the officers . . . to escape liability" and failed to make improvements after he " 'acknowledged a dire need to review and improve the police department's operations' " and need " 'to improve its disciplinary process.' " *Id.* at 243. The Court held the allegations "support the plausible inference that in the execution of his job functions, [he] at least knowingly acquiesced in the unconstitutional conduct of the officers"

because he allegedly " 'did more than play a passive role in the alleged violations or show mere tacit approval.' " *Id.* (citing *Gregory*, 444 F.3d at 751). Because his "alleged conduct of 'rubber stamping' the behavior of officers who shot and killed individuals with increasing frequency 'could be reasonably expected to give rise to just the sort of injuries that occurred,' " "the Complaint sufficiently pled a causal connection between [his] acts and omissions" and the injury. *Id.* at 244–45.

In *Salem v. Mich. Dep't of Corr.*, the plaintiffs sued a prison warden, alleging the defendants " 'conduct[ed] spread-labia vaginal searches on numerous female prisoners in full view of one another' " and provided an affidavit from one of the plaintiffs. 2018 U.S. Dist. LEXIS 144557, *1, 39 (E.D. Mich. Aug. 24, 2018). The plaintiffs further alleged the warden held meetings to "allow inmates to discuss issues of concern," meeting notes evidenced she was aware of improper searches, and there were many grievances regarding strip searches. *Id.* at 37, 41. Thus, a jury could reasonably find she "implicitly authorized or knowingly acquiesced in a pattern or custom of constitutionally violative strip searches" and her " 'apparent indifference' . . . 'could be

reasonably expected to give rise' " to the injuries. *Id*. at 40, 41 (citing *Campbell v. City of Springboro, Ohio*, 700 F.3d 779, 790 (6th Cir. 2012)).

Defendants here do not and did not directly supervise the individuals who allegedly violated Plaintiffs' constitutional rights (MSP and local law enforcement personnel.) There is a stark contrast between a principal supervising a teacher, a local police director supervising police officers, a warden supervising corrections officers, and the Governor and MSP Director supervising every member of the MSP and all other law enforcement personnel in the state. Plaintiffs' interpretation of § 1983 liability would subject the Governor and MSP Director to individual liability anytime they are aware of an unconstitutional act committed by any state or local law enforcement employee and fail to stop it, circumventing the Eleventh Amendment and defeating constitutional protections.

Further, Defendants here were not aware that any of Plaintiffs' clearly established constitutional rights were being violated. Again, there is a stark contrast between sexual abuse, chronic police misconduct, non-private vaginal searches, and enforcement of the old SORA. Plaintiffs ignore that their arguments largely rely on a single

district court opinion, and regarding ex post facto, conflicting state court precedent until 2021. Further, the status of the old SORA for pre-2011 offenders was not clear until July of 2021. In *Does II* and *Betts*, Defendants argued the old SORA remained enforceable against pre-2011 registrants eliminating the 2006 amendments (student safety zones) and parts of the 2011 amendments, but the courts ruled the old SORA was not severable (and the old law could not be revived). *Doe v. Snyder*, 449 F. Supp. 3d 719, 733, 735 (E.D. Mich. 2020); *People v. Betts*, No. 148981, 2021 WL 3161828, at *20 (Mich. July 27, 2021). Based only on these recent rulings, the old SORA became entirely inoperable for the pre-2011 offenders. Moreover, if those rights were clearly established, the *Does II* class action would have been rendered without purpose. On this point, the District Court overlooked the controlling case of Michigan law before *Betts,* which was *Temelkoski*, 859 N.W.2d at 761 as noted above, and not an unpublished decision of the Michigan Court of Appeals, which would not be "a decision from a court with authority equal to the Sixth Circuit's" as mistakenly believed by the District Court. (Opinion and Order 09/08/2022, R. 18, Page ID #250.)

Furthermore, unlike in *Peatross* (where the plaintiffs alleged attempted cover-ups and failure to make changes after admitting their necessity) and *Salem* (where the court found the warden held meetings to keep apprised of issues and then ignored them), Plaintiffs here merely allege a failure to act, which " '. . . (even) in the face of a statistical pattern of incidents of misconduct' is not sufficient to confer liability." *Peatross*, 818 F.3d at 241–42 (citing *Hays v. Jefferson Cty.*, 668 F.2d 869, 873–74 (6th Cir. 1982)). There must be "more than an attenuated connection" between the supervisor's "specific action" of "active unconstitutional behavior" and the injury. *Peatross*, 818 F.3d at 241 (citing *Bass v. Robinson*, 167 F.3d 1041, 1048 (6th Cir. 1999), *Philips v. Roane Cty.*, 534 F.3d 531, 544 (6th Cir. 2008)). Similar to *Roseville*, Defendants' alleged failures do not amount to deliberate indifference or constitute encouragement, participation, authorization, approval, or knowing acquiescence. Defendants are entitled to qualified immunity.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendants-Appellees request this Court affirm the decision of the District Court to dismiss Plaintiff-Appellants' lawsuit.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 13,000 words. This document contains 7,407 words.

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CERTIFICATE OF SERVICE

I certify that on January 10, 2023, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendants-Appellees, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No. Range
Complaint	08/17/2021	R. 1	1-25
Defendants' Motion to Dismiss and Brief in Support	11/01/2021	R. 12	72-111
District Court's Opinion and Order Granting Defendants' Motion to Dismiss	09/08/2022	R. 18	220-251
Plaintiffs' Rule 59 Motion for Reconsideration	09/22/2022	R. 19	252-277
District Courts' Order Denying Plaintiffs' Rule 59 Motion for Reconsideration	10/12/2022	R. 22	292-293
Plaintiffs' Notice of Appeal	10/13/2022	R. 23	294

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