UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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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.

File No. 2:16-cv-13137

Hon. Robert H. Cleland

Mag. J. David R. Grand

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**PLAINTIFFS' REPLY BRIEF ON MOTION FOR PARTIAL SUMMARY JUDGMENT ON BEHALF OF THE PRIMARY CLASS**

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## I. BECAUSE THE PARTIES AGREE AS TO MOST OF THE RELIEF REQUESTED, THE COURT SHOULD GRANT THAT RELIEF.

Defendants concede that in *Does #1-5 v. Snyder*, 101 F. Supp. 3d 672 and 101 F. Supp. 3d 722 (E.D. Mich. 2015) (*Does I*), this Court already decided the merits of the primary class claims. Defendants also concede that "nothing has occurred in the intervening time that would compel the Court to reach a different result."[1] Response, R.77, PgID 1654. While Defendants preserve several arguments for appeal, and Plaintiffs likewise preserve their counter-arguments below, for purposes of the pending motion the parties are largely in agreement. That agreement narrows this Court's task considerably.

With respect to the claims of the primary class, the parties agree that under *Does I*, the following provisions of SORA are unconstitutionally vague or violate the First Amendment to the United States Constitution:

- M.C.L. §§ 28.733, 28.734, 28.735 (geographic exclusion zones);
- M.C.L. §§ 28.725(1)(f), 28.727(1)(h), (i) & (j) (reporting on phones, email, internet identifiers and vehicles).

The parties further agree that those provisions are severable. Accordingly, the Court should grant the declaratory and injunctive relief requested in paragraphs A

[1] Although Defendants claim that the Sixth Circuit's decision rendered this Court's 2015 decisions of no legal effect, Response, R.77, PgID 1659, the Court of Appeals did not vacate this Court's opinions. As this Court has explained, "the Sixth Circuit declined to address these rulings—thereby leaving them intact." *Doe v. Curran*, No. 18-11935, 2020 WL 127951, at *2 (E.D. Mich. Jan. 10, 2020).

and C of Plaintiffs' Motion for Partial Summary Judgment on Behalf of the Primary Class, R.75, PgID 1117-18.[2]

The parties further agree that in *Does I*, 101 F. Supp. 3d at 693-94, this Court held that SORA's strict liability provisions violate due process and that SORA therefore must be interpreted as incorporating a "knowledge requirement." Accordingly, the Court should grant the declaratory and injunctive relief requested in ¶ B of Plaintiffs' Motion, R.75, PgID 1118.

Plaintiffs' motion also requests notice to registrants, prosecutors, and law enforcement, as well as an order that the Michigan State Police correct the Explanation of Duties form. Defendants present no arguments why such relief should not be granted. Accordingly, the Court should grant the declaratory and injunctive relief requested in ¶¶ E-G of Plaintiffs' Motion, R.75, PgID 1119.

The relief above, about which there is no dispute, resolves the substantive claims of the primary class. *See* Second Am. Compl., R.34, ¶¶ C-E, PgID 388-89. That leaves relief for the ex post facto subclasses. *Id.* at ¶¶ F-G. There, too, little is in dispute. By stipulated order this Court has already granted declaratory relief holding that the 2006 and 2011 amendments cannot be retroactively enforced. Decl. Judgment and Order for 90-Day Deferral. R.55, PgID 783. With respect to

[2] Paragraphs A and C contain a typo. The provision regarding electronic mail addresses and internet identifiers is M.C.L. § 28.727(1)(i), not § 28.727(1)(*l*).

Plaintiffs' request for an injunction barring the retroactive enforcement of the 2006 amendments against John Does #1-3 and the pre-2006 ex post facto subclass, Defendants concede that such relief is required under *Does I*. Response, R.66, PgID 970. The parties also agree that the 2006 amendments are severable. Accordingly, the Court should grant the injunctive relief requested in ¶ D of Plaintiffs' Motion for Declaratory and Injunctive Relief, R.62, PgID 803.

The only remaining question is what injunctive relief should be granted to the ex post facto subclasses given the declaratory judgment that the 2011 amendments cannot be retroactively applied. Plaintiffs agree with Defendants that since liability has been decided, the issue is one of remedy. Further, there is no dispute that this Court should enjoin retroactive application of the 2011 amendments. The dispute relates solely to whether those amendments are severable, and whether the severability question should be certified to the Michigan Supreme Court.[3]

## II. THE LEGISLATURE, NOT THIS COURT, MUST REWRITE SORA.

Plaintiffs do not dispute that Michigan could have a registry law that would pass constitutional muster. Where Plaintiffs disagree with Defendants is on *who* should craft that law—the legislature or this Court. The Michigan Supreme Court has made it abundantly clear that Michigan statutes must be drafted by the

[3] While the present motion relates to the claims of the primary class, because much of Defendants' response addresses the severability and certification questions, Plaintiffs will address those arguments in reply as well.

Michigan legislature, not the judiciary. *See Devillers v. Auto Club Ins. Ass'n*, 702 N.W.2d 539, 555 (Mich. 2005) (citing Mich. Const. art. 3, § 2) (policy decisions are properly left for the legislature which, unlike the judiciary, is institutionally equipped to assess the numerous trade-offs associated with a particular policy choice); *Cameron v. Auto Club Ins. Ass'n*, 718 N.W.2d 784, 790 (Mich. 2006) ("ours is to declare what the law is, not what it ought to be"). In sum, there is simply no doubt that writing laws is the job of the legislature. That remains true even when the legislature refuses to do its job.

Defendants suggest that the Court should salvage the statute by severing unconstitutional provisions. That is possible where provisions are severable: as set out above, many of the unconstitutional provisions (M.C.L. §§ 28.725(1)(f), 28.727(1)(h), (i), & (j), 28.733, 28.734, 28.735) are indeed severable. Plaintiffs agree that such severable provisions can simply be enjoined without invalidating the statute.

But the 2011 amendments are different. They "are like the interwoven threads constituting the warp and woof of a fabric." *Carter v. Carter Coal Co.*, 298 U.S. 238, 315 (1936). This Court cannot simply excise them. For the reasons previously briefed, *see* R. 62, 69, this Court should grant the relief requested in ¶¶ A-B of Plaintiffs' Motion for Declaratory and Injunctive Relief, R.62, Pg.ID 802, hold that the 2011 amendments are not severable, and enjoin application or

enforcement of SORA to John Does #1-5 and the ex post facto subclasses. Plaintiffs have no objection to the Court delaying the effective date of such relief by 60 days so that the legislature can finally do what it should have done long ago: revise SORA to bring it into compliance with *Does I*.

## III. CERTIFICATION WOULD CAUSE UNDUE DELAY OR PREJUDICE ABSENT INTERIM RELIEF.

Defendants revive their argument that this Court should certify the severability question to the Michigan Supreme Court, arguing in effect that tens of thousands of people should continue to suffer punishment—which is what the Sixth Circuit said SORA is—for however long certification takes. Defendants downplay the delay, claiming (without citation) that by court rule the Michigan Supreme Court must decide *People v. Betts*, No. 148981 (Mich.) this term. Response, R.77, PgID 1665. But the rule apparently at issue, Mich. Ct. R. 7.313(E), provides only that if a case remains undecided at the end of the term in which it was argued, the parties may file supplemental briefs and reargue the case. *See also* Mich. Ct. R. 7.301(B). Thus, it is far from clear that *Betts* will be argued, much less decided, this term. Briefing has just begun, and argument is not yet scheduled.[4]

[4] Based on a conversation with Larry Royster, clerk of the Michigan Supreme Court, Plaintiffs' counsel's understanding is that the Michigan Supreme Court generally does not schedule calendar cases later than the April session and that there are numerous factors that could affect whether *Betts* is argued this term.

Defendants ignore altogether the question of how long certification of *this* case would take. This Court would need to rule on the request for certification, the parties would need to comply with the requirements of L.R. 83.40 (including negotiation and court approval of an agreed statement of facts), and then the issues would need to be briefed in the Michigan Supreme Court. *See* Mich. Ct. R. 7.308(A)(3) (setting briefing schedule of 84 days, absent extensions). Thus, if the question were certified, the Michigan Supreme Court would not likely be able to issue a decision this term, meaning that a decision would probably not come before next winter. Moreover, the Michigan Supreme Court might decide to hear any certified question together with *Betts*, delaying a decision in that case as well.

L.R. 83.40 prohibits certification if it would cause undue delay or prejudice. Ongoing punishment is clearly prejudicial. And delay is the "inevitable side effect of certification." *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 275 (5th Cir. 1976) ("the process requires a period approaching one year at the least—sometimes much more") (collecting cases with delays of two years or more).[5] As the Fifth Circuit explained in *Exxon Corp.*, "delay that is not absolutely necessary should be avoided," particularly when a case is already quite old. *Id.* at 276. The

[5] *See also Valls v. Allstate Ins. Co.*, 919 F.3d 739, 744 (2d Cir. 2019) (declining certification partly due to the "inevitable burdens on the parties relating to the cost and delay"); *Montgomery v. Gore Mutual Insurance Co.*, 2019 WL 5303749 (E.D. Mich. 2019) (denying certification, in part, because it would lead to further delay, and prejudice plaintiff who had been denied benefits for almost two years).

court there denied certification in part because the case was two-and-a-half years old. *Id.* (*Does II* is three-and-a-half years old.) The Fifth Circuit "recognize[d] the supremacy of the Florida Supreme Court as interpreter of state law, as well as the possibility, though we believe it to be small, that our decision today is an erroneous one," but found "the price of certainty too high, in terms of delay which may prejudice the plaintiffs' rights to a speedy resolution of the merits." *Id.* Here the price of certification is not just a delay of resolution, but many more months or years of punishment for tens of thousands of people. That price is far too high.

As previously briefed, certification is entirely unnecessary because Michigan severability law is clear. Defendants object that this Court's ruling *might* turn out to be inconsistent with *Betts*. But Defendants offer no reason why they could not then ask the Court to modify the injunction under Rule 60(b), or why, at a minimum, the Court should not grant a preliminary injunction during any certification proceedings. Punishment is indisputably irreparable harm.

Finally, Defendants suggest that the Court could grant injunctive relief on the claims of the primary class (and presumably also those of the pre-2006 ex post facto subclass), but hold in abeyance its decision on injunctive relief with respect to the retroactive application of the 2011 amendments. Response, R.77, PgID 1665. That approach presents even greater pitfalls than certification because it is by no means clear that the Michigan Supreme Court's decision in *Betts* will

actually address the severability of the 2011 amendments. There could be many other paths to dispose of *Betts* without reaching that question, especially given that *Betts* is an individual criminal appeal dependent on specific individual facts, not to mention that the Michigan Supreme Court might analyze the questions of federal law (such as the ex post facto claim) quite differently from the Sixth Circuit, without addressing the state-law question of the severability of the 2011 amendments at all.

## IV. PLAINTIFFS PRESERVE ALL COUNTER-ARGUMENTS.

Defendants concede that this Court's *Does I* decisions are effectively binding—or at least control the pending motion—because, as to the primary class, *Does II* seeks enforcement only of the identical claims already decided in *Does I*.[6] Nevertheless, to preserve the issues for appeal, Defendants restate in summary form the (losing) arguments they made in *Does I*. Given Defendants' concession, Plaintiffs do not need to respond at all, as nothing hinges on the defense argu-

[6] The relitigation of *Does I* claims may be barred in this Court by the issue preclusion doctrine, although—since Defendants do not challenge *Does I*'s applicability—it is not necessary to decide that issue. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."). The issues here have already been exhaustively litigated in *Does I*. Defendants do not need "more than one full and fair opportunity for judicial resolution of the same issue." *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 328 (1971). Plaintiffs concede Defendants' right to appeal a decision adopting the holdings of *Does I* for the primary class, because those issues were not decided by the Sixth Circuit.

ments for purposes of the pending motion. But out of an abundance of caution, Plaintiffs, too, want to make clear that they mean to preserve all the arguments they made on the issues this Court decided in *Does I*, and that were briefed and argued both in this Court and in the Sixth Circuit (but were only decided here). That way, if a new appeal is taken, both sides will be fully able to make the arguments on appeal of *Does II* that they made in *Does I*. Accordingly, Plaintiffs incorporate by reference the relevant briefing in *Does I*, both in this Court[7] as well as in the appeals to the Sixth Circuit.[8]

## CONCLUSION

For the reasons set out above, the Court should grant the relief requested.

Respectfully submitted,

[7] *See, e.g.* Pls' Rule 52 Motion for Judgment on the Papers, R.96: vagueness (PgID 5678-90); strict liability (PgID 5690-92); exclusion zones (PgID 5696); First Amendment (PgID 5697-99). *See also* Pls' Combined Response to Defs' Rule 52 Motion and Reply on Pls' Motion for Judgment, R.99: vagueness (PgID 5816-23); exclusion zones (PgID 5826); First Amendment (PgID 5826-34).

[8] *See, e.g.* Appeal No. 15-1536, Brief of the Pls-Appellees, R.24-1: vagueness (pp 40-44); (pp 21-29); exclusion zones (pp 21-29, 45-55); loitering (pp 29-31, 55-57); strict liability (p 50); Appeal Nos. 15-2346/2486, Pls-Appellees' Opening Brief, R.32-1: factual summary (pp 15-26); First Amendment (pp 58-62); vagueness (pp 63-65); *and* Pls-Appellees Response & Reply (Third) Brief, R.43: First Amendment (pp 46-51); vagueness (p 55).

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Dated: January 21, 2020

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**Certificate of Service**

On January 21, 2020, plaintiffs filed the above reply brief using the Court's ECF system, which will send same-day email service to all counsel of record.

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