UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOES #1-4 AND MARY DOE,

Plaintiffs,

v

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

Defendants.

No. 2:12-cv-11194

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AMENDED MOTION TO DISMISS

Defendants Governor Rick Snyder and Col. Kriste Ettue move this Court to dismiss Plaintiffs' Complaint pursuant to F.R.Civ. P 12(b) (1) and (6) for the reasons set forth in the accompanying Brief in support.

Defense counsel contacted Plaintiffs' counsel on Thursday, April 19, 2012 to discuss concurrence in this motion as required by L.R. 7.1a. Concurrence was denied.

Defendants pray the Court grants this motion, dismisses this Complaint with prejudice and awards any additional relief it determines appropriate.

DEFENDANTS' *AMENDED* BRIEF IN SUPPORT OF MOTION TO DISMISS

CONCISE STATEMENT OF ISSUES PRESENTED

1. Michigan's Sex Offender Registration Act ((SORA") is a valid state regulation imposing registration and reporting requirements. It is not intended to punish and does not otherwise impose effects similar to punishment. Plaintiffs' ex post facto challenges, thus, fail as a matter of law.

2. The 2011 SORA amendments to do not implicate fundamental rights or liberty interests protected by the federal due process clause. Plaintiffs' Complaint fails to state a claim under the federal Due Process Clause.

3. Plaintiffs have failed to make allegations sufficient to state a claim that their First Amendment rights have been infringed by SORA's registration requirements.

4. Federal law provides for district courts to decline supplemental jurisdiction over claims that involve complex or novel issues of state law and where there are other compelling reasons not to hear the case. This Court should decline to exercise supplement jurisdiction over the Headlee Amendment claim in this Complaint or, in the alternative, dismiss it for failing to state a claim.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases

Statutes

STATEMENT OF FACTS

This is an action for declaratory judgment and permanent injunction asserting both factual and as applied challenges to the constitutionality of recent amendments to Michigan's Sex Offenders Registration Act ("SORA" or "the Act"), M.C.L. 28.721, *et. seq*. Specifically, Plaintiffs challenge the application to them of certain registration requirements and changes to the period of registration based implemented by 2011 P.A. 17:

- as violating federal constitution's prohibition against ex post facto laws without an individualized determination of dangerousness;
- and, as violating fundamental rights to travel, to engage in the common occupations of life, to direct the education and upbringing of their children, so unconstitutionally vague and to engage in free speech.

Plaintiffs also assert a violation of Mich. Const. 1963, art. 9, § 29, commonly referred to as the "Headlee Amendment." Plaintiffs claim the 2011 amendments increase the required activities of local governments without any appropriation to cover related increased costs.

Each of the Plaintiffs was required to register as an offender prior to the challenged 2011 amendments. (Complaint ¶¶ 25, 36, 51, 62, 74) Does 2 and 3 were charged with criminal sexual conduct offenses but assigned to youthful trainee status pursuant to M.C.L. 762.11 prior to October 1, 2004. Although successfully discharged with no conviction being entered, they were required to register under both the Holmes Youthful Trainee Act (HYTA), M.C.L. 762.11, *et. seq.,* SORA, pre and post the 2011 amendment, M.C.L. 28.724. (Complaint ¶¶ 36, 51)Does 1 and 4

and May Doe were also convicted of offenses requiring registration prior to the 2011 amendments. (Complaint ¶¶ 25, 62, 74)

Michigan's SORA was first adopted in response to the requirements imposed by federal law. 42 U.S.C. §14071. The SORA initially required the registration of individuals convicted of certain identified sex offenses and created a "law enforcement registry" available to only law enforcement agencies. 1994 P.A. 295, §8. In 1996, "Megan's Law" amended the federal statute to require community notification. 42 U.S.C. § 14071. Michigan's SORA was amended to comply with these new federal requirements. 1996 P.A. 494, § 1, M.C.L. 28.728(2); M.C.L. 28.730(2) and (3).

Subsequent amendments have been made to the Act including:

- verification requirements determined by the crime of conviction, M.C.L. 28.724a; M.C.L. 28.725;
- to incorporate the requirements of the Campus Sex Crimes act, 42 U.S.C. §14071;
- to provide authority for offenders who were provided youthful trainee status under M.C.L. 762.11, *et. seq.* prior to October 1, 2044 to petition the original sentencing court to reduce their registration period from 25 to 10 years; M.C.L. 28.725a; M.C.L. 28.728c(15); M.C.L. 28.728d. At the same time, HYTA was amended to remove from eligibility anyone charged with criminal sexual offense or an offense for which registration is required. 2004 P.A. 239; M.C.L. 762.11.

- to create a Student Safety Zone prohibiting an offender from working, residing or loitering with the zone, with certain exceptions, the Student Safety Zone Act was adopted and incorporated in to SORA, M.C.L. 28.733-736;

The challenged 2011 amendments and these 2004 and 2007 changes form the basis for Plaintiffs' challenge here. Defendants' motion relies on the facts as alleged in this Complaint.

INTRODUCTION

Each iteration of sex offender registration statutes has brought federal constitutional challenges under the same or similar theories raised here – ex post facto; substantive and procedural due process; first amendment. All have failed and the registration, public notification provision and retroactive application to offenders convicted before the adoption of these laws has been generally affirmed. *Doe v. Patacki,* 120 F.3d 263 (2nd Cir. 1997); *Russell v. Gregoire,* 1254 F.3d 1079 (9th Cir. 1997); *Artway v. Attorney General,* 81 F.3d 1235 (3rd Cir. 1996); *Roe v. Officer of Adult Probation,* 125 F.3d 47 (2nd Cir. 1997); *Cutshall v. Sundquist,* 193 F.3d 466 (6th Cir. 1999); *Connecticut v. Doe,* 538 U.S. 1 (2003); *Smith v. Doe,* 538 U.S. 84 (2003).

Michigan's federal district courts and the Sixth Circuit have also addressed these claims in the context of Michigan's SORA prior to the 2011 amendment, affirming these same provisions. See: *Doe v. Kelley,* 961 F.Supp. 1105 (W.D. Mich. 1997) (ex post facto, due process claims); *Lanni v. Engler,* 994 F.Supp 849 (E.D. Mich. 1998) (ex post facto, due process claims); *Akella v. Michigan Dept. of State Police,* 67 F.Supp.2d 716 (E.D. Mich. 1999) (ex post facto, due process claims); *Fullmer v. MSP,* 360 F.3d 579 (6th Cir. 2004) (substantive and procedural due process, equal protection); *Doe XIV v. MSP,* 490 F.3d 491 (2007) (a case specific to HYTA classifications – substantive and procedural due process; equal protection claims)

Michigan's appellate court has also upheld SORA's registration and public notification provisions against ex post fact and due process challenges. See: *People v. Pennington,* 240 Mich App 188, 193-197 (2000); *In re Ayers,* 239 Mich App 8, 14-19 (1999); *People v. Rahilly,* 247 Mich. App. 108, 114-116 (2001) (finding that registration requirements applied to youthful trainees did not violate due process)

In designing its registry, Michigan opted for on an offense based registration system rather than risk assessment community notification. This choice is consistent with the federal statute and mirrors the approach taken by Congress in enacting the law. Except in its treatment of sexually violent predators, the federal act, 42 U.S.C. § 14071, also focused on the nature of the offense.

Practical considerations also supported Michigan's choice. Predictions about future dangerousness, expert or otherwise, following individualized hearings, are problematic. "The scientific community virtually unanimously agrees that psychiatric testimony on future dangerousness is, to put it bluntly, unreliable and unscientific." *Flores v. Johnson,* 210 F.3d 456, 463 (5th Cir. 2000) (Garza, J., concurring) (rejecting psychiatrist's testimony regarding "future dangerousness" pursuant to requirements set by the court for expert testimony), *cert. denied,* 531 U.S. 987 (2000). The U. S. Supreme Court, itself has noted the difficulty inherent in predicting "future dangerousness." *Barefoot v. Estelle,* 463 U.S. 880, 900 (1983); *Kansas v. Crane,* 534 U.S. 407 (2002). The U.S. Supreme Court has also affirmatively recognized that sex crimes and sex offenders pose a serious threat citing statistics indicating that a majority of reported forcible sex offenses were committed against person under 18 years of age; nearly 4 in 10 imprisoned

offenders indicate their victims were 12 or younger; and, when convicted sex offenders reenter society, they are more likely than any other type of offender to be re-arrested for a new rape or sex assault. *McKune v. Lile,* 536 U.S. 24, 32, 33 (2002). Given these considerations, Michigan's choice to continue an "offense based" classification of sex offenders for purposes of ordering its registry is both rational and directed to the very purposes of the law – law enforcement access; public safety; and community notification.

ARGUMENT

I. Michigan's SORA is a valid state regulation imposing registration and reporting requirements. It is not intended to punish and does not otherwise impose effects similar to punishment. Plaintiffs' ex post facto challenges, thus, fail as a matter of law.

Plaintiffs contend that the 2011 amendments to Michigan's Sex Offenders Registration Act are *ex post facto* punishments because they made more burdensome the punishments imposed for offenses committed prior to the enactment of the amendments. (Complaint, ¶294). However, federal courts—including the United States Supreme Court—have already rejected the argument that sex offender registration constitutes an *ex post facto* punishment.

In *Smith v. Doe,* the Supreme Court evaluated sex offender registration under the *ex post facto* prescription. *Smith v. Doe*, 538 U.S. 84; 123 S. Ct. 1140; 155 L. Ed. 2d 164 (2003). The Supreme Court observed that the public dissemination of truthful information is not considered a punishment. *Smith*, 538 U.S. at 98-99. In fact, the Supreme Court noted, "although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these

consequences flow not from the Act's registration and dissemination provisions, but from the conviction, already a matter of public record." *Smith*, 538 U.S. at 101.

Plaintiffs allege that they have not been individually determined to pose a risk to the community. (Complaint, ¶252-271). This appears to be a fundamental grounding of all their federal claims including this ex post facto challenge. Yet, these allegations are irrelevant to this analysis because Michigan does not classify based on risk but rather based on offense, a categorical judgment affirmed by the U.S. Supreme Court. A state's determination to legislate with respect to convicted sex offenders as a class, "rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause." *Smith*, 538 U.S. at 103-104. Consequently, the fact Plaintiffs are subject to registration based on their crimes rather than on a personal determination of risk to the community does not render their registration unconstitutional. Such a requirement "is non-punitive, and its retroactive application does not violate the Ex Post Facto Clause." *Smith*, 538 U.S. at 105-106. *Smith* continues to have application today. *Carr v. United States,* 130 S. Ct. 2229, 2239, n 7; 176 L. Ed. 2d 1152 (2010).[1]

It should be noted, though, Plaintiffs were already registered offenders at the time of the 2011 amendments. Plaintiffs' ex post face challenge is based on the following:

[1] While the Court did not reach the *ex post facto* challenge in that case because it found that SORNA did not apply to pre-enactment travel, it is worth observing for purposes of considering Plaintiffs' "Due Process—Travel" claim that the Supreme Court expressed no concern over SORNA's travel restrictions for post-enactment registered sex offenders. *Carr,* 130 S Ct at 2239-40.

- the creation of Tiers I, II, and III retroactive assignment to Tier III; and the resulting extension of their reporting period from 25 years to life (Complaint ¶¶ 104, 105, 110);
- Classifications based on the offense, not actual risk of re-offending or danger to the public (Complaint ¶¶ 106, 107);
- Application of Tier III requirements to offenders convicted of offenses that do not have a sexual component or who were subject to diversion under HYTA and to individuals adjudicated as juveniles. (Complaint ¶¶ 113, 114).

These claims are not different than those previously considered and rejected by the numerous federal courts previously considering ex post facto challenges to registration and reporting requirements. Now, however, those offenders convicted of the most serious offenses are assigned to Tier III. M.C.L. 28.722(w). Previously these offenders were required to report for 25 years. With the 2011 amendment, Tier III offenders must now report for life. M.C.L. 28.725(12).

The information each offender must provide is identical, whatever the assigned Tier. M.C.L. 28.727(1)(a)(r). With a few exceptions, this is the same information previously required of the registrants. The reporting requirements are generally the same as well. A Tier III offender must report and verify the registry information quarterly. M.C.L. 28.725 (9)-(12). Like before, offenders are also required to update certain registration information within a specified number of days from any change. M.C.L. 28.725.

Plaintiffs' ex post facto challenge, thus, is principally based on the change in the required reporting period applied to those offenders assigned to Tier III. The Ex Post Facto Clause of the federal constitution, art. 1, § 10, prohibits a state legislative enactment that 1) makes a prior action, which was legal when done, criminal, and punishes such action; 2) aggravates a crime, or makes it greater than it was, when committed; 3) changes the punishment by inflicting a greater punishment, than the law annexed to the crime, when committed; 4) alters the legal rules of evidence, and requires less, or different testimony than the law required at the time of the commission of the offense in order to convict the offender. *Roe v. Winthrop Farwell, et. al.,* 999 F. Supp. 174, 183 (D.C. MA 1998) citing, *Calder v. Bull,* 3 U.S. 386, 390, 1 L.Ed. 648 (1798). The Ex Post Facto Clause applies only to criminal statutes. *Kansas v. Hendricks,* 521 U.S. at 361. In deciding whether Plaintiffs have plead a constitutional claim under this theory, the Court applies the intent-effects test discussed in *Kansas v. Hendricks,* 521 U.S. 346, 361 (1997) utilizing the factors identified in *Kenedy v. Mendoza-Martinez,* 372 U.S. 144, 168, 169 (1963).

As noted, both federal and state courts have addressed the purpose and intent of Michigan's SORA finding it to be regulatory and not punitive—including the registration, quarterly verification and reporting requirements as applied to registered offenders. This leaves only the question of whether extending the verification and reporting requirements violates the prohibition against ex post facto laws under the intents-effects test.

The first step of this analysis is to determine whether the legislative purpose is civil or criminal. The second step is to determine whether the effects of the law, apart from the legislative purpose, constitute punishment.

A. Legislative Purpose

Whether a legislative scheme is civil or criminal is first a question of statutory construction. *Hendricks, Id.* at 361; *Smith,* 538 U.S. at 92. This requires the court to consider the statute's text and its structure to determine the legislative objective. Here, the provisions at issue, M.C.L. 28.722(w), M.C.L. 28.725 and 725((12), and M.C.L. 28.727 (1)(a)-(r) were amended to create a tiered registration system and impose different reporting and verification requirements based on the assigned Tier. The federal courts have previously recognized SORAs registration and verification requirements to be remedial or regulatory in nature. *Kelley,* 961 F. Supp. At 1109-12; *Lanni,* 994 F. Supp. At 855; *Akella,* 67 F. Supp.2d at 733. And SORA's purpose to be public safety and community notification. *Id.; Lanni, Id,* at 855. See also, *Russell v. Gregoire,* 124 F.3d at 1093.

The registration, quarterly verification and reporting requirements, even when imposed for life, are rationally related to this identified purpose. The fact Michigan's SORA was amended to bring it into compliance with federal requirements does not alter this purpose. Rather it serves to further it. These requirements assure current, up-to-date information to both law enforcement and the public. Further, requiring individual offenders to go to a police agency and complete the verification form, notifies the offenders of their continued obligations under SORA; assists the Michigan State Police in maintaining accurate

identification; and assists law enforcement by providing a central information source as an investigatory tool. Yet, as the U.S. Supreme Court noted in *Smith,* the requirement of reporting in person to a police station once per quarter is less harsh than "occupation debarment" which the federals courts conclude is not punitive. *Smith,* 538 U.S. at 100.

Other factors to be considered by the Court in evaluating legislative intent include the manner of the statute's codification and the enforcement procedures it establishes. *Hendricks, Id.* at 361; *Smith, Id.* at 94. SORA is codified in Chapter 28 of the State's Civil code related to the administration and regulatory authority of the Michigan State Police. None of the provisions within this Chapter can be considered punitive. Codification of SORA in this Chapter clearly indicates a non-punitive legislative intent. SORAs requirements to notify offenders of the registration, verification and reporting requirements also denote a non-punitive purpose. M.C.L. 28.726. The fact this notice may be part of the plea colloquy or invoke the criminal process in aid of the statutory scheme does not render it punitive. *Smith, Id. at* 95.

These requirements are nothing more than a civil consequence for the criminal conduct for which the individual was convicted as defined under the Act. The fact certain Plaintiffs must now continue to report for life as opposed to 25 years, is nothing more than a continuing remedy reflecting the seriousness of their offense, and assuring accurate, efficient and cost-effective information updates on those who have been convicted of the most severe criminal sexual conduct.

B. Effects

In cases analyzing these registration statutes under the ex post facto intents-effects test, the courts have routinely evaluated the five (5) most relevant *Mendoza-Martinez* factors.

1. Whether the regulations scheme is regarded by history and tradition as punishment: Sex offender registration and notification statutes are of recent origin – generally beginning in 1994. They have not typically been identified as punishment or associated with forms of punishment recognized through history. They are certainly less onerous than reporting to a probation or parole agent to establish compliance with the terms and conditions of the sentence or release. Here offenders personally appear to complete and sign a form, or update specific information, no questions are asked, no restrictions on conduct are imposed, and no continuing supervision is involved as with probation or parole. The challenged requirements are, thus, not similar to any historically recognized concept of punishment.

2. Whether the regulatory scheme imposes an affirmative or restraint: This factor evaluates how the effects of the Act are felt by those subject to it. If the disability is minor and indirect, its effects are too unlikely to be punitive. *Smith,* 538 U.S. at 99, 100. Here, the Act does not impose any physical restraint resembling imprisonment. As the *Smith* Court noted, these reporting and verification requirements are less harsh than "occupation debarment which we have held to be non-punitive." *Id.* at 100. Contrary to Plaintiffs' allegations, the Act does not restrain activities sex offenders may

pursue; they are free to choose jobs, change employment, move their residence, travel in and out of the state and country, move out of the state. The quarterly verification and reporting requirements involve a mere appearance at a police post to complete and sign a form. This takes no more time than it does to make a deposit or withdrawal from the bank. There is no interview, no interrogation, no discussion other than that needed to obtain and return the form. Thus, any disability is minor and indirect and does not constitute punishment.

3. Whether the regulatory scheme promotes the traditional aims of punishment or has a rational connection to a non-punitive purpose: reordering the register to comply with federal requirements and create a consistent scheme in relation to other states is also rationally related to the purpose of the Act. Michigan's statute tiers its register based on the severity of the offense—the more severe the offense, the longer the required registration period. States are not barred from drawing such classifications based on the offense alone. *Connecticut v. Doe,* 537 U.S. at 8; *Smith,* 538 U.S. at 103, 104. It represents a non-punitive, rational choice that directly relates to the purpose of the Act – notification and public safety.

4. In *Smith,* the Court concluded that Alaska's "Act's rational connection to a nunpunitive purpose is a 'most significant' factor in our determination that the statute's effects are not punitive." *Smith,* 538 U.S. at 102. Similar consideration should be given here in evaluating Plaintiffs' challenge. The fact the reporting periods are directly related to the offense of conviction

rather than a questionable risk assessment does not establish a punitive purpose. The *Ex Post Facto* Clause does not preclude a state from making a reasonable categorical judgment that conviction of specified crimes should entail particular regulatory consequences. *Id.* at 103-04. Thus, Michigan's determination to legislate with respect to convicted sex offenders as a class, and to now tier its registry based on the severity of the offense of conviction, rather than an individual determination of dangerousness, which is itself an reliable assessment and predictor, has a rational connection to the non-punitive purpose of the Act. *Id.*

5. SORA's reporting and verification requirements are not excessive with respect to its stated purpose. The requirement that Tier III offenders report for life is not excessive especially given the nature of the crime involved, the related recidivism rates, the purpose of the Act, the coextensive federal requirement and the non-punitive nature of the Act. *Id.* at 104.

In sum, Michigan's SORA does not violate the *Ex Post Facto* Clause. The cases by Plaintiffs in their Complaint do not support a different analysis. Each is easily distinguished and inapplicable to this federal constitutional challenge: *United States v. Juvenile Male*, 590 F.3d 924 (9th Cir. 2010) (the Court's holding that the SORNA's application to juveniles who were adjudicated delinquent under the Federal Juvenile Delinquency Act prior to its enactment had a punitive effect was vacated by the mootness. *Id.* at 2864); *State v. Williams,* 952 N.E.2d 1108, 110-11; 129 Ohio St. 3d 344 (2011); *Wallace v. Indiana*, 905 NE2d 371, 373, 377 (Ind, 2009); *Maine v. Letalien*, 985 A2d 4; 2009 ME 130 (Maine, 2009); *Doe v. Alaska*, 189

P3d, 999, 1006 (AK, 2008); *Kentucky v. Baker*, 295 SW3d 437, 440, 443 (Ky, 2009) (construing Kentucky's school safety zone provisions that created broader "exclusion zone" including schools, playgrounds and day cares the Court found the statute was not intended to be punitive, but the effect of including more locations in the "exclusion zones" acted as a kind of "banishment" rendering the statute punitive in effect); (each Court's analyzed the ex post facto claim under their state's constitutional provision, specifically noting the difference to the federal clause);

In summary, Plaintiff's *ex post facto* challenge fails to state a claim as a matter and should therefore be dismissed.

II. The 2011 SORA amendments do not implicate fundamental rights or liberty interests protected by the federal due process clause. Plaintiffs' Complaint fails to state a claim under the federal Due Process Clause.

Plaintiffs assert both substantive and due process challenges to the 201l SORA Amendments. Each will be addressed separately.

A. Substantive Process claims, Counts II, III, IV.

Plaintiffs allege the 2011 SORA amendments interfere with their fundamental rights to travel, engage in common occupations of life; and to direct the education and upbringing of their children. Yet, these claims fail based on the facts extant and the applicable law.

The substantive component of the Due Process Clause protects "fundamental rights" that are so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Conn.*, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937). Such rights include "the rights to marry, to have

children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997). The Supreme Court has cautioned, however, that it has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Id.* When reviewing a substantive due process claim, we must first craft a "careful description of the asserted right," *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993), and then determine whether that right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that it can be considered a "fundamental right." *Glucksberg*, 521 U.S. at 721. Legislation that infringes a fundamental right is reviewed under a strict-scrutiny test. Such a statute is constitutional, though, when it is narrowly tailored to serve a compelling state interest. *Flores, Id.* at 302.

a. Travel (Count II)

The Supreme Court has described the contours of the right to travel as including three different components. It protects the right of a citizen of one State to enter and to leave another State; the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State. *Johnson v. Cincinnati,* 310 F.3d 484, citing *Saenz v. Roe,* 526 U.S. 489, 493, 508 (1999). The Sixth Circuit holds that the Constitution also "protects a right to travel locally through public spaces and roadways."

Johnson, Id. at 498. Thus, for purposes of this motion only, Defendants concede a fundamental right to both interstate and intrastate travel under the described parameters exists.

Is this right to travel infringed by the 2011 amendments to SORA? The answer must be "No." SORA requires only that a registrant must report: a change of residence that is to last more than 7 days, M.C.L. 28.725 (1)(e); a change of residence or domicile to another state, M.C.L. 28.725(6); a change of residence or domicile to another country or travel to another country for more than 7 days, M.C.L. 28.725 (7). These requirements do not restrict either inter or intrastate travel within the described parameters. Rather they are reasonably related to the need to keep the registry current. Changes of residence or domicile or extended absences from the state are significant information. The required updates keep the registry current and law enforcement and the public informed of a registrant's movement.

Plaintiffs also allege the verification and reporting requirements restrict their ability to travel in violation of this protected right. Again, this is untrue in the context of the right as defined by the Supreme Court and the Sixth Circuit. Plaintiffs know the range of dates on which they must report each quarter as they are specified in the statute. M.C.L. 28.725a(c). There is no restriction on entering one State from another; there is no restriction on the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and there is no restriction on relocating permanently to another State. A similar analysis applies to intrastate travel. No restrictions on where and when

the registrant may travel was created by SORA. These requirements may require more careful planning, but do not impede or impose on travel.

Even if the Court construes the verification and reporting requirements as infringing this "right," these requirements are narrowly tailored to meet a compelling state interest. The verification requirements for Tier III registrants is once a quarter, with the dates identified in the statute. This allows for planning and notification if the registrant is going to be absent during that period. The reporting requirements only apply when certain registration information changes, i.e. residence or domicile for more than 7 days, or permanently; a vehicle registration; an email address; an employer address. Other reporting requirements relate directly to travel – traveling for more than 7 days inside or outside the country. These are not restrictive requirements in any sense. They are narrowly tailored to meet the purpose of the statute and the State's compelling interest– public safety.

b. Work (Count III)

The Sixth Circuit has long recognized that the ""freedom to choose and pursue a career" and "to engage in any of the common occupations of life," qualifies as a liberty interest which may not be arbitrarily denied by the State. *Parate v. Isibor,* 868 F.2d 821, 831 (6th Cir. 1989) citing, *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). A violation of this protected liberty interest occurs when 1) official acts that are unreasonable or arbitrary cause a deprivation, or 2) involve official acts that "may not take place no matter what procedural protections accompany them." *Parate, Id.* Additionally, the Court must consider the nature and seriousness of the

alleged governmental interference; and the strength of the justification given. *Id.* This is, in essence, a procedural due process claim.

Here, Plaintiffs do not and cannot make out such a claim. The facts establish that Plaintiffs' difficulty in obtaining work or keeping it is directly related to their criminal conduct, not their registration. The statute does not impose any affirmative restraint on the type of employment that can be sought; when the registrant may work; or where, other than the prohibition related to the student safety zone. M.C.L. 28.734(1)(a). Plaintiffs' do not identify any unreasonable or arbitrary acts causing the alleged deprivation, which is effectively an inability to find or keep employment, not to choose and pursue a career. Further, the State has a compelling interest being served by these registration requirements which strongly justifies the challenged requirements – public notification and public safety.

Significantly, Plaintiffs claim is premised on the reluctance of employers to hire sex offenders – not on any government action prohibiting or preventing that employment. On balance, the State's action does not infringe this constitutionally protected interest and is otherwise justified by the compelling interest and purposes served by this registry and community notification.

c. Children (Count III)

While parents have a constitutionally protected liberty interest in the education and upbringing of one's children, this right is not absolute or unqualified. *Williams v. Pollard,* 44 F. 3d 433, 434-435 (6th Cir. 1995); *Kottmyer v. Mass,* 436 F.3d 684, 690 (6th Cir. 2000); *Edison v. State of Tennessee,* 510 F.3d 631, 635, 636

(6th Cir. 2007). It is limited by an equally compelling governmental interest in the protection of children. *Kottmeyer, Id.* at 689, 690. The state's action, thus, must directly and substantially interfere with this right, and must be unrelated to a compelling government interest. *Lyng v. Castillo,* 477 U.S. 635, 638 (1986); *Kottmeyer, Id.*

Here the facts do not establish any interference with Plaintiffs' interest in the education and upbringing of their children. SORA does not directly infringe any significant aspect of the parenting relationship. Any restrictions are those related to their criminal conduct, not their registration. Any limitations on the registered offender's participation in school activities are minimal and indirect. A registered offender may participate in decisions about what school his or her children will attend, additional school activities; tutoring; homework, etc. A registered offender may attend a parent-teacher conference, but not activities whose primary purpose is to watch and observe children – such as sporting events or plays. M.C.L. 28.733(b).

Any State "interference" with this fundamental right indirectly, passes strict scrutiny because it is narrowly drawn and rationally related to a compelling government interest – public safety, the safety of children. This claim therefore fails as a matter of law and should be dismissed.

d. Retroactivity (Count VI)

The Due Process Clause provides a means by which to challenge the application of a judicial decision on ex post facto grounds based on "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what

previously had been innocent conduct." *Ruhlman v. Brunsman,* 664 .3d 615, 620 (6th Cir 2011), citing *Rogers v. Tennessee,* 532 U.S. 451, 459 (2001). "When addressing ex post facto-type due process concerns," questions of notice, foreseeability, and fair warning are paramount. *U.S. v. Barton,* 455 F.3d 649, 654 (6th Cir. 2006). Thus, a due process retroactivity claim involves a judicial interpretation of criminal law and must consider whether that decision is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Ruhlman, Id.* at 620, citing *Rogers,* 532 U.S. at 462.

This concept has also been discussed in the context of retroactive legislation. *Hamama v. INS,* 78 F.3d 233, 236 (6th Cir. 1996); *U.S. v. Yacoubian,* 24 F. 3d 1, 7, 8 (9th Cir. 1994) (each involving application of 8 U.S.C. §1251(a)(2)(C) to an alien convicted of a firearms offense before the passage of the statute.) See also: *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 729, 730 (1984) involving retroactive legislation.

Here, Plaintiffs retroactivity claims clearly fail:

- First, neither the criminal procedure, crime elements nor sentencing provisions related to the underlying criminals offenses have changed or were changed as a result of the 2011 SORA amendments;
- Second, SORA is not a criminal statute, nor a judicial interpretation being given retroactive application. Rather, each of the Plaintiffs were subject to SORA at the time of the 2011 amendments. The changes to the registration period, and required registration information are prospective.

- Third, in relation to John Does 2 and 3 and their youthful trainee status, they were on notice at the time of their application, acceptance and ultimate resolution of the criminal charges that they would have to register. When the SORA was first adopted in 1994, the legislature also amended the HYTA to provide that individuals assigned to youthful trainee status were required to register as sex offenders, in effect creating an exception to HYTA. 1994 P.A. 286*; Doe v. MSP,* 490 F.3d 491 at 495. In 2004, HYTA was changed again to remove all eligibility for sex offenses. *Doe, Id* at 496. Consequently, the Sixth Circuit concluded, this interaction between SORA and HYTA abrogates any agreement for youthful trainees charged with sex offenses prior to October 1, 2004. Their registration and its attendant requirements do not rise to the level of a substantive due process violation. *Id.* at 501. See also *People v. Rahilly,* 247 Mich. App. at 114-116.
- Fourth, the State has a rational basis for this requirement. These changes in the registration period and registration requirements, are rationally related the purpose of the statute – public safety, conforming the State's registry to federal law and that of other State's creating a more uniform system for law enforcement, and public notification.
- Fifth, contrary to Plaintiffs' allegations, they do have a remedy under state law – review by their respective sentencing courts on an as-applied basis. They could advance state court challenges on an as-applied just as other convicted sex offenders in Michigan have done. See *People v. DiPiazza*, 286 Mich. App. 137 (2009).

e. Vagueness, Impossibility and Strict Liability. (Count VII)

The due process clause of the Constitution provides the foundation for the void for vagueness doctrine. *Columbia Natural Resources v. Tatum*, 58 F.3d 1101, 1104, 1105 (6th Cir. 1995). This vagueness doctrine has two primary goals. The first is to ensure fair notice to the citizenry; the second is to provide standards for enforcement by the police, judges, and juries. *Id.* at 1104-1105.

A. A person of ordinary intelligence would know what reporting obligations are required by the statute.

The standard for vagueness in the constitutional context is whether "a person of ordinary intelligence could identify the applicable standard for inclusion and exclusion." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1971). The language of the statute at issue here is fairly specific when viewed in context and applying the ordinary understanding and meaning of the statute's terms. Plaintiffs' parsing of the words and questioning the most obscure reading of each challenged provision is beyond reasonable. (Complaint ¶¶ 216-228) A person of ordinary intelligence would understand these requirements. These registration requirements have been in the statute, for the most part, since its inception. Based on the facts alleged, Plaintiffs have understood these requirements and have been in compliance for the period of their registration. Indeed, they have apparently complied with all these requirements since July 1, 2011, the effective of the 2011 amendments. Plaintiffs have reported quarterly since the dates of their initial registrations and at least four (4) times since adoption of the 2011 amendments. They do not indicate being notified of any violations or charged with any failure to report information.

Apparently they are individuals of at least ordinary intelligence and understand these requirements and their obligations to meet them.

B. The statute provides the constitutionally requisite minimal law enforcement guidelines.

This second concern—minimal enforcement standards, is related to the first. While the first involves notice to those charged with obeying the law, the second relates to those who must enforce the law. The standards of enforcement must be precise enough to avoid "involving so many factors of varying effect that neither the person to decide in advance nor the jury after the fact can safely and certainly judge the result." *Columbia*, 58 F.3d at 1105. A statute will be held void for vagueness only when it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc basis. . . ." *United States v. Williams*, 892 F.2d 1044 (6th Cir. 1990) (citing *Grayned v. City of Rockford*, 408 U.S. at 109). The statute meets these controlling requirements:

- The statute contains a controlling standard – failure to meet the required dates for verification determined by the assigned Tier which is in turn determined by the offense of conviction; or a related failure to report new or changed information.

- Subsection (b) of the statute contains an intent requirement. The Supreme Court repeatedly has recognized that a scienter requirement may save a statute that might otherwise be unconstitutionally vague. *Robinson v. Waterford*, 883 F.2d 75 (6th Cir. 1989) (citing *Boyce Motor Lines v. United States*, 342 U.S. 342 (1951); *Screws v. United States*, 325 U.S. 91, 101-103

(1945). The effect of the "scienter standard on the vagueness . . . of a statute" must be examined on a case-by-case basis. *Id.* at 78. The statute contains just such a scienter requirement in that a crime is committed only when an "individual required to be registered" willfully violates the act. M.C.L. 28.729 (1).

Not only does this serve to invalidate Plaintiffs' vagueness challenge, it also squarely address the "impossibility" and "strict liability" claims. It is apparent the challenged provisions are not impossible of compliance because Plaintiffs have in fact complied with them. Further, there is not strict criminal liability because the failure to comply with the statute's requirements must be "willfull." This eliminates, at a minimum, accidental or excusable failure.

Plaintiffs' due process claims fail in all respects and should be dismissed.

III. Plaintiffs have failed to make allegations sufficient to state a claim that their First Amendment rights have been infringed by SORA's registration requirements.

Plaintiffs next allege that SORA abridges their First Amendment right to freedom of speech because the requirement that they reveal their on-line account information to law enforcement interferes with their access to the Internet, including Facebook and Netflix. This claim is specious at best. First, SORA requires only that Plaintiffs provide all electronic mail and instant message addresses, login names or other identifiers used for any electronic mail address or instant messaging system. M.C.L. 28.727(i). It does not require any passwords,

codes or other access information. Further, Plaintiffs fail to identify a recognized First Amendment right infringed upon by this.

SORA does not restrict internet or social media access. It does not regulate the time, place or manner of any internet content or speech. It has no chilling effect. It does serve an important government interest. *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973); *Phelps-Roper v. Strickland*, 539 F3d 356, 361 (6th Cir. 2008).

There are no cases in the Sixth Circuit recognizing a First Amendment right to Internet access—much less anonymous Internet access or speech—and Plaintiffs offer none. Indeed, the Supreme Court's most apt pronouncement on the subject tends to suggest that such a right does not exist. See *United States v. American Library Association*, 539 U.S. 194, 206-207; 123 S Ct 2297; 156 L Ed 2d 221 (2003).

Nonetheless, even if there were a First Amendment right to unfettered Internet access and unrestrained anonymous Internet speech, Plaintiffs have failed to make allegations suggesting that any such rights are abridged by SORA. Plaintiffs allege that their speech rights are infringed because they are unclear whether they have to register with law enforcement to set up on-line accounts to pay taxes, sign up for Netflix, or purchase and review products on Amazon. (Complaint ¶203). Plaintiffs also claim their Facebook accounts have been deleted (Complaint, ¶206). Further, Plaintiffs acknowledge that it is Facebook's own policy that prohibits sex offenders from using that service, not SORA. The fact that Facebook—a corporation and not a governmental entity—has chosen to exclude them from its on-line community does not implicate any First Amendment right.

Rather, Facebook has a First Amendment right of association to exclude them from its membership. See *Boy Scouts of America v. Dale*, 530 U.S. 640; 120 S Ct 2446; 147 L Ed 2d 554 (2000). First Amendment protections are triggered by government actions and private entities acting on their own cannot deprive a person of their First Amendment rights. *Bays v. City of Fairborn*, 668 F3d 814, 819 (6th Cir, 2012).

Plaintiffs do not allege that this registration requirement is in any way tied to specific viewpoints or content, and is instead applied to them generally on the basis of their being convicted sex offenders. SORA does not bar them from using the Internet as a channel for communication, and only requires that convicted sex offenders reveal their e-mail addresses, chat names, or other on-line identities. This limitation is narrowly tailored to the significant governmental interest in preventing sex offenders from using the Internet to conceal their registration status or prey upon children.

IV. Federal law provides for district courts to decline supplemental jurisdiction over claims that involve complex or novel issues of state law and where there are other compelling reasons not to hear the case. This Court should decline to exercise supplement jurisdiction over the Headlee Amendment claim in this Complaint or, in the alternative, dismiss it for failing to state a claim.

1. The Court should decline to exercise supplemental jurisdiction over Plaintiffs' Headlee Amendment claims.

28 USC 1367(a) provides, in pertinent part, that federal district courts may hear state claims that are part of the same case or controversy as a federal claim. However, 28 USC 1367(c) also provides circumstances under which a federal court may decline supplemental jurisdiction including when the claim raises a novel or

complex issue of State law; or in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

In considering whether to exercise this supplemental jurisdiction and applying the enumerated factors, the Court should consider the relationship between the federal claims. The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. *Gibbs v. United Mine Workers*, 383 U.S. 715, 725 (1966).

Plaintiffs' complaint includes a variety of causes of action centering on application of the challenged statutory provisions to them. Plaintiffs' Complaint also includes a claim brought under the "Headlee Amendment" of Michigan's state constitution. Const 1963, art 9, §25-34. In general, the Headlee Amendment concerns state taxes and funding for local units of government, and does not concern the individual rights of any of the Plaintiffs. Further, it is not easily determined on the facts alleged. In this case, the nature of the claims are such that this Court should not exercise supplemental jurisdiction over the Headlee Amendment claims.

First, the Headlee claims are not, so related to federal claims "that they form part of the same case or controversy." 28 USC §1367(a). The majority of Plaintiffs' Complaint describes and relies on the alleged application of the challenged statutory provisions to them. The Headlee "taxpayer" claim which alleges that Michigan's SORA imposes new obligations on local government without allocating funds to perform them—is not factually or practically connected with any of Plaintiffs substantive federal claims, let alone related enough that they are part of

the same case or controversy. Plaintiffs' Headlee claim does not satisfy the threshold for supplemental jurisdiction under §1367(a).

Second, at least two of the factors weighing against supplement jurisdiction in §1367(c) apply in this case. §1367(c)(1) provides that supplemental jurisdiction may be declined where novel or complex issues of State law are raised. §1367(c)(4) allows a court to decline jurisdiction where there are other compelling reasons. Both of these circumstances are satisfied here.

Headlee claims are exceedingly complex and intricately related to the interpretation of unique provisions of Michigan's constitution. Headlee cases are grueling affairs that have been known to last for years—several cases have continued for over a decade. See *Durant v. Michigan*, 456 Mich 175; 566 NW2d 272 (1997); *Adair I v. Michigan*, 470 Mich 105; 680 NW2d 386 (2004). Headlee cases are taxpayer challenges to legislative action requiring local governments to perform a "new activity" but without an appropriation to pay for that activity. Const. 1963, art. 9, §29; M.C.L. 21.231 *et. seq*. This Court, however, has no jurisdiction to evaluate the appropriation of state funds, to require the appropriation of state funds; or to determine the amount of state funds that need to be appropriated prohibiting resolution of the claim. U.S. Const., Amend. XI; *Pennhurst v. Halderman,* 465 U.S. 89, 100, 101 (1984). Given these significant considerations, the Court should decline to exercise jurisdiction over this supplemental state constitutional claim. *Gibbs*, 383 U.S. at 725.

2. Plaintiff has failed to make allegations sufficient to state a viable claim under Headlee.

Subsequent to adoption of the Headlee Amendment, the state legislature passed legislation enacting the new constitutional requirements. M.C.L. 21.231 *et. seq.* *Owczarek v. Michigan*, 276 Mich. App. 602, 604 (2007). Under these standards, when fees are implemented to pay for the government program or activity, Headlee is not implicated. For example, in *Owczarek*, the Michigan Court of Appeals analyzed whether a new statutory requirement that teachers receive criminal background checks violated Headlee. The Michigan Court of Appeals determined that it did not because the legislative mandate that teachers obtain a criminal background check was not an "activity" within the meaning of Headlee. *Owczarek*, 276 Mich App 609-10. Additionally, the school district could require the teachers' pay any cost, thus, obviating the need for an appropriation. A similar situation is presented here.

Plaintiffs are required to register as sex offenders, which in turn requires the submission of information to law enforcement—not altogether unlike the criminal background check in *Owczarek*. The amended statute does not require any new activities beyond additional information collected from the registrant as part of their registration. Plaintiffs have failed to identify any new, additional burdens on law enforcement as a result of the amendments to SORA. Even if collecting registration information were an "activity," Plaintiffs have failed to make allegations that their filling in a few additional blanks on the registration form increased the costs to the local government in any way. Plaintiffs have failed to

make allegations sufficient to identify a state-mandated activity upon local units of government, and so their Headlee claim must fail.

Further, even if SORA mandated local activity under Headlee, the sex offenders themselves pay a fee as part of the registration requirement. MCL 28.725b. Under that provision $20 of the $50 registration fee is paid to the local law enforcement agency collecting and inputting the registration information. MCL 28.725b(1). Consequently, the statute provides for funding through fees to be paid to local law enforcement agencies. Plaintiffs have offered no allegations stating this amount is insufficient to provide for any new "activity" required by SORA. Plaintiffs make vague allusions to a study conducted in Texas, but they fail to connect that study in any way to costs and activities here. It is noteworthy that Plaintiffs have not identified a single local government or police agency that has a complaint over the level of funding for SORA-related functions.

For these reasons, Plaintiffs' state constitutional claim should be dismissed.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendants respectfully request that this Honorable Court enter an Order dismissing Plaintiffs' complaint in its entirety and with prejudice, together with any other relief the Court finds appropriate under the circumstances.

Respectfully submitted,

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Dated: April 24, 2012

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such.

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