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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DEFENDANTS' REPLY BRIEF

1. SORA 2011 does not violate the federal Ex Post Facto Clause.

Plaintiffs' argument is replete with exaggeration as to the effect and impact between 2011 SORA. Plaintiffs ignore the fact prior court reviews rejecting similar ex post facto challenges to Michigan's SORA examined, for the most part, the same "affirmative obligations, disabilities and restraints" that form the basis for this claim. The interpretation and application of the sex offender registration statutes that now exists demonstrates that neither their purpose nor effect is "punishment" but rather is regulatory in nature to assist and inform both law enforcement and the public in today's mobile society.

A. 2011 SORA is not fundamentally different from the Alaska statute analyzed in *Smith v. Doe*.

The reporting and verification requirements required in 2011 SORA are essentially the same as those imposed by the Alaska statute construed in *Smith v. Doe*, 538 U.S. 84 (2004). The one notable exception is the "in-person" reporting. However, Michigan's registered offenders have been required to report in-person essentially from the inception of these registration requirements in 1995. This requirement does not significantly differentiate 2011 SORA from *Smith* or any other of the federal cases rejecting ex post facto challenges to sex offender registration statutes. *Doe v. Patacki,* 120 F.3d 263,1272-1285 (2nd Cir. 1997); *Russell v. Gregoire,* 124 F.3d 1079, 1084-1083 (9th Cir. 1997); *Artway v. Attorney General,* 81 F.3d 1235, 1263-1267 (3rd Cir. 1996); *Roe v. Officer of Adult Probation,* 125 F.3d 47, 53-55 (2nd Cir. 1997); *Cutshall v. Sundquist,* 193 F.3d 466, 473-477 (6th Cir. 1999). Cases related specifically to Michigan's statute have also rejected this same challenge. *Doe v Kelley,* 961 F. Supp 1105, 1109-1112 (W.D. Mich. 1997); *Lanni v. Engler,* 994 F. sup 849, 854, 855 (E.D. Mich. 1998); *Akella v Michigan Dept. of State Police, et. al.,* 67 F. Supp. 2d 716, 733-734 (E.D. Mich. 1999). Any burden resulting from the in-person requirement is, at most, deminumus.

The substantial differences in 2011 SORA and the prior iterations of Michigan's registration statute that form the basis for this challenge are: reorganizing the registry into tiers based on the crime of conviction; extending the reporting period for offenders now included in Tier III, the most serious category of offenses, from 25 years to life; and, the additional personal information that is now required – employer's name and address; internet address and identifiers. Plaintiffs also focus on the Student Safety Zone provisions added to the SORA in 2006 in their ex post facto challenge. M.C.L. 28.73B. (Defs. Ex. A – Comparison of 2011 SORA provisions to pre-2011 version of statute.) Plaintiffs attempt to distinguish 2011 SORA from the significant body of case law rejecting ex post facto challenges to these registration statutes. Yet their argument is principally based on requirements and regulations that pre-dated the 2011 amendment – an amendment required by federal law and which formed the basis of these prior challenges.

B. The requirements of 2011 SORA are not punitive.

Plaintiffs' reliance on the individual statements of legislators as suggesting a punitive intent in enacting these 2011 amendments is misplaced. Federal courts have long rejected reliance on individual legislators' statements as informative of legislative intent or purpose. *Isle Royale Boaters Assoc., et. al.* v. *Norton,* 330 F.3d 777, 784, 785 (6th Cir. 2003). Rather, "words of the statute" itself are the primary focus in determining legislative intent. *Id.* at 784. Here, the 2011 amendments do not support a finding of punitive intent. Rather, and more reasonably, the 2011 amendments directly address the requirements imposed by the federal law, specifically, 42 U.S.C.A. 16901, *et. seq.,* and the guidelines and requirements established by the United States Attorney General, thereunder. See 42 U.S.C.A. 16912. As further demonstrated below, the

statute's words clearly indicate the legislature's intent and purpose to provide a comprehensive, accessible tool for use by law enforcement and the public.

Further, the fact the challenged statute is codified in Chapter 28 of the Michigan Code, which concerns administrative activities of the Michigan State Police, does not inform this analysis either. The statute has always been housed in Chapter 28 which is a civil code. This factor was considered by those courts cited above in analyzing earlier ex post facto changes and concluded no intent to punish could be drawn from this codification. Additionally, the fact the statute imposes criminal sanctions is irrelevant. The statute has always contained criminal penalties. This fact was also rejected as supporting any inference of an intent to punish in those cases analyzing earlier ex post facto challenges to this statute.

C. The *Kennedy* Factors do not support the conclusion the impact and effects of the 2011 SORA Amendments are punitive.

Plaintiffs' argument rests principally on the fact they are now classified as Tier III offenders and thus, subject to all "the restrictions" imposed by the statute for life. Significantly, many of the reporting requirements Plaintiffs point to in support of this argument pre-dated the 2011 Amendments. (Defs. Ex. A) The impacts on all "major areas of plaintiffs' lives" are no different than existed prior to the 2011 amendments, with two principle exceptions – the requirement to provide their employer's name and address and their internet address and identifier information. Similarly, the 2011 amendments themselves do not trigger a "huge number of additional restrictions under a complex web of other federal, state, or local laws" – the fact each Plaintiffs is a convicted sex offender triggers these additional restrictions and obligations. No "complex web" of other federal, state, or local laws is not created or implicated by 2011 SORA. Rather, these 2011 amendments were required by and in response to federal law.

Further, by reorganizing the registry, 2011 SORA reduced the period of registration for thousands of offenders convicted of Tier I offenses – the least severe offenses requiring registration – and their in-person reporting requirements. 2011 SORA retained the 25 year reporting period and quarterly in-person reporting requirement for Tier II registrants – those convicted of mid-level criminal offenses requiring registration. Reorganizing the registry to reduce the registration and reporting periods for certain offenders; maintaining the requirements for certain offenders and increasing the requirements for those convicted of the most severe offenses relates to the purpose of the statute, the regulatory nature of the registry, and clearly demonstrates a non-punitive intent as certain juvenile and adult offenders' obligations were reduced. The fact these Plaintiffs may be unlikely recidivists, as they argue, is irrelevant to this analysis. Michigan's registry is based on the fact of conviction alone, a classification the State may constitutionally draw. *Fullmer v. Michigan Dept of State Police*, 360 F.3d 579, 582 (6th Cir. 2004).

Plaintiffs also argue implementation of the Student Safety Zone in 2006 distinguishes this case and demonstrates the punitive effect of this Act. The Court should reject this argument first because that provision of the statute was not applied retroactively. The Student Safety Zone Act exempted those registered offenders who were living and/or working within 1000' of a school on January 1, 2006 or who are within the safety zone because a school relocated or was established within 1000', and certain juvenile offenders. M.C.L. 28.734 (3) (a), (b); M.C.L. 28.735 (3) (a), (b). Second, Plaintiffs' facial challenge to this provision does not demonstrate any substantial direct impact or effect on them. These significant differences alone distinguish this case from those relied on by Plaintiffs. Those cases are further distinguished in that their analysis is based on the state constitution or specific federal SORNA requirements, not yet effective, and are

unpublished and thus, not authoritative. See *Mikaloff v. Walsh,* 2007 WL 2572258 (N.D. Ohio; *F.R.St. Charles County Sheriff's Dept.,* 301 S.W.3d 56, 61, 62 (Mo. 2010); *Elwell v Townsip of Lower,* 2006 WL 3797974 (N.J. Super. L). Plaintiffs' reliance on *Doe v Schwarzenegger,* 476 F. Supp. 2d 1179 (E.D. Cal. 2009) is also misplaced. That case does not address an ex post facto challenge.

Equally significant to this analysis is the fact Michigan's Student Safety Zone is not a bar to the registrants' participation in a child's education. The registrant is not prohibited from attending parent-teacher conferences or meetings at school or otherwise participating in events that do not involve viewing children. M.C.L. 28.733 (b). Thus, contrary to Plaintiffs' argument, this statute does not preclude the registrant from participating in their child's education and school development. Plaintiffs other arguments in reference to the *Kennedy* Factor are nothing than more than recitations of consequences associated with the fact of their conviction, not their registration. *Smith* at 101.

Plaintiffs argument the 2011 SORA imposes sanctions historically considered punishment is also without merit. The Act does not impose physical restraint or imprisonment. *Smith,* at 100. The Act does not provide the public with the means of shaming an offender. *Id.* at 99. The criminal sanctions available under the Act are imposed only upon a prosecutor's decision to prosecute and are not as harsh as other penalties imposed in the civil context. *Id.* at 100. The Act does not restrain the activities sex offenders may pursue "leaving them free to change jobs or residences" – the only limitation being they cannot move to a location or work at a location within a 1000' feet of a school. *Id.* at 100. Neither the impact nor effect of registration can be reasonably considered punishment. "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 provision, but from the fact of conviction, already a matter of public record." *Id.* at 101.

Plaintiffs also argue the quarterly reporting and updating requirements are similar to a supervised probation, which is a "traditional" form of punishment. This same argument has repeatedly been rejected by the federal courts in analyzing similar ex post facto challenges as indicated in the case cited above. Further, Plaintiffs characterization of being "supervised" by the police or the State as a result of this activity is baseless. Reporting only requires the preparation and submission of a form with the required information. The registrant is not interviewed. The registrant is not subject to drug or alcohol testing. The registrant does not have to provide details on living arrangements or employment. No limitations are imposed on the registrant's activities, who he or she lives with, where they work, who they associate with. No verification of the information is done by the police agency. No follow-up with the registrant is conducted. In other words, no one shows up at the residence or employment to verify who they live with, how they live, or that they are in fact employed or what job they do. The police do not and cannot "violate" a registrant and initiate court action.

Finally, Plaintiffs ignore a significant portion of the "Legislative declarations" in their argument. M.C.L. 28.721a provides the sex offenders registration act was enacted "… with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." The provision continues, "[T]he registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger." 2011 SORA clearly meets this purpose and intent. These legislative choices and the design of the registry do not support a

punitive intent, or a punitive effect. Thus, Plaintiffs have not shown the Act's effects negate Michigan's intent to establish a civil regulatory scheme compliant with federal law.

CONCLUSION

Defendants pray the Court grant this motion, dismiss Plaintiffs complaint and award such other relief it determines appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 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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