

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOES #1-6, on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

RICHARD SNYDER, Governor of the
State of Michigan, and COL. KRISTE
ETUE, 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

**PLAINTIFFS' MEMORANDUM IN SUPPORT
OF PROPOSED EMERGENCY INTERIM ORDER**

Even though this Court and the Sixth Circuit held provisions of Michigan's Sex Offenders Registration Act (SORA) unconstitutional in 2015 and 2016, plaintiffs have remained subject to criminal prosecution for SORA violations. Under the schedule envisioned in this Court's Opinion & Order of February 14, 2020, ECF #84, that was about to end: a final judgment would have entered by now, the 60-day countdown for the injunctions to take effect would be running, and individual notice would be on its way to all 44,000 Michigan registrants.

But with the advent of the COVID-19 crisis, the parties and the Court quickly understood that entry of judgment would have to be delayed. To be clear, this latest delay is a product of the state's larger failure to do anything to respond to this Court's

and the Sixth Circuit's rulings. From the perspective of the last half decade, instead of the last half month, at any time in the past five years the state could have passed a new law, or stopped enforcing the parts of SORA that were held to be unconstitutional, or even just worked on determining which registrants were added to the registry before the 2006 and 2011 amendments. The state defendants chose to do nothing.

Despite the fact that the state has failed to comply with two courts' rulings on SORA, the plaintiffs recognize that the Court's February 14 order cannot be entered as originally contemplated. Given the scope of the crisis, the legislature is not now in a position to undertake considered legislative reform, or even to hold hearings. And the Michigan State Police (MSP) are now not able to determine which registrants are eligible for removal from the registry (as members of the ex post facto subclasses). Nor can the MSP send notices to registrants informing them of their obligations on the timetable originally envisioned. Accordingly, both the plaintiffs' proposed judgment (*see* Exhibit A) and the defendants' proposed judgment postpone entry of a final judgment until after the COVID-19 crisis ends.

The parties disagree, however, on whether the plaintiffs should be left entirely unprotected for the duration of the crisis – a period no one can predict, but which could well drag on for months. While the delay allows the state to allocate resources to deal with the crisis, it puts registrants in an untenable situation absent at least interim relief from this Court. The Governor has ordered all residents, including tens

of thousands of registrants, to shelter in place and to self-isolate, meaning that they are subject to criminal penalties if they venture out other than for approved purposes. *See* Executive Order 2020-21, *Temporary requirement to suspend activities that are not necessary to sustain or protect life*.¹ But at the same time, SORA remains in effect. Registrants are subject to long prison terms if they fail to timely register, to verify certain information in-person and within three days, to stay out of school exclusion zones, and to timely pay their SORA fees. In short, the plaintiffs are subject to conflicting laws: it is crime not to report in person, but it is also a crime to leave home to do so.

Moreover, as a practical matter, most registrants cannot report even if they try to do so. On February 21 – before the crisis hit – the MSP sent a statewide memo to law enforcement agencies instructing them not to take actions like verifying registration unless the agency could confirm that the registrant’s offense occurred after April 11, 2011. Exhibit B. Numerous registrants reported to class counsel that they tried to register, but were turned away. Others, having heard that attempts to register

¹ It is unclear whether any of the exemptions in the order would allow registrants to leave their homes in order to comply with their obligations under SORA. Section 7(a)(10) allows individuals to attend legal proceedings, but SORA registration is not a legal proceeding. Section 7(b)(4) allows travel “[a]s required by law enforcement,” but it is unclear whether that refers simply to compliance with orders by law enforcement or should be read to exempt individuals who are trying to comply with a criminal law.

would be futile, did not make the trip.

Second, as a result of the COVID-19 crisis, numerous law enforcement agencies in Michigan (as elsewhere in the country)² have closed their doors and are refusing to allow registrants to appear in person for their mandated periodic verifications or to update information changes, even though in-person reporting is the only kind of reporting Michigan law allows. Class counsel have been bombarded with questions from registrants and criminal defense attorneys about what registrants should do under these circumstances. Absent an order from this Court, it is unclear what registrants should do about reporting³ or in-person payment of fees during the crisis. And because – as this Court previously found – the exclusion zones are vague, registrants have no way to know where they can live or spend time during the crisis if

² For examples of Michigan law enforcement agencies that have suspended in-person reporting for registrants, *see e.g.*, “Wyoming public safety closed to walk-in traffic during coronavirus crisis,” MLIVE (March 18, 2020), <https://www.mlive.com/news/grand-rapids/2020/03/wyoming-public-safety-closed-to-walk-in-traffic-during-coronavirus-crisis.html>; Kalamazoo County, “Sheriff’s Office Responds to Coronavirus Crisis”, <https://www.kalcounty.com/sheriff/>. Oregon, for example, has converted its registry to telephone-only reporting due to the pandemic: https://www.oregon.gov/osp/Docs/SOR_Web_Announcement.pdf. Pennsylvania has likewise suspended in-person reporting: <https://www.pameganslaw.state.pa.us/TermsandCondition/TermsAccepted>.

³ The parties discussed the possibility of switching to electronic or mail reporting during the crisis, but MSP staff indicated that this would not be feasible as there is no infrastructure for such reporting. There is also no reliable way to notify registrants about any such alternative reporting options.

they need, for example, to be hospitalized, or treated at a rehabilitation center, or tend to a sick relative. (In addition, all schools will be closed throughout the crisis.)

The relief provided in the plaintiffs' proposed order is as narrow as it can be. It is time-limited to the duration of the crisis. It does not take anyone off the public on-line registry. It does not prevent the state from maintaining the registry or adding new registrants. All it does is ensure that registrants will not have to face prosecution or establish the validity of their defense in a state criminal court – or worry about having to do so for the unknown future.

There is huge difference between leaving all registrants with no information and no direction for some indeterminate period, and letting them know that they are and will be protected from prosecution. The Court should not keep registrants in the dark as to whether they must register. Registrants should not have to speculate about whether it is a crime for them to take care of sick loved ones within 1,000 of a school, or guess about whether they must register in person within three days if they start using a family member's car to drive an elderly parent to the doctor.

Delaying entry of the judgment will accommodate the state's needs by allowing more time for the state to come into compliance with what the Sixth Circuit and this Court have ordered. But absent protection for the primary class, registrants will not only continue to be subject to an unconstitutional law, but could now face criminal charges *both* for trying to register and for not trying to register. This puts

registrants – who like all Michiganders are suffering under the stress of dealing with COVID-19 – in an impossible situation.

The defendants have provided no principled reason why interim relief should not evenhandedly reduce the harm to both sides; they merely suggested (at the last status conference) that it might be difficult to ensure that all registrants learn about such relief. In other words, the defendants' position is that registrants should be left in legal limbo for however long the crisis lasts, because some registrants might not find out that they are safe from criminal jeopardy. Nor do the defendants explain what the MSP or class counsel should tell registrants to do about their conflicting legal obligations in the interim (other than to suggest that prosecutors probably would not prosecute). But the state's own refusal to agree that reporting, zone, restrictions, and fee payments cannot be enforced for non-compliance during the crisis suggests that registrants have reason for concern. And state prosecutors have continued to enforce illegal parts of SORA for the past five years, despite the decisions of this Court and the Sixth Circuit. *See also* Registrant Correspondence with MSP, Exhibit C (acknowledging that registrant had tried to register, but informing registrant that MSP has “no authority in regards to enforcement or compliance issues”). Finally, the defendants provide no reason why registrants should be required to report in person and be unable to access safe housing during the crisis, when the overwhelming public health evidence suggests that requiring in-person

reporting and restricting access to safe housing will jeopardize the health of both registrants and the public alike.

While the notice to the class of interim relief may be imperfect, an imperfect solution is far better than no solution. If individual notice to registrants cannot be accomplished, then the Court should order the best notice that is feasible under the current circumstances. The plaintiffs' proposed order requires only simple and easy notice by the defendants: an online notice and copy of or link to the Court's order for the public and registrants; similar email notice to all elected prosecutors for distribution to their assistants (with the same copy or link); and similar email notice to law enforcement through the Michigan Association of Chiefs of Police and the Michigan Sheriffs' Association.⁴ The risk of SORA-related threats, stops, arrests, or prosecutions will be far lower with this simple group notice than with no notice, and similar notice to these groups can be easily and cheaply repeated when the COVID-19 crisis ends. The ACLU will also do everything it can to distribute notice of the order as widely as possible.

In sum, while the plaintiffs accept that the state's request for additional delay is reasonable in light of the COVID-19 crisis, the Court should not grant that request without protecting the plaintiffs at the same time. The plaintiffs' proposed order is

⁴ The plaintiffs' proposed notice provisions have been discussed with the defendants, and modified to reflect the defendants' preferences.

not only consistent with the Court's prior rulings, but will also protect the public because, at present, all Michiganders, including registrants, should be staying home.

All of the reasons for being fair to both sides are set forth in the preface to the plaintiffs' proposed emergency interim order. That text was intentionally included so that, if the Court wishes, there will be a clear public record of what the parties have accomplished, what caused the delay in entering the Court's order, and how entry of the order will allay harm to both sides. The Court obviously can use as much or as little of that text as the Court thinks is useful.

Conclusion

For the above reasons, and for the reasons set forth in the preface to the plaintiffs' proposed emergency interim order (Exhibit A), the plaintiffs ask the Court to enter that order and provide preliminary and temporary injunctive relief in favor of the primary class during the pendency of the COVID-19 crisis.

Respectfully submitted,

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Certificate of Service

On March 30, 2020, the plaintiffs filed the above motion and brief for partial summary judgment using the Court's ECF system, which will send same-day email service to all counsel of record.

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Attorney for Plaintiffs