UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIAN HOPE, GARY SNIDER, and JOSEPH STANDISH Plaintiffs, v. COMMISSIONER OF THE INDIANA DEPARTMENT OF CORRECTION, *et al.* Defendants.	)	1:16-cv-02865-RLY-TAB
PATRICK RICE, ADAM BASH, and SCOTT RUSH Plaintiffs, COMMISSIONER OF THE INDIANA DEPARTMENT OF CORRECTION, *et al.* Defendants.	)	

ENTRY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

As a matter of state constitutional law, Indiana does not impose mandatory sex offender registration on those who committed their offense prior to the enactment of Indiana's Sex Offender Registration Act ("SORA") and who have never left the state. However, the state does impose registration requirements on those who committed their sex offense *prior to* SORA's enactment but then left the state and returned *after* its enactment. It likewise imposes these requirements on those who committed their offense in another state prior to SORA's enactment and then moved to Indiana after SORA's

enactment. The effect of this practice is that a person who committed a sex offense prior to SORA's enactment within Indiana's borders and never left *does not* have to register while a person who committed the same offense at the same time and then moved into Indiana—either for the first time or to return—*does* have to register.

Plaintiffs are all sex offenders who are required to register because they committed their offenses prior to SORA's enactment but then moved to Indiana after its enactment. They allege SORA—as applied by the Commissioner of the Indiana Department of Correction ("DOC"), the respective county prosecutors' offices, and the respective county sheriffs (collectively the "State" or "Indiana")—violates the Constitution. The court agrees. Indiana's rule that those moving into the state must register while similarly situated residents do not have to register violates Plaintiffs' fundamental right to travel and guarantee to equal protection of the laws. The application of SORA's requirements retroactively also violates the Constitution's prohibition against retroactive punishment. That means the registration requirements as applied here cannot stand.

I. Background

Before beginning, the court starts with a few housekeeping issues. First, the court accepts Plaintiffs' version of the facts as true because Defendants have neither specifically controverted Plaintiffs' version with their own evidence nor have they specifically shown that Plaintiffs' facts are not, themselves, supported by admissible evidence. *See* S.D. Ind. L.R. 56-1(f) and (e); *see also Crawford v. Countrywide Home Loans, Inc.*, 647 F.3d 642, 648 (7th Cir. 2011). Defendants have objected to many of the facts contained in Plaintiffs' affidavits. (*See* Filing No. 105, Defendant's Brief in

Support of Summary Judgment at 2 – 3). But their objection is not specific, and so it is overruled. *See e.g. BKCAP, LLC v. Captec Franchise Trust 2000-1*, No. 3:07–cv–00637, 2010 WL 3219303, at *8 n. 4 (N.D. Ind. Aug. 12, 2010) (overruling objections to an affidavit because they were not made with specificity). And statements made by Defendants are not hearsay. *See* Fed. R. Evid. 801(d)(2).

Second, the court highlights what this case is *not* about. This case does not affect sex offenders who have committed their offense after 2006 and then moved into Indiana.[1] The court understands the parties to agree that if a person is convicted now, SORA would apply. This case only involves Plaintiffs whose offenses predated the enactment of SORA (or relevant amendment). Additionally, this case also does not involve the *federal* sex offender requirement(s), if any, that apply to Plaintiffs. (*See* Filing No. 109, Plaintiffs Response in Opposition at 9 – 12). The court makes no comment on those requirements and understands this to be only a challenge to SORA—as applied—to the Plaintiffs. With that out of the way, the court now turns to the background of this case.

A. Indiana's Sex Offender Registration Act

Sex offender registration regimes emerged in the mid-1990s. New Jersey enacted the first sex offender registration statute in 1994 after a child was abducted, raped, and murdered by a known child molester who had moved across the street from the child's family. *Wallace v. State*, 905 N.E.2d 371, 374 (Ind. 2009); *E.B. v. Verniero*, 119 F.3d

[1] 2006 is when Indiana adopted the requirement that an offender must register in Indiana if he was required to register in any other jurisdiction. *See* Ind. Code § 11-8-8-5(b)(1). It is also the same year Indiana adopted the restrictions against sexually violent predators and offenders against children. *See Wallace v. State*, 905 N.E.2d 371, 376 – 77 (Ind. 2009)

1077, 1081 (3d Cir. 1997). Other states followed suit, and eventually, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act—a law conditioning the receipt of federal funds on the enactment of state-sponsored sex offender legislation. *Wallace*, 905 N.E.2d at 374; *Verniero*, 119 F.3d at 1081. By 1996, almost every state had adopted some form of mandatory sex offender registration legislation. *Verniero*, 119 F.3d at 1081.

Indiana enacted SORA in 1994 and has frequently amended it since then. *Wallace*, 905 N.E.2d at 374 – 77 (discussing the history of amendments to the Act). The original version of the Act covered eight enumerated crimes and required offenders to provide location information to law enforcement. *Id.* at 375. The Act did not require offenders to register once they were no longer on parole or probation. *Id.* However, the original version pales in comparison to the present-day version. *See Schepers v. Com., Indiana Dep't of Correction*, 691 F.3d 909, 911 (7th Cir. 2012) ("Over time, Indiana's registry has greatly expanded in scope, in terms of both who is required to register and what registration entails."); *see also Wallace*, 905 N.E.2d at 375 – 77. Now, SORA covers twenty-two crimes, and an offender who is obligated to register must navigate a considerable list of requirements. *See* Ind. Code §§ 11-8-8-5(a)(1) – (22); 11-8-8-7; 11-8-8-8. The DOC and local county sheriff's offices jointly maintain SORA. Ind. Code §§ 11-8-2-12.4, 11-8-2-13(b), 36-2-13-5.5. The DOC makes the final determination as to who is required to register and how long each offender must register. (Filing No. 100-1, First Deposition of Brent Myers ("First Meyers' Dep.") at 6).

SORA demands a lot from offenders. Offenders must annually register—in person—at the local county sheriff's office. Ind. Code § 11-8-8-14. If the offender qualifies as a "sexually violent predator," he must report to the local sheriff's office at least once every ninety days. Ind. Code §§ 35-38-1-7.5, 11-8-8-14(b). Homeless offenders or those who live in transitional housing must report at least once every seven days. Ind. Code § 11-8-8-12. Offenders must also register in every county where they work or attend school. Ind. Code § 11-8-8-7.

Registration entails getting photographed and providing the state with identifying information: full name, date of birth, sex, race, height, weight, hair color, eye color, identifying features, social security number, driver's license or state identification card number, vehicle description, license plate number, principal address, the name and address of any employer or educational institutional that he attends, any electronic mail address, any instant messaging username, any social networking web site username, and "[a]ny other information required by the [DOC]." Ind. Code § 11-8-8-8(a). If any of this information changes, the offender must report such change, in person, within seventy-two hours. Ind. Code § 11-8-8-8(c). SORA also imposes corresponding requirements on law enforcement: local law enforcement must contact each offender at least once per year (at least once every ninety days if the offender is a "sexually violent predator") and must personally visit each offender at least annually (again, at least once every ninety days if the offender is a "sexually violent predator"). Ind. Code § 11-8-8-13(a).

On top of those requirements, SORA imposes additional burdens on specific categories of offenders: "sexually violent predators," "offenders against children," and

"serious sex offenders." Ind. Code §§ 35-38-1-7.5, 35-42-4-11(a), 35-42-4-14(a). These classifications stem from the commission of particular offenses. *See id.* A "sexually violent predator" must inform law enforcement whenever he plans to be absent from his home for more than 72 hours. Ind. Code § 11-8-8-18. An "offender against children" may not work or volunteer at, or reside within 1,000 feet of, school property, a youth program center, or a public park. Ind. Code §§ 35-42-4-10(c), 35-42-4-11(c). A "serious sex offender" may not enter school property. Ind. Code § 35-42-4-14(b).

C. The Plaintiffs in this Case

Plaintiffs all committed a sex offense that, at the time when committed, did not trigger registration under SORA.[2] All, except Brian Hope, committed an offense in another state and then moved to Indiana. Hope committed his offense in Indiana, moved out of the state temporarily, and then returned to live in Indiana. The DOC has determined that all six Plaintiffs must register even though they would not be required to register had they lived and committed their offenses in Indiana. (First Myers Dep. at 24 – 27; *see also* Filing No. 100-2, Second Deposition of Brian Meyers at 25 – 27). Now, a little more about each Plaintiff.

1. Brian Hope

Hope lives in Marion County, Indiana and has been homeless since 2016. (Filing No. 100-3, Affidavit of Brian Hope ("Hope Aff.") at ¶ 1). In 1993, prosecutors charged

[2] All of the Plaintiffs except Joseph Standish committed their offense prior to the enactment of SORA in 1994. Standish committed his offense in 1995, but the 1994 version of SORA did not cover his offense. The parties consider Standish to be similarly situated to the rest of the Plaintiffs, and so the court does too.

him with child molesting; in 1996, he pled guilty; and in 2000, he completed probation. (*Id.* ¶¶ 2, 3).

In 2004, Hope left Indiana and moved to Texas. (*Id.* ¶ 4). Texas officials required him to register as a sex offender in Texas due to the fact he was required to register in Indiana. (*Id.* ¶ 5). When Hope returned to Indiana in 2013, the state required him to register for the rest of his life because he qualified as an "offender against children." (*Id.* ¶ 7). He appealed that determination twice, but both the Marion County Sheriff's Department and the Indiana Department of Correction rejected his plea. (*Id.*, Attachment A., Letter from Marion County Sheriff's Department; *id.*, Attachment B, Letter from DOC).

Because Hope lacks a permanent residence and qualifies as an "offender against children," he must register once every seven days—in person—at the county sheriff's office, and this process can be time consuming. (*Id.* ¶ 13). Hope also cannot live within 1,000 feet of a park, daycare, or certain other facilities. (*Id.* ¶ 15). On at least one occasion, this requirement forced Hope to relocate from a homeless shelter because it was located within 800 feet of a park. (*Id.*).

2. Gary Snider

Snider resides in Huntington County, Indiana with his wife and adult child. (Filing No. 100-4, Affidavit of Gary Snider ("Snider Aff.") at ¶ 1). In 1994, a Michigan jury convicted Snider of criminal sexual conduct in the first degree for an offense committed in 1988; he completed his prison term in 2003. (*Id.* ¶¶ 2, 3).

That same year, he and his wife moved from Michigan to Huntington County, Indiana. (*Id.* ¶ 4). Snider registered as a sex offender until 2010 when the Huntington County Sheriff's Department informed Snider that he was no longer required to register under the Indiana Supreme Court's decision in *Wallace*. (*Id.* ¶ 6). However, he re-registered as a "sexually violent predator" in 2016 after the DOC told him *Wallace* no longer applied. (*See id.* ¶¶ 7, 8; Attachment A, 2016 Letter).

Snider must register in person every ninety-days for the rest of his life. (*Id.* ¶ 11). Like Hope, Snider cannot live within one-thousand feet of a park, daycare, or certain other facilities. (*Id.* ¶ 12). In 2006, he moved away from his wife because their house was located within 1000 feet of a daycare. (*Id.*). He cannot enter school property, which means he cannot see his grandchildren or great-grandchildren perform in school activities. (*Id.* at ¶ 13).

3. Joseph Standish

Standish resides in Allen County, Indiana with his wife and kids. (Filing No. 100-5, Affidavit of Joseph Standish ("Standish Aff.") at ¶ 1). Michigan prosecutors charged him with attempted criminal sexual conduct in the second degree in 1995; he pled no contest and was convicted in 1996; he completed probation in 2001. (*Id.* ¶¶ 2, 3).

Standish moved from Michigan to Allen County, Indiana in 2013. (*Id.* ¶ 5). After not being required to initially register by the DOC, Standish registered in 2016. (*Id.* ¶¶ 6, 7). Now registered, Standish faces the same requirements as Hope and Snider since he too is an "offender against children" and a "sexually violent predator." (*Id.* ¶ 10). And like Snider, the registration burdens have carried over to his personal life. (*See id.* ¶¶ 12

– 14). For example, Standish's son dropped out of Boy Scouts because of embarrassment when the other kids found out about Standish's status. (*Id.* ¶ 14). Standish lives constantly in a state of fear since new requirements can be added any time. (*Id.* ¶ 15).

4. Patrick Rice

Rice lives in Delaware County, Indiana. (Filing No. 100-8, Affidavit of Patrick Rice ("Rice Aff.") at ¶ 1). In 1989, Illinois prosecutors charged and convicted him of aggravated criminal sexual assault. (*Id.* ¶ 2). He completed his incarceration term in 2017. (*Id.* ¶ 5). Upon his release, Rice registered as a sex offender in Illinois. (*Id.* ¶ 7).

Rice moved to Madison County, Indiana in June of 2017 to live with his sister. (*Id.* ¶ 8). Even though Illinois required Rice to register for a period of ten years, Indiana required Rice to register for the rest of his life because he qualified as a sexually violent predator. (*Id.*).

The registration process for Madison County was tedious—to say the least. (*See id.* ¶ 10 – 12). Rice had to pay an an initial registration fee of fifty dollars and had to make multiple trips within a seventy-two-hour period to the Bureau of Motor Vehicles to obtain identification. (*Id.*). These burdens continued whenever he updated his information. He ended up making multiple trips due to changes in telephone number, e-mail address, and social media accounts. (*Id.*). These updates present a challenge because Rice does not have reliable transportation. (*Id.* ¶ 20). A few months later, Rice moved to Delaware County, where he currently resides, and had to do it all again. (*Id.* ¶

14). Like the others, Rice fears having to move again due to SORA's residency restriction. (*Id.* ¶ 22).

5. Adam Bash

Bash lives in Delaware County, Indiana. (Filing No. 100-9, Affidavit of Adam Bash ("Bash Aff.") at ¶ 1). In 1990, he pled guilty but mentally ill in Kentucky to an offense that occurred in the mid-1980s. (*Id.* ¶ 2). He was released from incarceration in 1998 and was not required to serve any term of parole or probation. (*Id.* ¶ 3).[3] After being released, Bash moved from Kentucky to Indiana around 2000. (*Id.* ¶ 5).

SORA's requirements burden Bash's financial situation, ability to travel, and ability to raise his six-year-old son. (*Id.* ¶¶ 12 – 16). SORA requires Bash to pay registration fees and change of address fees—which is difficult to do because Bash's only income comes from social security benefits. (*Id.* ¶ 13). SORA also prevents Bash from obtaining public assistance for housing due to his sex offender status. (*Id.* ¶ 14). When Bash leaves the county, he must inform the sheriff's office of his plans and must register in any county where he may stay. (*Id.* ¶ 12). In 2015, Bash and his family visited the Grand Canyon. (*Id.*). The sheriff's office required Bash to provide a list of accommodations where he would be staying and a detailed itinerary to go on the vacation. (*Id.*). And like the others, the prohibition on entering school property severely burdens Bash. (*Id.* ¶ 16). He has full legal custody of his six-year-old son but cannot

[3] Bash recently completed probation for a separate, non-sex offense. (*Id.* ¶ 6).

participate in any of his son's activities including school plays and parent-teacher conferences. (*Id.*).

6. Scott Rush

Rush resides in Pulaski County, Indiana. (Filing No. 100-10, Affidavit of Scott Rush ("Rush Aff.") at ¶ 1). In 1992, he was charged and convicted of a sex offense in Florida. (*Id.* ¶ 2). He completed his term of incarceration in 1995, and he completed his term of probation in 2005. (*Id.*). In 2017, he relocated to Indiana because of work. (*Id.* ¶ 5).

Rush qualifies as a sexually violent predator, an offender against children, and a serious sex offender. (*Id.* ¶ 10). SORA requires that he pay the yearly registration fees in addition to the change of address fees. These in-person requirements generally take more than an hour, and as a result, Rush must take an entire day off from work to register because his job is not flexible. (*Id.* ¶ 12).

Rush cannot participate in any school activities either. (*Id.* ¶¶ 13, 14). He missed all of his eighteen-year old daughter's choir concerts because he cannot show up at school functions. (*Id.*). On top of that, his daughter also has a learning disability, and he cannot attend any meetings regarding her individualized educational program held on school grounds. (*Id.* ¶ 14).

D. Procedural Posture

Plaintiffs Hope and Snider filed their joint complaint on October 21, 2016 alleging that SORA violated their right to travel, equal protection and the federal *ex post facto* clause; they also sought a preliminary injunction. (Filing No. 1). Standish joined the

case on November 6, 2016, prompting an amended complaint and a renewed motion for a preliminary injunction. (Filing Nos. 12, 14). The court heard argument on that preliminary injunction motion on February 9, 2017. (Filing No. 42). The court ultimately granted Plaintiffs' motion on April 6, 2017. (Filing No. 51).

Plaintiffs Rice, Bash, and Rush filed a complaint on December 6, 2017. The court consolidated the cases, and the parties agreed that the consolidated case would likely be resolved at summary judgment, and so, the court set a briefing schedule. (Filing No. 74). The parties then filed cross-motions for summary judgment—where the case stands today. (Filing Nos. 100, 104).

II. Legal Standard

Rule 56 authorizes the court to grant summary judgment when there is no genuine dispute as to any of the material facts and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *United States v. Z Investment Properties, LLC*, 921 F.3d 696, 699 – 700 (7th Cir. 2019) (internal quotations and citations omitted). Ordinarily on cross-motions for summary judgment, the court considers each motion separately, construing the facts and drawing all reasonable inferences from them, in the light most favorable to the nonmoving party. *Calumet River Fleeting, Inc. v. International Union of Operating Engineers, Local 150, AFL-CIO*, 824 F.3d 645, 647 – 48 (7th Cir. 2016) (internal quotations and citations omitted). Here, however, the court has accepted Plaintiffs' version of the facts as true. When this happens, the court only determines which party, if either, is entitled to judgment as a matter of law. *See Crawford v. Countrywide Home Loans, Inc.*, 647 F.3d 642, 648 (7th Cir. 2011).

III. Discussion

Plaintiffs argue that SORA—as applied—violates their fundamental right to travel, their right to equal protection of the laws, and their right to be free from retroactive punishment.[4] The court will discuss two important cases that apply to all the issues and then take each individual challenge up in turn.

A. The *Smith* and *Wallace* Decisions

Before going any further, the court must discuss two important decisions as they relate to this case, one from the United States Supreme Court and one from the Indiana Supreme Court: *Smith v. Doe*, 538 U.S. 84 (2003) and *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009).

In *Smith*, the Supreme Court considered a constitutional challenge to the State of Alaska's sex offender registration act from convicted sex offenders. *Smith*, 538 U.S. at 105 – 06. The plaintiffs—who had been convicted prior to the enactment of the Alaska act—argued that the act violated the *Ex Post Facto* clause of the Federal Constitution because the intent of the act was to punish sex offenders and its effects were punitive in nature. *Id.* at 92. The Supreme Court disagreed. The Court concluded that the Alaska Legislature intended to create a civil, nonpunitive regime. *Id.* at 96. As to the effects of the act, the Court concluded that the act did not impose punishment because it merely placed reasonable requirements on sex offenders and any additional burdens suffered by

[4] The parties spend some time arguing over whether DOC has a "policy" of registering sex offenders or whether registration is triggered by operation of law. This is unnecessary. Plaintiffs are simply challenging SORA as applied to them by the DOC and local law enforcement.

the offender stemmed from the conviction itself. *See id.* at 98 – 105. *Smith* is particularly important here because the state defends SORA—especially against the *ex post facto* challenge—as a valid, civil regulatory scheme just like the state of Alaska did before the Supreme Court.

In *Wallace*, the second case important here, the Indiana Supreme Court considered a challenge to SORA under the Indiana Constitution. *Wallace*, 905 N.E.2d at 384. The offender committed a sex offense in 1988, pled guilty in 1989, and completed probation in 1992. *Id.* at 373. After he failed to register in 2003, a jury found the defendant guilty. *Id.* He appealed, arguing SORA violated the *ex post facto* prohibitions of the Indiana Constitution when applied to him because everything occurred prior to the Act's enactment. *Id.* The Indiana Supreme Court agreed. *Id.* at 384. It held SORA imposed punishment when applied to an offender who was charged, was convicted, and had served the sentence before the act was enacted. *Id.* Plaintiffs' claims stem from *Wallace* because that is the decision that prevents the state from registering resident sex offenders who have never left the state.

With those decisions in mind, the court now turns to Plaintiffs' challenges.

B. Right to Travel

The Constitution protects an individual's fundamental right to travel. *Saenz v. Roe*, 526 U.S. 489, 498 (1999); *Williams v. Wisconsin*, 336 F.3d 576, 581 (7th Cir. 2003); *see also Selevan v. New York Thruway Authority*, 584 F.3d 82, 99 – 100 (2d. Cir. 2009). That right guarantees a citizen of one state (1) the right to enter and leave another state; (2) the right to be treated as a welcome visitor when temporarily present in another state;

and (3) for those who elected to become permanent residents, the right to be treated like other citizens of that state. *Saenz*, 526 U.S. at 500; *Chavez v. Illinois State Police*, 251 F.3d 612, 648 (7th Cir. 2001). A law that implicates the right to travel must survive strict scrutiny: it must be narrowly tailored to further a compelling governmental interest. *See Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 942 (7th Cir. 2016); *United States v. Holcombe*, 883 F.3d 12, 17 (2d Cir. 2018).

The court previously held, at the preliminary injunction stage, that Hope, Snider, and Standish were likely to succeed at showing SORA's registration requirement implicated their fundamental right to travel and failed strict scrutiny. (Filing No. 51, Preliminary Injunction Order at 13). The court sees no reason to reverse course with the rest of the Plaintiffs: SORA's registration requirement violates all six Plaintiffs' fundamental right to travel. More specifically, SORA violates the third component of the right to travel—the right to be treated like citizens of Indiana.

1. SORA Implicates the Right to Travel

SORA implicates Plaintiffs' right to travel because it treats them differently than sex offenders who are residents of Indiana and have never left. *See Saenz*, 526 U.S. at 500 (statute limiting welfare benefits to new residents implicated right to travel); *see also Shapiro v. Thompson*, 394 U.S. 618, 629 – 30 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974) (statute denying welfare assistance to new residents implicated right to travel); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 909 (1986) (plurality opinion) (statute granting benefits only to veterans who were residents of New York when they entered military service implicated right to

travel).[5] In fact, Defendants' position is that an offender "waives" the protection afforded to him by *Wallace* when he leaves the state. (Filing No. 105, Defendants' Motion for Summary Judgment at 23). That shows that an offender's right to travel is implicated.

Defendants also argue that Plaintiffs are not subjected to any *additional burdens* because their previous states of residency required them to register, but this ignores the fact that the DOC does not require registration for similarly situated sex offenders in Indiana. *See Saenz*, 526 U.S. at 502 – 504 (discussing the right to travel encompasses the right of a citizen to enjoy the same privileges and immunities enjoyed by other citizens of the same state); *see also Soto-Lopez*, 476 U.S. at 905 – 906 (plurality opinion) (favoring "prior" residents over "newer" residents implicates the right to travel).

Defendants also cite to a line of cases holding sex offender registration requirements neither offend the right to travel nor implicate it. *See e.g. Doe v. Moore*, 410 F.3d 1337, 1348 – 49 (11th Cir. 2005) (state sex offender registration requirements do not unreasonably burden sex offender's right to travel); *Holcombe*, 883 F.3d at 17 – 18 (federal sex offender registration requirements do not even implicate the right to travel). But the plaintiffs in those cases simply challenged the requirements as being too burdensome generally; they did not allege a state treated residents more favorably. *See e.g. Doe*, 410 F.3d at 1348 ("Here, however, the Appellants do not argue that they were treated differently because they were a new or temporary resident to Florida . . . .); *see*

[5] In *Soto-Lopez*, four justices held the statute violated both the right to travel and equal protection. 476 U.S. at 911. Chief Justice Burger and Justice White agreed with respect to equal protection, but not with respect to the right to travel. *Id.* at 912 (Berger, C.J., concurring in the judgment); 916 (White, J. concurring in the judgment).

also e.g. Holcombe, 883 F.3d at 17 – 18 (challenging generally the requirements of the federal sex offender registration act). Indiana makes Plaintiffs register; it does not make similarly situated residents register. That is why this case is different.

2. SORA does not Satisfy Strict Scrutiny

SORA fails strict scrutiny because Indiana has not narrowly tailored SORA to fit a compelling government interest. Indiana presses that SORA advances public safety by giving communities notice necessary to protect children from sex offenders. *See McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality opinion) (noting sex offenders are a serious threat in the United States); *Wallace*, 905 N.E.2d at 383 (noting SORA's purpose is to give the community notice necessary to protect children from offenders). If that is so, then Indiana should require *all* sex offenders who committed their offense before SORA's enactment to register—not just new residents or prior residents who left the state and returned. The state has offered no evidence that out-of-state sex offenders or those that leave and return are inherently more dangerous than resident sex offenders, and the court can think of none. SORA is vastly underinclusive because Indiana does not make similarly situated, resident sex offenders register.

To be fair, the state wishes to register *all* sex offenders. The problem is that it cannot do so because of *Wallace*. The court recognizes this is a difficult position, but it makes no difference whether Indiana passes a discriminatory statute that says "resident sex offenders who committed their offense prior to SORA and never left the state thereafter do not have to register, but those sex offenders who migrate to Indiana or those who leave and then return do have to register" or whether Indiana passes a facially

neutral statute that says "all sex offenders must register" but then—as a matter of state constitutional law—applies it only to new or returning residents. The result is the same: Indiana is favoring its own citizens over those who migrate into the state. It is treating sex offenders who committed their crimes prior to SORA's enactment differently based solely on the travel of the offender: if he never left the state—no registration; if he left the state and returned after the enactment of SORA, or if he moved into the state after the enactment of SORA—registration. Indiana cannot deny Plaintiffs the protection of Indiana's constitution while they are in Indiana simply because they moved to the state after SORA's enactment. *Soto-Lopez*, 476 U.S. at 911 (plurality opinion) (noting once non-residents become residents of a state, they become "the State's own" and cannot be discriminated against solely based on their arrival date) (citations omitted); *see also Burton v. State*, 977 N.E.2d 1004, 1010 (Ind. Ct. App. 2012) ("The fact that [the offender's] crime was committed in Illinois does not deprive him of the protection of Indiana's constitution while he is in Indiana."), *abrogated by State v. Zerbe*, 50 N.E.3d 368, 370 n. 2 (Ind. 2016).

Defendants argue that the state also has a compelling interest in preventing the Hoosier heartland from becoming a sanctuary destination for sex offenders. But that is no different from a state limiting benefits to new residents because it does not want the state to become a sanctuary city for welfare recipients. *See Shapiro*, 394 U.S. at 631 – 33. And, as the court stated in its Preliminary Injunction Order, the statute is overbroad with respect to this purpose because the statute treats every sex offender as if he came to Indiana to avoid registering. It fails to distinguish between those migrating to avoid

registering in another state and those migrating for other reasons, such as family or work. (Preliminary Injunction Order at 15); *see also Memorial Hospital v. Maricopa County*, 415 U.S. 250, 264 (1974) (striking down state statute requiring county residency for at least a year before receiving certain medical benefits because, in part, it treated every person as if he came to the jurisdiction solely to obtain free medical care).

Defendants also liken this case to *Doe v. Neer*, 649 F.Supp.2d 952 (E.D. Mo. 2009), but the court does not find it persuasive. There, a sex offender was convicted of an out-of-state offense prior to the enactment of Missouri's sex offender act but moved to Missouri after its enactment—like Plaintiffs in this case. *Id.* at 956. The court rejected the offender's right to travel challenge even though the act did not apply to Missouri residents who committed an in-state offense prior to the enactment of the sex offender act but never left the state. *Id.* at 956 – 57.

Putting aside the fact that *Neer* has no applicability to Hope, who was convicted in Indiana, left, and then returned, the court disagrees with *Neer's* reasoning:

> Subsection (7) of Mo.Rev.Stat. § 589.400 requires all Missouri residents who were convicted of an offense in another state after July 1, 1979 to register under SORA if the same crime, if committed in Missouri, would require registration. This subsection applies regardless of the offender's residence at the time of the offense. *For example, a Missouri resident who traveled to another state and was convicted of an offense that, if committed in Missouri, would require registration would be required to register under subsection (7). Similarly, a non-resident who was convicted of the same offense would be required to register upon moving to Missouri.*

Id. at 956 (emphasis added). That, respectfully, inverts the analysis. The question here is not whether an *Indiana resident* who traveled to another state and was convicted of an offense that would be registerable in Indiana is treated the same as Plaintiffs. The

question is whether *Plaintiffs* are treated the same as a resident who committed the same offense in Indiana and then never left. To say otherwise is to say there is no right to travel violation when a state passes a statute denying welfare assistance to new residents for one year because a non-resident who moves into the state and a resident of that state who leaves and then returns are both subject to the same one-year moratorium in welfare assistance. *See Shapiro*, 394 U.S. at 642. That cannot be the case, and as such, the court finds *Neer* distinguishable.

For those reasons, Indiana's failure to provide the same benefit to Plaintiffs as it does to similarly situated residents violates Plaintiffs fundamental right to travel.

C. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This means that states must treat similarly situated people alike. *St. Joan Antida High School Inc. v. Milwaukee Public School District*, 919 F.3d 1003, 1008 (7th Cir. 2019) (citation omitted); *Vision Church v. Village of Long Grove*, 468 F.3d 975, 1000 (7th Cir. 2006). Where, as here, a state statute burdens a person's fundamental right to travel, the state must overcome strict scrutiny. *See St. Joan Antida*, 919 F.3d at 1008; *see also Doe v. Heck*, 327 F.3d 492, 519 (7th Cir. 2003). Just to reiterate, strict scrutiny requires that the state show that the law is narrowly tailored to serve a compelling government interest. *Midwest Fence Corp.*, 840 F.3d at 941.

For the reasons already described under the right to travel, SORA fails strict scrutiny. SORA, as applied to Plaintiffs, differentiates between (1) out-of-state sex

offenders and resident sex offenders who leave the state and then return and (2) in-state sex offenders who never leave the state. The state offers two interests to try and justify this treatment—public safety and the fear of becoming a sanctuary for sex offenders—but as explained above, neither justification saves SORA. With respect to public safety, the means the state chooses are wholly underinclusive: it does not register resident offenders who committed their crimes in Indiana and never left the state, even though they have committed the *exact same crimes* at the *exact same point in time* as the others. *Soto-Lopez*, 476 U.S. at 905 (striking down benefits statute that favored veterans who were New York residents over those similarly situated veterans who were not New York residents at the same point in their lives). With respect to becoming a sanctuary state, the Supreme Court has rejected the notion that a state can provide a benefit to current residents and not to new ones so as not to become a sanctuary state. *Saenz*, 526 U.S. at 504. And, even if Indiana did have a compelling interest in preventing sex offenders from fleeing their home states, its measure is drastically overinclusive because it fails to account for those sex offenders who come to Indiana for other reasons like work or family.

The state advances a separate argument with respect to equal protection. Defendants argue that Indiana requires Plaintiffs to register not because of their out-of-state *conviction* in another state, but because of their out of state *registration* requirement. *See Ammons v. State*, 50 N.E.3d 143, 144 – 45 (Ind. 2016) (holding SORA does not violate *ex post facto* clause of state constitution when applied to offender who was convicted in Indiana, left the state, and then relocated back to Indiana after SORA's

enactment); *State v. Zerbe*, 50 N.E.3d 368, 370 (Ind. 2016) (holding SORA does not violate *ex post facto* clause of state constitution when applied to offender who was convicted in another state and then relocated to Indiana after SORA's enactment). But those cases prove the point under an *equal protection* analysis: the state applies a different rule to residents than it does non-residents who have engaged in the same conduct at the same time. There is no need to engage in a similarly situated analysis because everyone agrees the DOC applies SORA differently to residents than it does to Plaintiffs. *See St. Joan Antida*, 919 F.3d at 1010. And for reasons already explained, Indiana cannot satisfy the appropriate scrutiny for that differential treatment.

Indiana's application of SORA to Plaintiffs, thus, violates the equal protection clause of the Constitution.

D. Ex Post Facto

The *ex post facto* guarantees in the Constitution prohibit retroactive punishment. *See* U.S. Const., Art. I, § 9, cl. 3; Art. 1, § 10, cl. 1; *Weaver v. Graham*, 450 U.S. 24, 28 (1981). That means neither Congress nor any state can enact a law that increases the punishment for an offense already committed. *Weaver*, 450 U.S. at 28; *see also Vasquez v. Foxx*, 895 F.3d 515, 520 (7th Cir. 2018). A law must be both retroactive and punishment to be characterized as an *ex post facto* law. *Vasquez*, 895 F.3d at 520.[6]

[6] Although both "retrospective" and "retroactive" have been used to describe a law that applies to past conduct, *compare Smith v. Doe*, 538 U.S. 84, 92 (2003) (retroactive), *with Weaver*, 450 U.S. at 29 (retrospective), they mean the same thing. Black's Law Dictionary (10th ed. 2014), *available at* Westlaw (defining "Retrospective" as "See Retroactive" and "Retrospective Law" as "See Retroactive Law").

1. SORA's Registration Requirements are Retroactive

A law is retroactive if it applies to events occurring before its enactment. *See Weaver*, 450 U.S. at 29; *see also Smith*, 538 U.S. at 89 – 91; *Does #1-5 v. Snyder*, 834 F.3d 696, 697 – 98 (6th Cir. 2016).

Here, SORA applies retroactively to Plaintiffs. It is undisputed that Hope, Snider, Rice, Bash, and Rush all committed their offenses prior to the SORA's enactment, and Standish committed his offense after SORA's enactment but before his specific offense was covered. Because SORA's registration requirements apply to Plaintiffs' conduct occurring before its enactment, SORA operates retroactively. *See Weaver*, 450 U.S. at 29; *Smith*, 538 U.S. at 89 – 91 (Alaska Act's registration and notification requirements were "retroactive" and covered offenders whose conduct occurred before the Act's enactment); *see also Snyder*, 834 F.3d at 697 – 98 (undisputed that 2006 and 2011 Michigan's Sex Offender Registry Act amendments applied retroactively to plaintiffs whose offenses predated those amendments).

Defendants argue that the Seventh Circuit has foreclosed this conclusion. *See United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011), *cited with approval in Vasquez*, 895 F.3d at 520. In *Leach*, the Seventh Circuit upheld an *ex post facto* challenge to the Federal Sex Offender Registration Act by an Indiana sex offender. *Leach*, 639 F.3d at 773. In doing so, the Seventh Circuit included language in the opinion that the registration requirements under the Federal Act were not retrospective. *Id.* ("[F]ederal guidelines say that an offender who was convicted before [the Federal Act] was enacted must comply with them . . . But that does not make them retrospective:

[the Federal Act] merely creates new, prospective legal obligations based on the person's prior history.").

But *Leach* does not categorically bar challenges to state sex offender legislation. The Seventh Circuit explicitly authorized an offender to challenge sex offender registration requirements as punishment:

> Logically there are only two conceivable ways in which one might argue that an *ex post facto* violation arises under [the Federal Act]: either [the offender] could contend that the criminal penalties . . . are retroactive, or *he could assert that the registration requirements . . . constitute punishment*.

Id. (emphasis added). In the first challenge, the criminal penalties for failing to register are punishment; the only question is whether they apply retroactively. The opposite is true with respect to the second type of challenge: the registration requirements apply retroactively; the only question is whether they constitute punishment. That is the point of *Leach* notwithstanding some language to the contrary: the *registration requirements*, themselves, are retroactive because they apply to an offender based on his *past* conduct; the *criminal penalties* for failing to register are not retroactive because they are based on his *future* conduct. This makes sense too because the Seventh Circuit explicitly left the door open for a future challenge to *Indiana's sex offender registration* statute. *Id.* at 772 ("And even if Indiana's system were flawed (a point on which we express no opinion . . . ."). Since Plaintiffs challenge the *registration requirements*, there is no retroactivity problem.[7]

[7] To the extent that *Leach* holds otherwise, that conclusion cannot be squared with *Smith*. In *Smith*, the Supreme Court stated the registration requirements at issue were retroactive:

2. The Effects of SORA's Registration Requirements Constitute Punishment

In addition to being retroactive, an *ex post facto* law must also punish the offender. *See Smith*, 538 U.S at 92; *Vasquez*, 895 F.3d at 520. To determine whether a law imposes punishment, the court must look to whether (1) the "legislature intended to impose punishment," and if not, (2) whether the "regulatory scheme is 'so punitive either in purpose or effect as to negate' the legislature's nonpunitive intent." *Vasquez*, 895 F.3d at 521 (quoting *Smith*, 538 U.S. at 92). Plaintiffs only argue that the statute is punitive in effect, and so the court will assume without deciding that the legislature did not intend to impose punishment and skip to the second step.

Following the Supreme Court's lead in *Smith*, the court considers five factors in determining whether SORA imposes punishment: (1) whether the law inflicts what historically and traditionally has been considered punishment; (2) whether the law imposes an affirmative disability or restraint; (3) whether the law promotes the traditional aims of punishment; (4) whether the law has a rational connection to a non-punitive purpose; and (5) whether the law is excessive with respect to its purpose. *Vasquez*, 895

> The Alaska law, which is our concern in this case, contains two components: a registration requirement and a notification system. *Both are retroactive.*

Smith, 538 U.S. at 90. To be sure, the Supreme Court ultimately decided that Alaska's Act did not amount to punishment. But it was never really disputed whether the requirements were retroactive. The challenge there was the same as the challenge here: SORA's requirements constitute punishment. Accordingly, if there is any tension, *Smith* controls the outcome here.

F.3d at 521 (citing *Smith*, 538 U.S. at 97); *see also Snyder*, 834 F.3d at 701. The court turns to each now.

History and Tradition

Two important historical concepts are important here: shaming and banishment. Punishments involving shaming inflicted public disgrace and resulted in permanent stigmas. *Vasquez*, 895 F.3d at 521 (citing *Smith*, 538 U.S. at 97 – 98). SORA does just that. The Act does more than identify the offender and his conviction; it assigns them a label *based solely on the offense*—without any consideration of present dangerousness. SORA categorizes some offenders as a "serious sex offender" (all Plaintiffs in this case); some as an "offender against children" (all Plaintiffs); and some as a "sexually violent predator" (Snider, Standish, Rice, Rush). These lifelong labels shame Plaintiffs and result in a permanent stigma attached to their name for the rest of their lives. *See Snyder*, 834 F.3d at 702 – 703 (holding Michigan's Act resembled shaming because it "ascribes and publishes tier classifications corresponding to the state's estimation of present dangerousness without providing for any individualized assessment"). And SORA is even more gratuitous than the Act in *Snyder*. For example, SORA uses "sexually violent predator" instead of "tier III" offender. This is particularly disgraceful for offenders who committed their offense a long time ago such as Snider (mid-1980s) and Bash (early 1980s). Just like the Act in *Snyder*, SORA shames offenders by ascribing these lifelong labels. *Id.* at 702; *see also Schepers v. Com., Indiana Dep't of Correction*, 691 F.3d 909, 912 (7th Cir. 2012) (discussing the extra burdens sexually violent predators face). On top of that, SORA shames some offenders by including the details of the offense on the

registry. The DOC posts the details of the crime for some offenders—like Snider—on the internet:

> Details: CRIMINAL SEXUAL CONDUCT – 1ST DEGREE WITH PERSONAL INJURY – ENGAGED IN SEXUAL PENETRATION TO-WIT: ENTERED VICTIM'S VAGINA WITH PENIS CAUSING PERSONAL INJURY TO SAID CITIM [sic] AND USING FORCE OR COERCION TO ACCOMPLISH SEXUAL PENETRATION, BRUISING VICTIM'S THIGHTS [sic] HIPS, BUTTOCKS AND ARMS. VICTIM WAS A FRIEND OF THE FAMILY FOR EIGHT YEARS.

(Snider Aff., Attachment B). It is one thing to publish the offense and the conviction itself—information that did not pose a problem under *Smith*. It is quite another, on top of that, to publish the graphic details of the crime itself. These details and the permanent labels serve only to add an additional stigma above and beyond what naturally flows from the offense, and they resemble the historical practice of shaming.

SORA also resembles banishment—at least to a certain degree—because its geographical restrictions are intrusive and significant. *See Snyder*, 834 F.3d at 703. As "offenders against children," Plaintiffs cannot reside within 1000 feet of any school property, youth program center, or a public park. Ind. Code § 35-42-4-11(c). And as "serious sex offenders," they cannot enter school property. Ind. Code § 35-42-4-14(b). These prohibitions severely impact Plaintiffs. Snider once had to move away and live separately from his wife because of this requirement, and presently, he cannot participate in any of his grandchildren's or great-grandchildren's school events and activities. (Snider Aff ¶¶ 12, 13). Rice struggled to find a residence when he moved back to Indiana and lives in constant fear that a daycare may open at any time near his residence. (Rice Aff. ¶ 22). Rush cannot attend his daughter's choir concerts, and he cannot attend her

individualized education program meetings. (Rush Aff. ¶¶ 13, 14). Hope, Standish, and Bash are impacted even more so because they live in major cities (Indianapolis, Fort Wayne, and Muncie) where there are a countless number of schools and parks. Hope was required to leave a homeless shelter because it was within 800 feet of a park (Hope Aff. ¶ 15). Standish purchased a home within 1000 feet of a daycare when he was not originally required to register. (Standish Aff. ¶ 12). He also cannot participate in any school activities for his 10-year-old and 13-year-old children, including parent-teacher conferences. (*Id.*). And Bash may be impacted the worst. He has full, legal custody of his six-year old son, who attends elementary school in Muncie. (Bash Aff. ¶ 16). However, he cannot attend plays or parent-teacher conferences, and he cannot drop his son off at school. (*Id.*). While these restrictions do not force Plaintiffs to leave their communities, they significantly limit where they can live and go freely.

It is true that the Supreme Court found that Alaska's Act did not amount to shaming or banishment, and the Seventh Circuit likewise found the same with respect to the Illinois Act. *Smith*, 538 U.S. at 97 – 99; *Vasquez*, 895 F.3d at 521. However, those Acts differed considerably from SORA. The Act in *Smith* merely published already public information on the internet about the offense and did not classify or label the offender. *Smith*, 538 U.S. at 99 – 101. Nor did it restrict where offenders could move or live. *Id.* Here, SORA includes the details of the offense and permanently stigmatizes the offender. It also significantly impacts where Plaintiffs can reside and see their children. With respect to the Act in *Vazquez*, that Act restricted an offender from residing within 500 feet of a school, playground, or child-center. *Id.* at 518. Here, SORA prevents

Plaintiffs from *entering* school property, and it restricts them from living within *1000 feet* of school property, a youth program center, or a public park. SORA simply sweeps much more broadly.

Accordingly, SORA resembles the traditional forms of shaming and banishment. This factor weighs in favor of treating SORA as punishment.

Affirmative Disability or Restraint

The next factor in the analysis is whether SORA imposes an affirmative disability or restraint on Plaintiffs. A regulation that imposes only minor restraints is unlikely to be considered punishment. *See Smith*, 538 U.S. at 100 ("If the disability or restraint is minor and indirect, its effects are unlikely to be punitive.").

SORA, however, severely restricts Plaintiffs' liberty. In addition to the residency restrictions and the school property prohibition, SORA imposes demanding registration and reporting requirements. SORA requires all Plaintiffs to report *in person* at least once annually and Snider, Standish, Rice, and Rush to report in person every 90 days. Ind. Code §§ 11-8-8-14, 11-8-8-14(b). SORA requires homeless offenders, like Hope, to report in person every seven days. Ind. Code § 11-8-8-12. These encounters can take anywhere from twenty to forty minutes, and when factoring other variables such as travel and having to wait in line, they can take one to two hours. (Hope Aff. ¶ 13). If any of their information changes, Plaintiffs must report that change to the sheriff's office within 72 hours. Ind. Code § 11-8-8-8(c). If a "sexually violent predator" travels anywhere away from his residence for more than 72 hours, he must inform law enforcement—which can sometimes entail providing a detailed itinerary of where they will be. Ind.

Code § 11-8-8-18; (*see also* Bash Aff. ¶ 12). Moreover, these reporting requirements go both ways: local law enforcement must contact and visit all offenders yearly—every 90 days if the offender is a sexually violent predator. Ind. Code § 11-8-8-13(a).

Registration and reporting cost money too. Each Plaintiff must pay a $50.00 annual registration fee in the county where he resides. (*See e.g.* Rice Aff. ¶¶ 9, 15). If required to register in another county, he must also pay the $50.00 fee for that county too. (*Id.*). Indiana law authorizes charging a $5.00 "address change" fee; however, some Plaintiffs have paid this fee for other changes such as buying a new car or getting a new haircut. (*See e.g.* Bash Aff. ¶ 10). These fees particularly burden Bash, whose only income comes from disability and social security benefits and who is raising a child without financial support from the child's mother. (*Id.* ¶ 13). SORA also indirectly costs offenders. Rush must take an entire day of work off every 90 days to register because he lives six miles from the sheriff's office and the process takes longer than an hour. (Rush Aff. ¶ 12). Rush is also ineligible for housing assistance—either from non-profits like Habitat for Humanity or from the federal government. (Bash Aff. ¶ 14); *see also* 24 C.F.R. § 982.553(a)(2)(i) (prohibiting admission to HUD's Housing Choice Voucher program if any member is subject to a lifetime registration requirement under a State sex offender registration program). Even though no one is "actually being lugged off in cold irons bound," these requirements are far from minor or indirect. *See Snyder*, 834 F.3d at 703; *cf. Vasquez*, 895 F.3d at 521 ("Although the Illinois residency restrictions limit where sex offenders may live, the statute does not control any other aspect of their lives and thus does not resemble the comprehensive control of probation and supervised

release."); *cf. Smith*, 538 U.S. at 101 ("The Alaska Statute . . . does not require [periodic] updates to be made in person."); *id.* ("[O]ffenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision.").

Because SORA imposes severe restraints on Plaintiffs, this factor weighs in favor of treating the Act as punishment.

Traditional Aims of Punishment

The third consideration is the extent that SORA advances the traditional aims of punishment. *Vasquez*, 895 F.3d at 522 (citing *Smith*, 538 U.S. at 102); *see also Snyder*, 834 F.3d at 704. This inquiry focuses on whether the act is retributive. *Vasquez*, 895 F.3d at 522.

SORA serves the traditional goal of retribution. As did the Act in *Snyder*, SORA imposes severe restrictions and a community stigma on an offender based *solely* on a past criminal offense. *Snyder*, 834 F.3d at 704. Others who engage in similar conduct but who are not convicted of an offense do not have to register. This suggests the state is seeking punishment for the offender's past conduct—not present dangerousness. *See Smith*, 538 U.S. at 113 (Stevens, J. dissenting) ("No matter how often the Court may repeat and manipulate multifactor tests . . . it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders *and on no one else* as a result of their convictions are not part of their punishment.") (emphasis in original). Labeling offenders as sexually violent predators and including the details of an offender's crimes only reinforces the conclusion that SORA seeks to punish the offenders for their past offenses. *Snyder*, 834 F.3d at 704 (holding Michigan's Act advances all the

traditional aims of punishment including retribution); *Wallace*, 905 N.E.2d at 382 (treating the effects of SORA as punitive).

As such, the court finds that this factor weighs in favor of treating SORA as punishment.

Rational Connection to a Non-punitive Purpose and *Excessiveness*

The fourth and fifth factor concern whether SORA is rationally connected to a nonpunitive purpose, and whether its requirements are excessive. *Smith*, 538 U.S. at 102; *Vasquez*, 895 F.3d at 523.

As already discussed, Indiana has an interest in protecting children—few can argue with that as a general proposition. *Vasquez*, 895 F.3d at 522. But the evidence before the court suggests that Indiana has overstated the dangerousness posed by sex offenders relative to the other criminal population. (*See* Filing No. 100-12, Indiana DOC Recidivism Rates 2005 – 2007 at 18 – 22). According to the DOC's research, the recidivism rates for sex offenders were only marginally higher than that of all other offenders. (*Id.* at 18) (about three percent for 2005, about two percent for 2006, and about five percent for 2007). Moreover, the majority of sex offenders recidivate because of technical violations—violations of parole or probation—not because of new charges. (*Id.* at 21) (about 80% rate for technical violations in 2005, about 74% rate for technical violations in 2006, and about 70% rate for technical violations in 2007). The recidivism rate for sex offenders committing a new *sex offense* is very low. (*Id.* at 22) (between five and six percent for all three years). All of this shows that sex offenders pose no more of a risk than regular offenders. *Cf. Smith*, 538 U.S. at 103 (noting the legislature in Alaska

had grave concerns over the high rate of recidivism among convicted sex offenders). If anything, the evidence suggests that SORA may increase recidivism since most sex offenders recidivate due to a technical violation. *See also* J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161, 192 (2011) (noting sex offender notification requirements may encourage recidivism among registered offenders).

Even giving deference to Indiana's decision to target sex offenders, SORA's requirements simply go too far. The three-tier classification system with stigmatizing labels; the in-person registration and change of information requirements; the fees; the residency restrictions; the school property prohibition; and the vacation reporting requirements—when considered as a whole—resemble less of a calculated policy judgment and more of a type of "byzantine code governing in minute detail the lives of the state's sex offenders." *See Snyder*, 834 F.3d at 697 (citation omitted). The state imposes these requirements on many offenders *for life*—without any assessment as to their present dangerousness.[8] While SORA conceivably keeps "the stereotypical playground-watching pedophile" away from schools, *Snyder*¸ 834 F.3d at 705, it also keeps away parents who simply wish to parent their children and attend their activities.

[8] The statute does permit offenders to challenge their registration requirement. However, as the record here indicates, this route seems futile. Hope challenged his registration requirement in this case and simply received a letter in response saying he was required to register for life because he was an Offender against Children. (Hope Aff., Attachment A, Letter from Marion County Sheriff). He appealed that determination and received an even shorter letter saying the decision was correct *because of his past offense*. (Hope Aff., Attachment B) (emphasis added). There was no inquiry into Hope's present dangerousness (almost 20 years later). The state has not offered any evidence that it has removed offenders based on a challenge under this section.

(Rush Aff. ¶ 13); (Bash Aff. ¶ 16). The state has not offered *any* evidence as to how SORA's requirements accomplish its goals. *See Hoffman v. Village of Pleasant Prairie*, 249 F.Supp.3d 951, 960 (E.D. Wis. 2017) (village ordinance restricting sex offenders not rationally connected to its purpose where village presented no evidence that the ordinance furthered the village's goals). And while the state is not required to demonstrate a tight fit between its policy and its goals, it must tailor the policy in *some* way: the state cannot use a sledgehammer to swat a bee. *Smith*, 538 U.S. at 105 (regulatory means must be reasonable); *Snyder*, 834 F.3d at 705 (finding Michigan's Act excessive because the punitive effects of the restrictions far outweighed its salutary effects). Accordingly, SORA's requirements cannot be said to be rationally related to its purpose because the requirements are far too excessive.

Defendants argue that Plaintiffs are not punished because although they committed their offenses *before* SORA's enactment, they moved into the state *after* the enactment of the relevant amendments, and so they were on notice of the requirements when they moved to the state. *State v. Zerbe*, 50 N.E.3d 368, 370 – 71 (Ind. 2016) (holding SORA did not violate *ex post facto* clause of the State Constitution as applied to an offender who moved into Indiana because the offender's other state registry requirement triggered SORA's obligations, not his past crime); *Ammons v. State*, 50 N.E.3d 143, 144 – 45 (Ind. 2016) (same). But the reason an offender is registered in another state is because of his sex *offense*: but for an offender's conviction, he would not be subject to *any* registration requirements. *See also Burton v. State*, 977 N.E.2d 1004, 1009 (Ind. Ct. App. 2012) (noting an offender's registration requirement is imposed by virtue of the conviction),

abrogated by Zerbe, 50 N.E.3d 368, 370 n. 2 (Ind. 2016). SORA, itself, reinforces this point because the requirements in the statute are tailored to an offender's offense—not the state of conviction. For example, the state classifies offenders as "sexually violent predators" or "offenders against children" or "serious sex offenders" because of the offender's offense, not the state from which he came. Defendants even state in their brief that the purpose of the statutes is to govern sex offenders:

> The applicable Indiana statutes govern sex offenders, not non-residents. Indiana treats the plaintiffs the way it does because they are convicted of sex offenses and are present in Indiana and thus pose a threat to their potential Indiana victims. Registration is not based on being non-residents or new residents or visitors but is based on plaintiffs' status as sex offenders.

(Filing No. 105, Defendants Motion for Summary Judgment at 20). That "status"—whether imposed by Indiana or another state—comes from the offense itself. Simply put, the relevant date for Plaintiffs' *ex post facto* challenge is the date of the commission of their crime, not the date they moved to Indiana. *See Snyder*, 834 F.3d at 697 – 98.

When considered as a whole, SORA's effects are punitive as applied to Plaintiffs, and these punitive effects outweigh the Act's non-punitive, regulatory purpose. SORA restricts where Plaintiffs live and where they can go; it places time-consuming registration burdens on them; and, among other things, it subjects them to a lifetime status of being stigmatized—in some cases as a "sexually violent predator." Because SORA imposes retroactive punishment, it violates the Constitution's prohibition of *ex post facto* laws. *Snyder*, 834 F.3d at 705 – 06 (holding Michigan's Act violated the *ex post facto* clause of the Constitution).

IV. Conclusion

For the reasons above, SORA violates Plaintiffs' fundamental right to travel, Plaintiffs' right to equal protection of the laws, and the Constitution's prohibition against retroactive punishment. Defendants' Motion for Summary Judgment (Filing No. 104) is therefore **DENIED**. Plaintiffs' Motion for Summary Judgment (Filing No. 100) is **GRANTED**.

IT IS THEREFORE ORDERED that:

The Commissioner of the Indiana Department of Correction, as well as his officers, agents, servants, employees, and attorneys, is hereby **PERMANENTLY ENJOINED** from enforcing the Indiana Sex Offender Registration Act, Ind. Code § 11-8-8-1, *et seq.*, against Plaintiffs, or from requiring their registration as sex or violent offenders in any manner.

The Sheriffs of Marion County, Huntington County, Allen County, Delaware County, and Pulaski County as well as their officers, agents, servants, employees, and attorneys, are hereby **PERMANENTLY ENJOINED** from enforcing the Indiana Sex Offender Registration Act, Ind. Code § 11-8-8-1, *et seq.*, against Plaintiffs, or from taking any other action against Plaintiffs as a result of their failure to register as sex or violent offenders.

The Prosecutors of Marion County, Huntington County, Allen County, Delaware County, and Pulaski County as well as their officers, agents, servants, employees, and attorneys, are hereby **PERMANENTLY ENJOINED** from taking any action against Plaintiffs as a result of their failure to register as sex or violent offenders.

Final judgment will issue by separate order.

SO ORDERED this 9th day of July 2019.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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