UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

WINERIES OF THE OLD MISSION PENINSULA ASSOCIATION, *et al.*,

Plaintiffs,

v

PENINSULA TOWNSHIP, Michigan Municipal Corporation,

Defendant.

Case No: 1:20-cv-01008

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

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PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR STAY OF INJUNCTION PENDING APPEAL PURSUANT TO RULE 62(C)

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Federal Rule of Civil Procedure 58 requires that an injunction be set forth in a standalone document and a summary judgment opinion cannot operate as an injunction. For this simple reason, Defendant's stay motion must be denied as there is no injunction to stay. But, even if this Court treats the Opinion and Order Regarding Summary Judgment Motions ("Opinion") as an injunction, a stay is inappropriate.

Procedural Background

This Court's June 3, 2022, Opinion detailed why numerous ordinances enacted by Defendant were unconstitutional, preempted or otherwise unenforceable as written. (ECF No. 162.) While the Court stated it "will enjoin the Township from enforcing all of the sections of the Township Ordinances that the Court has found unconstitutional or contrary to law," the Court did not enter an injunction complying with Federal Rule of Civil Procedure 58.

On June 17, 2022, Defendant filed a claim of appeal seeking interlocutory appeal of an injunction not yet entered by the District Court. On June 24, 2022, Defendant filed a Motion for Stay of Injunction Pending Appeal Pursuant to Rule 62(C). (ECF No. 169.) Notably, that Motion is unsigned in violation of Fed. R. Civ. P. 11(a). Defendant also implies that it will present additional arguments at oral argument, however, Defendant did not request oral argument as required by Local Rule 7.2(d).

On July 1, 2022, Plaintiff Wineries filed a Motion to Dismiss Appeal with the Sixth Circuit Court of Appeals given that no injunction has issued pursuant to which the Sixth Circuit could obtain appellate jurisdiction.

Argument

1. This Court has not Entered an Injunction.

Federal Rule of Civil Procedure 58 requires that every judgment shall be set forth in a separate document. Furthermore, Federal Rule of Civil Procedure 54(a) provides, in part, that "'Judgment' as used in these rules includes a decree and any order from which an appeal lies." "[T]he express provisions of Rule 58 for entry of judgment on a separate document applies not only to final judgments in the ordinary sense but also to preliminary injunctions entered pursuant to Rule 65, Fed. R. Civ. P., and made appealable under 28 U.S.C. s 1292(a)(1)." *Buekema's Petroleum Co. v. Admiral Petroleum Co*., 613 F.2d 626, 627 (6th Cir. 1979); *Salyers v. Secretary of Health and Human Services*, 791 F.2d 935, *2 (6th Cir. 1986) (Table) ("This court has previously held that the express provisions of Rule 58 for entry of judgment on a separate document apply not only to final judgments in the ordinary sense but also to preliminary injunctions."). The *Buekema*'s court was faced with a memorandum opinion which provided that "[a] preliminary injunction will be issued" and determined that "[u]nder such circumstances we believe that the memorandum opinion of the court can not and should not act independently as an operable judgment within the meaning of Rule 58." *Id*. at 628. Regardless of the fact that the "district court's opinion here is quite explicit in stating the effect and scope of the injunction to be issued[,] there is no practical reason to ignore the lack of Rule 58 formality at this juncture of the proceedings, and the better practice calls for compliance in this case[.]" *Id*. at 629.

While this Court stated its intention to enter an injunction at a future date, the Court has not entered an injunction as a separate document in compliance with Rule 58 nor has it complied with the requirements of Rule 65 regarding the contents of an injunction. Because there is no injunction to stay, Defendant's motion must be denied.

2. Even if an Injunction Had Been Entered, a Stay is Inappropriate.

a. Defendant Cannot Meet its "Heavy Burden" for a Stay.

Defendant "failed to establish any of the four criteria that this court is required to evaluate when considering a motion to stay judgment pending appeal, i.e., (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926). It is instead "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id*. at 672–673; *Hilton*, 481 U.S. at 777 ("[T]he traditional stay factors contemplate individualized judgments in each case"). "[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Nken v. Holder*, 556 U.S. 418 (2009) (citation omitted). The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 708, (1997); *Landis v. North American Co*., 299 U.S. 248, 255 (1936).

"A stay is an 'intrusion into the ordinary processes of administration and judicial review.'" *In re MCP No. 165, OSHA Interim Final Rule: COVID-19 Vaccination & Testing*, 21 F.4th 357, 368, (6th Cir. Dec. 17, 2021) (quoting *Nken*, 556 U.S at 427). "'[T]he heavy burden for making out a case for such extraordinary relief' rests on 'the moving part[y].'" *Kentucky v. Biden*, 23 F.4th 585, 593 (6th Cir. 2022) (quoting *Nken*, 556 U.S. at 426). "In other words, the government bears the 'heavy burden' of showing that it is likely to succeed on the merits of its appeal, that it will be

irreparably injured without a stay, that imposition of a stay would not 'substantially injure' the plaintiffs, and that the public interest favors a stay." *Id.* (quoting *Nken*, 556 U.S. at 427). "Because the court has already considered these factors when it granted the preliminary injunction, Defendants must in essence show a likelihood of reversal." *George S. Hofmeister*, 2007 WL 128932, at *1 (citing *Grutter v. Bollinger*, 137 F.Supp.2d 874, 876 (E.D. Mich. 2001).[1]

b. Defendant Improperly Relies on New Caselaw.

In weighing the four factors in consideration of a motion to stay, the Court is not permitted to examine new evidence. *See George S. Hofmeister*, 2007 WL 128932, at *3. "As with a motion for reconsideration, a motion to stay should not be used to relitigate matters, submit new evidence, or 'raise arguments which could, and should, have been made before the judgment issued.'" *O'Donnell v. Harris Cty*., 260 F. Supp. 3d 810, 815 (S.D. Tex. 2017) (quoting *Rosenzweig v. Azurix Corp*., 332 F.3d 854, 863-64 (5th Cir. 2003)); *see also Brown v. Kia Motors Corp*., 2010 WL 11566481, at *1 (W.D. Pa. Jan. 8, 2010) ("To the extent that Plaintiff's motion attempts to offer new arguments and cites to additional authority not contained in his prior briefs, such arguments are not properly presented in a motion for reconsideration."). To allow otherwise would be to give the moving party "a second bite at the apple." *See Bhatnagar v. Surrendra Overseas Ltd*., 52 F.3d 1220, 1231 (3d Cir. 1995); *O'Donnell*, 260 F. Supp. 3d at 815 ("As the defendants note, these are new arguments; these cases are cited for the first time in the motion to stay. ... The court considers the defendants' arguments and authorities on this point waived.").

Regarding laches and preemption, Defendant relies on several new cases and arguments. For example, Defendant did not raise its rebuttable presumption argument related to laches in its summary judgment briefing. (Compare ECF No. 142, PageID.4980 with ECF No. 169,

[1] Unpublished cases attached as **Exhibit 2**.

PageID.6237–6238.) Because these cases and arguments were not previously presented, this Court should deem the "authorities on this waived." *O'Donnell*, 260 F. Supp. 3d at 815.

c. The Wineries Have a Strong Likelihood of Success on Appeal.

This Court determined that portions of the Winery Ordinances were preempted by Michigan law, violated the Commerce Clause, violated the Wineries' First Amendment Right to Commercial Speech, operated as an unconstitutional prior restraint on protected speech, unconstitutionally compelled speech, and were void for vagueness. This Court also determined that Defendant conceded that the Winery Ordinances do not contain an explicit closing time or prohibit weddings and other large gatherings. In its motion to stay, Defendant attacks this Court's preemption analysis and claims that this Court improperly analyzed its laches defense. Notably, neither of these arguments address this Court's ruling on Defendant's concessions.

In the constitutional context, "in order to justify a stay of the district court's ruling, the defendant must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted." *Baker v. Adams County/Ohio Valley School Bd.*, 310 F.3d 927, 928 (6th Cir. 2002) (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985) ("A showing of a mere 'possibility' of success would render the test for a preliminary injunction virtually meaningless. Therefore, we reiterate that the plaintiffs must demonstrate a strong or substantial likelihood or probability of success on the merits.") (citation omitted).

Because the Court issued its Opinion after the completion of discovery and at the summary judgment phase, Defendant "must in essence show a likelihood of reversal." *George S. Hofmeister*, 2007 WL 128932, at *1 (citing *Grutter v. Bollinger*, 137 F.Supp.2d 874, 876 (E.D. Mich. 2001). Defendant has failed to make this showing.

i. Defendant's Laches Defense is Inapplicable.

Defendant erroneously believes that this Court found a genuine issue of material fact on Defendant's laches defense and the defense is still an issue for trial. Instead, this Court determined "the Township has failed to meet its burden in proving the affirmative defense of laches." (ECF No. 162, PageID.6023.) Setting aside whether laches is still a viable defense, laches is inapplicable to the current motion which seeks a stay of an injunction preventing continued violations of constitutional rights. Defendant's newly-relied-upon case, *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397 (6th Cir. 2002), makes this point very clearly.

Nartron explained that "[l]aches only bars damages that occurred before the filing date of the lawsuit." *Id*. at 408 (internal citation omitted). "It does not prevent plaintiff[s] from obtaining injunctive relief or post-filing damages." *Id*; *see also Kellogg Co. v. Exxon Corp.*, 209 F.3d 562, 568 (6th Cir. 2000) (holding that laches "does not bar injunctive relief") (citing *TWM Mfg. Co., Inc. v. Dura Corp.*, 592 F.2d 346, 349–50 (6th Cir. 1979)). Laches does not apply to ongoing or recurring harms because while "[l]aches stems from prejudice to the defendant occasioned by the plaintiff's past delay . . . almost by definition, the plaintiff's past dilatoriness is unrelated to a defendant's ongoing behavior that threatens future harm." *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 959–60 (9th Cir. 2001) (citing *Lyons P'ship, L.P. v. Morris Costumes, Inc*., 243 F.3d 789, 799 (4th Cir. 2001)); *see also Kuhnle Bros., Inc. v. Cty. of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) (holding that "a law that works an ongoing violation of constitutional rights does not become immunized from legal challenge" merely because the plaintiff failed to sue within the applicable statute of limitations).

A "continuing violation" is an exception to the bar posed by a statute of limitations to claims based on actions that occurred before the statute of limitations period. *Varner v. National*

Super Markets, Inc., 94 F.3d 1209, 1214 (8th Cir. 1996). The "continuing violation" theory is applicable to § 1983 claims for continuing violations of a federal law or the Constitution. *See, e.g.*, *Kuhnle*, 103 F.3d at 520. When a "continuing violation" is shown, the limitations period runs from the "last occurrence" of wrongful conduct. *Varner*, 94 F.3d at 1214; *Gipson v. KAS Snacktime Co*., 83 F.3d 225, 229 (8th Cir.1996). Furthermore, the entire course of conduct creating the continuing violation is actionable. *Varner*, 94 F.3d at 1214. "[E]ach day that the invalid [ordinance] remained in effect, it inflicted 'continuing and accumulating harm.'" *Kuhnle*, 103 F.3d at 522. "A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment. [T]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations." *Id.* (citing *Virginia Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989)).

Every day that the Wineries are prevented from buying grapes outside the Township or exercising their First Amendment rights is an ongoing violation. *See, e.g.*, *S. Glazer's Wine & Spirits, LLC v. Harrington*, No. CV 21-1254 (JRT/ECW), 2022 WL 912032, at *5 (D. Minn. Mar. 29, 2022) (violation of Commerce Clause is continuing); *Flynt v. Shimazu*, 940 F.3d 457, 462–63 (9th Cir. 2019) (same); *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1338 (M.D. Ala. 2019) ("They are bound in perpetuity by allegedly vague laws. Thus, each new day is a new injury."); *3570 E. Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1268, 1278 (C.D. Cal. 1996) ("[A] statute that, on its face, violates the First Amendment's guarantee of free speech inflicts a continuing harm. . . . This harm continues until the statute is either repealed or invalidated.").

The Court need go no further. But if it is inclined to examine additional arguments, it is still on firm legal ground to deny Defendant's laches argument. The Court already concluded that Defendant was not prejudiced. (ECF No. 162, PageID.6022–6023.) The Court also indicated that

the Wineries had a good excuse for any alleged delay. (*Id.* at PageID.6022 ("[T]he Wineries assert that they have 'been trying for decades' to change the Township Ordinances, and when it was clear that negotiation was unsuccessful, the Wineries brought this lawsuit." (citing ECF No. 136, PageID.4719).). Either rationale avoids the application of laches. *Nartron*, 305 F.3d at 409.

The Court also could consider Defendant's "egregious conduct" in enforcing ordinances that it knew were unconstitutional. *Id.* The Wineries have presented evidence that Defendant knew, or should have known, that its Ordinances were unconstitutional for years while the Wineries attempted to negotiate changes. (*E.g.*, ECF No. 136-7, PageID.4832 (former planner ignored memo seeking interpretation of term "guest activity use"); ECF No. 3-6, PageID.705 (memo from Defendant's attorney stating "The Township's ordinances discussed below have some issues relative to Commerce Clause principles that require further examination regarding the impact out-of-state competitive interests of the Wineries"); *id.*, PageID.709 ("Constitutionally, the Township's ordinances have issues in this regard [First Amendment] and the same need to be addressed in the proposed revisions to the same, as specifically stated below."); *id.*, PageID.710 ("This Section should be revised as it is, under First Amendment standards, an invalid suppression of the Wineries' First Amendment rights."). Despite this knowledge, Defendant refused to change. Indeed, it went further—enforcing restrictions on weddings and hours of operation that were not present in the Ordinances. (ECF No. 162, PageID.6021.) "Accepting a laches defense in the wake of that conduct would reward the defendants solely because they didn't get caught sooner. That is not acceptable." *Cernelle v. Graminex, L.L.C.*, 437 F. Supp. 3d 574, 604 (E.D. Mich. 2020). *See also Calvary Chapel Bible Fellowship v. Cnty. of Riverside*, 2017 WL 6883866, at *5 (C.D. Cal. Aug. 18, 2017) (county equitably estopped from asserting statute of limitations defense to First

Amendment claim where it had negotiated with plaintiffs for years prior to lawsuit), aff'd, 948 F.3d 1172 (9th Cir. 2020).

This Court properly analyzed Defendant's laches defense and determined that Defendant "failed to meet its burden in proving the affirmative defense of laches." (ECF No. 162, PageID.6023.)

ii. This Court Applied the Correct Legal Precedent in its Preemption Analysis.

As for preemption, Defendant introduces *USA Cash #1, Inc. v. City of Saginaw*, 285 Mich. App. 262 (2009), for the uncontroversial legal proposition that an ordinance and a statute can, sometimes, regulate the same area. Defendant then alleges that this Court ignored this legal proposition and "employed a heightened standard where any differences between an ordinance and a statute constitutes preemption." (ECF No. 168, PageID.6239.) That is not correct—this Court cited to two Michigan Supreme Court cases standing for the very proposition Defendant alleges this Court ignored: *Walsh v. City of River Rouge*, 189 N.W.2d 318, 324 (Mich. 1971) and *Nat'l Amusement Co. v Johnson*, 259 N.W. 342, 343 (Mich. 1935). (ECF No. 162, PageID.5987–5988.)

Aside from citing this Court to a case it had not previously raised but which stands for a legal proposition this Court followed, it is unclear what argument Defendant is making except that the "Township believes it will prevail on the merits on this issue." Defendant cannot announce a position and leave it to this Court to find support for that position.

d. The Wineries, not Defendant, Will be Irreparably Harmed if a Stay Enters.

"When constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). "[E]ven a temporary infringement of First Amendment rights constitutes a serious and substantial injury, and the [government] has no legitimate interest in enforcing an unconstitutional ordinance." *KH Outdoor,*

LLC v. City of Trussville, 458 F.3d 1261, 1272 (11th Cir. 2006.) "The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest and this principle of law applies to violations of the Commerce Clause." *Indiana Fine Wine & Spirits, LLC v. Cook*, 459 F. Supp 3d 1157, 1170 (S.D. In. 2020) (internal quotations and citations omitted)). "Violations of first amendment rights constitute per se irreparable injury." *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978).

"[T]here can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute because it is always in the public interest to protect First Amendment liberties." *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) (internal quotation marks omitted)). Defendant and the public have "no right to the unconstitutional application of [] laws." *Tyson Foods, Inc. v. McReynolds*, 865 F.2d 99, 103 (6th Cir. 1989).

Defendant references *Maryland v. King*, 567 U.S. 1301 (2012) and the oft-cited maxim that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." But this position "is based on two closely related misunderstandings: first, that unconstitutional laws are nevertheless duly 'enacted' as long as they receive enough legislators' votes (and, if required, the signature of a governor); and, second, that, when the [State] is constrained by the U.S. Constitution, those constraints have been foisted upon the state by some outside authority contrary to the state's sovereignty and its accountability to its people. But neither of those assumptions is true." *Bongo Productions, LLC v. Lawrence*, 548 F. Supp. 3d 666, 686 (M.D. Tenn. 2021.) "No legislature can enact a law it lacks the power to enact." *Id*. The *Maryland v. King* "principle cannot really be as broad as it seems at first blush, or else these factors might cut against preliminarily enjoining all state laws, including unconstitutional ones. Instead, the Court understands that 'any time' actually appears to mean only

when the statute at issue *is not unconstitutional*." *Doe #11 v. Lee*, 2022--- F.Supp.3d ----, 2022 WL 2181800, *27 (M.D. Tenn. June 16, 2022) (citation omitted). The Sixth Circuit recognized this distinction in *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) when it noted that this maxim applied "[u]nless the statute is unconstitutional." "Therefore, a state only suffers an irreparable injury when the Court enjoins a law that does not violate the Constitution." *Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, and Kentucky, Inc. v. Cameron*, 2022 WL 1698085, *13 (W.D. Ky. May 26, 2022.) "Because [the Winery Ordinances] are unconstitutional, [Defendant] can suffer no harm from the Court's Order enjoining their enforcement against Plaintiffs." *Id*. "However, the harm suffered by Plaintiffs if the Court were to stay its Preliminary Injunction would be severe." *Id*.

Finally, Defendant erroneously argues that a stay would maintain the status quo. But the "relevant status quo" is "the new status quo between the parties that the court's grant of the injunction creates." *Graveline v. Johnson*, 2018 WL 4184577, *3 (E.D. Mich. Aug. 30, 2018) (quoting *George S. Hofmeister*, 2007 WL 128932, *2 n. 1). Here, "a stay would go well beyond preserving the status quo or preserving the integrity of the proceedings in the court of appeals. For this reason alone, [Defendant's] motion [should be] denied." *Id*. *See also George S. Hofmeister*, 2007 WL 128932, at *2 ("The relief Defendants seek is total reconsideration, which bears no resemblance to preserving the status quo or the more forgiving rule of preserving the integrity of the case for appellate proceedings. Accordingly, and for the reasons stated below, the court is not persuaded that Defendants' motion should be granted."); *Island Silver & Spice, Inc. v. Islamorada, Village of Islands*, 486 F. Supp. 2d 1347 (S.D. Fl. 2007.) ("Under the status quo, Plaintiffs are judicially freed from infliction of further damages [from an unconstitutional ordinance]. Staying

the injunction that is part of the status quo would restart the damages clock, inflicting further injury that the Final Judgment neither contemplates nor protects against.”).

This Court correctly determined that many of the Winery Ordinances were unconstitutional, preempted, or otherwise unenforceable. Peninsula Township cannot be harmed if it is prohibited from enforcing those ordinances. Instead, the Wineries would be irreparably harmed if this Court’s opinion is stayed.

e. An Injunction Serves the Public Interest.

“[N]o cognizable harm results from stopping unconstitutional conduct, so ‘it is always in the public interest to prevent violation of a party’s constitutional rights.’” *Planned Parenthood*, 2022 WL 1698085 at *14 (quoting *Deja Vu of Nashville, Inc. v. Metro. Gov’t of Nashville & Davidson Cnty*., 274 F.3d 377, 400 (6th Cir. 2001) (citation omitted)). “The public interest is served by the maintenance of First Amendment freedoms and could not possibly be served by the enforcement of an unconstitutional Ordinance.” *Howard v. City of Jacksonville*, 109 F. Supp. 2d 1360, 1365 (M.D. Fl. 2000.) “The public has no interest in enforcing an unconstitutional ordinance.” *KH Outdoor*, 458 F.3d at 1272 (citing *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 959 (5th Cir. Unit B June 1981) (noting that “[t]he public interest does not support the city’s expenditure of time, money, and effort in attempting to enforce an ordinance that may well be held unconstitutional”); *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) (noting that “there can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute because it is always in the public interest to protect First Amendment liberties” (internal quotation marks omitted)); *Planned Parenthood Ass’n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) (finding that the public's interest is in “prevention of enforcement of ordinances which may be unconstitutional”).

Here, Defendant argues that the interests of the Township Board control over the constraints of the United States Constitution. That simply cannot be. "[B]ecause the court found that the Ordinance was unconstitutional, continuing enforcement of it would also be contrary to the public interest." *Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia*, 739 F. Supp. 227, 231 (E.D. Penn. 1990).

3. If a Stay Does Enter, Defendant Should be Required to Post a Bond.

The Court has the authority to stay execution of judgment "[o]n appropriate terms for the opposing party's security." Fed. R. Civ. P. 62(b). "[N]ormally the party seeking a stay is required to post a bond sufficient to protect fully the prevailing party's interest in the judgement." *Lewis v. United Joint Venture*, 2009 WL 1654600, *1 (W.D. Mich. June 10, 2009.) (citations omitted). "[T]here is a presumption in favor of requiring a bond, and the party seeking an unsecured stay bears the burden of showing why a bond should not be required under Rule 62(b)." *Id*.

The Wineries' expert witness on damages has determined that the Wineries annually suffer approximately $40 million in lost profits due to the Winery Ordinances. (Exhibit 1.) Because an appeal to the Sixth Circuit could take a year before it is resolved, if this Court determines that a stay should issue then, under Rule 62(c), the Wineries request that the Court require Defendant to post a bond in the amount of $40 million.

CONCLUSION

For the reasons set forth above, the Wineries request that this Court deny Defendant's Motion for Stay of Injunction Pending Appeal Pursuant to Rule 62(c) and award the Wineries their costs and attorneys' fees incurred in defending against Defendant's motion. If the Court enters a stay, the Wineries request the Court order the Township to post a $40 million bond under Federal Rule of Civil Procedure 62.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Joseph M. Infante

Joseph M. Infante (P68719)
Stephen M. Ragatzki (P81952)
Christopher J. Gartman (P83286)
99 Monroe Avenue NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333

Dated: July 1, 2022

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This Brief complies with the type-volume limitation of L. Civ. R. 7.2(b)(i) because this Brief contains 4160 words.

/s/ Joseph M. Infante
Joseph M. Infante

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2022, I filed the foregoing Motion for Preliminary Injunction via the Court's CM/ECF System, which will automatically provide notice of the filing to all registered participants in this matter.

/s/ Joseph M. Infante
Joseph M. Infante

Exhibit 1

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August 10, 2021

Mr. Joseph M. Infante
Miller, Canfield, Paddock and Stone, PLC
99 Monroe Avenue NW, Suite 1200
Grand Rapids, MI 49503

Engagement Overview

I have been engaged by you in connection with the matter of *Wineries of the Old Mission Peninsula (WOMP) Assoc.; Bowers Harbor Vineyard & Winery, Inc.; Brys Winery, LLC; Chateau Grand Traverse, Ltd.; Chateau Operations, Ltd.; Grape Harbor, Inc.; Montague Development, LLC; OV The Farm, LLC; Tabone Vineyards, LLC; Two Lads, LLC; Villa Mari, LLC; and, Winery at Black Star Farms, LLC (collectively "the Wineries" or "the Plaintiffs") v Peninsula Township.*

I have been engaged to provide an opinion regarding the damages suffered by Plaintiffs as a result of several ordinances enacted by Peninsula Township.

The analysis performed in connection with this report was based on a review of documents provided to date in the above-captioned matter. If additional documents or other materials are provided at a future date that could have a material impact on my conclusions, I reserve the right to modify my conclusions accordingly.

Executive Summary

Wineries of Old Mission Peninsula Association ("WOMP") is a Michigan non-profit corporation with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.

Bowers Harbor Vineyard & Winery, Inc. ("Bowers Harbor") is a Michigan Corporation with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan. Bowers Harbor is a WOMP member.

Brys Winery, LLC ("Brys") is a Michigan limited liability company with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan. Brys is a WOMP member.

Chateau Grand Traverse, Ltd. ("Grand Traverse") is a Michigan Corporation with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan. Grand Traverse is a WOMP member.

Chateau Operations, Ltd. is a Michigan Corporation which operates a winery under the trade name Chateau Chantal ("Chateau Chantal") with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan. Chateau Chantal is a WOMP member.

Grape Harbor, Inc. is a Michigan Corporation which operates a winery under the trade name Peninsula Cellars ("Peninsula Cellars") with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan. Peninsula Cellars is a WOMP member.

Montague Development, LLC is a Michigan Limited Liability Company, operating under the trade name Hawthorne Vineyards ("Hawthorne") with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan. Hawthorne is a WOMP member.

OV the Farm, LLC is a Michigan limited liability company which operates a winery under the trade name Bonobo Winery ("Bonobo") with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.

Tabone Vineyards, LLC ("Tabone") is a Michigan Limited Liability Company with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan. Tabone is a WOMP member.

Two Lads, LLC ("Two Lads") is a Michigan Limited Liability company with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan. Two Lads is a WOMP member.

Winery at Black Star Farms, LLC ("Black Star") is a Michigan Limited Liability Company with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan. Black Star is a WOMP member.

Villa Mari, LLC is a Michigan Limited Liability Company which operates a winery under the trade name Mari Vineyard ("Mari") with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan. Mari is a WOMP member.

WOMP is voluntary membership trade association of licensed winery operations located on Peninsula Township's Old Mission Peninsula. Old Mission Peninsula's wine industry is a specialized segment of Michigan's larger economic community. WOMP represents the unique interests of its Winery Chateau members Bowers Harbor, Grand Traverse, Chateau Chantal,

Hawthorne and Mari; its Farm Processing Facility members Black Star, Two Lads and Tabone and its Remote Winery Tasting Room member, Peninsula Cellars. Of Plaintiffs, only Bonobo is not a WOMP member.

WOMP's purpose is to protect and promote the Old Mission Peninsula wine industry. To that end, WOMP provides services to its members including advertising its members' services and products and organizing events at its members' locations all to increase tourist traffic for its members and for Old Mission Peninsula as a whole. WOMP also exists to harmonize and advocate for its members' interests related to Peninsula Township's insistence on continued enforcement of the illegal Winery Ordinances.

Peninsula Township is located in Grand Traverse County, Michigan, with its offices located at 13235 Center Rd., Traverse City, MI 49686.

Peninsula Township has adopted various ordinances directed at wineries located within the township which control all aspects of the business including the content of commercial speech, restrictions on the free exercise of religion, groups and organizations that may use winery facilities, hours of operation, dictating that wineries use in-township suppliers, requiring commercial speech to favor local businesses and requiring pre-approval of commercial speech.

The Peninsula Township ordinances also arbitrarily dictate the maximum number of guests a winery may have not based on objective criteria like fire code considerations or acreage, but based on the size of one local winery's dining room.

The Peninsula Township ordinances also have placed an arbitrary financial barrier to operating a winery in the township.

Peninsula Township adopted its Zoning Ordinance on June 5, 1972. The Zoning Ordinance has been amended since that time with various winery related ordinances added. Currently,

Peninsula Township's regulation of wineries is found in three section of the Zoning Ordinance: Section 6.7.2(19) Use by Right – Farm Processing Facility; Section 8.7.3(10) Winery Chateau; Section 8.7.3(12) Remote Winery Tasting Room (collectively "the Winery Ordinances").

The following are some of the limitations placed on Farm Processing Facilities by the Winery Ordinances:

> *"[t]he majority of the produce sold fresh or processed has to be grown on the specific farm operation (land owned or leased for the specific farm operation) of the party owning and operating the Specific Farm Processing Facility."*
>
> *"[e]ighty-five (85) percent of the produce sold fresh or processed has to be grown on Old Mission Peninsula."*
>
> *"[g]rape wine that is processed, tasted and sold in a Farm Processing Facility under this section is limited to 'Old Mission Peninsula' appellation wine meaning 85% of the juice will be from fruit grown on Old Mission Peninsula."*
>
> *"wine, that is processed, tasted and sold in a Farm Processing Facility under this section is limited to wine bearing a label identifying that 85% of the juice is from fruit grown on Old Mission Peninsula."*

The Winery Ordinances also place a number of significant rules relating to parcel size and use of the facility for Processors. Retail space is constrained through the Winery Ordinances. In addition,

> *"Activities such as weddings, receptions and other social functions for hire are not allowed…."*

The portion of the Wineries Ordinances that pertain to winery chateau operations ("the Winery Chateau Ordinance") mandates significant restrictions on the operations of the Wineries, such as:

> *"seventy-five (75%) percent of the site shall be used for the active production of crops that can be used for wine production, such as fruit growing on vines or trees."*
>
> *"[a]ccessory uses such as facilities, meeting rooms, and food and beverage services shall be for registered guests only."*

Guest activities at the winery chateau operations are significantly limited. The only allowed guest activities are:

> *"Wine and food seminars and cooking classes that are scheduled at least thirty days in advance with notice provided to the Zoning Administrator."*
>
> *"Meetings of 501- (C)(3) non-profit groups within Grand Traverse County but full course meals are not allowed."*
>
> *"Meetings of Agricultural related groups that have a direct relationship to agricultural production provided that one month notice is given and the zoning administrator pre-approves the meeting after determining that the group has a "direct relationship to agricultural production."*

Guest activities do not include weddings, wedding receptions, family reunions or the sale of wine by the glass. Further,

> *At a Guest Activity, if wine is served "it must be served with food and shall be limited to Old Mission Peninsula appellation wine produced at the Winery."*

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Capacity for any guest activity is limited as follows:

> *"… limited to one person per 15 square feet of rooms for Guest Activities. But in no case may the number of persons exceed 111 or the Fire Marshall maximum occupancy, whichever is less."*

The capacity limitations are arbitrarily based on the capacity of one of the Plaintiff's dining room capacity (111).

Hours of operation are limited to no later than 9:30 p.m.

Alcohol sales are limited to only those that are produced on site.

Amplified music is prohibited.

Live music is prohibited.

The Wineries' kitchen facilities are prohibited from use for off-site catering events.

Damages: Lost Profits from Increased Cost of Grapes due to Requirement of Grapes Grown on the Peninsula

Costs based on actual volume of grapes purchased and the actual prices paid were compared to actual volumes of grapes purchased and costs for similar grapes purchased by producers outside of the Peninsula. The damage period utilized was five years. See **Schedule 1**.

Damages: Lost Profits from Lost Catering Revenues

The Wineries Ordinances prohibit off-site catering. The lost profits from these lost catering events was determined. The number of lost catering events, number of guests, cost per guest, and estimated profit margin were provided by the Plaintiffs, as well as profit margin data from

the Risk Management Association ("RMA"). The damage period utilized was five years. See **Schedule 2**.

Damages: Lost Profits from Limited Hours of Service

The operations of the Plaintiffs are limited to a closing time of no later than 9:30. Lost profits are based Plaintiffs' estimates of the additional hours Plaintiffs would operate, their estimated sales per hour in those additional hours, and estimated profit margins, as well as profit margin data from RMA. The damage period utilized was five years. See **Schedule 3**.

Damages: Lost Profits from Lost Restaurant Sales

Lost profits on lost restaurant sales were based on Plaintiffs' estimates of additional restaurant sales and related profitability, as well as profit margin data from RMA. The damage period utilized was five years. See **Schedule 4**.

Damages: Lost Profits from Lost Merchandise Sales

Lost profits on lost merchandise sales were based on the actual sales of Plaintiffs who currently sell merchandise, Plaintiffs' profitability estimates, as well as profit margin data from RMA. The damage period utilized was five years. See **Schedule 5**.

Damages: Lost Profits from Lost Event Hosting (Small Events and Meetings)

The Wineries Ordinances significantly limit the type of events the Plaintiffs may host. The number of lost events hosted, number of guests per event, price per guest, and estimated profit margin were provided by the Plaintiffs, as well as profit margin data from RMA. The damage period utilized was five years. See **Schedule 6**.

Damages: Lost Profits from Lost Event Hosting (Large Events and Weddings)

The Wineries Ordinances significantly limit the type of events the Plaintiffs may host. Further, the do not allow for hosting weddings or wedding receptions. The number of lost events hosted, number of guests, price per guest, and estimated profit margin were provided by the Plaintiffs, as well as profit margin data from RMA. The damage period utilized was five years. See **Schedule 7**.

This report does not include an analysis of other components of damages the Wineries may have suffered, such as damages to its trade name and other intangible assets, loss of business value, value of lost potential future customers or relationships, interest, and other elements of damages which have been incurred by the Wineries but not quantified yet in this analysis. Further, it does not include damages related to ordinance provisions such as disallowing live music or amplified music.

This report is based on information provided to date. If additional information is provide at a later date that would materially impact this analysis, I reserve the right to update or supplement this report.

Basis for Testimony

My testimony will be based on my analysis as described in this report, as well as my experience as outlined in my Curriculum Vitae attached to this report.

Sources of Information

My analysis has been based primarily on the following sources of information:

- Complaint
- Cost and volume data provided by the Wineries

- Various other sales volume and profitability estimates of products provided by the Wineries
- Profitability estimates provided by *Annual Statement Studies*, Risk Management Association ("RMA")

Conclusion

Based on the analysis stated herein, it is my opinion that the damages incurred by the Wineries as a result of the actions of Peninsula Township are at least $203,562,344.

Total lost profits form increased grape costs	$235,825
Total lost profits from lost catering	$1,468,500
Total lost profits from limited hours	$66,138,000
Total lost profits from lost restaurant sales	$53,912,655
Total lost profits from lost merchandise sales	$712,500
Total lost profits from lost small event hosting (small events)	$6,883,877
Total lost profits from lost event hosting (large events and weddings)	$74,210,988
TOTAL DAMAGES	$203,562,344

Sincerely,

Eric J. Larson, CPA/ABV, ASA, CBA, CMA, CFE

CURRICULUM VITAE

ERIC J. LARSON, CPA/ABV, ASA, CBA, CMA, CFE
Beene Garter, LLP
56 Grandville Ave, SW
Suite 100
Grand Rapids, Michigan 49503

EDUCATION

Grand Valley State University
Bachelor of Science
Major: Economics, Minor: Applied Statistics
1996

Grand Valley State University
Master of Business Administration (MBA) – with distinction
1999

PROFESSIONAL

Certified Public Accountant (CPA) – awarded in 2006
Accredited in Business Valuation (ABV) – awarded in 2006
Accredited Senior Appraiser (ASA) – awarded in 2004
Certified Business Appraiser (CBA) – awarded in 1999
Certified Management Accountant (CMA) – awarded in 2004
Certified Fraud Examiner (CFE) – awarded in 2010

Member:
American Institute of Certified Public Accountants
American Society of Appraisers
Institute of Business Appraisers
Institute of Management Accountants
Association of Certified Fraud Examiners

Speaker:
MICPA Annual Accounting and Auditing Symposium
MICPA Small Practitioners Seminar
Several other speaking engagements including Risk Management Association, Local First, Institute for Continuing Legal Education and Grand Valley State University

Former Adjunct Faculty Member:
Grand Valley State University – Economics Department

EMPLOYMENT

Partner "CPA firm of Beene Garter LLP from 2003 to present. Responsibilities include management of forensic, valuation and litigation services department, preparation of business valuations, litigation support, economic damages, ESOP feasibility analyses, fraud detection, forensic accounting and various other financial analyses.

CPA firm of Adamy + Company, P.C. from 1998 to 2003. Responsibilities include preparation of business valuations, litigation support, economic damages, ESOP feasibility analyses and various other financial analyses.

Kawasaki Motors Corp., U.S.A., Engine Division from 1996 to 1998 in Grand Rapids. Responsibilities included supervision of administrative staff handling all sales support functions and import functions, liaison between major OEM customers and manufacturing facilities in Missouri and Japan, and inventory control.

FORENSIC, VALUATION AND LITIGATION SERVICES

Numerous forensic accounting engagements related to suspected fraud investigation, data mining and analysis, and economic damages, among others.

Several hundred business valuation and litigation support engagements. Valuations have been prepared for ESOPs, estate and gift taxation, business sale and acquisition, divorce, succession planning, corporate planning and various other purposes.

Litigation support services have included data gathering, damage analysis and computation. Cases mainly involved commercial litigation, breach of contract, shareholder disputes, fraud, personal injury and merger/acquisition disputes. Testimony provided in trial, arbitration, mediation and deposition formats.

Exhibit 2

2007 WL 128932
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

GEORGE S. HOFMEISTER
FAMILY TRUST, et al, Plaintiffs,
v.
TRANS INDUSTRIES OF
INDIANA, INC., et al, Defendants.

No. 06-CV-13984-DT.
|
Jan. 12, 2007.

Attorneys and Law Firms

Arnold S. Schafer, Joseph K. Grekin, Kenneth R. Beams, Schafer & Weiner, Bloomfield Hills, MI, for Plaintiffs.

Kenneth B. Morgan, Birmingham, MI, for Defendants.

ORDER DENYING DEFENDANTS' "MOTION FOR ORDER SUSPENDING/STAYING DECEMBER 15, 2006 PRELIMINARY INJUNCTION"

ROBERT H. CLELAND, United States District Judge.

***1** Pending before the court is Defendants' December 21, 2006 motion to suspend or stay the preliminary injunction that the court granted to Plaintiffs. The matter has been fully briefed and the court concludes that a hearing is unnecessary. *See* E.D. Mich. LR 7.1(e)(2). For the reasons stated below, the court will deny Defendants' motion.

I. BACKGROUND

This case involves, principally, a dispute over control of Trans, an asset that Plaintiffs, the Trusts, value highly as investors and a business that Defendants Daniel Fuhrman and William Gruits allegedly have been mismanaging through self-dealing. On November 15, 2006, the court heard argument regarding Plaintiffs' motion for a preliminary injunction. The court granted an injunction in a written opinion and order on December 15, 2006. Defendants have appealed that order and request that the court suspend or stay the injunction pursuant to Federal Rule of Civil Procedure 62(c).

II. STANDARD

The court must in its discretion consider several factors in deciding whether it should stay an order pending appeal. Those factors include (1) whether the stay applicant has made a strong showing of likelihood of success on the merits, (2) whether the applicant will be irreparably harmed absent a stay, (3) whether grant of a stay will substantially injure other interested parties and (4) where the public interest lies. *Hilton v. Braunskill,* 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987). Because the court has already considered these factors when it granted the preliminary injunction, Defendants must in essence show a likelihood of reversal. *See e.g. Grutter v. Bolinger,* 137 F.Supp.2d 874, 876 (E.D.Mich.2001), rev'd en banc on other grounds, 288 F.3d 732 (6th Cir.2002), aff'd, 539 U.S. 982, 124 S.Ct. 35, 156 L.Ed.2d 694 (2003). The factors are not prerequisites to meet, but interrelated considerations for the court to balance. *Coal. to Defend Affirmative Action v. Granholm,* --- N.W.2d ----; No. 06-2640 (6th Cir., December 29, 2006) (citing *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog,* 945 F.2d 150, 153 (6th Cir.1991). In addition, specific findings regarding each of the four factors in not necessary if fewer factors are dispositive. *See Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.,* 119 F.3d 393, 399 (6th Cir.1997).

III. DISCUSSION

Generally, a federal district court is deprived of jurisdiction over an order once a notice of appeal of that order is filed. *Griggs v. Provident Consumer Disc. Co.,* 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (holding that "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously"); *see also Welch v. Fritz,* 909 F.2d 1330, 1331 (6th Cir.1990) (holding that after notice of appeal the district court's subsequent denial of a motion for reconsideration would ordinarily be a "nullity"). There are, however, some longstanding exceptions. *See e.g. Newton v. Cons.Gas Co.,* 258 U.S. 165, 177, 42 S.Ct. 264, 66 L.Ed. 538 (1922) ("Undoubtedly, after appeal the trial court may, if the purposes of Justice require,

preserve the status quo until decision by the appellate court.") (citing *Hovey v. McDonald,* 109 U.S. 150, 3 S.Ct. 136, 27 L.Ed. 888 (1883)). But the trial court "may not finally adjudicate substantial rights directly involved in the appeal." *Id.* (citations omitted). Under Federal Rule of Civil Procedure 62, this court has, while pending appeal, some continuing discretion over its preliminary injunction order.

> ***2** When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper fo the security of the rights of the adverse party.

Fed. R. Civ. P 62(c).

Courts have interpreted Rule 62(c) narrowly, but in varying degrees. Two main interpretations prevail. The first interprets the rule to mean that the district court's authority to suspend or modify an injunction pending appeal is limited to modifications that preserve the status quo between the parties already before the circuit court by virtue of the notice of appeal. [1] At least three circuits have applied this rule. *Coastal Corp. v. Texas E. Corp.,* 869 F.2d 817, 820 (5th Cir.1989); *Flynt Distrib. Co. v. Harvey,* 734 F.2d 1389, 1392 n. 1 (9th Cir.1984); *Ideal Toy Corp. v. Sayco Doll Corp.,* 302 F.2d 623, 625 (2d Cir.1962). Other circuits have gone beyond the status quo rule to allow, for example, substantive modification imposing more requirements in an injunction order pending appeal when the district court's action "preserve[s] the integrity of the proceeding in the court of appeals." *Ortho Pharm. Corp. v. Amgen, Inc.,* 887 F.2d 460, 464 (3rd Cir.1989); *see also* *Bd. Of Educ. of St. Louis v. State of Missouri,* 936 F.2d 993, 996 (6th Cir.1991). *Ortho* did state that Rule 62(c) does not grant district court "open-ended" authority to reconsider a preliminary injunction order. 887 F.2d at 464.

Citing each of the above five case, the Sixth Circuit has held that it "need not weigh in on this controversy ...." *Basicomputer Corp. v. Scott,* 973 F.2d 507, 513 (6th Cir.1992). *Basicomputer* involved an action to enforce noncompetition covenants and confidentiality agreements in employment contracts. *Id.* at 508. The district court modified its preliminary injunction order after it was appealed by shortening the time period when two parties could not compete. *Id.* at 513. Acknowledging that this modification altered the status quo, the Sixth Circuit avoided choosing between the two interpretations of Rule 62(c), holding that it would in any event vacate the district court's injunction because "it is based on an erroneous view of Ohio law." *Id.*

Similarly, the court in this case need not select among the differing interpretations of Rule 62(c). The relief Defendants seek is total reconsideration, which bears no resemblance to preserving the status quo or the more forgiving rule of preserving the integrity of the case for appellate proceedings. Accordingly, and for the reasons stated below, the court is not persuaded that Defendants' motion should be granted.

A. Likelihood of Prevailing on Appeal

For the reasons stated in the court's order denying Defendants' motion to dismiss, jurisdictional arguments are unlikely to succeed on appeal. On the merits, the court is still faced with substantial evidence that shows significant self-dealing by Defendants. The court will not recount that evidence in this order, other than to say that the additional evidence that the parties have submitted in their newest exhibits has not appreciably altered the court's determination. The only new evidence that Defendants submit is a self-serving declaration by Mr. Gruits, (Defs' Ex. D), which is in large part contradicted by affidavits submitted by Plaintiffs, (Pls.' Exs. 12-13). [2] To the extent that the injunction prevents Defendants from gathering and presenting more evidence on their behalf, the court will modify the injunction as needed and when needed, pending resolution of Defendants' interlocutory appeal. [3]

***3** Regarding other new arguments that Defendants now present, the court sees little to no likelihood of success on the merits. The Sixth Circuit will simply not hear any issues that Defendants failed to raise, and preserve for appeal, when this court considered Plaintiff's motion for a preliminary injunction. *See e.g.* *U.S. v. $100,375 in U.S.*

Currency, 70 F.3d 438, 441 (6th Cir.1995). In particular, as discussed below, Defendants' new claims of irreparable harm, which were plainly foreseeable, ring hollow, self-serving and exaggerated.

Finally, Defendants' First Amendment argument, which basically attacks the injunction as an overbroad restraint on commercial speech, lacks merit because it proves too much. If such an expansive view of the First Amendment were accurate, then the court can imagine no form of injunctive relief that would not constitute prior restraint or other impermissible restriction of speech.

B. Irreparable Harm

The second and third factors relevant to Defendants' motion for a stay require this court to weigh the relative irreparable harm that is at stake for the parties. The court again is not in a position to state with any certainty which party has the better argument. There is evidence on both sides. Defendants claim that significant business transactions hang in the balance that only Fuhrman and Gruits can complete and that it will be ruinous for Trans if the injunction is not stayed. Plaintiffs, meanwhile, argue that other managers can step in and operate Trans and that lifting the stay will only provide an opportunity for Defendants to engage in further misconduct.

The details of the purported impending doom for Defendants comes as news to this court, as Defendants earlier made no specific mention of important business that only Fuhrman and Gruits could conduct in early 2007. Because Defendants no doubt knew long ago about the deadlines and travel arrangements Defendants now present to the court, the court is unmoved and instead concludes that Defendants are attempting to create emergencies and attendant claims of irreparable harm where such do not exist. The court is reminded of the folk wisdom that can often be found on a sign under the glass of the front counter at the neighborhood repair shop: "failure to plan on *your* part does not constitute an emergency on *our* part." [4]

Furthermore, Plaintiffs' response calls into question several of Defendants' claims of irreparable harm. Without listing them exhaustively, it is apparent that the amount of business at stake, and the relative competence of other managers at Trans to pursue that business, are vigorous points of contention among the parties. The court will not lift its injunction based solely on the word of a principal party that he and his partner and co-defendant ought to be the ones taking care of the business. The court particularly will not open the door to Defendants on that basis given the evidence tending to show that Defendants take care of themselves above and before the interests of Plaintiffs, Trans and other entities used by Defendants for their apparent self-dealing. [5] As such, Defendants have failed to demonstrate that they will suffer more irreparable harm under the injunction than Plaintiffs would suffer in absence of it.

3. Public Interest

***4** Defendants argue that the injunction interferes with the public interest in having Trans run by its duly elected officers and removed, if at all, by its shareholders. The court is aware of this public interest, but it pales in comparison to the public interest that is served by preventing violations of the law. *See Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati,* 363 F.3d 427, 436 (6th Cir.2004). Because the new evidence before the court does not significantly counterbalance the previous evidence tending to show extensive self-dealing by Defendants, the court concludes that staying the injunction would not advance the public interest.

D. Security

Defendants claim that the court erred by not considering the issue of security. (Defs.' Br. at 11.) They cite to *Roth v. Bank of the Commonwealth,* 583 F.2d 527, 539 (6th Cir.1978), which stated that "it was error for the judge, not necessarily to have failed to require a bond in any particular amount, but to have failed to exercise the discretion required of him by Rule 65(c) by expressly considering the question of requiring a bond." Indeed, Rule 65(c) prohibits issuance of a preliminary injunction "except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Unlike in *Roth,* however, the court here did not fail to consider the issue of a security bond. The parties, who did not extensively brief the issue, discussed it at the hearing and the court asked counsel questions regarding what sum is appropriate, which elicited only tentative replies. (Tr. at 22-23, 30-31, Pls.' Ex. 2.)

The absence in the court's written opinion and order of any discussion regarding a security bond is an oversight that the court acknowledges. To correct the oversight and to both maintain the status quo of the parties and the integrity of the case on appeal, the court will set bond in a separate order.

IV. CONCLUSION

IT IS ORDERED that Defendants' "Motion for Order Suspending/Staying December 15, 2006 Preliminary Injunction" [Dkt # 37] is DENIED.

A separate order setting an amount for a security bond will issue.

All Citations

Not Reported in F.Supp.2d, 2007 WL 128932

Footnotes

1 A grant of a preliminary injunction necessarily alters the status quo between the parties as it existed at the time a complaint is filed. The relevant status quo for purposes of Rule 62(c) is thus the new status quo between the parties that the court's grant of the injunction creates.

2 The affidavit of George Hofmeister is equally self-serving, to the extent that his interests overlap with those of Plaintiffs.

3 Defendants claim that Trans was not in default to its lender. (Defs.' Br. at 6, 15-16.) In order to allow Defendants to submit evidence supporting that contention, the court will, if appropriate, later consider modification of the injunction. Plaintiffs do not oppose such a modification. (Pls.' Br. at 15 n. 4.)

4 That message is often found near another that features a cartoon character doubled over in laughter above the caption, "You want it WHEN?" In seriousness, this court actually is sensitive to implications of the very short deadline a court must sometimes impose on attorneys. It deserves mention here, therefore, that the court appreciates the diligent efforts of Plaintiffs' counsel to submit expedited briefing based upon the initial short timeline that Defendants' new cries of irreparable harm initially impressed upon the court.

5 Defendants' reply brief includes exhibits that purport to bolster its claim of pending business transactions. These exhibits, however, particularly those concerning communication with Volvo/Mack, do not corroborate the amount of business that the Gruits declaration asserts. The cryptic e-mails among unidentified individuals and the unsigned contracts (which contain numerous empty fields) say nothing about the amount of potential business, or, for that matter, the assertion that only Fuhrman and Gruits can effect the transactions.

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2010 WL 11566481
Only the Westlaw citation is currently available.
United States District Court, W.D. Pennsylvania.

Ralph Raymond BROWN, Plaintiff,
v.
KIA MOTORS CORPORATION and
Kia Motors America, Inc., Defendants.

02: 06-cv-0804
|
Filed 01/08/2010

Attorneys and Law Firms

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ORDER OF COURT

Terrence F. McVerry, United States District Court Judge

***1** Presently before the Court is the MOTION TO RECONSIDER MEMORANDUM AND ORDER REGARDING THE DEPOSITION OF JONG HO KIM IN THE FADOK CASE filed by Plaintiff Ralph Raymond Brown (Document No. 245), and the BRIEF IN OPPOSITION filed by Defendants Kia Motors Corporation and Kia Motors America, Inc. (Document No. 251).

Generally, a motion for reconsideration will only be granted if: (1) there has been an intervening change in controlling law; (2) new evidence, which was not previously available, has become available; or (3) necessary to correct a clear error of law or to prevent manifest injustice. *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985), *cert. denied*, 47 U.S. 1171 (1986).

The Court finds and rules that Plaintiff has presented no extraordinary circumstances or arguments which meet the high standard required to justify reconsideration. Rather, Plaintiff argues that reconsideration is proper because the designated deposition testimony of Jong Ho Kim "amounts to an admission on the part of a designated representative of the Defendants ...," an argument which Plaintiff is advancing for the first time as this argument was not advanced by Plaintiff in his original response to the Motion in Limine. To the extent that Plaintiff's motion attempts to offer new arguments and cites to additional authority not contained in his prior briefs, such arguments are not properly presented in a motion for reconsideration. A motion for reconsideration is not an appropriate vehicle for raising new facts or arguments that were not included in the original brief. *See, e.g., Sault Ste. Marie Tribe of Chippeway Indians v. Engler*, 146 F.3d 357, 374 (6th Cir. 1998) (holding that a party is not permitted to raise new legal arguments on a motion for reconsideration that could have been raised earlier.).

Moreover, even after considering the new arguments and authority contained in Plaintiff's motion, the Court continues to find that the deposition transcript of Jong Ho Kim, which was taken in the Fadok case, should be precluded.

First, as previously explained in the Court's Memorandum Opinion and Order of December 21, 2009, the deposition transcript of Jung Ho Kim is inadmissible hearsay for which there is no exception under the hearsay rules. The deposition transcript Plaintiff seeks to use is missing the errata sheet and all of the exhibits. Plaintiff wants to introduce testimony suggesting that Mr. Kim was shown and asked about a specific photograph of the Fadok vehicle; yet Plaintiff can not provide any evidence that verifies what specific photograph was shown to Mr. Kim.

Moreover, the Court finds that the statements made by Mr. Kim are simply not party admissions. In order for a statement to be deemed a party admission, it "must be contrary to that party's position at the time of the trial." *United States v. Ferri,* 778 F.2d 985, 991 (3d Cir. 1985) (*quoting Butler v. Southern Pacific Co.*, 431 F.2d 77, 80 (5th Cir. 1970)). It appears that the gist of the statements that Plaintiff seeks to introduce are that seat belt webbing should not get routed under recliner handles inadvertently during routine use. Defendants have repeatedly represented that they do not intend to argue otherwise.

***2** Furthermore, assuming *arguendo* that the statements made by Mr. Kim did qualify as party admissions, the Court finds that such statements remain inadmissible under the balancing test of Federal Rule of Evidence 403. The prejudicial effect of introducing such evidence would far outweigh the probative value of the evidence. In order to lay a foundation for these statements, Plaintiff would have to provide the context in which they were made, which by necessity would require a discussion of the facts and circumstances of the Fadok accident. The Court has previously ruled that any evidence regarding the existence of the Fadok accident is inadmissible and Plaintiff is precluded from introducing any evidence or references to the Fadok case at trial.

In sum, motions for reconsideration are not designed to provide litigants with a second bite of at the apple. *Bhatnagar v. Surrendra Overseas Ltd.,* 52 F.3d 1220, 1231 (3d Cir. 1995). The Court finds that the arguments raised in the instant motion do not warrant further analytical discussion.

AND NOW, this 8th day of January, 2010, it is hereby ORDERED that the MOTION TO RECONSIDER MEMORANDUM AND ORDER REGARDING THE DEPOSITION OF JONG HO KIM IN THE FADOK CASE filed by Plaintiff is **DENIED.**

All Citations

Not Reported in Fed. Supp., 2010 WL 11566481

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KeyCite Blue Flag – Appeal Notification
Appeal Filed by SOUTHERN GLAZER'S WINE AND SPIRITS, ET AL v. JOHNSON BROTHERS LIQUOR CO., ET AL, 8th Cir., May 4, 2022

2022 WL 912032
United States District Court, D. Minnesota.

SOUTHERN GLAZER'S WINE AND SPIRITS, LLC, and Southern Glazer's Wine and Spirits of Minnesota, LLC, Plaintiffs,
v.
John HARRINGTON, in his capacity as Commissioner of the Minnesota Department of Public Safety, Defendant,
v.
Johnson Brothers Liquor Company, and Bellboy Corporation, Intervenor Defendants.

Civil No. 21-1254 (JRT/ECW)
|
Signed 03/29/2022

Synopsis
Background: Liquor wholesaler brought action against Commissioner of the Minnesota Department of Public Safety for declaratory and injunctive relief, alleging that statute that required out-of-state liquor producers to offer their products on equal terms to all wholesalers unconstitutionally violated the dormant Commerce Clause. In-state wholesalers intervened as defendants to defend the statute. Wholesaler moved for judgment on the pleadings, and wholesaler and Commissioner filed joint motion for entry of stipulated judgment and permanent injunction prohibiting state from enforcing the statute against wholesaler.

Holdings: The District Court, John R. Tunheim, Chief Judge, held that:

wholesaler had Article III standing;

laches did not apply to bar wholesaler's requested relief;

doctrine of waiver did not apply to bar wholesaler's requested relief;

statute was facially discriminatory in violation of the dormant Commerce Clause;

statute did not constitute a constitutional exercise of state's right to regulate alcohol;

void subdivisions would not be severed; and

even if statute could be severed, severing void provisions was not appropriate remedy.

Motion for judgment on the pleadings granted; joint motion for stipulated judgment denied as moot.

Procedural Posture(s): Motion for Judgment on the Pleadings; Motion to Enter Judgment.

West Codenotes

Held Unconstitutional

Minn. Stat. Ann. § 340A.307

Attorneys and Law Firms

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Daniel N. Rosen, ROSEN LLC, 60 South Sixth Street, Suite 3615, Minneapolis, MN 55402, for amicus curiae Kick's Liquor Store, Inc., Zipp's Liquor Store, Inc., John Wolf Enterprises, Inc., JPG Corporation, and Keith and Linda's Place, Inc.

MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

JOHN R. TUNHEIM, Chief Judge

***1** Plaintiffs Southern Glazer's Wine and Spirits, LLC and Southern Glazer's Wine and Spirits of Minnesota, LLC (together, "Southern") brought this action against Defendant John Harrington in his capacity as Commissioner of the Minnesota Department of Public Safety ("the State") alleging that Minn. Stat. § 340A.307—otherwise known as the Coleman Act—unconstitutionally violated the dormant Commerce Clause. After a thorough review by the Minnesota Attorney General's Office, the State agreed that the Coleman Act was unconstitutional. Southern and the State filed a Joint Motion for Entry of Stipulated Judgment and Permanent Injunction prohibiting the State from enforcing the Coleman Act against Southern. Intervenor Defendants Johnson Brothers Liquor Company and Bellboy Corporation (together, "Intervenors") intervened in this action with the intention of defending the Coleman Act's constitutionality. [1]

The case is before the Court on both Southern's Motion for Judgment on the Pleadings and Southern and the State's Joint Motion for Entry of Judgment. Because the Coleman Act violates the dormant Commerce Clause, the Court will grant Southern's Motion for Judgment on the Pleadings. The Court will use its inherent authority to stay this Order for 60 days because legislation pending before the Minnesota Legislature may moot the current controversy.

BACKGROUND

I. THE PARTIES

Southern is the nation's largest liquor wholesaler and entered the Minnesota market in 2010. (Compl. ¶¶ 5–6, May 19, 2021, Docket No. 1.) Although Southern is not directly subjected to any alleged unconstitutional discrimination, Southern has multiple contracts with out-of-state producers that are regulated by the Coleman Act. (*Id.* ¶ 25.) Southern's contracts with out-of-state producers contain language giving it exclusive distribution rights in Minnesota but, pursuant to the Coleman Act's allegedly discriminatory language, Southern is unable to enforce these rights as out-of-state producers are banned from establishing exclusive distributorships and must offer their products equally to all wholesalers. Minn. Stat. § 340A.307, subd. 1; (Decl. Surelda Heard ("Heard Decl."), Exs. A–D, Oct. 12, 2021, Docket No. 88.).

The State agrees with Southern that the Coleman Act is unconstitutional after reviewing this Court's decision in *Alexis Bailly Vineyard, Inc. v. Harrington*, 482 F.Supp.3d 820 (D. Minn. 2020). In *Alexis Bailly*, portions of Minnesota's Farm Winery Act were found unconstitutional under the dormant Commerce Clause for treating out-of-state products differently than their instate counterpart. 482 F.Supp.3d at 828. Rather than defend what it determined was an unconstitutional law, the State sought to resolve Southern's challenge and avoid the inefficient use of resources prolonged litigation would require. (Reply Supp. Joint Mot. at 2, Dec. 15, 2021, Docket No. 128.)

***2** Intervenors are Minnesota-based wholesalers seeking to defend the Coleman Act against Southern's constitutional challenge due to the allegedly devastating financial effects their businesses would suffer. (Decl of David Gewolb [2] Supp. Mot. Intervene ¶¶ 2, 5, June 4, 2021, Docket No. 22; Decl. of Mark Hubler Supp. Mot. Intervene ¶¶ 7–9, June 4, 2021, Docket No. 24.)

II. THE COLEMAN ACT

Minnesota, like most states, employs a "three-tier system" to regulate alcohol classified by the separation of manufacturers, wholesalers, and retailers through licensing requirements. (Intervenor Defs.' Mem. Opp. Mot. J. Pleadings at 4, Nov. 17, 2021, Docket No. 113.) In a three-tier system, a manufacturer cannot sell directly to retailers and instead sells to wholesalers while wholesalers cannot sell directly to consumers and subsequently sell to retailers. *See* *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, —— U.S. ——, 139 S. Ct. 2449, 2457, 204 L.Ed.2d 801 (2019). The three-tiered system has routinely been upheld and is "unquestionably legitimate." *Granholm v. Heald*, 544 U.S. 460, 489, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005).

In its current form, the Coleman Act prohibits exclusive distribution agreements for alcohol produced outside of Minnesota and instead requires that the products be offered on an equal basis to all wholesalers—a practice known as open wholesaling. Minn. Stat. § 340A.307, subd. 1. Open wholesaling has not always been a requirement in Minnesota as exclusive distributorships were previously permitted. *Fed. Distillers Inc. v. State*, 304 Minn. 28, 229 N.W.2d 144, 152–53 (1975). However, the Minnesota Legislature became concerned about exclusive distribution under which a "retailer ... in order to sell a particular brand of liquor, was compelled to deal with a particular wholesaler and to pay that wholesaler's price" and passed legislation prohibiting exclusive distributorships in 1969. *Id.* at 153 n. 10 (quoting

Minn. Stat. § 340.984). The 1969 legislative effort initially proved to be ineffective because "distillers and wholesalers found it to their advantage to continue the practice of sole distributorships by the distillers, declaring that they had no agreement but simply cho[osing] in their discretion to limit sales to a wholesaler of demonstrated loyalty, efficiency, and selling ability." *Id.* at 152. Therefore, the Minnesota Legislature attempted to remedy its previous failure and passed the Coleman Act in 1973.

Under the Coleman Act, only out of-state liquor producers must offer their products on equal terms to all wholesalers. Minn. Stat. § 340A.307, subd. 1 ("All licensed importers must offer for sale on an equal basis to all licensed wholesalers and manufacturers all intoxicating liquor brought into the state of Minnesota.") After the Minnesota Supreme Court held in *Fed. Distillers* that the term "licensed importer" applied to a company that imported bulk liquor, rectified and bottled it in the state, the Minnesota Legislature amended the Coleman Act to explicitly exempt products that further are "distilled, refined, rectified, or blended" liquor within the state. Minn. Stat. § 340A.307, subd. 4. As it stands, the Coleman Act currently imposes open wholesaling on out-of-state producers and products while exempting Minnesota producers and products and allowing the latter to establish exclusive distributorships.

III. PROCEDURAL BACKGROUND

***3** On May 19, 2021, Southern filed the Complaint in this case seeking both a declaration that the Coleman Act is unconstitutional and an injunction against future enforcement. (Compl. ¶¶ 27–36.) After this Court's ruling in *Alexis Bailly Vineyard*, Southern contacted the State and inquired about the Coleman Act's constitutionality. (Pls.' Mem. Supp. Mot. J. Pleadings at 3, October 12, 2021, Docket No. 86.) The State agreed that the Coleman Act violated the dormant Commerce Clause. (*Id.*) Accordingly, Southern filed this Complaint and the parties filed a Joint Motion for Stipulated Judgment, asking the Court to enter the requested declaratory judgment and injunction. (*Id.* at 3–4; Joint Mot. Stip. J, May 21, 2021, Docket No. 10.)

Intervenors moved to intervene as defendants due to their interest in defending the Coleman Act. (Intervenor Mem. Supp. Mot. Intervene at 3–4, June 4, 2021, Docket No. 20.) After successfully intervening, Intervenors requested the Court stay the case until the end of the 2022 legislative session to permit the Minnesota Legislature to consider proposed amendments to the Coleman Act. (Mot. Stay at 1, Aug. 13, 2021, Docket No. 45.) On September 10, the Magistrate Judge denied Intervenors' Motion. (Order Denying Mot. Stay, Sept. 29, 2021, Docket No. 68.)[3]

Intervenors also requested that the Court allow them to amend their pleadings to assert crossclaims seeking declaratory judgments that (1) the Coleman Act is constitutional and (2) can be preserved through severance. (Mot. Am., Ex. B, Nov. 1, 2021, Docket No. 102.) The Magistrate Judge denied Intervenors' Motion because "the Intervenor Defendants all but admit their crossclaims are redundant of the factual and legal issues already in the case." (Order Denying Mot. Am. at 5, Dec. 7, 2021, Docket No. 121.)[4]

While Southern and the State's Joint Motion was pending, Southern filed a Motion for Judgment on the Pleadings and all of the relevant parties agreed to a briefing schedule permitting a single hearing on the Joint Motion and Southern's Motion for relief under Rule 12(c). (Stip. Briefing Schedule, Sept. 29, 2021, Docket No. 66; Pls.' Mot. J. Pleadings, Oct. 12, 2021, Docket No. 84.)

DISCUSSION

I. STANDARD OF REVIEW

Rule 12(c) of the Federal Rules of Civil Procedure provides that "[a]fter the pleadings are closed ... a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). The Court analyzes a motion for judgment on the pleadings under the same standard as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See* *Ashley County, Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009). The Court "accept[s] as true all facts pleaded by the non-moving party and grant[s] all reasonable inferences from the pleadings in favor of the non-moving party." *Syverson v. FirePond, Inc.*, 383 F.3d 745, 749 (8th Cir. 2004). "Judgment on the pleadings is appropriate only when there is no dispute as to any material facts and the moving party is entitled to judgment as a matter of law." *Wishnatsky v. Rovner*, 433 F.3d 608, 610 (8th Cir. 2006).

"When considering a motion for judgment on the pleadings ..., the court generally must ignore materials outside the pleadings, but it may consider some materials that are part of the public record or do not contradict the complaint, as well

as materials that are necessarily embraced by the pleadings." *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (cleaned up).

II. STANDING

***4** Intervenors contend that Southern lacks standing to bring this action because its injury is not redressable and the third-party standing doctrine bars Southern's claims. The Court must therefore first determine whether Southern has standing to request the relief it seeks.

A. Redressability

Assuming the Coleman Act is found unconstitutional, Intervenors argue that the Coleman Act is severable, and the invalid discriminatory provisions would be severed such that Southern would still be prohibited from exercising its exclusive distribution rights.

Article III of the Constitution limits the jurisdiction of federal courts to deciding cases and controversies. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Standing is essential to the case-or-controversy requirement. *Id.* at 560, 112 S.Ct. 2130. To establish standing, a plaintiff must show (1) that it suffered a concrete and particularized injury-in-fact that is actual or imminent; (2) a causal connection between the injury and the defendant's conduct; and (3) that it is likely the plaintiff's injury will be redressed by the remedy. *Id.* at 560–61, 112 S.Ct. 2130. "To determine whether an injury is redressable, a court will consider the relationship between 'the judicial relief requested' and the 'injury suffered.' " *California v. Texas*, —— U.S. ——, 141 S. Ct. 2104, 2115, 210 L.Ed.2d 230 (2021) (citation omitted).

In the Eighth Circuit, the general rule requires assuming that a plaintiff would be successful in their claims. *Graham v. Catamaran Health Sols. LLC*, 940 F.3d 401, 407–08 (8th Cir. 2017). "Therefore, if a claim presents a question of statutory interpretation under which one interpretation leads to possible relief and the other does not, standing exists." *Id.* However, redressability must be established by more than a "merely speculative" showing that the court can grant relief to redress the plaintiff's injury. *Advantage Media v. Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006).

As discussed *infra*, the Court finds that the Coleman Act is not severable. Accordingly, Southern's injury is redressable because a favorable decision finding that the Coleman Act is unconstitutional would eliminate the prohibition on exclusive distributorships.

B. Third-Party Standing

Intervenors also contend that Southern lacks standing because it is not directly regulated by the Coleman Act and Southern cannot challenge the law by asserting the rights of third parties.

"[O]nly in exceptional cases may a party have standing to assert the rights of another." *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cty.*, 115 F.3d 1372, 1378–79 (8th Cir. 1997). Plaintiffs alleging a violation of a constitutional or statutory right must show that their interests are arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Id.* "In Commerce Clause jurisprudence, cognizable injury is not restricted to those members of the affected class against whom states or their political subdivisions ultimately discriminate." *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 591–92 (8th Cir. 2003).

Though Intervenors are correct that the Coleman Act regulates out-of-state liquor producers and that Southern is not directly regulated, the Court finds that Southern has standing because its interest in exercising its exclusive distribution contracts with out-of-state producers is firmly within the zone of interests under the dormant Commerce Clause. *Hazeltine*, 340 F.3d at 592 (finding that loss of business as a result of a challenged statute satisfied the injury-in-fact requirement); *Ben Oehrleins,* 115 F.3d at 1379 (finding sufficient injury-in-fact where county ordinance prohibited plaintiffs from gaining access to a market).

III. DOCUMENTS OUTSIDE THE PLEADINGS

***5** Intervenors argue next that Southern's request for Rule 12(c) relief should be converted to a motion for summary judgement because Southern relies on documents outside of the pleading. Specifically, Intervenors contend that the four contracts Southern attached to a declaration supporting its Motion for Judgment on the Pleadings are not embraced by its Complaint and are inappropriate for this Court to rely on

without converting the motion to one for summary judgment. (Heard Decl., Exs. A–D ("Southern contracts").)

"In general, materials embraced by the complaint include 'documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleadings.' " *Zean v. Fairview Health Servs.,* 858 F.3d 520, 526 (8th Cir. 2017) (citation omitted).

Although Southern attached examples of it contracts to a declaration and not to its Complaint, the Southern contracts were sufficiently alleged in and embraced by the Complaint. (Compl. ¶ 25.) Additionally, Intervenors have not argued that the Southern contracts are fake or otherwise unreliable. The Court finds that the Southern contracts are not outside the pleadings and declines to convert the pending motion to one for summary judgment.

IV. INTERVENORS' AFFRIMATIVE DEFENSES

Intervenors alternatively allege that their affirmative defenses preclude Southern's requested relief. "When a defendant raises an affirmative defense in his answer it will usually bar judgment on the pleadings." *Lasser v. Am. Gen. Life Ins. Co.*, No. 14-3326, 2015 WL 12778004, at *4 (D. Minn. Apr. 3, 2015). "A grant of judgment on the pleadings is appropriate where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law." *Poehl v. Countrywide Home Loans, Inc.*, 528 F.3d 1093, 1096 (8th Cir. 2008). Because Intervenors' affirmative defenses raise no material issues of fact, the Court will not deny Southern's Motion.

A. Statute of Limitations

Intervenors argue that Southern's constitutional claims are barred by the statute of limitations because Southern entered the market in 2010 and did not challenge the Coleman Act until 2021. Southern does not contest this fact but alleges that the Coleman Act's unconstitutional restrictions constitute a continuing harm.

"[A] 'constitutional claim can become time-barred just as any other claim can[.]" *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 9, 128 S.Ct. 1511, 170 L.Ed.2d 392 (2008) (quoting *Block v. North Dakota*, 461 U.S. 273, 293, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983)). However, continuing violations of law, which inflict continuing and accumulating harm, can provide relief from a statute of limitation's effects. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968) ("We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span.... Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm[.]"); *Montin v. Est. of Johnson*, 636 F.3d 409, 416 (8th Cir. 2011) ("[Plaintiff] appears to allege, however, that he suffers daily and unconstitutional restrictions of his liberty of movement .... His claim, therefore, may be akin to a prisoner's Eighth Amendment claim or claims involving repeated enforcement of policies against a plaintiff rather than claims alleging merely ongoing consequences from an older, challenged action.").

Here, Southern alleges that the Coleman Act's allegedly discriminatory provisions produce a continual harm. Southern's claims therefore rest on continual violations resulting in an inability to enforce otherwise valid provisions of its contracts. The inapplicability of statutes of limitations to on-going and continuous harm is clearly established and Intervenors' statute of limitations defense does not raise issue of material fact sufficient to preclude Rule 12 relief.

B. Laches and Waiver

***6** Intervenors argue that both laches and waiver bar Southern's relief. The equitable doctrine of laches may permit dismissal of a claim if there is both an unreasonable delay and some change in position in reliance upon the delay which makes maintenance of the claim inequitable. *In re Panther Mountain Land Dev., LLC,* 686 F.3d 916, 927 (8th Cir. 2012). Similarly, under Minnesota law, a waiver is "an intentional relinquishment of a known right, and it must clearly be made to appear from the facts disclosed." *Slidell, Inc. v. Millennium Inorganic Chems., Inc.*, 460 F.3d 1047, 1055 (8th Cir. 2006) (citation omitted); *W. Cas. & Sur. Co. v. Beverforden*, 93 F.2d 166, 169 (8th Cir. 1937) ("A waiver is a voluntary relinquishment of a known right, the intended giving up of a known privilege or power.").

Here, Intervenors have not pled any change in reliance base upon Southern's alleged delay in challenging the Coleman Act. While Intervenors claim that they have conformed their businesses to account for open wholesaling over the last forty years, such allegations do not demonstrate that

Intervenors changed their positions in reliance on Southern's actions. Instead, Intervenors' argument concedes that they have not made any changes and have simply maintained the status quo. Similarly, Intervenors have not identified any facts demonstrating Southern intentionally relinquished a "known right" related to challenging the Coleman Act's constitutionality or that Southern intended to waive a challenge to the Coleman Act.

Accordingly, the Court finds that neither laches nor waiver present issues of material fact barring Rule 12(c) relief.

V. SOUTHERN'S MOTION FOR JUDGMENT ON THE PLEADINGS

A. Dormant Commerce Clause

The Commerce Clause in Article I, Section 8, of the United States Constitution grants Congress the power to regulate interstate commerce. U.S. Const. art. I, § 8, cl. 3. The Commerce Clause "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994); *see also* *S.D Farm Bureau, Inc.*, 340 F.3d at 592 ("The dormant Commerce Clause is the negative implication of the Commerce Clause: states may not enact laws that discriminate against or unduly burden interstate commerce."). State law discriminates in violation of the dormant Commerce Clause when the law "mandate[s] 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.' " *Granholm,* 544 U.S. at 472, 125 S.Ct. 1885 (quoting *Or. Waste Sys.*, 511 U.S. at 99, 114 S.Ct. 1345).

Under Section 2 of the Twenty First Amendment, States are allowed to regulate the "transportation or importation ... for delivery or use therein of intoxicating liquors." U.S. Const. amend. XXI, § 2. While the Supreme Court initially interpreted Section 2 as conferring the power to regulate alcohol in ways that would normally violate the dormant Commerce Clause, the Supreme Court's modern jurisprudence recognizes that Section 2 does not provide a blanket authorization to take actions violating other constitutional provisions. *Granholm*, 544 U.S. at 486–87, 125 S.Ct. 1885. Thus, although the three-tiered distribution system itself is unquestionably legitimate, previous cases establish that the ways in which a State implements a three-tiered system under the Twenty-first Amendment are not immune from dormant Commerce Clause scrutiny. Instead, the appropriate question is whether "the principles underlying the Twenty-first Amendment are sufficiently implicated ... to outweigh the Commerce Clause principles that would otherwise be offended." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984).

***7** The Supreme Court has further clarified the amorphous relationship between the constitutional provisions by stating that the Twenty-first Amendment provides States with the ability to enact measures that are "appropriate to address the public health and safety effects of alcohol use and [ ] serve other legitimate interests" but prohibits "States [from adopting] protectionist measures with no demonstrable connection to those interests." *Tenn. Wine & Spirits*, 139 S. Ct. at 2474. The Eighth Circuit has closely followed this tenant by upholding laws that " 'serve[ ] valid health, safety, and regulatory interests' " as well as licensing requirements and restrictions that are "essential" components of a three-tiered system. *Sarasota Wine Market, LLC v. Schmitt*, 987 F.3d 1171, 1181–82 (8th Cir. 2021) (citing *S. Wine and Spirits of Am., Inc., v. Div. of Alcohol and Tobacco Control,* 731 F.3d 799, 810–11 (8th Cir. 2013)). [5]

Therefore, this Court must decide whether the Coleman Act violates the dormant Commerce Clause and, if so, whether the unconstitutional aspects are essential components of Minnesota's three-tiered system or otherwise serve valid interests that cannot be achieved without discriminatory means.

1. Facial Discrimination

A state law that is challenged on dormant Commerce Clause grounds is subject to a two-step analysis. The Court first considers whether the challenged law discriminates against interstate commerce. *Or. Waste Sys.,* 511 U.S. at 99, 114 S.Ct. 1345. If the statute is discriminatory, it is "*per se* invalid." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.,* 511 U.S. 383, 392, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994). If the law is not discriminatory, the second step of analysis requires that the law be struck down only if the burden it imposes on interstate commerce "is clearly

excessive in relation to its putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

The Supreme Court recognizes three forms of discrimination against out-of-state interests. First, a state law may have an impermissible discriminatory purpose. *Bacchus Imports,* 468 U.S. at 270, 104 S.Ct. 3049. Second, a law may facially discriminate against out-of-state interests. *Chem. Waste Mgmt. v. Hunt,* 504 U.S. 334, 342, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992). Third and lastly, a law may have a discriminatory effect. *Maine v. Taylor,* 477 U.S. 131, 148 n. 19, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986).

Southern argues that the Coleman Act is facially discriminatory and prohibits out-of-state products and producers from establishing exclusive distributorships while explicitly exempting Minnesota producers and products. Intervenors contend that the Coleman Act is not discriminatory because it applies the same requirements to both in-state and out-of-state importers and additionally provides a mechanism allowing out-of-state producers to qualify for the same exemptions that in-state producers enjoy.

***8** The Court is not persuaded by Intervenors' arguments. A law is facially discriminatory if it expressly provides for "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys.*, 511 U.S. at 99, 114 S.Ct. 1345. The Coleman Act explicitly permits alcohol produced or further refined in Minnesota to be distributed through exclusive wholesaler agreements in order to circumvent the open wholesaling requirement imposed on alcohol produced outside of Minnesota. Although Intervenors are correct that the Coleman Act applies equally to all **importers**, the Coleman Act still disfavor **out-of-state-producers** by exempting Minnesota producers from the wholesaling requirement. Further, Intervenors' argument does not remedy the fact that the Coleman Act impermissibly discriminates against **out-of-state products** by prohibiting exclusive dealerships in the first place.

Intervenors' argument that out-of-state producers and products may qualify for the exemptions in-state producers and products are privy to is similarly unpersuasive. It is immaterial that out-of-state producers can qualify for the Coleman Act's exemptions by producing or further refining their product in Minnesota. A law that discriminates between in-state and out-of-state economic interests is impermissible regardless of the degree of disparate treatment because "the magnitude and scope of the discrimination have no bearing on the determinative question," which is "whether discrimination has occurred." *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 650, 114 S.Ct. 1815, 128 L.Ed.2d 639 (1994). The crucial fact is that the Coleman Act applies different requirements to out-of-state producers and products that would necessitate a workaround in the first place. Moreover, it can hardly be said that a law comports with the dormant Commerce Clause by forcing out-of-state producers to further distill, refine, or blend their product within the state to be treated the same as domestic products. Minn. Stat. § 340A.307, subd. 4.

The Coleman Act only prohibits exclusive distributorships of alcohol produced outside of Minnesota and expressly favors in-state producers and products by allowing them to enter into such exclusive agreements. Accordingly, the Court finds that the Coleman Act facially imposes differential treatment of in-state and out-of-state economic interests and is facially discriminatory.

2. Essential Element

Under the Twenty-first Amendment, the Coleman Act's open wholesaling requirement may still be a constitutional exercise of the State's right to regulate alcohol. The relevant question is whether the discriminatory provision is an essential component of a three-tiered system of regulation or otherwise " 'serves valid health, safety, and regulatory interests' " for which there are no other non-discriminatory alternatives. *Sarasota*, 987 F.3d at 1181 (citing *S. Wine and Spirits of Am.*, 731 F.3d at 810–11); *Tenn. Wine & Spirits*, 139 S. Ct. at 2474, 2476.

Intervenors argue that the Coleman Act must be upheld because its open wholesaling requirement is an essential element of Minnesota's three-tiered system and serves valid interests by preventing market concentration, increasing competition, and reducing prices. The Court finds that none of these reasons make the Coleman Act's discriminatory provision an essential function of a three-tiered system.

The Supreme Court in *Tennessee Wine & Spirits* held that the Twenty-first Amendment allows states to enact measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests, but it does not license the States to adopt protectionist measures with no demonstrable connection to those interests. 139 S. Ct. at 2474. While striking down the law at issue, the Supreme Court noted that the law was "ill suited to promote responsible sales and consumption practices" and "there [were] obvious alternatives that better serve that goal without discriminating against nonresidents." 139 S. Ct. at 2476. In the Eighth Circuit, courts have upheld licensing requirements as essential elements of a state's three-tiered system when they were similar to laws that defined the extent and requirements of the producer, wholesaler, and retailer tiers. *S. Wine & Spirits of Am.,* 731 F.3d at 809 (citing *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885). In *Sarasota*, the Eighth Circuit's most recent case on the issue, the Eighth Circuit again found that a challenged licensure requirement was an essential element defining the three-tiered system because the licensure requirements applied even-handedly to all retailers and set forth the requirements allowing retailers to sell alcohol directly to consumers. 987 F.3d at 1183–84.

***9** Here, the Coleman Act does not attempt to even-handedly regulate any form of Minnesota's three-tiered structure like the licensure requirements in *Sarasota*. Similarly, assuming that the Coleman Act was intended to reduce prices, as Intervenors assert, the law is not analogous to the residency requirement at issue in *Southern Wine and Spirits* that was intended to promote social responsibility and temperance. 731 F.3d at 811. Instead, the Coleman Act attempts to regulate the manner in which out-of-state producers offer their products while protecting in-state interests from the same requirements. In this light, the Coleman Act is more akin to *Tennessee Wine & Spirits* as a law that is "ill suited to promote responsible sales and consumption practices" when "there are obvious alternatives that better serve that goal without discriminating against nonresidents." 139 S. Ct. at 2474, 2476. As Intervenors acknowledge while arguing that the Coleman Act is severable, there are a plethora of alternatives to discriminating against out-of-state producers and products—most easily by requiring **all** producers and products to be subject to open wholesaling and prohibited from exclusive distributorships. Indeed, current proposed legislation in both the Minnesota Senate and House of Representatives provides this exact remedy. *Compare* S.F. 3008, 92nd Leg., First Engrossment and H.F. 2767, 92nd Leg, As Introduced, *with* Minn. Stat. § 340A.307, subds. 1, 4.

In sum, the Coleman Act facially discriminates against out-of-state producers and products, is not an essential element of Minnesota's three-tiered system, and is ill suited to serve valid regulatory interests when non-discriminatory alternatives that better serve such goals exist. Accordingly, the Court finds that the Coleman Act's open-wholesaling requirement and prohibition against exclusive distributorships is unconstitutional.

B. Severability

The Court must also determine whether any of the Coleman Act's unconstitutional provisions are severable. Severability is a matter of state law. *See Leavitt v. Jane L.,* 518 U.S. 137, 139, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996). The Minnesota statute governing severability provides that:

> Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable. If any provision of a law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Minn. Stat. § 645.20. The chapter encompassing the Coleman Act includes a severability clause. Minn. Stat. § 340A.910.

Therefore, the Court must consider whether the Coleman Act's provisions are sufficiently interconnected such that the legislature would not have enacted the statute in its severed form or whether the valid provisions would be incomplete and incapable of being executed in accordance with the legislative intent. Minn. Stat. § 645.20.

1. The Void and Valid Provisions are Interconnected

Intervenors contend that subdivision 1, subdivision 2, and the exceptions in subdivision 4 of the Coleman Act are severable in various forms. The Court will first consider whether "all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other." *State ex rel. Grozbach v. Common Sch. Dist. No. 65*, 237 Minn. 150, 54 N.W.2d 130, 133 (1952).

While interpreting Minnesota law, the Eighth Circuit has held that a statute is not severable when the valid sections were "conceived together as a unified effort to regulate certain practices[.]" *Cellco P'ship v. Hatch,* 431 F.3d 1077, 1084 (8th Cir. 2005). In *Cellco*, the Eighth Circuit found that three valid provisions—a definitional section and two sections regarding conduct ancillary to the heart of the legislation's purpose—worked in tandem with the void provision in order to achieve the legislature's intent. *Id.* Here, subdivision 1 (nondiscriminatory sales), subdivision 2 (prohibited practices), and subdivision 4 (exceptions) are part of a singular scheme to regulate producers' sale of their products. Because of their dependency on each other, it is unlikely that the Minnesota Legislature would have passed any of the subdivisions on their own. Subdivision 1 provides a general rule, subdivision 2 provides examples of conduct breaching the rule, and subdivision 4 provides exceptions to the rule and conduct described in subdivisions 1 and 2 respectively.

***10** The subdivisions of the Coleman Act are connected in subject-matter, depend on each other, and operate together for the same purpose. The Court finds that the subdivisions of the Coleman Act are therefore sufficiently interconnected and not severable.

2. The Valid Provision Would be Incapable of Being Executed in Accordance with the Legislature's Intent

Even if the provisions of the Coleman Act were not interconnected, the valid provisions would be "incomplete and [ ] incapable of being executed in accordance with the legislative intent." Minn. Stat. § 645.20.

Both Intervenors and Southern direct the Court to *Archer Daniels Midland Co. v. State ex rel. Allen,* 315 N.W.2d 597 (Minn. 1982) to support their respective positions regarding severability of the Coleman Act. In *Archer Daniels Midland*, the Minnesota Supreme Court refused to sever a discriminatory tax on out-of-state products after determining that doing so would violate the legislature's intent. Specifically, the court held that:

> [T]he unconstitutional language of the Act explicitly limits the four-cent per gallon tax reduction to Minnesota gasohol. This indicates a legislative intent to benefit only intrastate concerns. If the unconstitutional language of the Act were stricken and the Act's tax reduction extended to out-of-state concerns such as [plaintiff], this legislative intent would be completely frustrated. We conclude, therefore, that the remaining provisions of the Act, standing alone, are incapable of being executed in accordance with the legislative intent."

Archer Daniels Midland Co., 315 N.W.2d at 600. Intervenors contend that the *Archer Daniels* court invalidated the discriminatory law *in toto* because the "legislative intent [wa]s not at all clear." *Id.* However, this is an incorrect reading of the case. In the quotation Intervenors rely on, the *Archer Daniels* court was considering an argument that the discriminatory tax should be severed under *State v. Minnesota Federal Savings & Loan Ass'n*, 218 Minn. 229, 15 N.W.2d 568 (1944). *Id.* The *Archer Daniels* court noted that the *Minnesota Federal Savings* court severed a discriminatory portion of an income tax statute because there was a clear legislative intent to sustain a limited application of the tax rather than to eliminate it completely. *Id.* The *Archer*

Daniels court then noted that "[i]n this case, however, a similar legislative intent is not at all clear" and instead found that the legislature only intended to benefit intrastate concerns. *Id.* Contrary to Intervenors contentions, the *Archer Daniels* court did not refuse to sever the discriminatory tax because of a lack of legislative intent but, rather, refused to sever the discriminatory language of the tax because the legislature intended to benefit in-state actors and striking the discriminatory language would frustrate this intent. *Id.*

Like *Archer Daniels*, the language of the Coleman Act is indicative of the Legislature's intent to benefit Minnesota producers and products by exempting them from open wholesaling. Moreover, the Legislature reaffirmed its intention when it amended the Coleman Act in response to an unfavorable Minnesota Supreme Court decision holding that alcohol processed within the state was regulated by the Coleman Act. *Compare Fed. Distillers*, 229 N.W.2d at 155–56, *with* Minn. Stat. § 340A.307, subd. 4(2). Because the Minnesota Legislature initially exempted in-state producers and products from the Coleman Act and later doubled-down by amending the Coleman Act to rectify an unfavorable Minnesota Supreme Court decision applying the law to in-state products, the Court finds that severing the discriminatory language of the Coleman Act would not be consistent with the Legislature's intent and is not the appropriate remedy.

3. Certification to the Minnesota Supreme Court

***11** Intervenors lastly argue that the Court should certify the issue of severability to the Minnesota Supreme Court. The Court finds this step unnecessary.

Minnesota law provides that the Minnesota Supreme Court "may answer a question of law certified to it by a court of the United States ... if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this state." Minn. Stat. § 480.065, subd. 3. Use of a State's certification procedure by a federal district court rests in the court's sound discretion. *Lehman Bros. v. Schein,* 416 U.S. 386, 390–91, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974); *Allstate Ins. Co. v. Steele,* 74 F.3d 878, 881–82 (8th Cir. 1996). Although certification may "in the long run save time, energy, and resources and help[ ] build a cooperative judicial federalism," it is never obligatory, even when state law is in doubt. *Lehman Bros.,* 416 U.S. at 390–91, 94 S.Ct. 1741. A federal court's "most important consideration" in deciding whether to certify a question to a state court is whether it "finds itself genuinely uncertain about a question of state law[.]" *Johnson v. John Deere Co.,* 935 F.2d 151, 153 (8th Cir. 1991) (quoting *Tidler v. Eli Lilly & Co.,* 851 F.2d 418, 426 (D.C. Cir. 1988)). Certification "is not a procedure by which federal courts may abdicate their responsibility to decide a legal issue when the relevant sources of state law available to it provide a discernible path for the court to follow." *Tidler,* 851 F.2d at 426. Absent a " 'close' question of state law or the lack of state sources, a federal court should determine all the issues before it." *Johnson*, 935 F.2d at 154 (citing *Perkins v. Clark Equip. Co.,* 823 F.2d 207, 209 (8th Cir. 1987)).

Though there are multiple overlapping arguments concerning the severability of the Coleman Act, neither the arguments nor the principles underlying the severability issue are so complex that the Court is faced with a close or genuine question. The Court will decline to certify the severability issue to the Minnesota Supreme Court.

For the forgoing reasons, the Court finds that the Coleman Act's discriminatory provisions are unconstitutional and, because the law in not severable, is unconstitutional. Intervenors' challenges to Southern's standing are unsuccessful, as is their attempt to preclude Rule 12(c) relief through their affirmative defenses. The Court will therefore grant Southern's Motion for Judgment on the Pleadings. [6]

VI. JOINT MOTION FOR STIPULATED JUDGMENT

Because Southern's Motion for Judgment on the Pleadings is granted, the Court need not consider the Joint Motion for Stipulated Judgment and will deny the motion as moot.

ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' Motion for Judgement on the Pleadings [Docket No. 84] is **GRANTED** as follows:

   a. The Coleman Act, as reflected in Minn. Stat. § 340A.307, is **DECLARED** facially unconstitutional

as a violation of the dormant Commerce Clause of the United States Constitution.

b. Defendant John Harrington, in his official capacity as Commissioner of the Minnesota Department of Public Safety, is **PERMANENTLY ENJOINED** from enforcing the Coleman Act, as reflected in Minn. Stat. § 340A.307.

***12** 2. Entry of judgment is **STAYED** for sixty (60) days pending the resolution of the proposed legislation in the Minnesota Legislature.

3. Plaintiffs' and Defendant's Joint Motion for Stipulated Judgment [Docket No. 10] is **DENIED as MOOT**.

4. Intervenors' Objection to the Magistrate Judge's Order Denying the Motion to Stay [Docket No. 92] is **DENIED as MOOT**.

5. Intervenors' Objection to the Magistrate Judge's Order Denying the Motion to Amend [Docket No. 132] is **DENIED as MOOT**.

6. Plaintiffs', Defendant's, and Intervenors' Joint Motion Regarding Continued Sealing [Docket No. 133] is **GRANTED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

All Citations

--- F.Supp.3d ----, 2022 WL 912032, 112 Fed.R.Serv.3d 1027

Footnotes

1 Sunny Hill Distributors, Inc. was also an Intervenor Defendant but has since withdrawn from this action. (Order on Stip. Withdrawal, Mar. 24, 2022, Docket No. 164.)

2 Although it appears that the correct spelling is "Geowolb" based upon the declaration's signature page, the Court has referenced the declaration as it was titled when filed for clarity of the record.

3 Intervenors objected to the Magistrate Judge's Order. (Intervenor Defs.' Objs. Order Mot. Stay, Oct. 13, 2021, Docket No. 92.) However, because of this Order, the Intervenors' objections are moot.

4 Intervenors also objected to the Magistrate Judge's Order denying their Motion to Amend. (Intervenor Defs.' Objs. Order Mot. Am., Jan. 03, 2022, Docket No. 132.) Even if the Court were to reach a different conclusion than the Magistrate Judge, this Order moots their proposed crossclaims and objections.

5 Numerous courts have similarly upheld essential or inherent components of a state's three-tiered system when considering a dormant Commerce Clause challenge. *See* *Tenn. Wine & Spirits,* 139 S. Ct. at 2471 (invalidating a state liquor law under the dormant Commerce Clause when it "[was] not an essential feature of a three-tiered scheme[.]"); *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 623 (6th Cir. 2018) ("[R]equiring wholesaler or retailer businesses to be physically located within Tennessee may be an inherent aspect of a three-tier system[.]"); *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016) (distinctions between in-state and out-of-state retailers and wholesalers are permissible "if they are an inherent aspect of the three-tier system."); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 818 (5th Cir. 2010) ("[D]iscrimination that would be questionable, then, is that which is not inherent in the three-tier system itself."); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) (noting that challenging the requirement that out-of-state retailers sell through Virginia's three-tier system "is nothing different than an argument challenging the three tier system itself.").

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6 Intervenors'

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United States District Court, C.D. California.

CALVARY CHAPEL BIBLE FELLOWSHIP
v.
COUNTY OF RIVERSIDE

Case No. CV16-259 PSG (DTBx)
|
Filed 08/18/2017

Attorneys and Law Firms

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James E. Brown, Kelly Anne Moran, Melissa Renee Cushman, Office of County Counsel, Riverside, CA, for County of Riverside.

Proceedings (In Chambers): Order GRANTING in part and DENYING in part the County's motion for summary judgment, DENYING Plaintiff's motion for partial summary judgment, GRANTING the County's cross-motion for summary judgment, and DENYING Plaintiff's cross-motion for summary judgment

Philip S. Gutierrez, United States District Judge

***1** Before the Court are Plaintiff Calvary Chapel Bible Fellowship's partial motion for summary judgment as to its first, second and seventh causes of action (Dkt. # 29), and Defendant County of Riverside's motion for summary judgment as to the entire complaint (Dkt. # 28). After oral argument on April 17, 2017, the Court issued a tentative ruling and ordered the parties to submit simultaneous briefs in response to the tentative order and file cross-motions for summary judgment on Plaintiff's third, fourth, fifth and sixth causes of action. *See* Dkt. # 49. The response briefs and cross-motions are now before the Court. *See* Dkts. ## 51–54. After considering the moving, opposing and reply papers, as well as arguments presented in the response briefs, the Court GRANTS in part and DENIES in part the County's motion, DENIES Plaintiff's motion and cross-motion, and GRANTS the County's cross-motion.

I. Background

This dispute concerns whether certain provisions of the County of Riverside's land use ordinance facially violate the Religious Land Use and Institutionalized Persons Act of 2000 by excluding religious assemblies and institutions from two zoning districts. The motions before the Court seek a determination on the merits of Plaintiff's seven causes of action, which allege that the challenged ordinance provisions facially violate the "equal terms," "nondiscrimination," and "unreasonable limitations" provisions of RLUIPA, as well as violate the First Amendment. In addition, Defendant challenges Plaintiff's suit on standing, ripeness, and statute of limitations grounds. In order to address all of the issues raised by the parties, the Court provides the following detailed background of this case.

Plaintiff Calvary Chapel Bible Fellowship ("CCBF") is a non-denominational Christian church located in an area of Defendant County of Riverside ("County") known as "Temecula Wine Country." Dkt. # 1 ("Complaint" or "Compl.") ¶¶ 3, 8; *see also Defendant's Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment* ("DSUF") ¶¶ 1–3. CCBF owns two adjacent parcels of land located in the Citrus/Vineyard Zone ("C/V Zone"), one of approximately 40 zoning classifications in the County. Dkt. # 40-1, *Plaintiff's Statement of Undisputed Facts* ("PSUF") ¶ 2; *see also Declaration of Clark Van Wick* ("Van Wick Decl.") ¶ 3; Dkt. # 40-3, *Declaration of Juan Perez in Support of County's Opposition to Plaintiff's MSJ* ("Perez Decl. 1") ¶ 2. The County administers all land use planning and zoning regulation through its Zoning Ordinance No. 348 ("Ordinance No. 348"). *See DSUF* ¶ 6; *Perez Decl. 1* ¶ 5.

After acquiring the first parcel in 1996, CCBF applied for and obtained a public use permit to operate as a church and to construct a sanctuary and classroom on its property. *Compl.* ¶ 20; *PSUF* ¶ 3. Pursuant to the ordinance provision in force at the time, churches, temples and other places of religious worship were permitted in the County, either as of right, with approval of a Plot Plan or with approval of a public use permit. Dkt. # 40-4 ("Perez Decl. 2"), Ex. H p.2. In the C/V Zone at the time, churches were allowed with a public use permit. *Id.*; *PSUF* ¶ 3; Dkt. # 30-1, Ex. 6. In September of 1999, shortly after CCBF began construction of its sanctuary and classroom, the County amended Ordinance No. 348 to eliminate the previously existing right of religious assemblies to locate in all zones by way of a public use permit. Dkt. #41-2, *Declaration of Michael Naggar* ("Naggar Decl.") ¶ 17; Dkt. 30-1, Ex. 7. Instead, religious use was limited to

designated zones, no longer including the C/V Zone. *Naggar Decl.* ¶ 17. Because religious uses in the C/V Zone are no longer permitted, CCBF has been in nonconforming use ever since. [1] *PSUF* ¶ 5.

***2** Between 1999 and 2009, Ordinance No. 348 was amended on several occasions to further specify the permitted uses in the C/V Zone. *See Compl.* ¶¶ 27–28. Specifically, Sections 14.71–74 of Ordinance No. 348 govern the land use and zoning regulation of the C/V Zone and are the relevant provisions at issue in this case. *See Perez Decl. 1*, Ex. A ("C/V Zone"). Pursuant to Section 14.71, the C/V Zone classification is intended to "encourage agricultural cultivation, vineyards, and wineries, that would preserve the rural lifestyle, wine-making atmosphere and long term viability of the wine-industry." *Id.* § 14.71. To that end, uses permitted under section 14.73 include one-family dwellings; vineyards and groves; field crops and orchards; vegetable, flower and herb gardens; horse, cattle, sheep and other farm stock; and outside storage units used in connection with a farm. *Id.* at § 14.73(A). Other uses that may be permitted upon approval of a Plot Plan include additional dwelling units; public utility facilities, eighteen-hole golf courses; child day care centers, and limited incidental commercial uses that are in conjunction with an on-site vineyard and minimum gross acreage, such as special occasion facilities, bed and breakfasts, country inns, hotels, restaurants, spas, cooking schools, wine sampling rooms, retail wine sale stores, and agricultural product stands. *Id.* at § 14.73(B).

In 2009, allegedly unaware of the County's actions to exclude religious uses in the C/V Zone, CCBF purchased an adjacent unimproved parcel in order to allow for the expansion of its growing church. *Compl.* ¶ 30; *Van Wick Decl.* ¶ 18. In March of 2011, CCBF submitted a Plot Plan to the County containing its proposed expansion which includes a larger sanctuary, a special occasion facility, an open air wedding facility, a church administration building and a single family residence on the vacant parcel. *DSUF* ¶¶ 8–9; *Van Wick Decl.* ¶ 18. CCBF engaged in discussions with the County regarding its proposed expansion and requested that the County amend its ordinance in order to permit religious land use within the C/V Zone. *Id.* ¶ 22. To that end, in March of 2010, the County Board of Supervisors approved a draft Ordinance No. 348.4702 to permit churches and other places of religious worship in the C/V Zone. *Id.*; *see also* Dkt. # 41-5, Ex. 9 ¶ 3.46. Over the next several months, the draft ordinance was tentatively approved, but ultimately removed from the County Planning Commission's agenda in November of 2010. Dkt. # 41-2, *Naggar Decl.* ¶¶ 23–24; *see also* Dkt. # 41-5, Ex. 14, 19. Instead, on November 9, 2010, the County Board of Supervisors approved Ordinance No. 348.4713 which provided for the County Planning Director to permit uses that were substantially the same in character and intensity as uses already permitted within a County zone. *Naggar Decl.* ¶ 25; Dkt. # 41-5, Ex. 21. Pursuant to this ordinance, CCBF sent a letter to the County Planning Director requesting a finding that CCBF's proposed expansion of its church is the same in character and intensity as other projects already permitted in the C/V Zone. *Naggar Decl.* ¶ 26; Dkt. #41-5, Ex. 24. In January of 2011, the Planning Director sent a response, informing CCBF that a determination had been made that its proposed project was the same in character and intensity as other projects and that it must submit a Plot Plan application to the Planning Department in order to proceed with its expansion. *Naggar Decl.* ¶ 27; Dkt. #45-1, Ex. 15. Two months after CCBF submitted its Plot Plan application, a group known as "Protect Wine Country" filed a lawsuit against the County challenging the validity of Ordinance No. 348.4713. *Naggar Decl.* ¶ 29. Having found that the County had failed to comply with environmental and procedural laws in enacting the ordinance, the Superior Court of Riverside County found in favor of Protect Wine Country, thereby causing CCBF's Plot Plan application to be negated. *Id.*

Meanwhile, the County, in partnership with the Temecula Valley Wine Association, initiated the planning and development of a plan known as the Wine Country Community Plan ("WCCP") intended to cover a project area of approximately 18,000 acres that encompasses various zoning classifications, including the C/V Zone. *Id.* ¶ 20; *see also Perez Decl.* 2, Ex. L ("Resolution No. 2014-040") p.5. As established in Resolution No. 2014-040, the WCCP amends the County General Plan to create new Wine Country Zones in the area encompassed by the plan. *See Resolution No. 2014-040* p.2.

***3** While the County was preparing the WCCP, CCBF made numerous requests for the County to add religious assemblies as permitted uses in the proposed WCCP. *Nagger Decl.* ¶ 31. After several hearings took place in June, July, August and December of 2012 on the question of amending the WCCP to allow religious assemblies as permitted uses with an entitlement, the Planning Commission voted to recommend to the Board of Supervisors to "carve out" CCBF's two parcels from the WCCP, leaving them geographically surrounded but excluded from the WCCP. *Id.* ¶ 42; *Perez Decl.*, Ex. L p.3. At a September 24, 2013 hearing before the Board of Supervisors,

Supervisor Jeff Stone remarked that by keeping CCBF in the C/V Zone, "we can then come back and amend that plan to allow a church and we can be in compliance with RLUIPA and they will be I think a[n] agricultural asset to the county." *See* Dkt. # 41-23, Ex. 18, p. 126.

On March 11, 2014, the County approved the WCCP. *Id.*; *see Resolution 2014-040.* CCBF therefore remains subject to the requirements of the C/V Zone while the surrounding properties are now regulated by the WCCP, as provided in Sections 14.91–99 of Ordinance No. 348. *Id.* at 3; *Perez Decl. 1*, Ex. B ("Wine Country Zone"). The Wine Country Zone provisions, and specifically sections 14.91–14.94 which are at issue in this case, are substantially similar to the C/V Zone provisions, confirming the same intent of encouraging agricultural cultivation, vineyards, and wineries, and allowing the same permitted uses of dwellings, vineyards, crop fields, and specified facilities related to the production and selling of wine. *Compare Ordinance No. 348 §§ 14.71-74 with 14.91–94.*

After the County adopted the WCCP, Protect Wine Country filed another lawsuit against the County alleging that the "carve-out" of CCBF's parcels from the WCCP constituted illegal spot zoning. *Naggar Decl.* ¶ 47; *see also Protect Wine Country v. County of Riverside*, RIC1401719. The case concluded via settlement agreement on October 29, 2015, whereby the County agreed "that all amendments to the Citrus/Vineyard (C/V) Zone incorporating revisions to the permitted uses or development standards shall also be made to the [Wine Country] zones." *Id.* ¶ 48; *see also* Dkt. #41-5, Ex. 17 ("Settlement Agreement") ¶ 2. The County further agreed to "adopt a policy that requires interpretation of the planting requirements in the Citrus/Vineyard (C/V) Zone to be the same as the planting requirements in the [WCCP]." *See Settlement Agreement* ¶ 1.

In the midst of all these events, CCBF submitted to the County an application for a text amendment to permit churches in the C/V Zone along with a Plot Plan application to develop its vacant parcel. *Naggar Decl.* ¶ 33; *Perez Decl.* ¶ 6. Although initially filed in May of 2012, both applications are still pending because environmental review under the California Environmental Quality Act is ongoing. *Perez Decl.* ¶ 6.

CCBF filed suit against the County on February 10, 2016, asserting six claims for violations of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), as well as a claim for violation of Plaintiff's First Amendment rights under 42 U.S.C. § 1983. *See Complaint.* CCBF alleges that the C/V Zone and the Wine Country Zone provisions facially violate (1) the equal terms provision of RLUIPA (first and second causes of action); (2) the nondiscrimination provision of RLUIPA (third and fourth causes of action); and (3) the exclusion provision of RLUIPA (fifth and sixth causes of action). *Id.* CCBF additionally asserts that, on their face, Sections 18.28 and 18.30 of Ordinance No. 348 grant unbridled discretion to County officials to determine land use affecting CCBF's religious speech, in violation of the First Amendment (seventh cause of action).

CCBF filed a motion for partial summary judgment as to the first, second and seventh causes of action. Dkt. # 29 ("CCBF Mot."). The County filed a motion for summary judgment as to the entire complaint on grounds of untimeliness, ripeness and standing. Dkt. # 28 ("County Mot."). Lastly, the parties have filed cross-motions for summary judgment as to the third, fourth, fifth, and sixth causes of action. Dkt. # 51 ("County Corss-Mot."); Dkt. # 53 ("CCBF Cross-Mot.").

II. Legal Standard

***4** A motion for summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A disputed fact is material if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all reasonable inferences in the light most favorable to the nonmoving party. *See T.W. Electric Service, Inc. v. Pacific Electric Contractors Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987). The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

III. Discussion

The Court first addresses the County's motion for summary judgment because it argues that CCBF's claims fail as a matter of law on statute of limitations, ripeness and Article III standing grounds. Because the Court finds that these threshold requirements only bar CCBF's seventh cause of action, the Court then turns to CCBF's motion for partial summary judgment on its first and second causes of action, and the parties' cross-motions as to the third, fourth, fifth and sixth causes of action.

A. County's Motion for Summary Judgment

The County brings its motion for summary judgment on grounds that (1) CCBF's suit is barred by the statute of limitations; (2) CCBF's action is not yet ripe; and (3) CCBF lacks Article III standing as to its second, fourth, sixth and seventh causes of action. *See generally County Mot.* The Court addresses each argument in turn.

a. Statute of Limitations

While RLUIPA does not contain its own statute of limitations period, the Ninth Circuit has confirmed that RLUIPA claims, like other civil claims "arising under an Act of Congress enacted after [December 1, 1990]," have a four-year period of limitations. *Pouncil v. Tilton*, 704 F.3d 568, 573 (9th Cir. 2012) (citing *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004)). Accordingly, CCBF's first six causes of action are subject to a four-year statute of limitations. As to CCBF's seventh cause of action arising under 42 U.S.C. § 1983, the parties agree that federal courts look to the law of the state in which the cause of action arose and apply the state law of limitations governing an analogous cause of action. *See Wallace v. Kato*, 549 U.S. 384, 387 (2007). The parties also agree that the analogous cause of action in this case is California's personal injury action, which has a two-year statute of limitations. *See Maldonado v. Harris*, 370 F.3d 945, 954–55 (9th Cir. 2004).

The parties disagree, however, on when the statute of limitations on CCBF's claims began to run. The County argues that regardless of the statute of limitations applied, CCBF's claims are barred because the ordinance provisions being challenged in this case were adopted more than four years prior to the filing of the complaint. *See County Mot.* 4; Dkt. # 43 ("County Rep.") 1–3. The County thus appears to argue that CCBF's claims accrued on the date the ordinance was enacted or amended, causing the statute of limitations to begin to run. *See id.* Citing no authority for the proposition that a law is immune from facial challenges due to the passage of time after enactment,[2] the County misconstrues the nature of CCBF's claims. CCBF is not asserting an injury solely from the enactment of Ordinance No. 348, but claims that all of its causes of action demonstrate a continuing violation because the ordinance remains in effect. Dkt. # 41 ("CCBF Opp.") 6. The "continuing violation" doctrine holds that when a plaintiff is suffering not a discrete, particular injury, but an ongoing violation of rights, the plaintiff may file suit at any time within the limitations period after the most recent incident. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628 (2007); *see also Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1480 (9th Cir. 1989) ("To establish a continuing violation [a plaintiff has] to show a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the [limitations] period.") (internal citations omitted). Here, despite the various attempts over the past several years to address the inclusion of religious assemblies in the C/V Zone, Ordinance No. 348 remains unaltered and in effect. If a violation of RLUIPA does in fact exist on the face of Ordinance No. 348, "then each day that the invalid [ordinance] remaine[s] in effect, it inflict[s] a continuing and accumulating harm" on CCBF. *See Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) (holding that an ordinance barring plaintiff from using certain roads on an ongoing basis actively deprived plaintiff of its asserted constitutional rights every day that the ordinance remained in effect).

***5** This is equally applicable to CCBF's seventh cause of action asserting violations of its right to free speech under the First Amendment. *See Compl.* ¶¶ 109–14. In *3570 East Foothill Blvd., Inc. v City of Pasadena*, the Court specifically held that "a statute that, on its face, violates the First Amendment's guarantee of free speech inflicts a continuing harm.... This harm continues until the statute is either repealed or invalidated." 912 F. Supp. 1266, 1278 (C.D. Cal. 1996). The Court therefore held that the plaintiff was not barred by the statute of limitations from bringing a facial challenge to the law in question. *Id.* Similarly, in *Santa Fe Springs Realty Corp. v. City of Westminster*, the Court refused to hold that the statute of limitations prohibited a facial challenge to a city ordinance, noting that "[a] First Amendment challenge ...

involves a continuing injury based upon the statute's on-going effect on protected speech." 906 F. Supp. 1341, 1364–65 (C.D. Cal. 1995).

Moreover, the doctrine of equitable estoppel precludes the County from asserting a statute of limitations defense. Equitable estoppel, also termed fraudulent concealment, halts the statute of limitations when there is "active conduct by a defendant, above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time." *Guerrero v. Gates*, 442 F.3d 697 (9th Cir. 2006). Here, the undisputed facts demonstrate that between 2009 and 2015, the County and CCBF engaged in numerous discussions over the exclusion of religious assemblies in the C/V Zone and WCCP, many of which gave CCBF assurances that religious use would be added to the ordinance, thus precluding the necessity of filing suit. For example, in January of 2011, pursuant to a newly adopted ordinance that would approve a church as a non-designated, but permissible use, the County Planning Director made a determination that CCBF's proposed expansion project was the same in character and intensity as other projects in the C/V Zone and therefore permissible under the new ordinance. *Naggar Decl.* ¶ 27; Dkt. #45-1, Exs. 8, 15. CCBF then submitted a Plot Plan in March of 2011. *Naggar Decl.* ¶ 28. One year later, however, in March of 2012, the Riverside County Superior Court invalidated the ordinance, thereby negating CCBF's Plot Plan. After continued demands by CCBF to amend the ordinance to permit religious use, CCBF filed an application for a text amendment to permit churches in the C/V Zone. *Naggar Decl.* ¶ 33–34, 43. Further, at a County Board of Supervisors hearing that took place on September 24, 2013, Supervisor Stone explained that carving CCBF out of the WCCP and thereby keeping it the C/V Zone alone would allow the County to "then come back and amend the plan to allow a church." *Naggar Decl.* 41; Ex. 18, p. 126. This carve-out, however, was challenged as impermissible spot zoning in yet another lawsuit against the County surrounding its treatment of CCBF's parcels. The case concluded in a settlement agreement in October of 2015, whereby the County agreed that all amendments to the C/V Zone must also apply to the Wine Country Zones, which CCBF contends represents a departure from the previous representations that the County will amend the C/V Zone alone to permit religious use. *See Settlement Agreement*, p.2, ¶ 2.

Drawing all inferences in favor of CCBF, as it must do in this motion, the Court finds that the undisputed facts demonstrate CCBF did not file suit at an earlier time due to reliance on the County's assurances that its concerns regarding religious use in the C/V Zone would be addressed. *See* *Atkins v. Union Pacific R. Co.*, 685 F.2d 1146, 1149 (9th Cir. 1982) ("[C]onduct or representations by the defendant[ ]which tend to 'lull (the plaintiff) into a false sense of security,' can estop the defendant from raising the statute of limitations.") (quoting *Glus v. Brooklyn Eastern Terminal*, 359 U.S. 231, 232-33, (1959)). The Court thus finds that the doctrine of equitable estoppel provides additional grounds for barring the County's statute of limitations defense.

***6** The County's motion for summary judgment on grounds that the statute of limitations bars CCBF's claims is therefore denied.

b. Ripeness

The County next argues that CCBF's claims are not ripe for judicial review. *County Mot.* 5. "[R]ipeness is peculiarly a question of timing, designed to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.' " *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by* *Califano v. Sanders*, 430 U.S. 99 (1977)) (internal quotation marks omitted).

Relying on the landmark takings case, *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), the County argues that CCBF's claims are not ripe for judicial review because no final action has been taken on CCBF's pending text amendment and Plot Plan application. *See County Mot.* 5.

In *Williamson County*, the Supreme Court held that Fifth Amendment regulatory takings claims are not ripe "until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cnty.*, 473 U.S. at 186. Although the ripeness paradigm in *Williamson County* was originally developed in the context of a regulatory takings challenge, the Circuit Courts, including the Ninth Circuit, have applied the final decision prong of

the *Williamson County* analysis to land use disputes involving more than just takings claims, including claims brought under RLUIPA. *See* *Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 979 (9th Cir. 2011) ("All of the circuits to address this issue have applied the final decision requirement to RLUIPA claims, as well as to related First Amendment-based § 1983 claims....").

Fatal to the County's argument, however, is that here, CCBF asserts facial challenges to the validity of Ordinance No. 348 under RLUIPA and the First Amendment. The Supreme Court has held *Williamson County* to be inapplicable to facial challenges. *See* *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("While ... a claim that the ordinance effects a regulatory taking as applied to petitioners' property would be unripe for [failure to satisfy *Williamson County*], petitioners mount a facial challenge to the ordinance."). The Ninth Circuit is in accordance, holding facial challenges exempt from the final-decision requirement of the *Williamson County* ripeness analysis because a facial challenge by its nature does not involve a decision applying the statute or regulation. *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003). Therefore, the final-decision rule does not present a barrier to adjudicating CCBF's causes of action, all of which assert facial challenges to the ordinance provisions in question. Summary judgment on these grounds is therefore denied.

c. Standing

Lastly, the Court addresses the County's argument that CCBF lacks standing to maintain its second, fourth, sixth and seventh causes of action. *County Mot.* 6, 8–14. CCBF's second, fourth and sixth causes of action assert that the Wine Country Zone provisions of Ordinance No. 348 (sections 14.91–94) violate the equal terms, nondiscrimination and exclusion provisions of RLUIPA, respectively. The Court first addresses CCBF's standing as to these causes of action before turning to CCBF's standing as to its seventh cause of action under the First Amendment.

***7** Article III requires a plaintiff asserting claims in federal court to have suffered an "injury in fact" that is fairly traceable to the conduct of a named defendant and that will be "likely" "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The County contends that these threshold requirements are not met as to CCBF's facial challenge to the validity of the Wine Country Zone provisions because CCBF's parcels are not located in the Wine Country Zones zones. *County Mot.* 6.

In response, CCBF contends that it has standing to challenge the provision of the Wine Country Zones because its parcels in the C/V Zone are inextricably intertwined with the Wine Country Zones. *County Opp.* 12. CCBF argues that, on account of the Settlement Agreement executed between Protect Wine Country and the County in October of 2015, the County is prohibited from making any amendments to the C/V Zone without also amending the Wine Country Zones. *Id.*; *see also Settlement Agreement.* Consequently, any proposed amendment to allow religious assemblies in the C/V Zone must now be equally applied to the Wine Country Zones as well. CCBF thus asserts an injury in fact because it cannot use its property for religious use unless the County amends both the C/V Zone and the Wine Country Zone to permit religious assemblies. *See* *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1304 (11th Cir. 2006) (holding that a zoning restriction affecting property use constitutes an injury in fact). The remaining two standing requirements are also present. CCBF's injury is traceable to the conduct of the County for excluding religious use from the WCCP and agreeing to prohibit any amendment to the C/V Zone without also amending the Wine Country Zones. Finally, the injury would be redressed by a ruling in CCBF's favor. *Wolfson v. Brammer*, 616 F.3d 1045, 1056 (9th Cir. 2010) ("A plaintiff meets the redressability requirement for constitutional standing if it is likely, although not certain, that his injury can be redressed by a favorable decision."). Therefore, CCBF has standing to assert violations of RLUIPA against the Wine Country Zones provisions in its second, fourth and sixth causes of action. The County's motion for summary judgment on these grounds is denied.

Next, the County contends that CCBF also lacks standing to maintain its seventh cause of action for violations of the First Amendment under 42 U.S.C. § 1983. *County Mot.* 8. There, CCBF asserts a facial challenge to two sections of Ordinance No. 348 related to Conditional Use Permits ("§ 18.28") and Plot Plans ("§ 18.30"), on grounds that they grant "unbridled discretion in land use decisions affecting religious speech." *County Mot.* 9; *Compl.* ¶ 114. In its opposition brief, CCBF concedes that it lacks standing to challenge the validity of the Conditional Use Permit under § 18.28 because the section does not apply to churches, *see County Opp.* 13, so the

Court only addresses CCBF's standing as to Plot Plans under § 18.30.

Section 18.30(C) provides that no Plot Plan shall be approved unless "[t]he overall development of the land shall be designed for the protection of the public health, safety and general welfare; to conform to the logical development of the land and to be compatible with the present and future logical development of the surrounding property." *Perez. Decl.* Ex. G. § 18.30(C).

The Supreme Court and the Ninth Circuit have repeatedly allowed facial attacks premised on the grant of unbridled discretion to a licensing official. *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) ("[I]t is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license."); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1020 (9th Cir. 2009) (allowing unbridled discretion claim to proceed as facial challenge). However, a plaintiff must meet two requirements to bring a facial unbridled discretion challenge under the First Amendment. "First, a plaintiff must satisfy the standing requirements of Article III by showing that the challenged provision or provisions apply to its conduct." *Kaahumanu v. Hawaii*, 682 F.3d 789, 802 (9th Cir. 2012). "Second, the challenged [regulation granting discretion] 'must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.' " *Id.* (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988)) ("[A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.").

***8** Here, CCBF lacks standing to bring a facial challenge based on unbridled discretion because by its terms, Ordinance No. 348 does not seek to regulate expressive conduct nor do the criteria outlined in § 18.30 grant County officials discretion to discriminate based on content or viewpoint of speech. Rather, § 18.30 seeks to regulate "development of the land" in an area zoned for agricultural cultivation and vineyards. In the absence of a regulation's "close enough nexus to expression," CCBF may not "challenge as censorship any law involving discretion to which it is subject." *City of Lakewood*, 486 U.S. at 759. In *Southern Oregon Barter Fair v. Jackson County, Oregon*, the Ninth Circuit explained:

> "[L]aws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken, such as laws requiring building permits, pose little danger of censorship and may therefore be challenged only by the usual as-applied method. *In other words, a facial challenge is proper only if the statute by its terms seeks to regulate spoken words or patently expressive or communicative conduct, such as picketing or handbilling.*"

372 F.3d 1128, 1135 (9th Cir. 2004) (emphasis added). As no expressive activity is implicated in Ordinance No. 348, CCBF lacks standing to bring a facial challenge to its validity under the First Amendment. The County's motion for summary judgment on CCBF's seventh cause of action for lack of standing is therefore granted.

B. CCBF's Motion for Partial Summary Judgment as to the First, Second and Seventh Causes of Action

CCBF moves for partial summary judgment on its first, second and seventh causes of action. *CCBF Mot.* Having determined that CCBF's lack of standing precludes its seventh cause of action, CCBF's motion for summary judgment on that cause of action is moot.

1. "Equal Terms" under RLUIPA (First and Second Cause of Action)

RLUIPA has four separate provisions limiting government regulation of land use: (1) the substantial burden provision, (2) the equal terms provision, (3) the nondiscrimination provision, and (4) the exclusions provision. 42 U.S.C. § 2000cc(b); *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1169 (9th Cir. 2011). CCBF moves for summary judgment on its first two causes of action, asserting that the C/V Zone and the Wine Country Zones provisions of Ordinance No. 348 violate the equal terms provisions of RLUIPA. *See CCBF Mot.*

The statutory text of the equal terms provision provides:

> "No government shall impose or implement a land use regulation in a manner that treats a religious assembly or

institution on less than equal terms with a nonreligious assembly or institution."

§ 2000cc(b)(1). Under RLUIPA, the government bears the burden of persuasion once a religious plaintiff establishes a prima facie case of a violation. § 2000cc–2(b) ("If a plaintiff produces prima facie evidence to support a claim alleging a violation of ... section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim [.]"). The Ninth Circuit has described the elements of a prima facie case under the equal terms provision as follows: "(1) there must be an imposition or implementation of a land-use regulation, (2) by a government, (3) on a religious assembly or institution," (4) that is "on less than equal terms with a nonreligious assembly or institution." *Centro Familiar*, 651 F.3d at 1170–71. "Under the equal terms provision, analysis should focus on what 'equal' means in the context." *Id.* at 1172. The equal terms provision is violated "only when a church is treated on a less than equal basis with a secular comparator, similarly situated with respect to an accepted zoning criteria." *Id.* at 1173; *see also* *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010) ("If a church and a community center, though different in many respects, do not differ with respect to any accepted zoning criterion, then an ordinance that allows one and forbids the other denies equality and violates the equal-terms provision.").

***9** Here, the parties do not dispute that the challenged ordinances are "land use regulation[s]," *see* § 2000cc–5(5) (defining "land use regulation" as "a zoning or land-marking law, or the application of such a law, that limits or restricts a claimant's use or development of land ..."); that the County is a "government" within the meaning of the statute, *see* § 2000cc–5(4) (defining "government" to include, inter alia, "a State, county, municipality, or other governmental entity created under the authority of a State"); or that CCBF is a "religious assembly or institution." *See* Dkt. # 40 ("County Opp.") 9. Thus, the dispositive issue is whether the C/V Zone and the Wine Country Zones treat religious entities "on less than equal terms with a nonreligious assembly or institution." § 2000cc(b)(1). Because the C/V Zone and Wine Country Zones are substantially similar for purposes of determining whether they treat religious and nonreligious entities unequally, the Court considers them together. *See CCBF Mot.* 12; *County Opp.* 23. Furthermore, because CCBF is bringing a facial challenge to these ordinances, the Court "considers only the text of the measure itself, not its application to the particular circumstances of an individual." *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1084 (1995); *Henderson v. JPMorgan Chase Bank*, CV 11-4328 PSG (PLAx), 2012 WL 12886831, *8 (C.D. Cal. May 30, 2012).

In its supplemental brief on the matter, CCBF explains that it is challenging the ordinance provisions "for failing to include religious assemblies as permissible uses." Dkt. # 54 ("CCBF's Supp. Brief") 2. A permissible use is use that is allowed in the zones only upon obtaining a Plot Plan pursuant to § 18.30. *See C/V Zone* § 14.73.B; *Wine Country Zones* § 14.92.B. Drawing upon the language of these provisions and pointing to the deposition of Phayvanh Nanthavongdouangay, the principal planner for the County Planning Department, CCBF states that the following uses are permissible: "indoor and outdoor special occasion facilities, real estate training seminars, golf courses, child day care, centers, conference centers, opera houses, auditoriums, dance halls, wineries, tasting rooms, wine clubs, residences, religious and nonreligious wedding services, and non-profit charity events." *CCBF Supp. Brief* at 7; *C/V Zone* § 14.73.B; *Wine Country Zone* § 14.92.B; *see also* Dkt. 30-6, *Deposition of Phayvanh Nanthavongdouangay* ("Phayvanh Depo.") pp. 91–93. CCBF contends that because it is not included in the list of permissible uses, applying for a Plot Plan is not an option for a church as it is for these other enumerated non-religious assemblies. *CCBF Supp. Brief* 4. CCBF thus argues that "since the County allows similarly situated secular assemblies by way of a plot plan, it should do the same for religious assemblies." *Id.* at 2.

While the Court agrees that religious assemblies should be permitted by way of a Plot Plan if similarly situated secular assemblies have that right, CCBF has not shown that religious assemblies are in fact excluded from permissible uses. As a threshold matter, the Court first notes that the only permissible uses expressly listed in the relevant provisions are additional one-family dwellings, public utility facilities, bed and breakfast inns, country inns and hotels, day spas, cooking schools in conjunction with inns or hotels, wine sampling rooms, retail wine sale and/or gift sale, restaurants, child day care centers, 18-hole golf courses, and "special occasion facilities." *See C/V Zone* § 14.73.B; *Wine Country Zones* § 14.92.B. The other uses enumerated by CCBF in its brief, such as auditoriums, opera houses, dance halls, and other places of public assembly are not expressly listed in the text of the ordinance, but rather derive from the County's planner's explanation of what may qualify as a "special occasion facility" for purposes of a Plot Plan application,

as evidenced by the deposition of County planner Phayvanh Nanthavongdouangay:

> Q: So for purposes of the Wine Country Zones and the Citrus/Vineyard Zones, special occasion facilities include wedding facilities; right?
>
> A: Yes.
>
> ...
>
> Q: If I wanted to put an auditorium in the Citrus/Vineyard Zone or the Wine Country Community Plan, would that be deemed a special occasion facility?
>
> ***10** A: An auditorium, yes.
>
> Q: What if I wanted to put an opera house? Would that be considered a special occasion facility?
>
> A: Yes.
>
> ...
>
> Q: What if I wanted to put a recreational hall in the Citrus/Vineyard Zone or the Wine Country Zones, would that be considered a special occasion facility?
>
> A: Yes.
>
> ...
>
> Q: A special occasion facility is not necessarily determined based upon whether it's for profit or nonprofit; right?
>
> A: Correct.

Phayvanh Depo. 91–93.

Thus, to the extent CCBF is arguing that comparative secular assemblies such as auditoriums and recreation halls are "listed" in the ordinance as permissible uses, while religious assemblies are not, this argument is misleading. On the face of the ordinance provisions at issue, nothing indicates that a secular assembly such as an auditorium or a conference center is permissible, while a church is not. Instead, the evidence makes clear that secular places of public assembly are only permissible as "special occasion facilities," subject to a Plot Plan approval. More importantly, section 21.59 of Ordinance No. 348 defines places of public assembly as:

> "Any place designed for or used for congregation or gather[ing] of 20 or more persons in one room where such gathering is of a public nature, assembly hall, *church*, auditorium, recreational hall, pavilion, place of amusement, dance hall, opera house, motion picture theater, outdoor theater or theater, are included within this term."

Dkt. # 31, Ex. 18 § 21.59 (emphasis added). When asked about § 21.59 as it pertains to "special occasion facilities," the Phayvanh deposition provides:

> Q: Is it fair to say that if a place—or if a use is designated as a public assembly under, you know, the 21.59, like we read before, that it would fall under a special occasion facility with the Citrus/Vineyard Zone or the Wine Country Community Plan by nature of the use?
>
> [A]: It would fall under the special occasion facility.

Phayvanh Depo. 93–94.

Section 21.59 expressly includes churches as a use designated as a public assembly, and because, according to the Phayvanh deposition, § 21.59 uses fall under the definition of a "special occasion facility" for purposes of permissible uses in the zones, CCBF's argument that churches are not allowed to seek a Plot Plan like other similarly situated assemblies is strongly undermined by the provisions of the ordinance. Namely, if special occasion facilities include places of public assembly, and places of public assembly include churches by definition in § 21.59, then by its terms, Ordinance No. 348 does not treat churches on less than equal terms than secular public assemblies.[3] Thus, CCBF's argument that "these permissible uses are similarly situated to CCBF but CCBF has no available relief to seek a plot plan," *see CCBF Supp. Brief* at 7–8, has no support in the text of the ordinances or the submitted evidence.

***11** The case relied on extensively by CCBF, *Vietnamese Buddhism Study Temple In Am. v. City of Garden Grove*, does not support its position. 460 F. Supp. 2d 1165 (C.D. Cal. 2006). In evaluating likelihood of success on the merits for purposes of a preliminary injunction, the Court found sufficient evidence of a prima facie claim alleging an equal terms violation. *Id.* at 1174. The Court determined that the ordinance in question on its face treats churches and religious centers on less then equal terms than private clubs and other secular assemblies, finding the following:

> "[The ordinance] allows private clubs to operate without a CUP in the office professional zone, while religious

assemblies are banned from that zone entirely. The [ordinance] also allows private clubs to operate without a CUP in the open space zone, while churches are subject to the CUP requirements. Indeed, private clubs and assemblies may operate, as a matter of right, in four of the City's ten zones, while churches are not permitted as a matter of right anywhere in Garden Grove."

Id. In contrast, all of the secular comparators listed by CCBF, such as auditoriums, opera houses, recreation halls, and other places of public assembly, are equally excluded from the zones,[4] and subject to the same Plot Plan and zoning criteria applicable to "special occasion facilities." *See* *River of Life Kingdom Ministries v. Village of Hazel Crest, III.*, 611 F.3d 367, 373–74 (7th Cir. 2010) (noting that "should a municipality create what purports to be a pure commercial district and then allow other uses, a church would have an easy victory if the municipality kept it out," however, an ordinance that created a commercial district that "excludes churches *along with* community centers, meeting halls, and libraries because these secular assemblies, like churches, do not generate significant taxable revenue or offer shopping opportunities" would not violate the equal terms provision). CCBF points to no provision that distinguishes among the types of places of public assembly, religious or non-religious, as they pertain to permissible use, or show that religious assemblies may not be considered a special occasion facility. As emphasized throughout the depositions of County planners Phayvanh and Ross, the "special occasion facility" Plot Plan application imposes certain requirements, such as an on-site vineyard, a minimum gross parcel size, and use in conjunction with a dwelling or winery, but nothing in the record suggests that these criteria apply unequally to religious and non-religious assemblies. *Phayvanh Depo.* 95; *Ross Depo.* 104; *see also C/V Zone* § 14.74.B.4. CCBF has therefore not shown that, on their face, the C/V Zone and the Wine Country Zones provisions treat religious assemblies "on a less than equal basis with a secular comparator, similarly situated with respect to an accepted zoning criteria." *Centro Familiar*, 651 F.3d at 1173.

Accordingly, CCBF has failed to establish a prima facie case for violation of the equal terms provision under RLUIPA. Summary judgment is therefore not warranted. Under Federal Rules of Civil Procedure 56(f), "after giving notice and a reasonable time to respond, the court may: (1) grant summary judgment for a nonmovant." Fed. R. Civ. P. 56(f). *see also* *Kassbaum v. Steppenwolf Productions, Inc.*, 236 F.3d 487, 494 (9th Cir. 2000) ("[A] court has the power sua sponte to grant summary judgment to a non-movant when there has been a motion but no cross-motion."). Although the County did not move for summary judgment on the merits of CCBF's first and second causes of action, it is well established that a court may grant summary judgment sua sponte to a nonmoving party if, there are no genuine issues of material fact, the moving party has "be[en] given reasonable notice that the sufficiency of his or her claim will be in issue," and the nonmoving party is entitled to summary judgment as a matter of law. *Albino v. Baca*, 747 F.3d 1162, 1176 (9th Cir. 2014) (internal quotation marks and citation omitted). In the present case, there are no genuine disputes of material fact, and in moving for summary judgment, CCBF had reasonable notice that the question of whether the challenged ordinance provisions facially violate the equal terms provision of RLUIPA would be at issue. *See* *Gonzales v. CarMax Auto Superstores, LLC*, 840 F.3d 644, 654–55 (9th Cir. 2016) (granting summary judgment in favor of non-moving party where plaintiff, as the moving party, had reasonable notice that its claim would be at issue, and the claim failed as matter of law). Furthermore, CCBF was on notice that the Court may grant summary judgment in favor of the County through the tentative ruling issued on April 18, 2017, which provided as follows:

***12** "Because CCBF has failed to show that the challenged ordinances facially violate the equal terms provision of RLUIPA, CCBF's first and second causes of action fail as a matter of law. The Court therefore sua sponte enters summary judgment in favor of the County on CCBF's first and second causes of action."

See Dkt. # 49 at 15. In addition, by ordering the parties to submit briefs in response to the Court's tentative ruling, CCBF was provided with "a reasonable time to respond." Fed. R. Civ. P. 56(f). Having met all the requirements of Fed. R. Civ. P. 56(f), the Court therefore sua sponte enters summary judgment in favor of the County on CCBF's first and second causes of action.

C. Cross-motions for Summary Judgment as to CCBF's Third, Fourth, Fifth and Sixth Causes of Action

The parties cross-motions for summary judgment address CCBF's third and fourth causes of action, which are facial challenges to the C/V Zone and Wine Country Zone provisions under the nondiscrimination provision of RLUIPA, and fifth and sixth causes of action, which assert

facial challenges to the two zoning provisions under the exclusion and unreasonable limitations provision of RLUIPA.

1. "Nondiscrimination" under RLUIPA (Third and Fourth Caused of Action)

CCBF's third and fourth causes of action assert a facial challenge to the C/V Zone provisions (sections 14.71 through 14.74) and Wine Country Zones provisions (sections 14.91 through 14.94) under the "nondiscrimination" provision of RLUIPA, which provides that:

> "No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination."

42 U.S.C. § 2000cc(b)(2). As with the equal terms provision, CCBF bears the initial burden of establishing a prima facie case, after which the County bears the burden of persuasion on the elements of the nondiscrimination claim. *Id.* § 2000cc–2(b); *Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 198 (2d Cir. 2014). Although the Ninth Circuit has not yet addressed the analysis under the nondiscrimination provision of RLUIPA, other courts have looked to equal protection precedent in weighing such claims. *See id.*; *Bethel World Outreach Ministries*, 706 F.3d at 559; *Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1370 (N.D. Ga. 2012); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1239 (11th Cir. 2004) (noting that "RLUIPA tailors the nondiscrimination prohibitions to land use regulations because Congress identified a significant encroachment on the core First and Fourteenth Amendment rights of religious observers").

Where, as here, a challenged ordinance is neutral on its face, a plaintiff seeking to establish a nondiscrimination claim under RLUIPA must put forth evidence of the government's "discriminatory intent" in approving the land use ordinance in question. *Chabad Lubavitch*, 768 F.3d 183, 198 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *Roman Catholic Bishop of Springfield v. City of Springfield*, 760 F. Supp. 2d 172, 191 (D. Mass. 2011), *aff'd in part, vacated in part*, 724 F.3d 78 (1st Cir. 2013) ("[T]he nondiscrimination provision sets a higher bar for plaintiffs by requiring evidence that the government action was motivated by ('on the basis of') religion."). Accordingly, courts assessing discriminatory intent consider "a multitude of factors, including the series of events leading up to a land use decision, the context in which the decision was made, whether the decision or decision-making process departed from established norms, statements made by the decision-making body and community members, reports issued by the decision-making body, whether a discriminatory impact was foreseeable, and whether less discriminatory avenues were available." *Id.*; *see also* *Bethel World Outreach Ministries*, 706 F.3d at 559–60; *Church of Scientology*, 843 F. Supp. 2d at 1370–76.

***13** CCBF asserts that the evidence establishes a "clear discriminatory intent in enacting the amendments to the C/V Zone and enacting the WCCP zone entirely," thus violating RLUIPA's nondiscrimination provision. *CCBF Cross-Mot.* 9. CCBF points to several pieces of evidence to support its showing that the County "enacted laws in a discriminatory manner." *Id.* at 8.

First, CCBF points to Ordinance No. 348.4702, a proposed amendment to the C/V Zone that would have allowed churches as a permitted use. *Id.*; *see* Dkt. # 41-5, pp. 235, 269. Based on the minutes of the County's Planning Commission meetings that took place in September and November of 2010, the proposed amendment was postponed once and then continued off calendar, and ultimately never adopted. *Id.*; Dkt. # 51-, *Declaration of Phayvanh Nanthavongdouangay* ("Phayvanh Decl.") ¶ 4. CCBF asserts that "when local citizens became aware of CCBF's proposed expansion and voiced objections, the County of Riverside abruptly postponed and removed from the meeting agenda a proposed amendment that would have made churches a permissible use." *Id.* at 8. CCBF also states that it "faced a nontrivial amount of public anti-church sentiment" regarding its proposed expansions that influential vintners communicated to the County officials. *CCBF Cross-Mot.* 9. CCBF claims this sentiment is best evidenced by the lawsuit filed by Protect Wine Country against the County "to obstruct the County's plan to allow CCBF's project to go forward." *Id.* In further support, CCBF cites to a hearing transcript from a September 24, 2013 meeting of the County Board of Supervisors that addresses the creation of the WCCP. *See* Dkt. # 41-23 pp.225–29. Specifically, CCBF cites to Supervisor Jeff Stone's comments as evidence that the County wanted

to keep CCBF in the C/V Zone and then amend the plan to permit churches. *Id.* CCBF claims this original intention to allow religious assemblies in the zone is greatly contrasted by the "severe animus" demonstrated in the October 2015 Settlement Agreement between Protect Wine Country and the County. *CCBF Cross-Mot.* 9. CCBF asserts that the County has "subjected CCBF to atypical restrictions" in the C/V Zone through the Settlement Agreement. *Id.* at 8–9; *see also Settlement Agreement.*

As to the Wine Country Zones, approved by Resolution No. 2014-040 in March of 2014, the only evidence of events leading up to its adoption is the formation of an ad hoc advisory committee in 2009 that did not include CCBF, and the resolution itself that provides background on the adoption of the WCCP and new zoning classifications. *See* Dkt. # 56 ("CCBF Cross-Opp.") 2; *CCBF Cross-Mot.* 9; *Resolution No. 2014-040.* CCBF asserts that Resolution No. 2014-040 shows the County's willingness to include religious assemblies in the zone based on the following provisions:

- The Project, as approved, does not apply to the two parcels owned by the Calvary Church Bible Fellowship (Calvary). There was much testimony during the public hearings regarding Calvary's parcels. Concerns were voiced by existing residents, surrounding property owners and Calvary. Calvary intends to continue using its properties for religious exercise, and such use fails within [RLUIPA]. Not applying the Project to Calvary's parcels allows the County to ensure there is no violation of RLUIPA by maintaining existing land use policies and regulations to accommodate this religious exercise.

***14** • Further, as Calvary's parcels will remain citrus/vineyard zoning, any future development on said parcels will require compliance with the 75% planting requirement. Therefore, future development on Calvary's parcels will be similar to development allowed under the Project and will further the County's goals of preserving the viticulture and rural lifestyle of the Project area.

See Resolution No. 2014-040 at 162–62. CCBF argues that despite this willingness to accommodate CCBF, the County had "changed its intention based on vehement public opposition," as evidenced in the 2015 Settlement Agreement. *See CCBF Opp.* 2. Finally, CCBF argues that the creation of an ad hoc committee that included local vintners and equestrians, but not CCBF, to assist the County in the zoning process "departed from established norms in enacting the challenged ordinances." *CCBF Cross-Opp.* 2.

The County challenges the majority of CCBF's evidence on grounds that it does not concern the decisions leading up to the approval of the challenged portions of Ordinance No. 348, namely, those pertaining to the CV/Zone and the Wine Country Zones. *See* Dkt. #55 ("County Cross-Opp."). First, the County shows that removing churches from the list of permitted uses in the C/V Zone was approved in 1997, and the last amendment to the provisions governing the C/V Zone took place in 2009. *See id.* at 6, citing Dkt. # 30-8, Ex. 6, Dkt. # 30-9 Ex. 7, Dkt. # 53-2, XIV-12, 13, 16. The County thus argues that a facial challenge to the enactment of these ordinance provisions governing the C/V Zone cannot be based on evidence concerning events that took place after the final enacted amendment. *See County Cross-Opp.* 6. As noted above, courts look to the "series of events leading up to the land use decision ..." in determining whether a government acted with discriminatory intent. *Roman Catholic Bishop of Springfield*, 760 F. Supp. 2d at 191. CCBF proffers no evidence concerning the events leading to the 1997 decision to remove churches as permitted uses or those leading to the last amendment to the C/V Zone in 2009.

For example, the proposed amendment to the C/V Zone that was considered but ultimately taken off calendar in 2010 post-dates the enactment of the C/V Zone and is not part of the challenged provisions subject to CCBF's facial attack. *See* Dkt. # 41-5 pp.235, 269; *see e.g.*, *Grace Church of Roaring Fork Valley v. Bd. of Cty. Comm'rs of Pitkin Cty., Colorado*, 742 F. Supp. 2d 1156, 1165 (D. Colo. 2010) (finding evidence of "comments made by Commissioners during discussion of amendments to the Land Use Code in 2006, and comments made by Commissioners in 2008 in connection with the settlement agreement," irrelevant to the determination of whether the denial of the Church's application in May 2005 was motivated by religious animus). Even if it were, however, CCBF offers no evidence that the proposed amendment was removed from consideration due to religious animus. Although CCBF asserts that the County "abruptly" removed the proposed amendment from the calendar "when local citizens became aware of CCBF's proposed expansion and voiced objections," the Planning Commission minutes cited in support contain no statements bearing on intent, and make no mention of local citizens or any objections to the proposed expansion. *See* Dkt. # 41-5, pp. 235, 269. CCBF's similar assertion that the

County originally had every intention to include religious assemblies in the zones, but abruptly changed its intention "upon vehement public opposition" to CCBF's proposed expansion, also has no support in the proffered evidence. While it is undisputed that Supervisor Jeff Stone stated in the September 24, 2013 meeting that by keeping CCBF in the C/V Zone, the County "can then come back and amend that plan to allow a church," no additional statements support CCBF's contention that there was vehement public opposition rising to the level of discriminatory intent. Dkt. # 41-23 p. 227. *See* *Roman Catholic Bishop of Springfield*, 760 F. Supp. 2d 172, 191 (rejecting plaintiff's argument that "Defendants yielded to the concerns of disgruntled parishioners" as evidence of discriminatory intent, finding, inter alia, that "Plaintiff presents no evidence to substantiate its claim that these considerations played a role in the Commission's decision to propose this Ordinance to the City Council."). In fact, the only public concerns mentioned by Supervisor Stone indicate "that the concern is not necessarily the church expanding their sanctuary," but rather "having a school on the new property they purchased." *Id.* at 226. Such statements undermine CCBF's assertion that the opposition to its expansion was grounded in religious animus.

***15** As to the adoption of the WCCP plan and the Wine Country Zones, nothing in Resolution No. 2014-040 shows a discriminatory intent or religious bias; to the contrary, the cited provisions, quoted above, demonstrate a consideration for CCBF's religious use and the need to comply with RLUIPA. *See Resolution No. 2014-040*, pp. 162–63. Moreover, that concerns were voiced at a public hearing does not support an inference of bias towards the church, especially since "existing residents, surrounding property owners *and Calvary*" participated in the debate. *Id.* at 162. As to the formation of the ad hoc committee to assist with the WCCP which failed to include CCBF, CCBF hangs its argument on this constituting a departure from "established norms of enacting zoning laws." *CCBF Cross-Mot.* 2. The County however proffers evidence that it is in fact common for the County "to seek public opinion through surveys, workshops, and committees when contemplating certain land use actions." *County Cross-Rep.* 7 n.7. In light of other evidence that CCBF actively participated in County decision-making processes over the years and had its concerns heard, *see e.g., Resolution No. 2014-040*, p. 162, the ad hoc committee alone is insufficient to show discriminatory intent in enacting the WCCP Plan and Wine Country Zones.

Moreover, CCBF appears to rely primarily on the 2015 Settlement Agreement as evidence of the "severe animus" towards religious institutions. *See CCBF Cross-Mot.* 9. However, not only does this agreement post-date any enactment of the C/V Zone and Wine Country Zones provisions at issue, but the nine-page document contains no statement that could be construed as demonstrating discriminatory intent or religious bias sufficient to support CCBF's argument. *See Settlement Agreement.* Even to the extent that the Settlement Agreement amends the C/V Zone [5] or imposes "atypical" restrictions on CCBF's use of its property, CCBF once more fails to show that "the County's agreement to enforce additional restrictions" is grounded in discriminatory intent or animus. Mere speculation as to the County's intent in settling the lawsuit and agreeing to the above provisions is insufficient to support CCBF's claim. Moreover, CCBF's contention that the Settlement Agreement is a departure from established norms is another conclusory statement without any factual support. CCBF offers no evidence that the County settling lawsuits in such a manner is a unique occurrence, and much less one that was conducted to obstruct religious institutions in the zone. More importantly, any application of a County ordinance or the particular impact of the Settlement Agreement on CCBF's property and proposed facility expansion is not a proper argument in the context of a facial challenge. CCBF has adamantly insisted in all its briefing that it is only bringing facial challenges, and therefore cannot now argue that the particular circumstances and requirements imposed on it by the County support its prima facie showing of a facial nondiscrimination violation. *See* *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174–75 (2d Cir. 2006) ("A 'facial challenge' to a statute considers only the text of the statute itself, not its application to the particular circumstances of an individual. [ ] An 'as-applied challenge,' on the other hand, requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right.") (citing *City of Lakewood*, 486 U.S. at 770 n. 11; *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006)).

***16** Finally, the two cases CCBF cites extensively in support of its motion do not support CCBF's claim of discriminatory intent. *See CCBF Cross-Mot.* 7–8. First, in *United States v. County of Culpeper*, the question of nondiscrimination under RLUIPA was brought before the Court on a motion to dismiss, not a motion for summary judgment. *United States v. Cty.*

of Culpeper, Virginia, No. CV 16-00083, 2017 WL 1169767, at *9 (W.D. Va. Mar. 29, 2017). In the complaint, plaintiff made the following allegations:

> (1) the County historically granted permits as a matter of course and subjected applications to minimal review; (2) prior permits were granted to religious and secular organizations alike; (3) when local citizens and officials became aware of the [plaintiff's] application, the scheduled hearing was abruptly postponed; (4) the County then subjected [plaintiff's] application to an atypically thorough examination; (5) some County officials believed this heightened scrutiny was attributable to [plaintiff's] religious status and beliefs; (6) [plaintiff's] application satisfied state law requirements and the County's historical criteria, and; (7) there was a nontrivial amount of public anti–Muslim sentiment regarding the application, which was communicated by constituents to Board members before their vote."

Id. Noting that "the Court has before it only allegations, not evidence," the Court was bound at a motion to dismiss stage to take these allegations as true and draw all plausible inferences in favor of plaintiff. *Id.* at 1, 9. Therefore, the Court found that the "above facts support the conclusion that [plaintiff's] religion motivated the County's permit denial." *Id.*

County of Culpeper is distinguishable on several grounds. First, the Court here is bound by the summary judgment standard to look at the sufficiency of the evidence offered in support of CCBF's nondiscrimination claim, and need not take CCBF's allegations or bald conclusions as true. "[C]onclusory allegations ... without factual support, are insufficient to defeat summary judgment." *National Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 502 (9th Cir. 1997). Second, the plaintiff in *County of Culpeper* presented an as-applied challenge based on the County's permit denial, which requires a more particularized inquiry not presently before this Court. The Court notes once again that CCBF's facial challenge limits this Court's inquiry to the ordinance provisions themselves and events "leading up to the land use decision," rather than any application of the ordinance or Settlement Agreement to CCBF's particular circumstances and still pending application for the expansion of its facilities.

The other case CCBF cites, *Bethel World Outreach Ministries v. Montgomery Cty. Council*, likewise undermines its position. 706 F.3d 548 (4th Cir. 2013). In *Bethel*, plaintiff brought a facial challenge under the nondiscrimination provision and pointed to the County residents' opposition to plaintiffs' proposed large sanctuary as well as the sequence of events leading up to the County's adoption of the ordinance as evidence of discrimination. *Id.* at 559–60. The evidence showed that the County deferred plaintiffs' application for public water and sewer service while considering an amendment to the ordinance which would prohibit water and sewer services to private institutions in the zone. *Id.* at 559. The County adopted the proposed amendment and then denied plaintiffs' application. *Id.* The Court reasoned that such evidence "could certainly support an inference that the County took the measures it did to prevent [plaintiffs] from going forward with their building plans." *Id.* However, because plaintiffs "failed to put forth any evidence that the County took those measures because Bethel and Derwood are religious organizations," the court affirmed the district court's grant of summary judgment to the County on the nondiscrimination claim. *Id.* at 560.

***17** As in *Bethel*, CCBF lacks sufficient evidence that the measures taken by the County as to the C/V Zone and the Wine Country Zones were grounded in bias towards religious institutions, rather than considerations of relevant zoning criteria. *See* *Bethel*, 706 F.3d at 560 (noting that the evidence showed that "the County and the residents involved in the process consistently expressed concern with the size of the proposed facilities, which they considered incompatible with the character of the agricultural reserve," rather than discriminatory animus). Thus, because there are no disputes of material fact, and the evidence presented fails to support CCBF's prima facie showing of discriminatory intent on the part of the County in enacting the relevant provisions of Ordinance No. 348, CCBF's claim for violation of the nondiscrimination provision of RLUIPA fails.

Therefore, summary judgment on CCBF's third and fourth causes of action is granted in favor of the County. *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006) ("Summary judgment for a defendant is appropriate when the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to[his] case, and on which [he] will bear the burden of proof at trial.' ") (quoting *Cleveland v. Policy Management Sys. Corp.*, 526 U.S. 795, 805–06, (1999) and *Celotex*, 477 U.S. at 322).

2. Exclusion and Unreasonable Limitations under RLUIPA (Fifth and Sixth Causes of Action)

CCBF brings its fifth and sixth causes of action under subsection (b)(3) of RLUIPA, which states:

> "No government shall impose or implement a land use regulation that—(A) totally excludes religious assemblies from a jurisdiction, or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."

42 U.S.C. § 2000cc(b)(3). The "unreasonable limitations" provision "prevents government from adopting policies that make it difficult for religious institutions to locate anywhere within the jurisdiction." *Bethel World Outreach Ministries*, 706 F.3d at 560. "[T]he purpose of this provision is not to examine restrictions placed on individual landowners, but to prevent municipalities from broadly limiting where religious entities can locate." *Church of Scientology*, 843 F.Supp.2d at 1377 (N.D. Ga. 2012) (citing *Adhi Parasakthi Charitable, Med., Educ. & Cultural Soc'y of N. Am. v. Twp. of West Pikeland*, 721 F. Supp. 2d 361, 387 (E.D. Pa. 2010) and *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs*, 613 F.3d 1229, 1238 (10th Cir. 2010)); *see also Church of Our Savior v. City of Jacksonville Beach*, 69 F. Supp. 3d 1299, 1324–25 (M.D. Fla. 2014) ("[T]he focus of the Unreasonable Limitations provision is not on the treatment of a particular landowner, but religious entities in general.").

CCBF contends that the C/V Zone and Wine Country Zones "exclude and unreasonably limit religious assemblies." *Compl.* ¶¶ 102, 107. In its motion, CCBF argues that "[b]ecause churches are prohibited from locating in the 29.2 square miles that encompass the C/V Zone and WCCP Zones, churches have been totally excluded from a jurisdiction as prohibited by RLUIPA." *CCBF Cross-Mot.* 13. Central to CCBF's argument here is a determination that "jurisdiction" under § 2000cc(b)(3) means only the area covered by the challenged provisions of the County's zoning ordinance. In other words, CCBF urges the Court to interpret "jurisdiction" in this context as meaning only the C/V Zone and the Wine Country Zones. *See id.*

The Court cannot adopt CCBF's proposed interpretation. Although RLUIPA does not define "jurisdiction," courts consider the "geographical area covered by the ordinance" in applying the term in the context of a RLUIPA exclusion claim. *Elijah Grp., Inc. v. City of Leon Valley, Tex.*, No. CIV.A.SA08CV0907OGNN, 2009 WL 3247996, at *8 (W.D. Tex. Oct. 2, 2009), *rev'd on other grounds*, 643 F.3d 419 (5th Cir. 2011) ("As applied to a land use regulation like a zoning ordinance, "jurisdiction" logically refers to the geographical area covered by the ordinance. The City's zoning ordinance applies to the entire City. Logically then, jurisdiction equates to the City.").

***18** Here, the government in question is the County of Riverside and Ordinance No. 348 governs land use regulation in the County, which is the geographical area over which the County government exercises its authority. *See Black's Law Dictionary* (10th ed. 2014) (defining jurisdiction as "[a] geographic area within which political or judicial authority may be exercised."); *see also Redwood Christian Sch. v. Cty. of Alameda*, No. C-01-4282 SC, 2007 WL 781794, at *5 (N.D. Cal. Mar. 8, 2007) (interpreting "within a jurisdiction" to mean the entire County of Alameda); *Bethel World Outreach Ministries*, 706 F.3d at 560 (affirming summary judgment in favor of County on plaintiff's unreasonable limitations claim where "Bethel has failed to produce any evidence suggesting that religious organizations are left without a reasonable opportunity to build elsewhere *in the County.*") (emphasis added); *Grace Church of Roaring Fork Valley v. Board of County Com'rs of Pitkin County, Colorado*, 742 F. Supp. 2d 1156, 1166 (D. Colo. 2010) ("To prove this claim, the plaintiffs must show that Pitkin County's land use regulations, as applied or implemented, have the effect of depriving Grace Church and other religious institutions or assemblies of reasonable opportunities to practice their religion, including the use of structures, *within the County.*") (emphasis added).

As noted by the Seventh Circuit in addressing the "substantial burden" provision of RLUIPA, "the ban on churches in [a particular] zone cannot in itself constitute a substantial burden on religion, because then every zoning ordinance

that didn't permit churches everywhere would be a prima facie violation of RLUIPA. *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007). Such reasoning applies equally in the context of an exclusion claim, where equating "jurisdiction" with only a zoning district would mandate that every zone covered by a government's land use ordinance permit religious assemblies and institutions. *Elijah Grp.*, 2009 WL 3247996, at *9 ("If jurisdiction equated to a zoning district, then every zoning ordinance that didn't permit churches in every zone would be a prima facie violation of the RLUIPA."). Such an interpretation would exempt religious institutions from all zoning laws, which is not the intent of RLUIPA. *Islamic Soc'y of Basking Ridge v. Twp. of Bernards*, 226 F. Supp. 3d 320, 348–49 (D.N.J. 2016) ("It is important to note that RLUIPA does not provide a religious assembly with immunity from zoning regulation."); *Hope Rising Cmty. Church v. Municipality of Penn Hills*, No. CV 15-1165, 2015 WL 7720380, at *4 (W.D. Pa. Oct. 28, 2015) ("RLUIPA's unreasonable limitations provision does not protect a religious institution from any and all limitations imposed by a zoning ordinance, only those which are an unreasonable limitation on religious practice.").

Without CCBF's preferred interpretation of "jurisdiction," it cannot prevail on its motion for summary judgment. As presented by the evidence submitted by the County, the County neither excludes nor unreasonably limits religious assemblies or institutions within its jurisdiction. The area governed by Ordinance No. 348 covers approximately 3,932,240 acres and includes 40 zoning classifications. *Prayvanh Decl.* ¶ 4. Of those 40 zoning classifications, 30 expressly allow churches with approval of a permit or plot plan. *Id*. Moreover, those 30 zoning classifications that allow churches with an entitlement cover approximately 95% of the zoned portion of the unincorporated County (the area covered by the County less the area within the jurisdiction of incorporated cities). *Id.* ¶ 5.

Therefore, because the undisputed evidence shows that such a large portion of the County is zoned to allow religious institutions, CCBF cannot meet its burden of showing that the County "totally excludes" or "unreasonably limits" religious assemblies in violation of RLUIPA. *See Redwood Christian Sch.*, 2007 WL 781794, at *5 (finding no evidence that the County's regulations unreasonably limited religious assemblies where, although "not permitted to build at the Palomares Canyon site," plaintiff "operates a school at the Martin Site, also in Alameda County .. [and] has been granted several CUPs to make improvements to the Martin Site and would be eligible for a CUP at various other sites in the County where it might choose to move in the future."); *Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro, Wis.*, 734 F.3d 673, 680 (7th Cir. 2013), *abrogated on other grounds in* *Schlemm v. Wall*, 784 F.3d 362 (7th Cir. 2015) (finding no violation of the total exclusion provision where plaintiff "could construct a year-round Bible camp on thirty-six percent of the land in Oneida County."); *Truth Found. Ministries, NFP v. Vill. of Romeoville*, No. CV 15-7839, 2016 WL 757982, at *11 (N.D. Ill. Feb. 26, 2016) (finding that plaintiff had failed to establish a total exclusion claim where "the Village has presented uncontested evidence that in its twenty-four Districts, churches are only prohibited in 36.3% of the Village."); *Covenant Christian Ministries, Inc. v. City of Marietta, Ga.*, No. CV 06-1994 CC, 2008 WL 8866408, at *16 (N.D. Ga. Mar. 31, 2008) (no violation of the unreasonable limitation provision where "religious institutions are allowed to be located on approximately half of the property in the City."); *see also* *Bethel World Outreach Ministries*, 706 F.3d at 560 (requiring evidence demonstrating "that religious organizations are left without a reasonable opportunity to build elsewhere in the County."); *Elijah Grp.*, 2009 WL 3247996, at *9 ("Nothing in the RLUIPA or case law suggests a church is unreasonably limited just because it is excluded from a zoning district it prefers.").

***19** Accordingly, CCBF's fifth and sixth causes of action fail as a matter of law. Summary judgment is granted in favor of the County.

IV. Conclusion

Based on the foregoing, the Court ORDERS as follows:

- The County's motion for summary judgment as to the entire Complaint, Dkt. # 28, is GRANTED in part and DENIED in part. The County's motion as to causes of action one through six on statute of limitations, ripeness and standing grounds is DENIED. The County's motion as to cause of action seven is GRANTED.

- CCBF's motion for partial summary judgment as to causes of action one, two and seven, Dkt. # 29, is DENIED. Pursuant to Fed. R. Civ. P. 56(f), the Court enters

summary judgment on CCBF's first and second causes of action in favor of the County.

- The County's cross-motion for summary judgment as to causes of action three, four, five and six, Dkt. # 51, is GRANTED.
- CCBF's cross-motion for summary judgment as to causes of action three, four, five and six, Dkt. # 53, is DENIED.

Because summary judgment on all seven causes of action is entered in favor of the County, this order closes the case.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 6883866

Footnotes

1 CCBF is, however, engaged in legal non-conforming use, which is permissible under Section 18.8 of Ordinance No. 348: "[A]ny nonconforming structure or use may be continued and maintained for the periods of time hereinafter set forth, provided there are no structural alterations except as hereinafter allowed." *Perez Decl. 1* ¶ 15; *see also id.*, Ex. C. § 18.8.

2 Indeed, such a proposition would be contrary to well-established landmark cases that struck down decade-old laws as facially unconstitutional. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (bringing a facial challenge in 1998 to a law enacted more than twenty years earlier); *see also* *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) ("A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment.").

3 Moreover, the evidence shows that both religious and non-religious wedding services are permissible on Sunday mornings in these zones, and the County draws no distinction between for-profit and non-profit uses of special occasion facilities. *See* Dkt. # 30-6, *Deposition of Larry E. Ross* ("Ross Depo.") at 96, 105; *Phayvanh Depo.* 89, 91, 93.

4 As emphasized repeatedly by CCBF, all uses not expressly permitted are prohibited. *See Ordinance No. 348* § 3.3.

5 It is undisputed that the Settlement Agreement has not altered the text of the relevant provisions at issue. Whether the agreement nonetheless amends the C/V Zone provisions is an issue currently being litigated in state court in *Calvary Chapel Bible Fellowship v. County of Riverside*, Riverside Superior Court Case No. RIC 1601720. *See* Dkt. # 52-2, *Declaration of Melissa Cushman*, Exs. A and B. Because CCBF does not challenge the validity or meaning of the Settlement Agreement in this action, the Court will abstain from any determination as to whether the Settlement Agreement in fact amends the C/V Zone.

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United States District Court, M.D.
Tennessee, Nashville Division.

John DOE #11, Plaintiff,
v.
William B. LEE, et al., Defendants.

No. 3:22-cv-00338
|
Filed 06/16/2022

West Codenotes

Validity Called into Doubt

Tenn. Code Ann. §§ 40-39-201, 40-39-202, 40-39-203, 40-39-204, 40-39-205, 40-39-206, 40-39-207, 40-39-208, 40-39-209, 40-39-210, 40-39-211, 40-39-212, 40-39-213, 40-39-214, 40-39-215, 40-39-216, 40-39-217, 40-39-218

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MEMORANDUM OPINION

ELI RICHARDSON, UNITED STATES DISTRICT JUDGE

INTRODUCTION

***1** The Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act of 2004 ("SORA" or the "Act"), Tenn. Code Ann. §§ 40-39-201 to -218, requires an individual convicted of a qualifying offense ("Registrant") to register for inclusion in a database maintained by the Tennessee Bureau of Investigation ("TBI"). Under SORA, a Registrant is subject to a number of requirements. Chief among them, a Registrant is prohibited from residing or working within 1,000 feet of many common facilities where children are likely to be present, including schools, day care centers, and public parks and athletic fields. *Id.* § 40-39-211(a). The Registrant must also report in person to a designated law enforcement agency at prescribed intervals, *id.* § 40-39-204(b), (c), including within forty-eight hours of certain triggering events, such as a change of residence or employment, *id.* § 40-39-203(a). And the Registrant's status as a sexual offender, along with a laundry list of information about the individual, is made publicly available. *Id.* § 40-39-206(d). A violation of the Act's requirements is a Class E felony. *Id.* §§ 40-39-208(b), 40-39-211(f).

Several years ago, the Sixth Circuit concluded that Michigan's Sex Offender Registration Act—which similarly restricts registered offenders from living, working, or "loitering" within 1,000 feet of a school, and requires all registrants to appear in person "immediately" to update information such as new vehicles or "internet identifiers"—violates the U.S. Constitution's Ex Post Facto Clause to the extent that it punishes persons for offenses committed before the statute's enactment. *Does #1–5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016).

Due to the obvious similarities between the Michigan statute and Tennessee's Act, *Snyder* unleashed a flood of litigation regarding the constitutionality of Tennessee's SORA under the Ex Post Facto Clause. *See, e.g., Jordan v. Lee*, No. 19-cv-00907, 2022 WL 1196980 (M.D. Tenn. Apr. 21, 2022) (Trauger, J.); *Reid v. Lee*, —— F. Supp. 3d ——, 2022 WL 1050645 (M.D. Tenn. Apr. 7, 2022) (Trauger, J.) ("*Reid II*"); *Does #1–9 v. Lee*, —— F. Supp. 3d ——, 2021 WL 5761039 (M.D. Tenn. Dec. 3, 2021) (Trauger, J.); *Doe v. Lee*, No. 21-cv-00028, 2021 WL 1907813 (M.D. Tenn. May 12, 2021) (Trauger, J.); *Doe #1 v. Lee*, 518 F. Supp. 3d 1157 (M.D. Tenn. 2021) (Richardson, J.); *Jackson v. Rausch*, No. 19-cv-377, 2020 WL 7496528 (E.D. Tenn. Dec. 21, 2020) (Jordan, J.); *Reid v. Lee*, 476 F. Supp. 3d 684 (M.D. Tenn. 2020) (Trauger, J.) ("*Reid I*"); *Doe v. Rausch*, 461 F. Supp. 3d 747 (E.D. Tenn. 2020) (Reeves, C.J.); *Doe v. Rausch*, 382 F. Supp. 3d 783 (E.D. Tenn. 2019) (Phillips, J.).

In this case, Plaintiff John Doe #11, [1] a Registrant due to a 2002 conviction for second-degree criminal sexual conduct committed against his 14-year-old stepchild, alleges that

subjecting him to SORA's requirements violates the Ex Post Facto Clause.[2] Pending before the Court is Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (Doc. No. 12, the "Motion"), to which Defendants —Governor William B. Lee and TBI Director David B. Rausch (collectively, "Defendants")—have filed a joint Response (Doc. No. 23), and Plaintiff has filed a Reply (Doc. No. 25). For the reasons that follow, Plaintiff's Motion will be **GRANTED IN PART** and **DENIED IN PART**.[3]

BACKGROUND

A. Tennessee's Adoption and Amendment of Sexual Offender Registration Statutes

***2** This Court has previously provided a detailed account of the history of Tennessee's adoption and amendment of its sexual offender registration statutes. *See Doe #1*, 518 F. Supp. 3d at 1167–70; *see also Reid II*, —— F. Supp. 3d at ——–——, 2022 WL 1050645, at *2–7 (recounting SORA's history and major provisions). The Court will not provide that full history here, but instead will provide only the details necessary to understand the instant dispute.

Tennessee did not have a sex offender registration law prior to 1994.[4] In that year, Tennessee enacted the predecessor statute to the current SORA, known as the Sexual Offender Registration and Monitoring Act ("SORMA"). 1994 Tenn. Pub. Acts, ch. 976. SORMA required any individual convicted of a qualifying offense ("SORMA registrant") to register with the TBI within ten days of release without supervision from probation, parole, or incarceration. *Id.* § 4. SORMA did not require in-person registration or reporting; instead, SORMA registrants were required to register and periodically update their information with the TBI by completing and returning paper forms. *Id.* §§ 4, 5. The information in the SORMA registry was expressly designated as confidential, with the exception that the TBI or a local law enforcement agency could "release relevant information deemed necessary to protect the public concerning a specific sexual offender." *Id.* § 7(c).

In the decade that followed, the General Assembly repeatedly amended SORMA to expand its scope, increase its reporting requirements, and reduce the level of confidentiality of registry information. For example, in 1997, the General Assembly amended SORMA to provide that, for all qualifying offenses committed on or after July 1, 1997, certain information concerning a SORMA Registrant "shall be considered public information" and made available online by the TBI. 1997 Pub. Acts, ch. 461, § 2. However, until 2003, SORMA did not expressly restrict where a SORMA registrant could live, work, or travel. In 2003, the General Assembly enacted legislation prohibiting a SORMA registrant from knowingly: (i) establishing a residence or accepting employment within 1,000 feet of a school, a child care facility, or the home of the SORMA Registrant's victim or the victim's immediate family member; (ii) coming within 100 feet of the victim; (iii) establishing a residence or other living accommodation with a minor who was not the SORMA registrant's own child; or (iv) establishing a residence with the SORMA registrant's own minor child, if any child of the SORMA registrant had been the SORMA registrant's victim or if the SORMA registrant's parental rights had been or were being terminated. 2003 Tenn. Pub. Acts, ch. 95, § 1.

***3** In 2004, the Tennessee General Assembly repealed SORMA and replaced it with SORA, which remains, in amended form, in effect today. 2004 Tenn. Pub. Acts, ch. 921.[5] The Act's major requirements can be classified in five categories:

1. *Providing and updating information.* A Registrant must provide a laundry list of information under penalty of perjury, including (but not limited to) the Registrant's name, address, date and place of birth, social security number, information about the Registrant's offense(s) of conviction, copies of the Registrant's driver license and passports, and a "complete listing of the [Registrant]'s electronic mail address information, including usernames, any social media accounts the [Registrant] uses or intends to use, instant message, other internet communication platforms or devices, and the [Registrant]'s username, screen name, or other method by which the [Registrant] accesses these accounts or websites." *See* Tenn. Code Ann. § 40-39-203(i). In contrast to SORMA's system of TBI-propagated forms, the Act requires a Registrant to register in person with the designated law enforcement agency. *Id.* § 40-39-203(a), (c). The Registrant must report in person with the appropriate law enforcement agency within 48 hours of "establishing or changing a primary or secondary residence, establishing a physical presence at a particular location, becoming employed or practicing a vocation or becoming a student in this state." *Id.* § 40-39-203(a)(1). A Registrant must also report within 48 hours any "change in any other information given to the registering agency by the [Registrant] that is

contained on the registration form," or any "material change in employment or vocation status." *Id.* § 40-39-203(a)(4), (a)(6). The Registrant has "three (3) days, excluding holidays" to report any change in his "electronic mail address information, any instant message, chat or other internet communication name." *Id.* § 40-39-203(a)(7). The Act also requires that the Registrant's DNA sample be taken and sent to the TBI. *Id.* § 40-39-203(n).

2. *Periodic in-person reporting.* Under the Act, each Registrant is classified as either a "violent sexual offender" or a "sexual offender," depending on the Registrant's offense(s) of conviction.[6] *Compare id.* § 40-39-202(31) (listing "violent sexual offenses"), *with id.* § 40-39-202(20) (listing "sexual offenses"). A Registrant classified as a violent sexual offender must report in person to the designated law enforcement agency four times per year (once in March, June, September, and December of each calendar year) to update the Registrant's fingerprints, palm prints, and photograph, and to verify the continued accuracy of the information in the registry. *Id.* § 40-39-204(b)(1). A Registrant classified as a sexual offender must report in person for these same purposes once a year. *Id.* § 40-39-204(c).[7]

***4** 3. *Residence and work restrictions.* A Registrant may not "knowingly establish a primary or secondary residence or any other living accommodation or knowingly accept employment within one thousand feet (1,000') of the property line of any public school, private or parochial school, licensed day care center, other child care facility, public park, playground, recreation center, or public athletic field available for use by the general public." *Id.* § 40-39-211(a)(1). Moreover, if a Registrant's victim was a minor, the Registrant may not "knowingly reside or conduct an overnight visit at a residence in which a minor resides or is present." *Id.* § 40-39-211(c)(1). There is an exception to this latter prohibition if "the [Registrant] is the parent of the minor." *Id.* But this exception is, in turn, subject to exceptions of its own; that is, even if it otherwise would apply, the exception to the prohibition is inapplicable under certain circumstances, including when "[a]ny minor or adult child of the [Registrant] was a victim of a sexual offense or violent sexual offense committed by the [Registrant]." *Id.* § 40-39-211(c)(1)(B). Thus, SORA prohibits a Registrant who committed an offense against his own minor child from residing or conducting an overnight visit at any residence in which there is a minor—regardless of whether that minor is the Registrant's child.

4. *Movement restrictions.* A Registrant cannot knowingly "[b]e upon or remain on the premises of any building or grounds of any public school, private or parochial school, licensed day care center, other child care facility, public park, playground, recreation center or public athletic field available for use by the general public in this state when the [Registrant] has reason to believe children under eighteen (18) years of age are present." *Id.* § 40-39-211(d)(1)(A). A Registrant also cannot knowingly "[s]tand, sit idly, whether or not the [Registrant] is in a vehicle, or remain within one thousand feet (1,000') of" the facilities covered under § 40-39-211(d)(1)(A) "when children under eighteen (18) years of age are present, while not having a reason or relationship involving custody of or responsibility for a child or any other specific or legitimate reason for being there." *Id.* § 40-39-211(d)(1)(B).

5. *Additional restrictions related to children.* A Registrant may not be "alone with" a minor in a "private area." *Id.* § 40-39-211(k)(2). SORA defines a "private area" as "any real or personal property, regardless of ownership, where the conduct of the [Registrant] is not readily observable by anyone but the minor or minors alone with the [Registrant]," potentially including individual rooms of a building. *Id.* § 40-39-211(k)(1)(B). "Alone with" is defined to mean that the Registrant is in the presence of a minor in a "private area," and there is no other adult "present in the area" who is conscious and able and willing to come to the minor's aid. *Id.* § 40-39-211(k)(1)(A)(i). However, if the Registrant is in a private area "where the [Registrant] has the right to be," he is not "alone with" a minor if the Registrant is engaged in an "otherwise lawful activity" and the minor's presence is "incidental, accidental, or otherwise unrelated to the [Registrant]'s lawful activity." *Id.* § 40-39-211(k)(1)(A)(ii).

B. Facts Relating to Plaintiff[8]

In 2002, while living in Michigan, Plaintiff committed the offense of criminal sexual conduct, second degree, against his 14-year-old stepchild.[9] (Doc. No. 12-1 at ¶ 3). *See* Mich. Comp. Laws Ann. § 750.520c. Plaintiff pled guilty and served 42 months in prison. (Doc. No. 12-1 at ¶¶ 3–4). While in prison, Plaintiff underwent more than a year of sex offender therapy. (*Id.* at ¶ 4). He was ultimately released on parole. (*Id.*). He did not violate the terms of his parole and, in 2007, his sentence terminated. (*Id.*). Plaintiff initially registered as a sex offender under Michigan law; however, he ceased registering in September 2019 after Michigan stopped

enforcing its sex offender law against Plaintiff (and others) due to court rulings in federal litigation in that state. (*Id.* at ¶ 5).

***5** A year later, in October 2020, Plaintiff moved to Tennessee and did not believe he was required to register as a sex offender under SORA. (*Id.* at ¶ 6). Plaintiff lived in Tennessee for more than a year (apparently without incident) until, in February 2022, he was arrested by the local law enforcement officer responsible for enforcing SORA in Plaintiff's county. (*Id.*). The district attorney general ultimately dismissed the charges against Plaintiff, but Plaintiff was required to register as a sex offender under SORA. (*Id.*).

Plaintiff's arresting officer informed Plaintiff that he may not attend his church—at which Plaintiff is a lay pastor and which his wife and children attend—because the church has a gymnasium. (*Id.* at ¶ 14). [10] Accordingly, Plaintiff avers that, since his February 2022 arrest, he has "been unable to attend church with [his] family or practice [his] ministry as a lay pastor on church grounds when children are present." (*Id.*). Plaintiff also states that he cannot go to parks or playgrounds with his minor children or attend their sporting events. (*Id.*).

Further, because the victim of Plaintiff's offense was his minor stepchild, the TBI has determined that Plaintiff is not permitted to live with his children. Under Tenn. Code Ann. § 40-39-211(c)(1), a Registrant whose victim was a minor is prohibited from "knowingly resid[ing] or conduct[ing] an overnight visit at a residence in which a minor resides or is present." Although there is an exception "if the [Registrant] is the parent of the minor," *id.*, that exception does not apply when "[a]ny minor or adult child of the [Registrant] was a victim of a sexual offense or violent sexual offense committed by the [Registrant]," *id.* § 40-39-211(c)(1)(B). As a result, in April 2022, Plaintiff's arresting officer "ordered [Plaintiff] to get a hotel room and move out of [his] house immediately or he would arrest [Plaintiff]." (Doc. No. 12-1 at ¶ 15.) Since April, Plaintiff has thus spent each night in a hotel room and returned home in the morning. (*Id.*). The officer told Plaintiff that he must leave his home each night by 11:59 p.m. (Doc. No. 25-4 at ¶ 2.) Although the officer did not specify when Plaintiff may return, Plaintiff has been returning home each morning by 5:30 a.m., so far without incident. (*Id.*). Plaintiff avers that his practice has been to leave home around 10:00 p.m. each night, after which he drives about twenty-five minutes to the hotel his arresting officer has approved Plaintiff to stay in. (*Id.* at ¶ 3). Although there are hotels closer to Plaintiff's home, Plaintiff cannot stay in them because they are within 1,000 feet of parks and other SORA-prohibited areas. (*Id.*). Plaintiff avers that he is staying in the nearest, cheapest hotel at a cost of $130 per night. (*Id.*).

Further, Plaintiff avers that he "cannot safely be alone with [his] children at any time," (Doc. No. 12-1 at ¶ 17), because SORA prohibits him from being in the presence of any of his minor children in any "private area" (such as a room or car), Tenn. Code Ann. § 40-39-211(k)(2), unless (a) another conscious adult is present, or (b) his children's presence is "incidental, accidental, or otherwise unrelated to [Plaintiff's] lawful activity," *id.* § 40-39-211(k)(1)(A).

***6** Plaintiff also canceled a family vacation to Florida after his arresting officer threatened to arrest Plaintiff if he spent the night with his children in Florida. (Doc. No. 12-1 at ¶ 16.).

The TBI currently classifies Plaintiff as a "sexual offender," not a "violent sexual offender," meaning that he is subject to only annual (as opposed to quarterly) reporting and is eligible to apply for removal from the registry after a certain period of time (as opposed to being required to register for life). (*Id.* at ¶ 7). However, Plaintiff avers that his arresting officer told him that the officer had "lobbied hard" for the TBI to classify Plaintiff as a "violent sexual offender." (*Id.*). Consequently, Plaintiff "fear[s] that future TBI counsel may interpret SORA differently and re-classify [him] as a 'violent sexual offender.' " (*Id.*).

C. Procedural Background

On May 10, 2022, Plaintiff filed his Complaint for Declaratory and Injunctive Relief. (Doc. No. 1). Based on the facts described above, the Complaint asserts two counts, both under 42 U.S.C. § 1983, for alleged violations of the U.S. Constitution's Ex Post Facto Clause. Count 1 asserts a claim that SORA violates the Ex Post Facto Clause "as applied to pre-SORA offenses." (*Id.* at ¶¶ 72–76). Count 2 asserts a claim that SORA violates the Ex Post Facto Clause "as applied to Plaintiff." (*Id.* at ¶¶ 77–81).

On May 11, 2022, Plaintiff filed the instant Motion, along with a Memorandum in Support. (Doc. Nos. 12, 13). In the Motion, Plaintiff states that he seeks preliminary relief "only on Count 2 of the complaint, which claims SORA violates the Ex Post Facto Clause as applied to Plaintiff." (Doc. No. 12 at 1 n.1). Plaintiff requests a temporary restraining order

and preliminary injunction (i) prohibiting Defendants from enforcing SORA against Plaintiff, including the continued publication of Plaintiff's information on the sex offender registry ("SOR"), and (ii) requiring Defendants to remove Plaintiff's information from the SOR. (*Id.* at 1). At the Court's direction, Defendants filed a Response in Opposition on May 16, 2022. [11] (Doc. No. 23). Plaintiff filed a reply on May 20, 2022 (Doc. No. 25), and the matter is now ripe for disposition.

LEGAL STANDARD

The Court considers four factors in deciding a motion for preliminary injunction [12] under Federal Rule of Civil Procedure 65: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to the opposing party or others; and (4) whether the public interest would be served by the issuance of the injunction. *Daunt v. Benson*, 956 F.3d 396, 406 (6th Cir. 2020) (citing *Bays v. City of Fairborn*, 668 F.3d 814, 818–19 (6th Cir. 2012)); *see* *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

***7** Generally speaking, "district courts weigh the strength of the four factors against one another," in what is commonly described as a "balancing test." *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 326 (6th Cir. 2019). However, the inquiry is not a pure balancing test because the second factor—irreparable injury absent the injunction—*must* be present in order for the Court to issue the requested preliminary injunction. *Id.* at 326–27 (6th Cir. 2019) ("[E]ven the strongest showing on the other three factors cannot 'eliminate the irreparable harm requirement.' That factor is indispensable: If the plaintiff isn't facing imminent and irreparable injury, there's no need to grant relief *now* as opposed to at the end of the lawsuit.") (quoting *Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982)). Thus, "although the *extent* of an injury may be balanced against other factors, the *existence* of an irreparable injury is mandatory." *Id.* at 327.

"Furthermore, the first factor in many cases is not far from effectively being a prerequisite, inasmuch as 'a finding that there is simply no likelihood of success on the merits is usually fatal.' " *Carter v. Tenn. Dep't of Child.'s Servs.*, No. 22-cv-00247, 2022 WL 1144134, at *2 (M.D. Tenn. Apr. 18, 2022) (brackets omitted) (quoting *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000)); *see Daunt*, 956 F.3d at 421 ("Our cases warn that a court must not issue a preliminary injunction where the movant presents no likelihood of merits success.") (brackets omitted) (quoting *La.-Pac. Corp. v. James Hardie Bldg. Prods., Inc.*, 928 F.3d 514, 517 (6th Cir. 2019)). Indeed, "[i]n constitutional cases, the first factor is typically dispositive," because when "constitutional rights are threatened or impaired, irreparable injury is presumed," and "no cognizable harm results from stopping unconstitutional conduct, so 'it is always in the public interest to prevent violation of a party's constitutional rights.' " *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021) (first quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012), and then quoting *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001)).

"A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). "The party seeking the preliminary injunction bears the burden of justifying such relief, including showing irreparable harm and likelihood of success." *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012).

Plaintiffs seeking a preliminary injunction may not merely rely on unsupported allegations, but rather must come forward with more than "scant evidence" to substantiate their allegations. *See, e.g.,* *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 417 (6th Cir. 2014); *McNeilly*, 684 F.3d at 614 (upholding denial of preliminary injunction when plaintiff made only a "small showing" of evidence); *Cameron v. Bouchard*, 815 F. App'x 978, 986 (6th Cir. 2020) (vacating preliminary injunction when plaintiffs made no evidentiary showing on some elements of their claim, but instead made mere allegations regarding the treatment of Covid-19 in prisons); *United States v. Certain Land Situated in City of Detroit*, No. 95-1118, 1996 WL 26915, at *1 n.1 (6th Cir. Jan. 23, 1996) (affirming denial of a preliminary injunction where the district court relied on a lack of evidence to support speculative allegations); *Boulding v. Corr. Med. Servs.*, No. 06-cv-811, 2008 WL 2095390, at *1 (W.D. Mich. Feb. 11, 2008), *report and recommendation*

adopted, 2008 WL 2095387 (W.D. Mich. May 15, 2008) ("Plaintiff did not marshal any evidence in support of his motion [for a preliminary injunction]. Plaintiff's unsupported allegations do not suffice."). In conducting the preliminary injunction analysis, the Court is not limited to the four corners of the complaint but rather may rely on evidence, including affidavits and hearsay materials, which would not be admissible evidence for a permanent injunction if the evidence is appropriate given the character and objectives of the preliminary injunctive proceeding. *Express Franchise Servs., L.P. v. Impact Outsourcing Sols., Inc.*, 244 F. Supp. 3d 1368, 1379 (N.D. Ga. 2017); *Action NC v. Strach*, 216 F. Supp. 3d 597, 629 (M.D.N.C. 2016) (explaining that district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted).

***8** Notably, the decision whether to grant a preliminary injunction is a matter within the discretion of the district court. *Tenn. Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 447 (6th Cir. 2009).

DISCUSSION

A. Substantial likelihood of success on the merits

Before turning to the merits of Plaintiff's likelihood of success, it is necessary first to consider the distinction between a "facial" challenge and an "as-applied" challenge, and how that distinction applies to Plaintiff's ex post facto claim.

1. Ex post facto challenges in relation to the "facial versus as-applied" dichotomy

Constitutional challenges to statutes are often categorized as either "facial" or "as-applied." A "facial" challenge to a law's constitutionality has been described as "an effort to invalidate the law in each of its applications, to take the law off the books completely." [13] *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 691 (6th Cir. 2015) (quoting *Speet v. Schuette*, 726 F.3d 867, 871 (6th Cir. 2013)). To prevail on a "facial" challenge, a plaintiff must establish that "no set of circumstances exist under which the statute would be valid." *Id.* (brackets omitted) (quoting *Speet*, 726 F.3d at 872). An "as-applied" challenge, by contrast "argues that a law is unconstitutional as enforced against the plaintiffs before the court." *Id.* (quoting *Speet*, 726 F.3d at 872); *see* *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) ("It is axiomatic that a 'statute may be invalid as applied to one state of facts and yet valid as applied to another.' ") (quoting *Dahnke–Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289, 42 S.Ct. 106, 66 L.Ed. 239 (1921)).

The major significance of the facial/as-applied distinction is that a facial challenge, if successful, will generally result in a much broader remedy and, consequently, requires a greater showing. *See* *Bucklew v. Precythe*, —— U.S. ——, 139 S. Ct. 1112, 1127, 203 L.Ed.2d 521 (2019) ("A facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications. So classifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding 'breadth of the remedy[.]' ") (quoting *Citizens Utd. v. Fed. Election Comm'n*, 558 U.S. 310, 331, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010)). However, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens Utd.*, 558 U.S. at 331, 130 S.Ct. 876. And it is possible that a claim "can have characteristics of as-applied and facial challenges: it can challenge more than just the plaintiff's particular case without seeking to strike the law in all its applications." *Green Party of Tenn.*, 791 F.3d at 692 (citing *John Doe No. 1 v. Reed*, 561 U.S. 186, 194, 130 S.Ct. 2811, 177 L.Ed.2d 493 (2010)).

***9** An ex post facto law has two features. First, it must be retroactive—that is, "it must apply to events occurring before its enactment." *Lynce v. Mathis*, 519 U.S. 433, 441, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997) (quoting *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981)). Because the ex post facto prohibition is centrally concerned with fair notice, *see* *id.*, the relevant date for purposes of determining retroactivity is the date the offense was *committed*, not (for example) the date of conviction or sentencing. *Doe v. Bredesen*, 507 F.3d 998, 1003 (6th Cir. 2007) ("a law is retrospective if it changes the legal

consequences of acts committed before its effective date") (quoting *United States v. Davis*, 397 F.3d 340, 347 (6th Cir. 2005)).

Second, an ex post facto law must be punitive (as opposed to civil): "the Constitution's ban on Ex Post Facto laws does not bar *all* retroactive lawmaking, but only retroactive punishment." *Does #1–5 v. Snyder*, 834 F.3d 696, 699 (6th. Cir. 2016); *see* *Kansas v. Hendricks*, 521 U.S. 346, 369, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (holding that the Court's conclusion that the law at issue was "nonpunitive" removed "an essential prerequisite" for the ex post facto claim at issue).

Ex post facto claims are something of an awkward fit within the facial/as-applied dichotomy. In one sense, an ex post facto challenge can never truly be a facial challenge to the law at issue; because only *retroactive* applications are prohibited, even a punitive statute will never violate the Ex Post Facto Clause *as applied prospectively.* That is, an ex post facto challenge can never "invalidate the law in each [*i.e.*, all] of its applications," *Green Party of Tenn.*, 791 F.3d at 691, because (by definition) the Ex Post Facto Clause does not reach prospective applications.

In another sense, however, ex post facto challenges do resemble facial challenges. That is because the second element of an ex post facto claim—whether the challenged law is punitive—must be determined based on the face of the statue. *Seling v. Young*, 531 U.S. 250, 267, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001). ("An Act, found to be civil, cannot be deemed punitive 'as applied' to a single individual in violation of the ... *Ex Post Facto* Clauses ...."). The determination is not to be made based on any case-specific facts applicable only to the specific plaintiff at issue, except for the facts concerning when the plaintiff's offense was committed. *See* *State v. Letalien*, 985 A.2d 4, 17 (Me. 2009) ("The ex post facto prohibition is intended to act as a check on the exercise of legislative authority as it affects broad categories of persons, and is not intended to create an individual right to challenge a retroactive law based on the effect that the law has on each person's individual circumstances.").

In *Seling*, the Court considered whether a Washington state law authorizing the civil commitment of "sexually violent predators" violated the Ex Post Facto Clause. 531 U.S. at 253, 121 S.Ct. 727. The case came to the Supreme Court on the assumption that the state law in question was "civil in nature," *id.* at 260, 121 S.Ct. 727, and the issue before the Court was thus only whether the plaintiff "could challenge the statute as being punitive 'as applied' to him," *id.* at 253, 121 S.Ct. 727, its generally civil nature notwithstanding. The Court held that the question of whether a statute is "civil" or "punitive" must be answered on the face of the statute, and that a facially civil statute cannot be rendered punitive "as applied" to the particular plaintiff. *Id.* at 263, 267, 121 S.Ct. 727. The Court explained that a prior decision, *Hudson v. United States*, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997), had "expressly disapproved of evaluating the civil nature of an Act by reference to the effect that Act has on a single individual. Instead, courts must evaluate the question by reference to a variety of factors ' "considered in relation to the statute on its face[.]" ' " *Seling*, 531 U.S. at 262, 121 S.Ct. 727 (quoting *Hudson*, 522 U.S. at 100, 118 S.Ct. 488 (in turn quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)). In support of its conclusion that a statute's punitive nature must be determined on its face, the *Seling* Court emphasized administrability concerns: allowing an individual plaintiff to challenge a facially civil statute as being punitive "as-applied" would be "unworkable," because "[s]uch an analysis would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme's validity under the ... *Ex Post Facto* Clauses." *Id.* at 263, 121 S.Ct. 727; *see also* *id.* ("The particular features of confinement may affect how a confinement scheme is evaluated to determine whether it is civil rather than punitive, but it remains no less true that the query must be answered definitively.").

***10** Based on *Seling*, this Court has recognized in other cases challenging SORA that the protections of the Ex Post Facto Clause "do not depend on 'the effect that a challenged law has on a single individual,' but rather the punitive nature of the 'statute on its face.' " *Does #1–9*, —— F. Supp. 3d at ——, 2021 WL 5761039, at *3 (brackets omitted) (quoting *Seling*, 531 U.S. at 262, 121 S.Ct. 727); *accord Reid II*, —— F. Supp. 3d at ——, 2022 WL 1050645, at *9 ("[T]he

particularities of [plaintiff's] situation—aside from when he committed his offense—are of only limited importance to the merits of his *Ex Post Facto* Clause challenge."). [14] "As a result, the application of the Ex Post Facto Clause to a given situation can typically be ascertained simply by identifying the law at issue, placing the law in context, and piecing together the chronology of the law's adoption and the underlying criminal offense—without the need for a deep dive into any individual offender's circumstances." *Does #1–9*, —— F. Supp. 3d at ——, 2021 WL 5761039, at *3. The Court agrees and holds that, under *Seling*, the question whether SORA is civil or punitive is not amenable to as-applied analysis, but instead must be determined on the face of the statute without regard to any case-specific factors (other than the date of the individual's offense). In other words, SORA is either civil or punitive, and the Court must decide that question without reference to "the effect that Act has on a single individual." *See* *Seling*, 531 U.S. at 262, 121 S.Ct. 727. [15]

***11** A further complication arises from the fact that many laws—SORA included—are amended over time. Even since SORA was first adopted in 2004, the General Assembly has "repeatedly revised [SORA] to increase its restrictions and requirements and to make more information about registered offenders publicly available." *See Doe #1*, 518 F. Supp. 3d at 1170 (collecting amendments to SORA from 2005 to 2015). Thus, the question of precisely *what law* is at issue (because it is retroactive) may vary depending on when the plaintiff committed his offense. Specific provisions of SORA may be retroactive (and thus subject to analysis to determine whether they are civil or punitive) as to one plaintiff but not another plaintiff. The list of retroactive SORA provisions will differ, for example, between: (i) the case of a plaintiff (like Plaintiff) who committed his offense in 2002, before any of SORA's most burdensome provisions went into effect; (ii) the case of a plaintiff who committed his offense in 2006 (when some of SORA's provisions were already in effect); and (iii) the case of a plaintiff who committed his offense in 2010 (when even more of SORA's provisions had already been enacted). The upshot is that even if the cumulative effect [16] of the provisions that apply retroactively to one plaintiff who committed his offense at one time is punitive, that does not necessarily mean that the cumulative effect of the provisions that apply retroactively to a different plaintiff who committed his offense at a later date will necessarily also be punitive.

In sum, after distilling applicable case law, the Court discerns three generally applicable principles about how the "facial" and "as-applied" labels apply to ex post facto claims:

1) An ex post facto challenge to a law will never be a "pure" (or "classic") facial challenge, because it inherently can support invalidation of only *some* applications of the challenged law—namely retroactive (not prospective) applications.

2) The punitive character of a given law (or, to put it more precisely, the retroactive portions thereof) is determined based on the law's face, not based on its application to a specific plaintiff.

3) However, the specific law (provisions) that apply retroactively—and thus are assessed for whether they are punitive rather than civil in nature—must be determined based on the date that the particular plaintiff before the Court committed his offense; accordingly, a determination that the law being retroactively applied to one plaintiff who committed his offense at Time X is punitive will not necessarily compel a conclusion that the law being retroactively applied to a second plaintiff who committed his offense at Time Y is also punitive.

Returning to the instant case, Plaintiff's Complaint describes each of his counts as "as-applied" ex post facto challenges. Count 1 asserts that SORA violates the Ex Post Facto Clause "as applied based on criminal offenses [like those that landed Plaintiff on the SOR] that occurred before SORA's effective date." (Doc. No. 1 at ¶ 75). Count 2 asserts that SORA violates the Ex Post Facto Clause "as applied to Plaintiff." (*Id.* at ¶ 80). In his Motion, Plaintiff describes Count 1 in a somewhat different manner, as not merely an "as-applied" challenge, but rather as a "hybrid as-applied/facial challenge: as-applied because it only attacks SORA's application to pre-enactment offenses, facial because the determination that SORA is punitive is made on its 'face,' *Seling v. Young*, 531 U.S. 250, 262, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001), and thus not limited to Plaintiff's particular case." (Doc. No. 13 at 1 n.1). Plaintiff describes Count 2 as a wholly (solely) as-applied challenge, which claims that "SORA violates the Ex Post Facto Clause as applied to Plaintiff." (*Id.*).

***12** It appears to the Court that the only difference between Count 1 and Count 2 is the *scope of the remedy* that Plaintiff intends to seek, not the substantive content of the claim. *See* *Bucklew*, 139 S. Ct. at 1127 ("[C]lassifying

a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding 'breadth of the remedy,' but it does not speak at all to the substantive rule of law necessary to establish a constitutional violation.") (quoting *Citizens Utd.*, 558 U.S. at 331, 130 S.Ct. 876). Via Count 1, Plaintiff seeks to prohibit the application of SORA to "any pre-SORA offense" (which necessarily would include Plaintiff's offense, which was committed pre-SORA). Via Count 2, Plaintiff seeks to prohibit the application of SORA to Plaintiff (and not anybody else). In both counts, Plaintiff claims that the application of SORA's provisions to offenses pre-dating the enactment of SORA violates the Ex Post Facto Clause; the only difference is that Count 1 seeks relief that is framed to benefit *anyone* who committed offenses pre-SORA, while Count 2 seeks relief framed to benefit *only Plaintiff.*

In his Motion, Plaintiff states that he seeks preliminary injunctive relief only on Count 2, and that he "does not presently seek preliminary injunctive relief on Count 1." (Doc. No. 13 at 1). So the Court will consider granting injunctive relief only to the extent sought and justified by Count 2. That is to say, the Court will entertain Plaintiff's request for a preliminary injunction as one seeking a prohibition of SORA's application to Plaintiff (and only Plaintiff)—the remedy that Count 2 requests. In so doing, however, the Court remains cognizant that the question of whether (and to what extent) SORA violates the Ex Post Facto Clause is not a plaintiff-specific question, with one exception alluded to elsewhere herein: the Court, in handling an ex post facto challenge brought by a particular plaintiff (including Plaintiff here), needs to determine what provisions of the applicable law are retroactive (thereby coming within the scope of the Ex Post Facto Clause) as to that plaintiff, considering when the plaintiff committed his or her offense(s).

2. Analysis of Plaintiff's likelihood of success

This Court has previously discussed in detail relevant Supreme Court and Sixth Circuit precedents addressing the constitutionality of SORA and other similar sex-offender registration laws. *See Doe #1*, 518 F. Supp. 3d at 1175–79 (discussing *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999), *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007), and *Does #1–5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016)). In particular, the Sixth Circuit's published decision in *Snyder*, which found Michigan's similar Sex Offender Registration Act to be punitive in effect for purposes of the Ex Post Facto Clause, is of central importance to the Court's analysis. "The question of whether Tennessee's *ex post facto* application of its sexual offender requirements to individuals like [Plaintiff] is illegal under *Snyder* may not be entirely beyond debate, but the issue has been addressed so clearly and so many times that the court assumes that all of the attorneys and government officials involved understand the basic jurisprudential lay of the land." *Does #1–9 v. Lee*, —— F. Supp. 3d at ——, 2021 WL 5761039, at *2. The Court will not here spill more ink analyzing the governing precedent, but instead refers the reader to its prior opinion, *Doe #1*, 518 F. Supp. 3d at 1175–79.

As noted earlier, Plaintiff's ex post facto claim has two elements: (1) retroactive application of (2) a punitive law. The Court's analysis will consider those elements in turn.

a. Which provisions of SORA are retroactive?

The first step in an ex post facto analysis is to identify precisely which provisions of the law at issue apply retroactively to the plaintiff, considering the date of his applicable offense(s). Here, Plaintiff requests a preliminary injunction prohibiting Defendants (i) "from enforcing [SORA], Tenn. Code Ann. §§ 40-39-201–40-39-218 ... against Plaintiff, including the continued publication of Plaintiff's information on the [SOR]," and (ii) requiring Defendants "to remove Plaintiff's information from the SOR." (Doc. No. 12 at 1). Thus, Plaintiff requests the Court to preliminarily enjoin the entirety of SORA, Tenn. Code Ann. §§ 40-39-201 to -218.

***13** As noted above, SORA was enacted to replace SORMA in 2004. The major provisions of SORA that Plaintiff argues constitute punishment—*i.e.*, the provisions expressly restricting where a Registrant can live, work, or travel; requiring in-person registration and reporting (including reporting within forty-eight hours of certain triggering events); prohibiting Registrants from being "alone with" a minor in a "private area"; and prohibiting certain Registrants from residing with minors, including their own children—were all enacted in 2003 or later. [17]

However, two aspects of SORA predate Plaintiff's offense and are thus *not* retroactive for purposes of Plaintiff's claim. First, the Court finds that Plaintiff should not be removed from the SOR, because the registration requirement predates his 2002 offense. *See* 1994 Tenn. Pub. Acts, ch. 976, § 4 (requiring that "each sexual offender shall complete a TBI sexual offender registration/monitoring form and shall cause such form to be delivered to TBI headquarters in Nashville"); *id.* § 7(a) ("Using information received or collected pursuant to this act, the TBI shall establish, maintain, and update a centralized record system of sexual offender registration and verification information."). The Act's registration requirements do not meet the retroactivity element of Plaintiff's ex post facto claim, and Plaintiff is thus not likely to show that application of those requirements to him violates the Ex Post Facto Clause.

Second, for the same reason, the Court will decline to enjoin Defendants from publishing Plaintiff's information on the SOR. [18] Registry information for SORMA registrants who committed their offenses after July 1, 1997 was made publicly available as early as 1997. *See* 1997 Tenn. Pub. Acts, ch. 461, § 2 ("For all sexual offenses committed on or after July 1, 1997, the information concerning a registered sexual offender ... shall be considered public information. In addition to making such information available in the same manner as other public records, the bureau shall prepare and place the information on the State of Tennessee's internet home page on or before January 1, 1998."). [19]

***14** Otherwise, there appears to be no dispute as to the retroactivity element—*i.e.*, as to the extent to which SORA is retroactive as to Plaintiff—for purposes of this motion. All agree that Plaintiff committed his offense in 2002. (Doc. No. 13 at 3; Doc. No. 23 at 2). As described above, in 2002 SORA had not yet been enacted, and Defendants do not point to any other provisions of the current SORA (besides the ones the Court has already noted) that they argue have been in effect since before Plaintiff's offense in 2002. Accordingly, the Court accepts for purposes of this motion that the entirety of SORA, Tenn. Code Ann. §§ 40-39-201 to -218, is the law here at issue—at issue because it is retroactive as to Plaintiff—except for (i) SORA's baseline requirement that Plaintiff register with the TBI, and (ii) SORA's publication provision, Tenn. Code Ann. § 40-39-206(d). The upshot of these exceptions is as follows: (i) because the baseline requirement that Plaintiff register with the TBI is not retroactive as to Plaintiff, the Court will not order that Plaintiff's information be removed from the SOR, and (ii) because SORA's publication provision, Tenn. Code Ann. § 40-39-206(d) is not retroactive as to Plaintiff, the Court will not order that Plaintiff's information not be published on the SOR. For ease of reference, the Court will hereafter refer to SORA—minus its registration and publication requirements—as "Retroactive SORA."

b. Is Retroactive SORA punitive?

To determine whether a law is punitive, the Court employs a two-part "intent-effect test." Under the first (intent) prong, the Court asks whether the legislature *intended* the law to impose punishment. If not, the Court then asks whether, despite the legislature's "intention ... to enact a regulatory scheme that is civil and nonpunitive," the statutory scheme is nonetheless "punitive either in purpose or effect." [20] *Smith*, 538 U.S. at 92, 123 S.Ct. 1140 (quoting *Hendricks*, 521 U.S. at 361, 117 S.Ct. 2072); *Snyder*, 834 F.3d at 700.

For purposes of this motion, Plaintiff concedes the first part of the test by "assum[ing] SORA is civil in intent." (Doc. No. 13 at 10). [21] Accordingly, the only issue for the Court is whether Retroactive SORA has a punitive effect. *Smith*, 538 U.S. at 92, 123 S.Ct. 1140; *Snyder*, 834 F.3d at 700. In analyzing this question, the Court is mindful that it "ordinarily defer[s] to the legislature's stated intent," and so " 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92, 123 S.Ct. 1140 (first quoting *Hendricks*, 521 U.S. at 361, 117 S.Ct. 2072, and then quoting *Hudson*, 522 U.S. at 100, 118 S.Ct. 488).

***15** To determine whether the effect of a law is punitive, the Supreme Court has instructed lower courts to "refer to" seven factors originally noted in *Kennedy v. Mendoza–Martinez*, 372 U.S. 144, 168–69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). *Smith*, 538 U.S. at 97, 123 S.Ct. 1140. And of these seven "*Mendoza-Martinez* factors," the Court has identified five as the most relevant to analyzing the effect of a sex offender-registration law. *Id.* The Sixth Circuit

has since reformulated these five factors into five respective questions for courts to consider:

1) Does the law inflict what has been regarded in our history and traditions as punishment?

2) Does it impose an affirmative disability or restraint?

3) Does it promote the traditional aims of punishment?

4) Does it have a rational connection to a non-punitive purpose?

5) Is it excessive with respect to this purpose?

Snyder, 834 F.3d at 701 (citing *Smith*, 538 U.S. at 97, 123 S.Ct. 1140). [22]

The *Mendoza-Martinez* factors are neither elements nor a true multi-factor test. Instead, they are merely "useful guideposts" to aid a court in answering the ultimate question of whether a law's effect is so punitive as to negate the state's intention to enact a civil law. *Smith*, 538 U.S. at 97, 123 S.Ct. 1140 (quoting *Hudson*, 522 U.S. at 99, 118 S.Ct. 488). The *Mendoza-Martinez* factors are thus "neither exhaustive nor dispositive." *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 249, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)). The Court could, in theory, examine additional pertinent factors or arguments not specifically contemplated by the *Mendoza-Martinez* factors. However, the parties have not identified any such additional factors or arguments in their briefs, and none are apparent to the Court. The Court will thus confine its analysis to the *Mendoza-Martinez* factors.

***16** As explained above, the question that the *Mendoza-Martinez* factors help to answer—whether the law in question is punitive in its effects—must be analyzed based on the face of the statute, not on its particular application to Plaintiff. *See* *Doe*, 2021 WL 1907813, at *13 ("As the *Mendoza-Martinez* factors plainly account for, some legal consequences, in light of their nature, context, and social function, simply *are punishments*, regardless of any variation in the individual's subjective experience of that consequence.").

Before turning to the individual factors, the Court will first address a cross-cutting argument that Defendants make with regard to multiple factors. Defendants repeatedly argue that SORA is not punitive because Plaintiff is presently classified as a "sexual offender," not a "violent sexual offender," and so he is eligible to apply to the TBI for termination of his registration requirement after five years pursuant to Tenn. Code Ann. § 40-39-207(i)(4)(B). [23] (Doc. No. 23 at 5, 12, 18). Defendants argue that "the district courts extending *Snyder* to hold the Act unconstitutional upon which Plaintiff relies all also involved offenders who were required to register for life. Plaintiff has not cited, and Defendants have not found, a single case holding a five-year registration requirement unconstitutional." (Doc. No. 23 at 5 (footnote omitted)). In support of this argument, Defendants cite *Jackson v. Rausch*, No. 19-cv-377, 2021 WL 4302769, at *9–10 (E.D. Tenn. Sept. 21, 2021), in which the court indeed found that SORA was not punitive as applied to the particular plaintiff in large part because the particular plaintiff (like Plaintiff in this case) was potentially subject to SORA for only five years, after which the plaintiff could request removal from the SOR. (Doc. No. 23 at 18).

The Court does not find Defendants' argument persuasive. The argument amounts to a claim that Retroactive SORA is not punitive as applied to Plaintiff because of the specifics of when he, as opposed to other Registrants, may apply for removal from the SOR. [24] But under *Seling*, the salient question is whether Retroactive SORA is civil or punitive on its face, not "the effect [SORA] has on a single individual." *See* *Seling*, 531 U.S. at 262, 121 S.Ct. 727. The specifics of when Plaintiff (as distinguished from other Registrants) is eligible to apply to the TBI for removal do not affect the Court's determination of whether Retroactive SORA, as a whole, is punitive on its face. *See Reid II*, —— F. Supp. 3d at ——, 2022 WL 1050645, at *19 ("The *Mendoza-Martinez* factors ... look at the broad, general features of a law on its face. They do not call for a fine-grained analysis of the day-to-day effects of a law on any given person in any given situation, because the factors are designed to render a verdict regarding whether a law is punitive or non-punitive with regard to *everyone*."). [25] Further, the fact that Plaintiff apparently may, five years from now, "file a request for termination of registration with TBI headquarters in Nashville," Tenn. Code Ann. § 40-39-207(a)(1), (i)(4)(B), does not persuade the Court that Retroactive SORA looks

any less like punishment. As will be explained below, the Court concludes that Retroactive SORA resembles probation and parole. Probation and parole can (and often do) last for five years or less. Defendants offer no basis to conclude that short-term probation or parole is not punishment. As Plaintiff persuasively argues, "Five years' imprisonment is less severe than life, but punishment nonetheless." (Doc. No. 25 at 2). [26]

***17** The Court will now proceed to analyze each *Mendoza-Martinez* factor in turn, mindful that they are only guideposts toward the ultimate end of determining whether Retroactive SORA is punitive in its effects.

i. Does Retroactive SORA inflict what has been regarded in our history and traditions as punishment?

Under the first factor, the Court considers whether the effects of Retroactive SORA resemble traditional forms of punishment. One consideration relevant to this factor is whether the law at issue meets the general definition of punishment offered by legal philosopher H.L.A. Hart: (1) it involves pain or other consequences typically considered unpleasant; (2) it follows from an offense against legal rules; (3) it applies to the actual (or supposed) offender; (4) it is intentionally administered by people other than the offender; and (5) it is imposed and administered by an authority constituted by a legal system against which the offense was committed. *Snyder*, 834 F.3d at 701 (citing H.L.A. Hart, *Punishment and Responsibility* 4–5 (1968)). This Court has already concluded that SORA falls within that general definition. *Doe #1*, 518 F. Supp. 3d at 1184. Defendants identify no reason to revisit that conclusion.

Plaintiff also argues that SORA resembles the traditional punishments of (1) probation and parole, (2) banishment, and (3) shaming. The Court will consider each in turn.

Probation and parole. [27] Plaintiff argues that SORA resembles the traditional punishments of probation and parole "because of [SORA's] in-person reporting requirements, Tenn. Code Ann. § 40-39-204(b)(1) (2021), its extensive restrictions on where offenders may live, work, or be present, *id.* § 40-39-211(a) & (d) (2021), and its severe criminal penalties for failure to comply, *id.* § 40-39-208." (Doc. No. 13 at 13). This Court has already agreed with Plaintiff's argument:

> Similar to *Snyder*[ ], all registrants under the Tennessee system have numerous restrictions. SORA requires registrants to update changes to certain information [within] 48 hours. Tenn. Code. Ann. § 40-39-203(a)(1). Violent sexual offenders must report in person four times a year. Tenn. Code. Ann. § 40-39-204(b)(1). All sexual offenders must report in person once a year. *Id.* at (c). All sexual offenders must report at least 21 days before leaving the country, with a few exceptions. *Id.* at (h). Within three days of changing "internet communication name or identity information," an offender must report the change. Tenn. Code. Ann. § 40-39-203(a)(7).... [R]egistrants also have numerous geographic restrictions on where they live, work, and spend time....
>
> Looking at the statute on its face, all registrants face some level of monitoring and in-person reporting requirements. These in-person reporting and supervision restrictions faced by ... offenders generally are similar to those found to resemble probation in *Snyder* [ ] and [*Doe v. Rausch*, 461 F. Supp. 3d 747 (E.D. Tenn. 2020)] and they appear to have a similar effect.

Doe #1, 518 F. Supp. 3d at 1196. Accordingly, this Court found that SORA "facially" resembled probation. *Id.* [28]

***18** Defendants do not directly address this reasoning from *Doe #1*. Instead, Defendants cite *Shaw v. Patton*, 823 F.3d 556, 565 & n.14 (10th Cir. 2016), in which the Tenth Circuit set forth a list of typical conditions of probation. [29] Defendants argue that because SORA does not require these same conditions, it does not resemble parole or probation. (Doc. No. 23 at 10–11). This argument fails because the inquiry is not whether Retroactive SORA is *identical* to probation and parole, but merely whether it "resembles" those traditional punishments. [30] *See* *Snyder*, 834 F.3d at 703; *Reid II*, —— F. Supp. 3d at ——, 2022 WL 1050645, at *16 ("the *Mendoza-Martinez* factors do not look merely to whether a law exactly replicates a traditional punishment, but whether it 'resembles' one"). Thus, in *Snyder*, the Sixth Circuit found that Michigan's statute was punitive in effect where it had "a number of similarities to parole/probation," even though the court acknowledged Michigan's law was "not identical to any traditional punishments." 834 F.3d

at 703. *Snyder* found that Michigan's law sufficiently resembled parole and probation because "registrants are subject to numerous restrictions on where they can live and work and, much like parolees, they must report in person, rather than by phone or mail. Failure to comply can be punished by imprisonment, not unlike a revocation of parole." *Id.* Defendants do not explain how Retroactive SORA differs from Michigan's statute in these material aspects, which the Sixth Circuit found sufficient to conclude that Michigan's statute "resembled" parole and probation. Moreover, probation in one case will often have different conditions from probation in another case. *See, e.g.*, 18 U.S.C. § 3563(b)(1)–(23) (listing discretionary conditions of probation). That certain conditions of probation are imposed in one case but not the other does not mean they are not *both* "probation." A difference in conditions by itself does not necessarily distinguish probation from something that is not probation. Thus, the numerous distinctions Defendants cite—which merely show that Retroactive SORA is not *identical* to probation and parole, a point *Snyder* conceded with respect to Michigan's law—do not undermine the conclusion that Retroactive SORA is sufficiently similar to probation and parole to constitute punishment. *See Reid II*, —— F. Supp. 3d at ——, 2022 WL 1050645, at *16 (stating that *Snyder* "explicitly did not require the conditions of inclusion on the registry to be identical to the conditions of parole in order for there to be a constitutionally persuasive resemblance"). [31]

Defendants also argue that, unlike SORA Registrants, probationers are "traditionally subject to the active supervision of a probation officer." (Doc. No. 23 at 10 (citing *Shaw*, 823 F.3d at 564)). But *Snyder* considered this argument, too, and found it to be merely another basis on which Michigan's statute and parole/probation were perhaps not identical, but nonetheless bear a resemblance. *Snyder*, 834 F.3d at 703 ("while the level of individual supervision [under Michigan's law] is less than is typical of parole or probation, the basic mechanism and effects have a great deal in common"). In addition, "[w]hile large numbers of probationers and parolees are under the actual supervision of a caseworker, some are released without any supervision at all.... Often the only condition is that they refrain from new criminal activity during the probation term." Cohen, *Law of Probation & Parole* § 17:6. So the degree of supervision—or even the absence thereof—is also not by itself sufficient to destroy Retroactive SORA's resemblance to probation.

***19** Defendants further contend that, while SORA is "enforceable through criminal penalties, those penalties are a consequence distinct from Plaintiff's original offense—unlike the possibility that parole or probation may be revoked, which is tied to the underlying criminal punishment." (Doc. No. 23 at 11). But *Snyder* found the enforceability of Michigan's law via criminal penalties to be a characteristic that *supported* finding a resemblance between Michigan's law and probation/parole: "Failure to comply can be punished by imprisonment, not unlike a revocation of parole." 834 F.3d at 703. And *Snyder* did not seem concerned by the fact that any criminal penalties for violating Michigan's law were distinct from the violator's original criminal offense (unlike in the case of penalties for a probation or parole violation). [32]

Banishment. In a prior decision, this Court concluded that two individual plaintiffs—both of whom resided in Davidson County—had shown that SORA banished them *from Davidson County*, but did *not* show that they were banished from *anywhere else* in Tennessee. *Doe #1*, 518 F. Supp. 3d at 1184–88. In particular, the Court relied on three maps of Davidson County that the plaintiffs in that case submitted to support their argument (without Defendants objecting that the maps impermissibly injected the plaintiffs' particular circumstances into the analysis), showing that SORA excluded them from a large percentage of Davidson County. *Id.* at 1186–87. Here, Plaintiff argues that the Court should take judicial notice of those same maps of Davidson County introduced by the *Doe #1* plaintiffs. (Doc. No. 13 at 13). Plaintiff also cites two other decisions of this Court, which suggest that SORA may effectively banish Registrants at least from Nashville and "Tennessee's denser cities." (Doc. No. 13 at 12 (citing *Reid I*, 476 F. Supp. 3d at 707, and *Reid II*, —— F. Supp. 3d at ——, 2022 WL 1050645, at *18). Accordingly, Plaintiff argues that the Court should take judicial notice that Registrants are effectively banished from "every urban area in this state." (Doc. No. 13 at 12). For their part, Defendants (likely following Plaintiff's lead) also debate statistics regarding Davidson County. (Doc. No. 23 at 7–8). Neither party notes that Plaintiff does not actually live in Davidson County, but rather lives in a less populated county in East Tennessee. [33] The parties thus focus their briefing on SORA's effects in Davidson County and other urban areas of Tennessee, but they do not address how these effects in Davidson County and other urban parts of the state should affect the banishment analysis (if at all) when the

particular plaintiff lives in a less urban part of the state. It may be that an analysis of Davidson County is pertinent because, regardless of where Plaintiff actually lives, under *Seling*'s facial standard the relevant question is whether Registrants are banished from large urban areas in Tennessee (even if the particular plaintiff before the Court does not live in those places). But without guidance from the parties on this issue, the Court declines to address Retroactive SORA's resemblance to banishment at this preliminary stage. [34]

***20** *Shaming.* Although Plaintiff's opening brief states in one of the subheadings of its argument that SORA resembles "public shaming," (Doc. No. 13 at 11), Plaintiff does not support this argument anywhere in the body of his opening brief. (*See id.* at 11–13). Plaintiff's reply addresses shaming briefly, arguing that SORA resembles shaming because "SORA's restrictions hang around Plaintiff's neck like a virtual scarlet letter. This ignominy flows not from his offense but from SORA's legal proscriptions." (Doc. No. 25 at 3). The Court does not find that Plaintiff's briefing, which relies almost exclusively on a single colorful metaphor, addresses shaming thoroughly enough to allow the Court to analyze it at this juncture. [35]

In sum, the Court finds that Plaintiff has demonstrated a strong likelihood that he will succeed in showing that Retroactive SORA resembles the traditional punishments of parole and probation. Accordingly, this first factor favors Plaintiff and a finding that Retroactive SORA is likely punitive on its face. The Court does not address at this stage of the litigation whether Plaintiff is likely to succeed in showing that Retroactive SORA resembles banishment or shaming. This does not, however, affect its conclusion on this factor, as it is not necessary that Retroactive SORA resemble *more than one* traditional form of punishment; one is sufficient for this factor to favor Plaintiff.

ii. Does Retroactive SORA impose an affirmative disability or restraint?

This Court previously found that, under this factor, SORA facially imposes an affirmative restraint on a Registrant's personal conduct. *Doe #1*, 518 F. Supp. 3d at 1197. A Registrant faces "serious punishment, including imprisonment" if he fails to comply with in-person reporting requirements and particular geographic restrictions. *Id.* "[T]hese requirements and restrictions resemble probation, and probation is a restriction on liberty." *Id.*; *see* *United States v. Knights*, 534 U.S. 112, 119, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) (noting that probation inherently entails restricting liberty to which the probationer otherwise would be entitled); *Blanton v. City of N. Las Vegas, Nev.*, 489 U.S. 538, 542, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989) (noting that probation "may engender a significant infringement of personal freedom") (internal quotation marks and citation omitted); United States Sentencing Commission, *Federal Sentencing: The Basics*, at 8 (discussing probation as a "form of deprivation of liberty"). The Court thus found SORA to be a "direct restraint on personal conduct." *Doe #1*, 518 F. Supp. 3d at 1197 (quoting *Doe v. Rausch*, 461 F. Supp. 3d at 765).

***21** Defendants argue that nothing short of "physical restraints or obligations so onerous that they approach imprisonment" will make this factor cut in favor of a Registrant. (*See* Doc. No. 23 at 12). In support of that argument, Defendants rely on out-of-circuit precedent in which courts have found sex-offender registration laws to be civil in nature when they imposed residency restrictions of 500 feet, *Vasquez v. Foxx*, 895 F.3d 515, 522 (7th Cir. 2018), 1,000 feet, *Hope*, 9 F.4th at 531, and 2,000 feet, *Shaw*, 823 F.3d at 570. (Doc. No. 23 at 12–13). Defendants also note that, in *Hope*, 9 F.4th at 532, the Seventh Circuit listed various "onerous burdens" that the Supreme Court has found not to amount to punishment—including fines, occupational debarment, denial of government benefits, and even certain forms of involuntary confinement. (Doc. No. 23 at 12). *See* *Hope*, 9 F.4th at 532 (citing *Hudson*, 522 U.S. at 104, 118 S.Ct. 488; *Flemming v. Nestor*, 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960); and *Hendricks*, 521 U.S. at 363, 117 S.Ct. 2072).

Defendants' arguments are once again foreclosed by binding Sixth Circuit precedent. In *Snyder*, Michigan argued under this factor that the relevant restraints—including the Michigan statute's prohibition on living, working, or loitering within 1,000 feet of a school—were "not physical in nature" and were therefore "minor and indirect." 834 F.3d at 703. The Sixth Circuit expressly rejected the notion that only physical restraints are sufficiently serious to make this factor cut in the plaintiff's favor: "something is not 'minor and indirect' just because no one is actually being lugged off in cold irons bound. Indeed, those irons are always in the

background since failure to comply with these restrictions carries with it the threat of serious punishment, including imprisonment." *Id.* Defendants do not attempt to explain why this reasoning from *Snyder* does not apply equally here.

Defendants cite *Smith v. Doe* for the proposition that "registration requirements make a valid regulatory program effective and do not impose punitive restraints in violation of the *Ex Post Facto* Clause." 538 U.S. at 102, 123 S.Ct. 1140 (Doc. No. 23 at 12). But Plaintiff challenges more than just SORA's bare registration requirement (which, as discussed above, is excluded from Retroactive SORA in any event); he challenges the residency restrictions and in-person reporting requirements (among other retroactive provisions of SORA), which are similar to those in the Michigan statute the Sixth Circuit has already distinguished from the Alaska statute at issue in *Smith*. *See* *Snyder*, 834 F.3d at 703 (stating that the Michigan statute's restraints "are greater than those imposed by the Alaska statute by an order of magnitude" because, for example, the Alaska statute did not require information to be updated in person).

iii. Does Retroactive SORA promote the traditional aims of punishment?

Snyder found that Michigan's statute "advances all the traditional aims of punishment: incapacitation, retribution, and specific and general deterrence." 834 F.3d at 704. The court noted that:

> Its very goal is incapacitation insofar as it seeks to keep sex offenders away from opportunities to reoffend. It is retributive in that it looks back at the offense (and nothing else) in imposing its restrictions, and it marks registrants as ones who cannot be fully admitted into the community. Further, ... it does so in ways that relate only tenuously to legitimate, non-punitive purposes. Finally, its professed purpose is to deter recidivism (though ... it does not in fact appear to do so), and it doubtless serves the purpose of general deterrence.

Id. However, the court in *Snyder* gave this factor "little weight," noting that the same goals can also be described as "civil and regulatory." *Id.*

***22** As Plaintiff argues, *Snyder*'s "conclusion that the Michigan scheme 'advance[d] all the traditional aims of punishment: incapacitation, retribution, and specific and general deterrence' can simply be imported, effectively word-for-word, into an analysis of Tennessee's Act." (Doc. No. 13 at 14 (quoting *Reid II*, —— F. Supp. 3d at ——, 2022 WL 1050645, at *18)). Accordingly, this factor favors Plaintiff, although the Court gives it "little weight," as did the court in *Snyder.*

iv. Does Retroactive SORA have a rational connection to a non-punitive purpose?

Retroactive SORA's rational connection to a nonpunitive purpose is a " 'most significant' factor" in determining whether the law's effects are punitive. *Smith*, 538 U.S. at 102, 123 S.Ct. 1140 (brackets omitted) (quoting *United States v. Ursery*, 518 U.S. 267, 290, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996)). For purposes of this Motion, Plaintiff "assumes SORA has a non-punitive purpose of preventing future acts of sexual violence." (Doc. No. 13 at 15). *Cf.* *Smith*, 538 U.S. at 102–03, 123 S.Ct. 1140 (finding that the Alaska Sex Offender Registration Act "has a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community") (internal quotation marks and brackets omitted).

Plaintiff argues that SORA lacks a rational connection to this non-punitive purpose, given the Sixth Circuit's conclusions about the empirical evidence before it in *Snyder.* (Doc. No. 13 at 14–15). In *Snyder*, the court canvassed empirical studies placed into the record in that case, which cast "significant doubt" on the risk of recidivism posed by sex offenders. 834 F.3d at 704–05. The court cited studies in the record suggesting that "sex offenders (a category that

includes a great diversity of criminals, not just pedophiles) are actually *less* likely to recidivate than other sorts of criminals," and that "laws such as [Michigan's statute] actually *increase* the risk of recidivism, probably because they exacerbate risk factors for recidivism by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities." *Id.* The *Snyder* court thus found "scant support for the proposition that [Michigan's statute] in fact accomplishes its professed goals," based on the record in that case. *Id.* at 704.

Plaintiff also argues that SORA is not rationally connected to its non-punitive purpose of preventing recidivism because SORA does not tailor its restrictions to actual risks posed by individual Registrants. Instead, Plaintiff argues, SORA "simply imposes its restrictions automatically on every person convicted by a jury of committing a certain type of criminal offense—in other words, like a punishment." (Doc. No. 13 at 15 (quoting *Reid II*, —— F. Supp. 3d at ——, 2022 WL 1050645, at *18)).

At the preliminary injunction stage, the Court finds that the empirical evidence discussed in *Snyder* is sufficient to show that this factor is likely ultimately to favor Plaintiff. There is no reason to think that the empirical evidence discussed in *Snyder* "would apply differently in Tennessee than it does in Michigan." *See Reid I*, 476 F. Supp. 3d at 707. Defendants certainly do not suggest any such reason. The Court also finds it significant that, in other cases recently decided in this Court, these same Defendants conceded for the purposes of summary judgment "that they do not actually have any evidence that the restrictions imposed [by SORA] on individuals like [the plaintiff] make crimes, let alone crimes against children, less likely." *Jordan*, 2022 WL 1196980, at *18; *Reid II*, —— F. Supp. 3d at ——, 2022 WL 1050645, at *18. [36]

***23** Defendants respond that Plaintiff "bears the burden" on this factor. [37] (Doc. No. 23 at 14). This argument is correct, so far as it goes. As this Court has previously concluded, "in the case of a facial challenge, the burden clearly falls on the challenger to show what needs to be shown, and not on the state (officials) to disprove the existence of what needs to be shown." *Doe #1*, 518 F. Supp. 3d at 1202. Given that Retroactive SORA's punitive effect (or lack thereof) is determined on the face of the statute, if this factor is ultimately to favor Plaintiff, then he does indeed bear the burden to demonstrate that Retroactive SORA lacks a rational connection to its conceded non-punitive purpose of preventing future acts of sexual violence. *See Seling*, 531 U.S. at 261, 121 S.Ct. 727 ("A court will reject the legislature's manifest intent [to establish a civil law] only where *a party challenging the Act provides the clearest proof* that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention.") (emphasis added). In other words, this factor will not go in Plaintiff's favor unless he shows that it should; it is not enough for this factor to favor Plaintiff if Defendants merely *fail* to show that the factor favors them.

But even though Defendants are correct that Plaintiff bears the burden on this factor, [38] that ultimately does not help them. At this preliminary stage, Plaintiff need not carry this burden in the same way he would at a later stage of the case:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing.

Univ. of Tex. v. Camenisch, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). As the Court has already concluded, the empirical evidence thoroughly canvassed in *Snyder*, and to which Plaintiff's briefing refers, shows that Plaintiff is likely to succeed in showing that Retroactive SORA lacks a rational connection to a non-punitive purpose. (*See* Doc. No. 13 at 14–15). The Court does not mean to imply that a plaintiff will always (or even often) show a likelihood of success by pointing to evidence in a different case that persuaded a different court. But this context is unique in that (1) the Sixth Circuit recently analyzed a very similar sex offender registration statute from another state (2) on the

basis of generally applicable empirical studies and (3) these same Defendants have recently conceded that they may lack countervailing evidence. Given all this, the Court finds that Plaintiff has shown he is likely to prevail on this factor by pointing to *Snyder*.

v. Is Retroactive SORA excessive with respect to the state's alleged non-punitive purpose?

***24** This factor is closely related to the last one because "both consider the degree to which a law serves its stated civil purpose, as opposed to, for example, a desire for retribution or stigmatization appropriate only in the criminal context." *Reid II*, —— F. Supp. 3d at ——, 2022 WL 1050645, at *15. In analyzing this factor, *Snyder* looked for evidence of the Michigan statute's "salutary effects" to compare against its "punitive effects." 834 F.3d at 705. *Snyder* found "no evidence in the record that the difficulties the statute imposes on registrants are counterbalanced by any positive effects." *Id.* In particular, with respect to the requirement that registrants make "frequent, in-person appearances before law enforcement," the court found "no relationship to public safety at all." *Id.*

At the preliminary injunction stage, Plaintiff has demonstrated a likelihood of success on this factor. Following *Snyder*'s lead, this Court has previously found that SORA is facially excessive with respect to its asserted non-punitive purpose of preventing recidivism because it likewise lacks sufficient salutary effects to justify its punitive consequences. *Doe #1*, 518 F. Supp. 3d at 1202 ("The Court ... is not willing to blindly assume that periodic mandatory visits to law-enforcement offices actually help[ ] law enforcement keep a proverbial eye on the registrant in a way that actually deters the registrant from re-offending in between visits."). And these same Defendants have recently suggested in similar litigation that they may lack evidence of SORA's countervailing benefits. *Jordan*, 2022 WL 1196980, at *18; *Reid II*, —— F. Supp. 3d at ——, 2022 WL 1050645, at *18.

Defendants point to *Smith*, in which the Supreme Court observed that "[t]he excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective." 538 U.S. at 105, 123 S.Ct. 1140. Based on this reasoning, Defendants argue that this Court may not engage in a "tailoring" inquiry on this factor. (Doc. No. 23 at 15). However, *Smith* does not say that *all* analysis of the legislature's "tailoring" is impermissible under this factor. To the contrary, some degree of means-ends analysis is inherent in *Smith*'s statement that the question is whether the means chosen are "reasonable" in light of the legislature's non-punitive end. *Smith* does say that the legislature need not have made the "best choice possible" to address the problem. 538 U.S. at 105, 123 S.Ct. 1140. But it is certainly possible to weigh the salutary and punitive effects against one another to determine whether the legislature has made *a permissible choice*, without requiring the legislature to make *the best choice possible.* Indeed, that is what *Snyder* (which is binding precedent) clearly requires. *See* 834 F.3d at 705.

Defendants' remaining arguments on this factor all suffer from a common flaw: they each note the scope, scale, or risk of sexual assault and rape offenses, but fail to point to *evidence* (as opposed to sheer intuition) that Retroactive SORA's restrictions actually prevent such offenses. For example, Defendants cite statistics about medical expenses and other costs associated with sexual assault and rape offenses throughout the United States generally and argue that the state has "an intense interest in mitigating the economic and noneconomic costs of such crimes." (Doc. No. 23 at 16). The Court does not doubt the sincerity and magnitude of the state's interest in preventing such crimes. But as Plaintiff correctly points out, these data show only the high costs of sexual crimes, "not that SORA is an effective way to prevent them." (Doc. No. 25 at 4). And, in any event, statistics regarding *nationwide* costs for all sexual assault and rape offenses are overinclusive in considering whether Retroactive SORA's restrictions are excessive in light of its asserted non-punitive purpose.

***25** Defendants further cite Department of Justice statistics that, according to Defendants, show that many SORA-protected areas, including schools, daycares, and outdoor public locations, "fall within the categories accounting for the vast majority of locations of sexual assaults in Tennessee not committed in a home or hotel." (Doc. No. 23 at 17). But again, the mere fact that a large fraction of sexual assaults occur in locations protected by Retroactive SORA

does not show—as would be required to support Defendant on this particular factor—that *Retroactive SORA actually has salutary preventative effects* on future sexual assaults in those locations (or anywhere else).

Defendants also point to the specific provision of Retroactive SORA that prohibits residence or overnight visitation at a residence in which a minor resides or is present. *See* Tenn. Code Ann. § 40-39-211(c). Defendants argue that this provision is beneficial because "[t]he risk of sexual assault is pronounced in residences." (Doc. No. 23 at 18). However, this argument once again appears to rely on sheer intuition about the provision's salutary effects, not evidence. In *Snyder*, the Sixth Circuit "cautioned courts against using intuition to make a decision regarding the rational connection" between a sex offender registry law's restrictions and its professed goals. *See Doe #1*, 518 F. Supp. 3d at 1199 (citing *Snyder*, 834 F.3d at 705). Without supporting evidence, Defendants' intuition about the efficacy of this provision—no matter how sensible—does not undermine Plaintiff's likelihood of prevailing on this factor. [39]

vi. Conclusion

All five *Mendoza-Martinez* factors favor Plaintiff. Based on the Court's analysis of the *Mendoza-Martinez* factors—and given that neither the parties nor the Court have identified additional factors relevant to the analysis—the Court concludes that Plaintiff is likely to show that Retroactive SORA is punitive on its face, and thus is likely to prevail in his ex post facto challenge.

B. Irreparable harm to Plaintiff

The second preliminary injunction factor is whether the movant (Plaintiff) would suffer irreparable injury without the injunction. When a constitutional right is threatened or impaired, "a finding of irreparable injury is mandated," *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001), or is at the very least "presumed.' " *Vitolo*, 999 F.3d at 360 (quoting *Obama for Am.*, 697 F.3d at 436). By establishing a likelihood of success on the merits of his constitutional claim, Plaintiff therefore also establishes a presumption that the irreparable injury factor favors granting a preliminary injunction. Defendants do nothing to rebut this presumption. Instead, Defendants argue that "a finding of irreparable injury is only mandated *if* Plaintiff shows a significant possibility that he will succeed on the merits of his claims," thus effectively conceding that the first and second factors rise and fall together. (Doc. No. 23 at 19).

***26** In addition, Plaintiff has presented undisputed evidence that he is presently unable to reside with his family and has spent every night since April in a hotel room on pain of arrest. (Doc. No. 12-1 at ¶ 15; Doc. No. 25-4 at ¶¶ 2–3). He is also unable to attend church or travel with his family. (Doc. No. 12-1 at ¶¶ 14, 16.) Plaintiff's inability to engage in these basic aspects of family life, based on a law he will likely be able to demonstrate is unconstitutional as retroactively applied to him, further supports the conclusion that he is irreparably harmed. *See Reid I*, 476 F. Supp. 3d at 708–09 ("The irreparable harm that Reid faces, moreover, does not end with his constitutional rights. While Reid complains of many features of the Act, he has made clear that some of the restrictions most distressing to him are those that interfere with his ability to be an active father and stepfather. Reid has two young children who will not stop aging and growing while this case works its way through litigation. Every school activity or event that he is unable to share with them is one he will never get back. This factor therefore strongly supports issuance of the preliminary injunction.").

Defendants argue that, even if the Court grants a preliminary injunction, any such injunctive relief should be limited to the specific harms Plaintiff has identified—*i.e.*, the restriction on his attendance at church and overnight residence in a house with minor children. Defendants argue that Plaintiff has not alleged any other irreparable harm. (Doc. No. 23 at 19). *See Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 599 (6th Cir. 2012) (suggesting district courts should fashion "injunctive relief tailored to the identified harm"). The Court understands Defendants to effectively argue that any preliminary injunction should be limited to the specific provisions prohibiting Plaintiff from attending his church and from spending the night at his home. *See* Tenn. Code Ann. § 40-39-211(c), (d).

However, under *Seling*, the Court determines whether Retroactive SORA is punitive on the basis of *all of its provisions.* And since the Court has determined Retroactive SORA as a whole is punitive on its face (and thus cannot be applied retroactively under the Ex Post Facto Clause), the Court also concludes that Plaintiff is irreparably harmed by

the application of *all* of Retroactive SORA. *See* *Bonnell*, 241 F.3d at 809 ("if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated"). Defendants' request that the Court hunt through the facially punitive Retroactive SORA to determine which provisions are (and which are not) irreparably harming Plaintiff is inconsistent with these principles. [40]

C. Harm to Defendants and the public interest

The final two factors—harm to others and harm to the public—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009); *Daunt*, 956 F.3d at 422. Defendants primarily direct their arguments on the third and fourth factors to the registration and publication requirements. Defendants argue that members of the public benefit from dissemination of information on the SOR because it allows the public to decide whether to live near and interact with individuals who may pose a risk of recidivism. (Doc. No. 23 at 20). Similarly, Defendants argue that law enforcement benefits from using SOR information to investigate suspected recidivists. (Doc. No. 23 at 21). But as explained above, the registration and publication requirements of SORA are not retroactive as to Plaintiff and thus do not violate the Ex Post Facto Clause as applied to him. Accordingly, these arguments by Defendants provide no reason against enjoining Retroactive SORA. [41]

***27** Defendants also argue that the Act's various 1,000-foot distance restrictions serve the public interest because they "reduce the opportunity for offenders to recidivate by limiting their contact with potential victims in the places where offenders are more likely to reoffend." (Doc. No. 23 at 21). In support of this assertion, Defendants point to the declaration of Officer Kerley, who states her belief that SORA reduces recidivism because she "believe[s] that some offenders are opportunist[ic]," and that "[w]hen an offender knows they are required to register, have periodic residential verification, and laws to abide by that are enforced it narrows the opportunity for the offender." (Doc. No. 23-2 at ¶ 7). However, the beliefs of one individual, no matter how well-intentioned or sincerely held, are not sufficient to tip this factor in Defendants' favor. *Cf.* *Snyder*, 834 F.3d at 704–05 (cautioning against relying on intuition, and instead looking to evidence from empirical studies regarding recidivism and the efficacy of sex offender registry laws).

Indeed, the factual record before the Court at this preliminary stage casts significant doubt on the notion that Plaintiff really poses a risk of recidivism. According to Plaintiff's declaration, he has been convicted of only a single criminal offense (Doc. No. 12-1 at ¶¶ 3, 18); his record, therefore, reflects an absence of recidivism thus far. As for his sole offense, committed against his 14-year-old stepchild in 2002, it undoubtedly was serious; not without reason, he served more than three years in prison for it. But Plaintiff did not violate his parole, and he underwent sex offender therapy. (*Id.* at ¶ 4). This, together with the above-referenced apparent absence of offenses in the last twenty years (other than his February 2022 arrest for failure to register under SORA that sparked this litigation), suggests a relatively low risk of recidivism. Plaintiff's record effectively counters Defendants' claim that the public will be harmed unless Plaintiff is prohibited from living or working within 1,000-feet of parks and schools. [42]

Moreover, "no cognizable harm results from stopping unconstitutional conduct, so 'it is always in the public interest to prevent violation of a party's constitutional rights.' " *Vitolo*, 999 F.3d at 360 (quoting *Deja Vu of Nashville, Inc.*, 274 F.3d at 400); *accord* *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004) ("[T]he public interest is served by preventing the violation of constitutional rights."). And although it is often stated that a state is harmed " '[a]ny time" it is "enjoined by a court from effectuating statutes enacted by representatives of its people,' " *Maryland v. King*, 567 U.S. 1301, 1303, 133 S.Ct. 1, 183 L.Ed.2d 667 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977) (Rehnquist, J., in chambers)), that principle cannot really be as broad as it seems at first blush, or else these factors might cut against preliminarily enjoining *all* state laws, including unconstitutional ones. Instead, the Court understands that "any time" actually appears to mean only when the statute at issue is *not unconstitutional.* *See* *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020) (per curiam) ("Unless the statute is unconstitutional, enjoining a 'State from conducting its elections pursuant to a statute enacted by the Legislature would seriously and irreparably harm the State.' ") (alterations omitted) (quoting *Abbott v. Perez*, —— U.S. ——, 138 S. Ct. 2305, 2324, 201 L.Ed.2d 714 (2018)); *Planned Parenthood Great Nw., Haw., Alaska, Ind., and Ky., Inc. v. Cameron*, No. 3:22-cv-198, 2022

WL 1698085, at *13 (W.D. Ky. May 26, 2022) ("a state only suffers an irreparable injury when the Court enjoins a law that does not violate the Constitution"). And so this principle does not really help the state where, as here, the statutory provisions at issue appear (at this early stage) likely to be held unconstitutional.

***28** Accordingly, the third and fourth factors support granting a preliminary injunction.

D. Balancing the preliminary injunction factors

In sum, the Court finds that Plaintiff is likely to succeed on the merits of his ex post facto challenge; that he will suffer irreparable injury without an injunction; and that issuance of the injunction would not cause substantial harm to Defendants, the public, or any specific third parties. Therefore, finding the requisite irreparable injury, and then balancing all of the factors, the Court determines that a preliminary injunction should issue.

E. Security requirement

Rule 65(c) provides that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). "Yet, 'the rule in the Sixth Circuit has long been that the district court possesses discretion over whether to require the posting of security.' " *Ever-Seal, Inc. v. Halferty*, No. 3:22-cv-00082, 2022 WL 418692, at *10 (M.D. Tenn. Feb. 10, 2022) (brackets omitted) (quoting *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995)).

Plaintiff argues that the Court should exercise its discretion not to require the posting of security "in light of the strength of Plaintiff's claim, the public interest, and the unlikelihood that Defendant[s] will incur damages or costs if enjoined." (Doc. No. 13 at 18–19). Defendants do not respond to this argument.

The Court agrees that Defendants are unlikely to incur more than minimal costs in complying with the preliminary injunction described herein. *See Reid I*, 476 F. Supp. 3d at 709 (M.D. Tenn. 2020) ("[A]ny costs to the defendants appear to be so minimal that the court concludes that no cash surety would be necessary 'to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.' ") (quoting Fed. R. Civ. P. 65(c)). Accordingly, the Court will exercise its discretion not to require Plaintiff to post security for the preliminary injunction to be entered in accordance with this opinion.

CONCLUSION

For the reasons discussed herein, Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (Doc. No. 12) will be granted in part and denied in part. The Court will grant the Motion insofar as it seeks a preliminary injunction, with the exception that the Court will not order (1) that Plaintiff's information be removed from the SOR, or (2) that Plaintiff's information not be published on the SOR. [43] The Court will deny the motion as moot insofar as it seeks a temporary restraining order.

***29** An appropriate order will be entered.

All Citations

--- F.Supp.3d ----, 2022 WL 2181800

Footnotes

1 Plaintiff has filed a Motion to Proceed Under Pseudonym and for Protective Order, along with a Memorandum in Support. (Doc. Nos. 10, 11). Defendants have filed a response (Doc. No. 28) and Plaintiff has filed a Reply (Doc. No. 34). That motion remains pending and the Court will not address it herein. Accordingly, the Court will refer to Plaintiff using the pseudonym "John Doe #11" in this opinion, pending a ruling on his request to proceed under that pseudonym. Although Plaintiff is the only plaintiff in this case, he has designated himself as "John Doe #11" in the hope that the Court would grant his Motion to Deem Cases Related, Reassign, and Consolidate (Doc. No. 8), which asks that this case be consolidated with another case pending before this

Court, *Does #1–10*, No. 21-cv-00590. Although the Court has denied that motion (Doc. No. 24), the Court will retain the current case caption for purposes of this opinion. The recent proliferation of litigation challenging SORA's constitutionality has resulted in numerous cases with similar names. *Compare, e.g.,* *Doe v. Lee*, No. 21-cv-00028, 2021 WL 1907813 (M.D. Tenn. May 12, 2021), *with* *Doe v. Lee*, No. 21-cv-010, 2022 WL 452454 (E.D. Tenn. Feb. 14, 2022). In the interest of reducing future confusion for parties citing and referring to this case, the Court finds that for now it should continue as "Doe #11," notwithstanding that there are no Does #1–10 in this case.

2 The U.S. Constitution contains two clauses commonly referred to as an "ex post facto" clause: one applicable to the States (U.S. Const. art. I, § 10, cl. 1), and one applicable to the federal government (U.S. Const. art. I, § 9, cl. 3). Because this case involves a state law (SORA), the Court's references herein are exclusively to the ex post facto clause applicable to the States, which the Court herein will call "the Ex Post Facto Clause."

3 As explained below, the Court will grant Plaintiff's Motion to the extent that it seeks a preliminary injunction prohibiting Defendants from enforcing SORA, Tenn. Code Ann. § 40-39-201 to -218, against Plaintiff. However, the Court will deny Plaintiff's Motion insofar as it seeks an order (i) requiring removal of Plaintiff's information from the sex offender registry ("SOR"), and (ii) prohibiting Defendants from publishing Plaintiff's information on the SOR. Therefore, Defendants will *not* be required to remove Plaintiff's information from the SOR, and will *not* be prohibited from publishing Plaintiff's information on the SOR pursuant to Tenn. Code Ann. § 40-39-206(d).

In light of the Court's resolution of Plaintiff's request for a preliminary injunction explained herein, Plaintiff's alternative request for a temporary restraining order seeking the same relief will be denied as moot. *See* *SEC v. Torchia*, 183 F. Supp. 3d 1291, 1324 n.40 (N.D. Ga. 2016) ("Because the Court grants the [plaintiff]'s Preliminary Injunction Motion, it denies as moot the [plaintiff]'s TRO Motion.").

The Court finds that it is appropriate in this case to grant a preliminary injunction without an evidentiary hearing. Neither side has requested an evidentiary hearing and, as explained more fully herein, this Motion turns on the pure legal question of whether the retroactive provisions of SORA are punitive on their face, not on any factual dispute. Under these circumstances, an evidentiary hearing would be unnecessary. *See* *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 552–53 (6th Cir. 2007) (holding that a preliminary injunction hearing is required only "when there are disputed factual issues, and not when the issues are primarily questions of law").

4 Sex offender registration statutes proliferated throughout the United States beginning in 1994, following Congress's passage of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (formerly codified at 42 U.S.C. § 14071, but since superseded by the Adam Walsh Child Protection and Safety Act of 2006, 34 U.S.C. § 20901 *et seq.*). The Wetterling Act conditioned "certain federal law enforcement funding on the States' adoption of sex offender registration laws and set[ ] minimum standards for state programs." *Smith v. Doe*, 538 U.S. 84, 89–90, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003); *see also* *Ward v. State*, 315 S.W.3d 461, 467–68 (Tenn. 2010). The state laws adopted in the wake of the Wetterling Act are today often referred to as "Megan's Laws," in remembrance of Megan Kanka, a 7-year-old New Jersey girl who was sexually assaulted and murdered in 1994 by a neighbor with prior convictions for sex offenses against children. "By 1996, every State, the District of Columbia, and the Federal Government had enacted some variation of Megan's Law." *Smith*, 538 U.S. at 90, 123 S.Ct. 1140.

5 Like SORMA, the Act has been revised repeatedly to impose additional restrictions and requirements and to make more information about Registrants publicly available. *See Doe #1*, 518 F. Supp. 3d at 1170 (cataloging amendments from 2005 to 2015).

6 Most (but not all) of the offenses that require registration under SORA are offenses that contain an explicitly sexual element. For example, sexual battery and sexual exploitation of a minor, among other offenses, qualify as "sexual offenses," Tenn. Code Ann. § 40-39-202(20)(A)(i), (iv), whereas rape is a "violent sexual offense," *id.* § 40-39-202(31)(B). SORA classifies false imprisonment and kidnapping as "sexual offenses" if the victim was a minor (and the defendant was not the victim's parent), even though those offenses do not contain an expressly sexual element. *Id.* § 40-39-202(20)(A)(v), (vi).

7 The distinction between a "sexual offender" and "violent sexual offender" is significant not only because of the corresponding differences in requirements and prohibitions for the two classes of Registrants, but also because generally a first-time "sexual offender" may petition the TBI to be removed from the registry after ten years, Tenn. Code Ann. § 40-39-207(a), (g)(2)(A), whereas a "violent sexual offender" must register for the remainder of his life, *id.* § 40-39-207(g)(2)(B).

8 Unless otherwise noted, all facts in this section are drawn from the two declarations Plaintiff has submitted in support of his Motion (Doc. Nos. 12-1, 25-4), and have not been disputed by Defendants (at least for purposes of this Motion).

Plaintiff has filed redacted version of both declarations not under seal (Doc. Nos. 12-1, 25-4), along with unredacted versions and motions for leave to file the unredacted declarations under seal (Doc. Nos. 14, 26). The Court herein does not address the motions to seal the unredacted declarations, and those motions remain pending. Citations in this opinion will be to the publicly available versions of Plaintiff's redacted declarations.

9 As discussed below, the only case-specific fact relevant to Plaintiff's ex post facto challenge is the date of his offense. The Court includes additional alleged facts in this section of the opinion not because they relate to the ex post facto analysis (which they do not), but instead because they (a) are relevant to factors of the preliminary injunction analysis other than likelihood of success on the merits, and/or (b) help place the parties' arguments in context.

10 Although not entirely clear from Plaintiff's declaration, the arresting officer's determination that Plaintiff may not attend his church appears to be based on Tenn. Code Ann. § 40-39-211(d)(1)(A), which prohibits a Registrant from being upon or remaining on "the premises of any building or grounds of any ... playground, recreation center or public athletic field available for use by the general public in this state when the [Registrant] has reason to believe children under eighteen (18) years of age are present."

11 The Court recognizes and appreciates Defendants' counsel's compliance with the briefing schedule ordered by the Court.

12 As noted in footnote 3 *supra*, in light of the Court's resolution of Plaintiff's request for a preliminary injunction explained herein, Plaintiff's alternative request for a temporary restraining order seeking the same relief will be denied as moot. *See SEC v. Torchia*, 183 F. Supp. 3d 1291, 1324 n.40 (N.D. Ga. 2016) ("Because the Court grants the [plaintiff's] Preliminary Injunction Motion, it denies as moot the [plaintiff's] TRO Motion."). Accordingly, the Court will only discuss the legal standard for a preliminary injunction motion in this section.

13 Although perhaps convenient shorthand, the commonly used metaphor of a successful facial challenge as acting to "take the law off the books" (or, similarly, "strike down" the law) is not technically an accurate

description of how the judicial power or court judgments of unconstitutionality actually operate. *See, e.g.,* *Arizona v. Biden*, 31 F.4th 469, 483 (6th Cir. 2022) (Sutton, C.J., concurring) ("[W]e do not remove —'erase'—from legislative codes unconstitutional provisions.... We merely refuse to enforce them in a case, thereby exercising 'the negative power to disregard an unconstitutional enactment.' ") (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923)); *see also* *Murphy v. Nat'l Collegiate Athletic Ass'n*, —— U.S. ——, 138 S. Ct. 1461, 1486, 200 L.Ed.2d 854 (2018) (Thomas, J., concurring) ("Invalidating a statute is not a 'remedy,' like an injunction, a declaration, or damages.... [C]ourts do not have the power to 'excise' or 'strike down' statutes."). When the Court herein quotes a case that uses such a description, the Court does not mean to suggest that the description is accurate.

14 Other courts agree. *See, e.g.,* *McGuire v. Strange*, 83 F. Supp. 3d 1231, 1250 n.17 (M.D. Ala. 2015) ("As-applied challenges in ex post facto cases are directly barred by *Seling.*"); *Pittman v. Strange*, No. 12-cv-00667, 2014 WL 4685536, at * 4 (S.D. Ala. Sept. 22, 2014) ("The Supreme Court has flatly rejected the concept of an 'as-applied' *ex post facto* challenge to a civil statute.") (citing *Seling*); *Doe v. Biang*, 494 F. Supp. 2d 880, 887 n.7 (N.D. Ill. 2006) (stating that *Seling* "held that a plaintiff cannot mount an as-applied ex post facto challenge"); *People v. Tucker*, 312 Mich.App. 645, 879 N.W.2d 906, 911 n.4 (2015) ("the United States Supreme Court has held that ex post facto challenges cannot be brought on an as-applied basis") (citing *Seling*).

In *Arthur v. United States*, 253 A.3d 134, 141 (D.C. 2021), the court questioned (in dictum) whether *Seling* bars all ex post facto challenges claiming that a statute is punitive as-applied. The *Arthur* court instead stated that "[a] more precise description of the holding of *Seling* is that the Supreme Court 'rejected the argument that a statute can be declared punitive "as applied" to a particular person when the highest State court has already definitively construed the statute as civil.' " *Id.* (quoting *In re Dutil*, 437 Mass. 9, 768 N.E.2d 1055, 1065 (2002)). While that may be an accurate description of *Seling*'s core case-specific holding, *Seling*'s operative rationale is less case-specific and is broader. *Seling* was fundamentally concerned with the "unworkable" nature of as-applied analysis that "would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme's validity." *Seling*, 531 U.S. at 263, 121 S.Ct. 727. That administrability concern is implicated whenever there is a series of discrete cases—each filed separately by a particular plaintiff or group of plaintiffs—asserting that the "application" of a statute is "punitive" (as there has been in Tennessee regarding SORA). The Court does not see why the presence or absence of a prior definitive construction of the statute as civil by the state's highest court is relevant to this key workability concern. Moreover, the Court in *Seling* made clear that its analysis turned on both "the prior finding by the Washington Supreme Court that the Act is civil, and [the U.S. Supreme] Court's decision in [*Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)] that a nearly identical Act was civil," 531 U.S. at 264, 121 S.Ct. 727, thus belying any notion that the state court's prior construction of the statute was necessary to *Seling*'s reasoning.

15 In a prior case challenging SORA under the Ex Post Facto Clause, the undersigned construed the plaintiffs' ex post facto claim to assert both facial and as-applied challenges, and ultimately concluded that SORA was unconstitutional to the two particular plaintiffs as applied. *Doe #1 v. Lee*, 518 F. Supp. 3d 1157 (M.D. Tenn. 2021). In that case, however, the parties seemed to assume the propriety of the plaintiffs' reliance on a range of case-specific circumstances particular to them; moreover and relatedly, none of the parties cited *Seling*

v. Young, 531 U.S. 250, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001), which, as the Court has already explained, mandates that a statute's punitive nature be determined on its face rather than as applied to a particular plaintiff. *See* Case No. 16-cv-2862 (M.D. Tenn.), Doc. Nos. 67, 74, 80, 91, 93, 104, 105.

16 The retroactive provisions of the law in question are to be considered *together* to determine whether their *cumulative* effect is punitive; the Court's task is not to parse the law's provisions separately and categorize them one-by-one as punitive or civil. This principle is implicit in the Supreme Court's phrasing of the inquiry as whether an entire "statutory scheme" or "Act" (not a "provision") is civil or punitive. *See, e.g.,* *Smith*, 538 U.S. at 92, 123 S.Ct. 1140 ("Whether *a statutory scheme* is civil or criminal 'is first of all a question of statutory construction.' ") (emphasis added) (quoting *Hendricks*, 521 U.S. at 361, 117 S.Ct. 2072). Further, in *Seling* the Court stated that a major reason for prohibiting claims that a scheme is punitive as-applied is that such an analysis would be "unworkable," in that it "would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme's validity under the ... *Ex Post Facto* Clauses." 531 U.S. at 263, 121 S.Ct. 727. If the Court were required to parse a statute to pronounce one-by-one each of a statute's provisions as punitive or civil, that would pose just the sort of administrability concerns that *Seling* attempted to avert. Finally, in practice courts have examined the punitive effects of a law's provisions in combination, not in isolation. *See, e.g.,* *Snyder*, 834 F.3d at 701–05 (examining various provisions of Michigan's SORA—including geographical residence and work restrictions, tier classifications, in-person reporting requirements, and sanctions for failure to report—to determine that "Michigan's SORA imposes punishment").

17 As noted earlier, in 2003 (even before SORA's enactment), the General Assembly amended the predecessor statute, SORMA, to prohibit a SORMA registrant from establishing a residence or accepting employment within 1,000 feet of a school, a child care facility, or the home of the SORMA registrant's victim or the victim's immediate family member; coming within 100 feet of the victim; establishing a residence or other living accommodation with a minor who was not the SORMA registrant's own child; or establishing a residence with the SORMA registrant's own minor child, if any child of the SORMA registrant had been the registrant's victim or if the registrant's parental rights had been or were being terminated. 2003 Tenn. Pub. Acts, ch. 95, § 1. This amendment, though preceding SORA, occurred after Plaintiff's 2002 offense and thus is retroactive as applied to Plaintiff.

18 To clarify, Plaintiff requested an injunction against publishing *on the SOR in particular* any information relating to Plaintiff, not an injunction against publishing *in places other than the SOR* Plaintiff's information that is found on the SOR.

19 Specifically, the 1997 amendment made public a registrant's name, date of birth, home address, race, gender, photograph, driver's license information, parole/probation office, last date of verification of information by the registrant, and the qualifying offense or offenses of which the registrant has been convicted. 1997 Tenn. Pub. Acts, ch. 461, § 2.

The Court does not consider whether, to the extent that amendments to SORMA and/or SORA since 2002 have increased the amount (*i.e.*, added to the types) of each Registrant's information required to be published on the SOR, that may create a retroactivity issue as to Plaintiff that is not implicated by the original (non-retroactive) 1997 requirement to publish a smaller set of each registrant's information. The preliminary injunction to be issued therefore neither prohibits nor definitively condones the publication of Plaintiff's information that was subjected to SORA's publication provisions only *after* Plaintiff committed his qualifying offense.

20 In directing the court to ask, as part of prong two, whether the statutory scheme is "punitive ... in *purpose*," *Smith* seems to mandate a redundancy. That is, *Smith* seems to require the court to re-ask what it already asked at prong one, *i.e.*, whether the statutory scheme was punitive as a matter of legislative *intent.* Perhaps there is a difference between a statute's being punitive as a matter of legislative intent and a statute's being punitive "in purpose," but any such distinction strikes the undersigned as dubious and in any event too nuanced to be of much analytical value. Moreover, the caselaw appears to focus mainly (if not exclusively) on the law's *effect* at this second stage. *See* *Smith*, 538 U.S. at 97, 123 S.Ct. 1140; *Snyder*, 834 F.3d at 701. And the parties here do not make any arguments based on the law's "purpose." Accordingly, the undersigned believes that if he reaches prong two, it is precisely because he has already determined that the statutory scheme is not "punitive in purpose," and that he should focus on what prong two clearly is supposed to be about anyway: whether the statutory scheme is punitive *in effect.*

21 *See* Tenn. Code Ann. § 40-39-201(b)(6) ("This policy of authorizing the release of necessary and relevant information about offenders to members of the general public is a means of assuring public protection and shall not be construed as punitive[.]"); *id.* § 40-39-201(b)(8) ("[I]n making information about certain offenders available to the public, the general assembly does not intend that the information be used to inflict retribution or additional punishment on those offenders."); *Ward*, 315 S.W.3d at 470 ("The plain language of [SORA] expresses a nonpunitive intent to protect the public.").

In *Ward*, the Tennessee Supreme Court considered whether a state trial court conducting a plea colloquy must inform the defendant that his guilty plea will require him to register under SORA. In that context, the Tennessee Supreme Court concluded that "the registration requirements imposed by the sex offender registration act [as it existed in 2010] are nonpunitive and ... they are therefore a collateral consequence of a guilty plea," such that a trial court need not inform the defendant of his obligation to register before pleading guilty. *Id.* at 469. In reaching this conclusion, the Tennessee Supreme Court relied mostly on the General Assembly's stated intent in enacting SORA. *Id.* at 469–70. Although *Ward* also purported to analyze SORA's punitive effect, *id.* at 472, it did not do so by considering the *Mendoza-Martinez* factors. Accordingly, *Ward* does not answer the question whether SORA is punitive under the second prong of the "intent-effect" test for ex post facto challenges established by U.S. Supreme Court precedent. Other district courts have similarly understood *Ward* to speak to the General Assembly's intent on the first prong, but not SORA's effects on the second prong. *See* *Jackson*, 2021 WL 4302769, at *5; *Doe v. Rausch*, 461 F. Supp. 3d at 761; *Doe v. Rausch*, 382 F. Supp. 3d at 793. Moreover, even if *Ward* had addressed SORA's punitive effect in the manner contemplated by U.S. Supreme Court precedent, it still would not settle the question of whether SORA is punitive in effect *now* following subsequent amendments to the statute. *See* *Foley v. State*, No. M2018-01963-CCA-R3-PC, 2020 WL 957660, at *9 (Tenn. Crim. App. Feb. 27, 2020) (Holloway, J., concurring) (calling for reevaluation of *Ward* in light of the fact that "the residential and work restrictions in [SORA] have become much more onerous during the ten years that have elapsed since the issuance of *Ward*").

22 The undersigned here will reiterate what he has said previously about multi-factor tests generally:

> "The undersigned has noted on multiple occasions that multi-factor (or balancing) tests, though often having considerable desirability and merit, tend to foster outcomes that are unpredictable on the front end, given such tests' subjectivity." *Memphis A. Phillip Randolph Inst. v. Hargett*, 482 F.Supp.3d 673, 696, (M.D.

Tenn. 2020) (quoting Eli J. Richardson, *Eliminating the Limitations of Limitations Law*, 29 Ariz. St. L.J. 1015, 1050 (1997) (proposing a multi-factor test to resolve civil limitations issues, while conceding that when courts "apply[ ] a multi-factor test, [it is] always an unpredictable endeavor") and Eli J. Richardson, *Taking Issue with Issue Preclusion: Reinventing Collateral Estoppel*, 65 Miss. L.J. 41, 95 (1995) (proposing multi-factor test to resolve collateral estoppel issues, while conceding that its drawback is that it "would produce unpredictable resolutions of collateral estoppel issues, in that it is so flexible and calls for very subjective judicial determinations")). This reality tends not to bode well for the prospects of a multi-factor test to resolve a question as a matter of law at the summary judgment stage.

Acosta v. Peregrino, No. 17-cv-01381, 2020 WL 5995049, at *6 (M.D. Tenn. Oct. 9, 2020). The undersigned is well aware that room for disagreement exists with respect to the proper result of the outcome of the multi-factor test to be employed here; this is especially true because, as noted elsewhere herein, the commonly recognized factors are neither exhaustive nor dispositive. But he must call it like he sees it after weighing each factor in turn, and he will do just that.

23 Tenn. Code Ann. § 40-39-207(i)(4) provides:

> Unless otherwise authorized by law, a person required to register as any form of a sexual offender in this state due to a qualifying offense from another jurisdiction which is classified as a sexual offense in this state may apply for removal from the registry pursuant to subdivision (a)(1) following the later of:
>
> (A) Ten (10) years from the date of termination of active supervision or probation, parole or any other alternative to incarceration, or after discharge from incarceration without supervision; or
>
> (B) Five (5) years after being added to the Tennessee sexual offender registry.

Defendants' position appears to be that, because Plaintiff's sentence (apparently including parole) terminated in 2007, and thus ten years from the date of termination of his parole occurred in 2017, he is eligible to apply for removal from the registry under subsection (B) five years after being added to the registry (*i.e.*, in 2027).

24 In *Doe #1*, 518 F. Supp. 3d at 1204, this Court did discuss the potential significance of lifetime registration (required for the plaintiffs in that case but not for many other Registrants) to the analysis of whether SORA is punitive in effect. However, as already noted *supra* at note 15, in that case the parties proceeded on the assumption that SORA could be punitive as applied to particular plaintiffs based on case-specific facts, and none of the parties cited *Seling* or addressed its significance. In light of *Seling*, whether a *particular* plaintiff must register for life actually is not relevant to whether SORA's effects are punitive, a question to be answered based on the face of SORA.

25 This analysis applies equally to Defendants' argument that this case is distinguishable from *Snyder* because the plaintiffs in *Snyder* were required to report in person a minimum of four times per year, whereas here Plaintiff must report in person a minimum of only once per year. (Doc. No. 23 at 12).

26 Plaintiff avers that, although present TBI counsel has classified Plaintiff's offense as a "sexual offense" rather than a "violent sexual offense," Plaintiff's arresting officer told him that the officer had "lobbied hard" for the TBI to classify Plaintiff as a "violent sexual offender." (Doc. No. 12-1 at ¶ 7.) If Plaintiff were classified as a "violent sexual offender," he would be required to register for life. *See* Tenn. Code Ann. § 40-39-207(g)(2)(B). Plaintiff "fear[s] that future TBI counsel may interpret SORA differently and re-classify [him] as a 'violent sexual offender.' " (Doc. No. 12-1 at ¶ 7). Plaintiff implies that this is a reason why the possibility that he will be able to apply for removal from the registry in five years should not affect the analysis of whether SORA is punitive. (Doc. No. 25 at 1 n.1). The Court finds this concern speculative and does not factor it into

its analysis, other than to note that, if TBI counsel can indeed move offenders between classifications, that is further reason to look at SORA as a whole—rather than individual provisions that apply (at least at the moment) retroactively to a particular plaintiff—to determine whether the Act's effects are punitive.

27 The parties do not distinguish between probation and parole. The two, however, are not identical:

> While probation and parole are similar and are often confused, they differ in several important respects. Probation is a sanction imposed by a court as punishment for a criminal offense. Probationers must adhere to a set of conditions that can severely limit their freedom. Probation is generally given in lieu of a prison sentence, although a short jail term may also be imposed as a condition of release. If the conditions of probation are breached, the offender can be sentenced to prison following a judicial revocation proceeding.
>
> Parole, on the other hand, is an administrative rather than a judicial procedure. Parole, unlike probation, begins after an offender has completed service of part of a prison term. The parole board permits the prisoner to serve the remaining part of the sentence in the community, but requires the offender to abide by a set of release conditions similar to those imposed on probationers. If a parole condition is breached, the offender can be returned to prison for the remaining part of the original prison term.

Neil P. Cohen, *Law of Probation & Parole* § 1:1 (2d ed.), Westlaw (database updated September 2021) [hereinafter Cohen, *Law of Probation & Parole*] (footnotes omitted). The parties' failure to distinguish between the two is understandable, given that the Sixth Circuit in *Snyder* also lumped probation and parole together for its punitive effects analysis. *See* 834 F.3d at 703 (finding that "SORA also resembles the punishment of parole/probation"). The Court does not perceive a relevant distinction between probation and parole for purposes of this analysis. *See* Cohen, *Law of Probation & Parole* § 1:1 (stating that probation and parole are "similar in most respects"). The Court will thus analyze probation and parole together to determine whether Retroactive SORA resembles them.

28 Plaintiff avers that SORA's reporting and supervision requirements are similar to, but more restrictive and onerous than, the reporting and supervision he personally experienced while serving his sentence on parole in Michigan. (Doc. No. 12-1 at ¶¶ 9–10, 12). Plaintiff's personal experiences on parole are not relevant to the question whether Retroactive SORA facially resembles parole, except to the extent they may inform the Court's understanding of what parole generally entails. Here, given the Sixth Circuit's analysis in *Snyder* and this Court's own analysis in *Doe #1*, the Court need not consider whether Plaintiff's personal experiences accurately describe parole as a general matter.

29 Specifically, *Shaw* noted that conditions of probation historically have typically required probationers to, among other things: accept the first offer of employment; obtain written consent from a probation officer before moving or changing jobs; financially support family members; report monthly to the probation office; avoid all "evil associations," including abstaining from drugs and alcohol; submit to searches of person and property on no more than reasonable suspicion of a probation violation or criminal activity; submit to random drug tests; permit state agents to visit their homes; perform community service; go on house arrest; and sometimes serve time in a county jail. 823 F.3d at 565 & n.14 (citing *State v. Petersen-Beard*, 304 Kan. 192, 377 P.3d 1127, 1137 (2016)).

30 The undersigned realizes that whether one thing resembles another is often in the eye of the beholder; one person may view one thing as "resembling" another, whereas another person would not. But the undersigned must call it like he sees it (based on, among other things, guidance provided by precedent), pronouncing his view as to whether Retroactive SORA resembles parole and probation.

31 The undersigned will offer a slight variation on a point he has already made in the footnote immediately above. Specifically, as he made clear decades ago, he understands that if two things are not deemed identical (or "the same"), the question of whether they are properly deemed "similar" to each other is often a subjective one because "a subtle, inscrutable continuum runs from 'different,' [to] 'similar[.]' " Eli J. Richardson, *Taking Issue with Issue Preclusion: Reinventing Collateral Estoppel*, 65 Miss. L.J. 41, 70 (1995). But once again, the Court must call it like it sees it, assessing whether Retroactive SORA is sufficiently similar to parole and probation that it can be said to resemble those punishments.

32 *But see* *Hope v. Comm'r of Ind. Dep't of Corr*, 9 F.4th 513, 532 (7th Cir. 2021) (en banc) (distinguishing *Snyder*, and concluding that Indiana's SORA is "distinct from parole" because although "plaintiffs may face criminal prosecution for failure to comply with reporting requirements," that "would be a consequence distinct from the plaintiffs' original offenses; parole and the supervisor's ability to seek revocation of it are tied to the terms of the original offense. A sex offender who violates [Indiana's] SORA is not subject to revocation—but rather a new criminal prosecution for violating state law."). This Court, of course, is bound by the Sixth Circuit's published opinion in *Snyder* and not by the contrary reasoning of *Hope.*

33 The precise city and county of Plaintiff's residence are stated in the unredacted version of his declaration (Doc. No. 15 at ¶ 2), which Plaintiff has requested leave to file under seal (Doc. No. 14). That motion remains pending and the Court does not address it herein.

34 As Defendants note, "this Court has already concluded that the maps of Davidson County [in *Doe #1*] are insufficient to support a claim that the Act is invalid on its face." (Doc. No. 23 at 8 (citing *Doe #1*, 518 F. Supp. 3d at 1188)). In this preliminary posture, the Court is hesitant to revisit that conclusion without on-point briefing from the parties. *See* *Arizona*, 31 F.4th at 483 (Sutton, C.J., concurring) ("Imperatives of speed in decisionmaking ... do not always translate into accuracy in decisionmaking.").

Some courts have focused their banishment analysis not on where the particular plaintiff lives, but rather on the most populous cities in the State. *Snyder*'s reliance on maps of Grand Rapids, Michigan, to evaluate Michigan's statute lends some support to this approach. *See* *Reid II*, —— F. Supp. 3d at ——, 2022 WL 1050645, at *17 (noting that *Snyder* relied on maps of Grand Rapids, a city with a population of about 200,000, and that "the markedly *more* populous cities of Nashville (pop. ~690,000) or Memphis (pop. ~645,000)" would presumably result in similar, if not greater, restrictions on Registrants) (footnotes omitted). As this Court explained in *Reid II*:

> Of course, there are places in Tennessee where less-dense development [than in Nashville and Memphis] presumably makes compliance easier. Again, though, that is an argument that could have prevailed in *Snyder* but did not. Michigan, like Tennessee, is a diverse state with various different types of communities, and the *Snyder* court expressly acknowledged that the Michigan regime was likely more burdensome in "densely populated areas" than elsewhere. *Snyder*, 834 F.3d at 701. That did not dissuade the Sixth Circuit from looking at the effects of the Act in those densely populated areas and concluding that they supported a finding of punitive effect.

—— F. Supp. 3d at ——, 2022 WL 1050645, at *17. This analysis appears to be consistent with the facial inquiry mandated by *Seling*, insofar as it would require the Court to determine Retroactive SORA's resemblance to banishment without reference to plaintiff-specific facts. However, the Court declines to reach

a definitive conclusion on the relevance of an analysis of Davidson County to the question of banishment without adequate briefing and in this preliminary posture.

35 This Court previously found that SORA resembles shaming, in a case brought by two plaintiffs who were designated under the Act as a "violent sexual offender" and an "offender against children," respectively. *Doe #1*, 518 F. Supp. 3d at 1189–95. Plaintiff in this case is apparently not labeled as either a "violent sexual offender" or an "offender against children." *See* Doc. No. 1 at ¶ 27 ("The TBI currently classifies Plaintiff's sex offense as a 'sexual offense' rather than a 'violent sexual offense.' "); Tenn. Code Ann. § 40-39-202(10) (defining "offender against children" as a Registrant whose victim "was a child of twelve (12) years of age or less"). Although the Court in this opinion has concluded that Retroactive SORA's punitive effect must be determined from the face of the statute, the Court declines to simply import its prior conclusion regarding shaming into this case without adequate briefing from the parties, especially since this case involves Retroactive SORA, not the entirety of SORA, and this case also does not involve the same derogatory statutory categories that were implicated in the prior case.

36 Specifically, the Governor and TBI Director conceded for purposes of summary judgment in *Jordan* and *Reid* that "[t]here is no evidence tending to show that the Act generally reduces the incidence of criminal offenses," and that "[t]here is no evidence to show any other societal benefits of the Act." *Jordan*, 2022 WL 1196980, at *10 (brackets omitted); *Reid II*, —— F. Supp. 3d at ——, 2022 WL 1050645, at *9 (brackets omitted).

37 Defendants also argue that, to carry his burden, Plaintiff must show that SORA's "nonpunitive purpose is a 'sham or mere pretext.' " (Doc. No. 23 at 14 (quoting *Smith*, 538 U.S. at 103, 123 S.Ct. 1140)). It is true that *Smith* suggests that such a showing will support a finding that the statute at issue is punitive. But it does not follow that a plaintiff *must* show that the non-punitive purpose is false or pretextual under this factor. Rather, as Plaintiff persuasively argues, the question is whether SORA's restrictions have a "rational connection" to the non-punitive interest, *Smith*, 538 U.S. at 97, 123 S.Ct. 1140, "not whether that interest is false." (Doc. No. 25 at 4 n.6). Indeed, as Defendants concede in a later filing, *Snyder* does not support Defendants' view that such a showing is mandatory (rather than merely potentially helpful) for a plaintiff. (Doc. No. 30 at 14 n.3) (arguing that *Snyder* "neglected to consider this crucial component of the *Smith* decision"). Instead, as discussed further below, *Snyder* examined whether the evidence showed that Michigan's statute "in fact accomplishes its professed goals." 834 F.3d at 704.

38 To be clear, the fact that Plaintiff "bears the burden" on this factor does not mean that he *must prevail* on it in order to obtain a preliminary injunction. This is only one of five *Mendoza-Martinez* factors—albeit a "most significant" one—which are only "non-dispositive 'guideposts' " to aid the Court in analyzing whether Retroactive SORA is punitive in effect. *Snyder*, 834 F.3d at 701. Even if this factor did not favor Plaintiff, the Court could still in theory conclude that Retroactive SORA is punitive in effect based on the remaining factors (and possibly other considerations). Moreover, at the preliminary injunction stage, the question is only whether Plaintiff is *likely* to succeed in showing that Retroactive SORA is punitive in effect. And even then, Plaintiff's likelihood of success must be weighed against the remaining preliminary injunction factors. In any event, the Court concludes herein that Plaintiff *is* likely to prevail on this factor, so in that sense he "carries his burden." But the Court makes these observations to ensure that, in its discussion over who bears the "burden" on one *Mendoza-Martinez* factor, an extended discussion of one tree does not obscure the forest.

39 Defendants have provided a declaration from Henrietta Kerley, a sex offender compliance officer with the Cumberland County Sheriff's Office. (Doc. No. 23-2). In her declaration, Officer Kerley describes widespread

community support for SORA. (*Id.* at ¶ 6 ("The community loves having the ability to check for offenders in their neighborhoods."); *id.* at ¶ 8 ("The residents of this county want to know if there are registered offenders in their neighborhood."). Defendants contend that these averments support finding that Retroactive SORA is not excessive in relation to its asserted non-punitive purpose. (Doc. No. 23 at 18). However, Officer Kerley's observations appear to be aimed at the Act's registration and publication provisions, which (as explained above) are not retroactive as applied to Plaintiff and which the Court thus will not enjoin. In any event, it is unclear what relevance community support, no matter how strong, has to the instant analysis—other than to highlight that sex offenders are a disfavored minority group potentially in need of protection from ex post facto laws. "[T]he fact that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the Ex Post Facto clause." *Snyder*, 834 F.3d at 705–06.

40 Defendants also argue that the Court's injunction should not require removal of Plaintiff's information from the SOR, because Plaintiff has not shown irreparable harm from inclusion of such information on the SOR alone, and because some courts have declined to order removal from the SOR on the basis that the statute creates a process for applying to the TBI Director for removal. (Doc. No. 23 at 19–20). As discussed above, the Court agrees that it would be inappropriate to order Plaintiff's removal from the SOR entirely—not for the reasons Defendants assert, but instead because the registration requirement is not retroactive as applied to Plaintiff.

41 The third factor requires the Court to examine whether the injunction "would cause substantial harm to the opposing party *or others.*" *Tailgate Beer, LLC v. Boulevard Brewing Co.*, No. 18-cv-00563, 2019 WL 5208186, at *3 (M.D. Tenn. Oct. 16, 2019) (citing *Bays*, 668 F.3d at 818–19). Defendants do not identify any *specific* third parties (as opposed to the public or law enforcement, generally) that they contend would be harmed by issuance of the preliminary injunction.

42 Defendants also point to the substantial costs of sexual assault and rape offenses (monetary and otherwise) as reasons why the third and fourth factors cut against preliminary injunctive relief. (Doc. No. 23 at 20). But again, the costs alone are not probative without evidence that enforcing Retroactive SORA against Plaintiff would actually *mitigate* those costs.

43 For the avoidance of doubt, the Court clarifies that its preliminary injunction will expressly permit Defendants to continue publishing Plaintiff's information on the SOR in compliance with Tenn. Code Ann. § 40-39-206(d), since that provision is not retroactive as to Plaintiff.

Although the Court's preliminary injunction will not require Defendants to remove Plaintiff's information from the SOR, the preliminary injunction *will* prohibit Defendants from using any authority conferred under SORA to require Plaintiff to update his registration information. *See* Tenn. Code Ann. § 40-39-203(a). Accordingly, if Defendants elect to retain Plaintiff's information in the SOR and to continue to publish it (as the Court's injunction will permit them to do), they do so on the understanding that they cannot use SORA to compel Plaintiff to update that information to ensure its accuracy. To the extent Defendants may have the ability (and the inclination) to update Plaintiff's registration information through means other than SORA, the propriety of Defendants' doing so is not before the Court at this time, and the Court's preliminary injunction will not prevent Defendants from doing so.

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United States District Court, W.D. Kentucky.

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, AND KENTUCKY, INC., on Behalf of Itself, Its Staff, and Its Patients, Plaintiff
and
EMW Women's Surgical Center, P.S.C., on Behalf of Itself, Its Staff, and Its Patients; Ernest W. Marshall, M.D., on Behalf of Himself and His Patients, Intervenor Plaintiffs
v.
Daniel CAMERON, in His Official Capacity as Attorney General of the Commonwealth of Kentucky; Eric Friedlander, in His Official Capacity as Secretary of Kentucky's Cabinet for Health and Family Services; Michael S. Rodman, in His Official Capacity as Excecutive Director of the Kentucky Board of Medical Licensure; and Thomas B. Wine, in His Official Capacity as Commonwealth's Attorney for the 30th Judicial Circuit of Kentucky, Defendants

Civil Action No. 3:22-cv-198-RGJ
|
Signed 05/26/2022

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MEMORANDUM OPINION & ORDER

Rebecca Grady Jennings, District Judge

***1** Defendant Attorney General Daniel Cameron ("Attorney General") moves the Court to stay its May 19, 2022, Memorandum Opinion and Preliminary Injunction [DE 65] ("Preliminary Injunction") pending appeal. [1] For the reasons below, the Attorney General's Emergency Motion for Stay Pending Appeal ("Motion") [DE 67] is **DENIED**.

I. PROCEDURAL BACKGROUND [2]

On March 29, 2022, the Kentucky Legislature passed House Bill 3, the Humanity in Healthcare Act of 2022 ("HB 3"). [DE 3 at 110]. HB 3 revises Kentucky's existing abortion regulations to create new requirements, including a new regulatory regime for abortion-inducing medication, new reporting, new informed consent requirements, new registration requirements, and new requirements for disposition of fetal remains. *Id.* HB 3 also bans abortions after 15 weeks. *Id.* §§ 27(2), 34. Penalties for violating HB 3 include a Class D felony, fines of up to $1 million, and revocation of physician and facility licenses. *Id.* § 28(6). HB 3 directs Kentucky's Cabinet for Health and Family Services ("Cabinet") to promulgate regulations, forms, and programs for compliance with the law's mandates within 60 days of the effective date. *Id.* § 13(1).

On April 8, Governor Andy Beshear vetoed HB 3. [DE 3 at 113]. On April 13, the Kentucky Legislature voted to override Governor Beshear's veto. [DE 1 at 3]. HB 3 contains an emergency clause, causing it to become effective April 13, 2022. HB 3, § 39.

The next day, on Thursday, April 14, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, and Kentucky, Inc., ("Planned Parenthood") filed its Complaint, asserting four claims [3] and seeking emergency relief. [DE 1, DE 3]. Simultaneous with its Complaint, Planned Parenthood filed a Motion for Temporary Restraining Order and Preliminary Injunction [DE 3]. This motion put forth the declaration of Rebecca Gibron ("Gibron Declaration") that absent injunctive relief, Planned Parenthood would cease providing abortion services as providers could not risk the penalties of non-compliance with HB 3, and that it had services scheduled for April 22 that would need to be cancelled as a result. [DE 3-1, Gibron Decl. at 133–34]. Also on April 14, Planned Parenthood moved the Court to reassign the case, asserting that it is "nearly identical with a related case," *EMW Women's Surgical Center, P.S.C., et al. v. Eric Friedlander, et al.*, Case No. 3:19-cv-00178-DJH-RSE ("EMW Case") already pending in this district. [DE 6 at 149].

***2** On April 15, the Court denied Planned Parenthood's motion to reassign, holding the cases were not "nearly identical" and the interests of justice did not support reassignment. [DE 12]. On that same date the Court entered an order notifying Defendants that the motion for temporary restraining order required an expeditious ruling, and thus, any response needed to be filed by noon on April 19. [DE 13].

On April 19, the Attorney General responded to Planned Parenthood's motion for temporary restraining order. [4] [DE 21]. Also on April 19, Planned Parenthood replied. [DE 22].

On April 21, the Court issued a Memorandum Opinion & Temporary Restraining Order ("TRO") restraining Defendants from enforcing HB 3 for a period not to exceed 14 days from the date of entry as required by Federal Rule of Civil Procedure ("FRCP") 65(b)(2). [5] [DE 27].

On April 25, EMW Women's Surgical Center and Dr. Ernest W. Marshall ("EMW" and together with Planned Parenthood, "Plaintiffs") moved to intervene and for clarification of the Court's TRO. [DE 28]. EMW is the only other abortion provider in Kentucky besides Planned Parenthood, but unlike Planned Parenthood, EMW does provide abortions after 15 weeks. [DE 28 at 263].

On April 26, the Court granted EMW's motion to intervene as it was made less than two weeks after this action began and the day after EMW's motion to supplement its complaint with a challenge to HB 3's 15-week ban in the EMW Case was denied. [DE 32]. The Court denied EMW's motion for clarification as moot, reiterating that HB 3 was enjoined in its entirety. *Id.*

Also on April 26, the Court ordered the preliminary injunction hearing be set for Monday, May 2 at 10:00 a.m. [DE 30]. The Court made clear in its text order that "[f]or the preliminary injunction hearing, the Court expects both sides to explain in detail and designate by section and line the provisions of House Bill 3 they believe can and cannot be complied with before the rules are promulgated and the forms are created by the Cabinet. The parties will also be required to submit proposed findings of fact and conclusions of law after the hearing." [*Id.*].

On April 28, EMW filed a Motion for Preliminary Injunction to enjoin HB 3. [DE 38].

On April 29, the Attorney General responded to Planned Parenthood's motion for temporary restraining order [DE 39] and attached a color-coded exhibit chart asserting which of HB 3's provisions the Attorney General believed were capable of compliance. [DE 39-1].

On May 1, the Attorney General filed a response to EMW's motion for preliminary injunction [DE 41] and attached the declaration of Robin Pierucci ("Pierucci Declaration") discussing whether fetuses are pain-capable at 15 weeks. [DE 41-1]. On that same day, Planned Parenthood replied in support of its motion for temporary restraining order [DE 42], attaching as an exhibit a duplicate of the Attorney General's color-coded chart with an additional column that included Planned Parenthood's response to whether compliance with each provision of HB 3 was possible [DE 42-1]. Also attached to the reply were a copy of the existing abortion reporting form [DE 42-2], a copy of the existing abortion prescription reporting form [DE 42-3], and a copy of the existing cremation authorization form [DE 42-4].

***3** On May 2, EMW replied in support of its motion for preliminary injunction. [DE 43].

The same day, the Court held a three-and-a-half-hour hearing on Plaintiffs' motions for preliminary injunctions. [DE 51].

Based on the issues raised and discussions at the hearing, the Court requested the parties to submit proposed findings of fact and conclusions of law including affidavits supporting any facts relevant to their positions. [DE 51, Hrg. Tr. at 657–58].

The Court allowed for staggered responsive pleadings so that the Attorney General could review Plaintiffs' submissions of facts and affidavits and have an opportunity to contest any facts or affidavits submitted. [*Id.* at 788–90]. On May 3, the Court entered an order setting forth what was discussed at the hearing and ordering that (1) the official transcript of the hearing be filed by noon on May 4, (2) Plaintiffs submit their briefs by Friday, May 6, (3) Defendants respond by Thursday, May 12, and (4) Plaintiffs file any reply by Monday, May 16. [DE 48].

On May 4, for good cause shown and in order to consider the impending briefing, the Court extended and modified the TRO for another 14 days, to expire May 19.[6] [DE 49]. Also that same date, at the Court's request, the Cabinet for Health and Family Services ("Cabinet") filed a status report stating the Cabinet's position on the promulgation of forms and programs required under HB 3. [DE 53].

On Friday, May 6, Plaintiffs filed their findings of fact and conclusions of law [DE 54] and three corresponding sworn declarations: the Miller Declaration [DE 55], the Marshall Declaration [DE 56], and the Lemasters Declaration [DE 57; DE 62] setting forth facts supporting their positions on compliance.

On Thursday, May 12, the Attorney General responded [DE 63], and attached a separate findings of fact and conclusions of law [DE 63-1], as well as several articles, Hospital Miscarriage Ceremonies [DE 63-2], Hospital Deceased Infants [DE 62-3], Archdiocese of Louisville Cemeteries [63-4], Calvary Cemetery, Lexington [63-5], and Paducah cemetery for unborn children set to expand [63-6]. Other than the Petrucci Declaration submitted earlier in the record, the Attorney General did not submit any declarations or affidavits.

On May 16, the Plaintiffs submitted their reply in support of their proposed findings of fact and conclusions of law. [DE 63]. Plaintiffs' reply did not contain any new facts or affidavits. *Id.*

On Thursday May 19, as the temporary restraining order was set to expire, the Court issued its Preliminary Injunction [DE 65] enjoining Defendants from enforcing or otherwise requiring compliance with the specific provisions[7] of HB 3 until the Cabinet creates a means for compliance. [DE 65 at 1289–90]. The Court also enjoined the Defendants from enforcing Sections 27, 33(2), (4), and (6), and 34 and stayed any related litigation on these sections pending the Supreme Court's decision in *Dobbs v. Jackson Women's Health*, 945 F.3d 265 (5th Cir. 2019). [*Id.*] That same day, the Attorney General filed a notice of his appeal to the United States Court of Appeals for the Sixth Circuit of the Court's Preliminary Injunction. [DE 66].

***4** On May 20, the Attorney General filed this Motion asking the Court to stay the Preliminary Injunction pending the resolution of the merits of his appeal. [DE 67].

II. STANDARD

Federal Rule of Civil Procedure 62(d) grants district courts power to stay an injunction pending appeal: "While an appeal is pending from an interlocutory order or final judgment that grants ... an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." *See also* Fed. R. App. P. 8(a)(1)(C) ("A party must ordinarily move first in the district court for ... an order suspending [or] modifying ... an injunction while an appeal is pending.").

In determining whether to issue a stay under Rule 62(d), courts consider: "(1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed; (3) the prospect that others will be harmed by the stay; and (4) the public interest in the stay." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (citing *Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006)). "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Where "the state is the moving party, its own potential harm and the public's interest merge into a single factor." *SawariMedia, LLC v. Whitmer*, 963 F.3d 595, 596 (6th Cir. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). As the moving party, the Attorney General carries "the burden of showing it is entitled to a stay." *DV Diamond Club of Flint, LLC v. SBA*, 960 F.3d 743, 746 (6th Cir. 2020).

"A motion for a stay pending appeal is generally made after the district court has considered fully the merits of the underlying action ... [a]s a result, a movant seeking a stay pending review on the merits of a district court's judgment

will have greater difficulty in demonstrating a likelihood of success on the merits."[8] *Id.* A party must, in essence, demonstrate "a likelihood of reversal." *Id.* Yet, "a movant need not always establish a high probability of success on the merits." *Id.* Rather, "[t]he strength of the likelihood of success on the merits that needs to be demonstrated is inversely proportional to the amount of irreparable harm that will be suffered if a stay does not issue." *Baker v. Adams Cty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002). But the moving party is "always required to demonstrate more than the mere 'possibility' of success on the merits." *Griepentrog*, 945 F.2d at 153. Even if, for example, the moving party establishes that irreparable harm "decidedly outweighs any potential harm to the defendant if a stay is granted, he is still required to show, at a minimum, 'serious questions going to the merits.' " *Id.* (quoting *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985)).

***5** "In evaluating the harm which will occur both if the stay is issued and if it is not, we look to three factors: (1) the substantiality of the injury alleged, (2) the likelihood of its occurrence, and (3) the adequacy of the proof provided." *Ohio ex rel. Celebrezze v. Nuclear Regul. Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987). When evaluating the four factors, "the movant must address each factor, regardless of its relative strength, providing specific facts and affidavits supporting assertions that these factors exist." *Griepentrog*, 945 F.2d at 154. The movant must provide evidence from which the Court can make specific findings of fact. *Ohio ex rel. Celebrezze*, 812 F.2d at 290. "Because the burden of meeting this standard is a heavy one, more commonly stay requests will not meet this standard and will be denied." *D.A.B.E., Inc. v. City of Toledo*, No. 3:03CV7637, 2004 WL 287415, at *2 (N.D. Ohio 2004) (quoting 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 2904 at 503–05 (1995)).

III. ANALYSIS

a. Likelihood of Success on the Merits

The Attorney General's motion levies several general complaints about the Court's Preliminary Injunction (and temporary restraining order) but fails to provide specific examples, facts, and analysis. This alone would be a sufficient basis to deny the motion, *Griepentrog*, 945 F.2d at 154; nonetheless, the Court has endeavored to address the Attorney General's conclusory arguments.

i. Fair Opportunity to Respond and Alleged "Procedural Irregularities"

First, the Attorney General argues that the Court "entered its preliminary injunction without providing Attorney General Cameron a fair opportunity to respond to Plaintiffs' claims." Moreover, the Attorney General alleges that the Court committed "procedural irregularities" that led to the wrongful issuance of a preliminary injunction; however, the Attorney General identifies no specific "irregularity." [DE 67 at 1294–95; *McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997) (quoting *Citizens Awareness Network, Inc. v. United States Nuclear Regul. Comm'n*, 59 F.3d 284, 293–94 (1st Cir. 1995)) ("It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to ... put flesh on its bones.")].

A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it. *Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) citing *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (citations omitted). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.* "A party thus is not required to prove his case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Id.* (internal citation omitted). Under FRCP 65(d), every order granting an injunction must (1) state the reasons why it issued, (2) state its terms specifically, and (3) describe in reasonable detail, and not by referring to the complaint or other document, the act or acts restrained.[9]

***6** The Court recognizes that a preliminary injunction is an extraordinary remedy and does not take this standard lightly. The Court followed correct procedures for deciding whether to grant a temporary restraining order and then preliminary

injunction under FRCP 65 and gave the Attorney General *multiple* opportunities to respond. This is demonstrated by the timeline of events set forth above from the filing of Planned Parenthood's Complaint to the Court's eventual issuance of the preliminary injunction, as well as the proof filed in the record by the parties, and the details set forth in the Court's order issuing the temporary restraining order [DE 27], order extending the temporary restraining order [DE 49], and order issuing the Preliminary Injunction [DE 65], all of which complied with the requirements of FRCP 65(d). The Court acted with speed given the constitutional rights at issue, while following the normal procedures for considering whether to grant a motion for injunctive relief. At no point was any fact, affidavit, or argument received into the record or considered by the Court without the Attorney General having an opportunity to respond in writing. Nor has the Attorney General identified any specific fact, affidavit, or argument received into the record that he did not have the opportunity to address or contest. [10]

In responding to the motion for temporary restraining order filed by Planned Parenthood, the Attorney General all but admitted that Plaintiff could not comply with the requirements of HB 3 because the requisite forms were not prepared, and programs were not in place. [DE 21 at 200 ("[i]f the Cabinet has not provided the form as required by HB 3, then there is no obligation to file it. So HB 3's provisions that require the Cabinet to provide a form do not impose an obligation on Planned Parenthood until the Cabinet does so ... [t]he same is true for the objected-to parts of HB 3 that require the Cabinet to promulgate administrative regulations ... [t]here is no requirement on any abortion provider prior to the Cabinet promulgating the regulations ...")]. Despite recognizing that HB 3 created requirements for which there was no means to comply, the Attorney General argued that Plaintiffs could still comply with various provisions. The Court disagreed with this argument [DE 27 at 256] but made clear in its order scheduling the preliminary injunction hearing that "[f]or the preliminary injunction hearing, the Court expects both sides to explain in detail and designate by section and line the provisions of House Bill 3 they believe can and cannot be complied with before the rules are promulgated and the forms are created by the Cabinet." [DE 30, April 26, 2022 Order]. The parties were thus on notice about the information requested at the hearing.

At the start of the preliminary injunction hearing, the Court advised the parties "that I will have you do any findings of fact and conclusions of law and do another submission before the PI, so it wasn't your last chance to be heard on paper, certainly." [DE 51, Hrg. Tr. at 657]. The parties stated that they had "conferred ahead of time and [ ] think that everything that should be discussed today is of a legal nature so we're not anticipating calling a witness. There is a declaration already in the record before you with respect to any facts that you may find. Of course, we're always happy to supplement." [*Id.* at 658–59]. Thus, the parties recognized the issues were largely legal, and for the next several hours the Plaintiffs walked section by section through HB 3 detailing the reasons they could or could not comply with the individual sections. [*Id.*].

***7** At the conclusion of the preliminary injunction hearing the Court discussed with the parties a post-hearing briefing schedule agreed to by the parties, mindful of the fact that the Court's temporary restraining order would expire several days later and any extension of that order could last no more than an additional 14 days. [DE 51, Hrg. Tr. at 788–90]. The Court also made clear it expected the Cabinet to file report as to its ability to comply with HB 3. [*Id.* at 791].

Counsel for the Attorney General conceded that not all the facts may be in the record as to the issues of this case, stating that:

> the 15-week ban issue potentially raises factual questions. And we submitted a declaration late last evening. We would reserve the opportunity -- or would seek the opportunity to perhaps further supplement the factual record. Perhaps that can be done in connection with whatever filing the court wants after today's hearing in terms of findings of fact and conclusions of law but certainly no witnesses today. And I think the determination of whether a separate hearing will be needed on the facts can be made after all filings are closed and the court looks at any declaration or proffers of evidence that are made.

[*Id.* at 659]. The Court gave the Attorney General time to provide such additional facts in its findings of fact and conclusions of law, and the chance to request to be heard again

in an evidentiary hearing. But the Attorney General did not submit any sworn declarations or expert testimonies with his findings of fact and conclusions of law, and he did not ask for another opportunity to he heard despite reserving that right. [DE 63]. Instead, he submitted five articles published by local newspapers and Catholic Dioceses in Kentucky. [DE 63-2; DE 63-3; DE 63-4; DE 63-5; DE 63-6]. These articles all relate to interment services provided for miscarried infants. There is no indication that any of these articles were published after the Kentucky Legislature passed HB 3, thus the articles fail to address whether these entities can provide these same services after the passage of HB 3 in accordance with its requirements.

The only declaration in the record from the Attorney General was the Pierucci Declaration [DE 41-1], which addressed the issue of fetal pain at and potentially before 15 weeks gestation. [DE 41-1 at 570–71]. While this proof goes to the issue of the state's legitimate interest in passing HB 3, the Court did not need to reach the issue of whether the interests identified by the state in passing HB 3 were reasonably related to a legitimate state interest because the Plaintiffs, [11] in particular EMW, demonstrated that the provisions of HB 3 prohibiting abortion after 15 weeks "has the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 520 (6th Cir. 2021), and thus it is likely to succeed on the merits of its claim that the 15-week ban violates EMW's patients' substantive due process rights under the Fourteenth Amendment. [DE 65 at 1287]. The Attorney General did not provide any facts or arguments regarding whether 15-weeks was previability or whether HB 3 constituted a substantial obstacle.

***8** In short, the Court did not deviate from the ordinary procedures of deciding a motion for injunctive relief and provided the Attorney General with *multiple* opportunities to respond to facts and arguments put into the record by the Plaintiffs. [12] The Attorney General is not likely to succeed on his claim that this Court denied him a fair opportunity to respond and entered the Preliminary Injunction as a result of unidentified "procedural irregularities."

ii. Alleged Burden-Shifting

Second, the Attorney General argues that the Court improperly shifted that burden from Plaintiffs to the Attorney General. [13] In determining whether to first grant a temporary restraining order, the Court carefully the considered the information and proof put forth by Planned Parenthood, including, but not limited to, the plain language of HB 3 and the Gibron Declaration that absent injunctive relief, Planned Parenthood would cease providing abortion as its providers could not risk non-compliance with HB 3, and that it had abortions scheduled for April 22 that would have to be canceled. [DE 3-1, Gibron Decl. at 133–34]. Ultimately the Court determined that Planned Parenthood met its burden, demonstrated that the language of HB 3 could not be complied with, and enjoined the entire law which maintained the status quo for the parties until more information could be garnered. [DE 27, April 21, 2022 Order]. The Court immediately scheduled a preliminary injunction hearing with the parties for the purpose of further evaluating the scope of a potential preliminary injunction.

At the preliminary injunction hearing, the Plaintiffs walked section by section through HB 3 detailing the reasons that they could or could not comply with individual sections. [DE 51]. The Attorney General participated in that hearing, advancing two main propositions that Plaintiffs have failed to carry their burden because (1) there is no obligation to comply until programs are established and forms are made by the Cabinet and thus there is no need for an injunction as to the sections specifically mentioning a form [DE 51, Hrg. Tr. at 667 ("I want to begin by making it very clear that it is the burden of the plaintiffs here to show that they cannot conform.")] and (2) all the other reporting requirements can be sent to the Cabinet in any manner the Plaintiffs think is expeditious [*id.* at 692 ("Again, to the extent the statute doesn't tell you how to do it so long as you report this information to the Cabinet.")].

***9** Based on the issues raised at the hearing on May 2, the Court asked the parties to submit findings of fact and conclusions of law. At this point, Plaintiffs had already provided two declarations. Planned Parenthood tendered a sworn declaration from Rebecca Gibron [DE 3-1] as part of its Motion for a Temporary Restraining Order and Preliminary Injunction. The Gibron Declaration described Planned Parenthood's services and current practices. [DE 3-1]. It also explained why Planned Parenthood could not comply with HB 3 until the Cabinet created forms and promulgated regulations. [*Id.*]. Plaintiffs also filed the Declaration of Michael Abate [DE 22-1] as an exhibit to their Reply in Support of a Temporary Restraining Order [DE 22]. The Abate Declaration included email correspondence between Plaintiffs and counsel in the Attorney General's

office regarding enforcement of HB 3. [DE 22-1]. Plaintiffs asked the Attorney General to agree not to enforce HB 3 until the "forms and programs contemplated by the statute are create." [*Id.* at 225]. The Attorney General ceased communication after asking Plaintiffs to clarify their request. [*Id.* at 226].

In response to the Court's request for findings of fact and conclusions of law, Plaintiffs submitted three sworn declarations. [DE 55; DE 56; DE 57; DE 62]. [14] The Miller Declaration was prepared by the Area Service Director for Planned Parenthood who has responsibility for overseeing operations at the Louisville location. [DE 55]. The Miller Declaration goes section by section through HB 3 and discusses Planned Parenthood's current practices, how current practices would have to change to comply with HB 3, and whether compliance is possible without additional guidance from the Cabinet. [*Id.*]. The Marshall Declaration was prepared by the owner and medical director of EMW. [DE 56]. The Marshall Declaration explains that EMW's internal procedures are substantially similar to Planned Parenthood's and, like Planned Parenthood, will be unable to provide abortion services without forms and guidance from the Cabinet. [*Id.*]. The Lemasters Declaration was prepared by an expert on deathcare topics under Kentucky law, including funeral and cremation issues. [DE 62 at 1119]. The Lemasters Declaration discusses current cremation and interment practices in Kentucky and explains how these practices will be altered by HB 3. [*Id.*]. It also explains why compliance with HB 3 is likely impossible for Plaintiffs and crematories or funeral directors until the Cabinet has created forms and promulgated regulations providing additional guidance. [*Id.*].

Attorney General Cameron only provided the sworn Pierucci Declaration [DE 41-1] as part of his response to EMW's Motion for a Preliminary Injunction. The Pierucci Declaration discusses fetal pain, but it does not refute Plaintiffs' inability to comply with HB 3, discuss the Cabinet's responsibilities, or discuss the issue of viability (as opposed to pain-capable) at 15 weeks. [*Id.*]. Only the final sentence of the Pierucci Declaration vaguely references HB 3, which states, "[l]egislation that notes fetal pain exists at 15 weeks gestation is consistent with updated medical and scientific literature." [*Id.* at 584].

If the Attorney General chose not to refute facts and arguments put forth by the Plaintiffs or the Court disagreed with the Attorney General's arguments, that does not mean that the Court shifted the burden to the Attorney General. For instance, on the issue of the 15-week ban, the Attorney General represented at the preliminary injunction hearing that the 15-week ban issue "potentially raises factual questions" and reserved the opportunity to supplement the factual record. But the Attorney General chose not to supplement the record after the hearing. And as stated in the Court's Preliminary Injunction [DE 65 at 1287], there is clearly established Supreme Court precedent that this Court must follow on this issue. The Court found that the 15-week ban constitutes a substantial obstacle to women seeking a pre-viability abortion. [DE 65 at 1287–88]. The Attorney General did not provide a basis for this Court to substantially distinguish that precedent and find that the 15-week ban did present a substantial obstacle to pre-viability abortion. The only declaration submitted by the Attorney General, the Petrucci Declaration [DE 41-1], does not refute whether HB 3 is a substantial obstacle, instead it addresses "government interest," an issue which the Court did not need to reach in its analysis. [*Id.*]. As a result, the Court did not shift the burden to the Attorney General.

***10** On the issue of fetal death remains, Section 22(2)(c) requires the parent or parent of fetal remains to "[r]elinquish the guardianship of the fetal remains and the responsibility for final disposition of those remains to the guardianship of the healthcare facility or abortion clinic" (HB 3 § 22(2)(c)(1)) or "[r]etain the guardianship for the fetal remains...." (*id.* § 22(2)(c)(2)). The Miller Declaration explains that there is not a form or process for Plaintiffs to take legal guardianship of pregnancy tissue. [DE 55 at 1043]. Plaintiffs also argue that not only does a form not exist but taking legal guardianship of pregnancy tissue is legally impossible. [DE 54 at 858]. The Attorney General did not respond to this argument. [DE 63]. Despite the Attorney General explicitly acknowledging the problems that arise for Plaintiffs if the parents choose to relinquish guardianship [DE 51, Hrg. Tr. 757 ("I think it's significant that the statute speaks in terms of guardianship. I think if–so the problem for plaintiffs only arises if the patient chooses option one; relinquish guardianship to the plaintiffs.")], he did not address this issue in his findings of fact and conclusions of law or any related briefing or affidavit. [DE 63; 63-1]. Again, the burden was not shifted. Plaintiffs met their burden. If the Attorney General believed, as he stated, that Plaintiffs failed to meet their burden as to disposal of fetal remains, then the Court provided him an opportunity to identify competing legal and factual arguments as to why the Plaintiffs proof and arguments were insufficient. Again the Attorney General did not avail himself of that opportunity

and thus has waived these arguments on appeal. *Johnson*, 13 F.4th at 503–04 (6th Cir. 2021) (quoting *Scottsdale Ins. Co.*, 513 F.3d at 552 and stating, "an argument not raised before the district court is waived on appeal."). The burden was not shifted.

On the issue of government-issued IDs, Section 1(2)(a)(2)(a) requires Plaintiffs to secure a copy of a patient's "government-issued identification" to satisfy the written consent requirements. HB 3 does not define "government-issued identification" or explain the procedures for obtaining an abortion when a patient does not have a "government-issued identification." The Miller Declaration explained that Plaintiffs cannot determine what counts as a "government-issued identification" under Section 1 without further guidance from the Cabinet. [DE 54 at 812–13; DE 55 at 1050]. It also noted that most minors who visit the clinics do not have a driver's license or any other form of identification issued by the state. [DE 54 at 813; DE 55 at 1050]. In response, the Attorney General argues in a single sentence that "any argument as to the ID requirement is forfeited because it was not made in the preliminary-injunction motion." [15] [DE 63 at 1152]. Although questions related to government-issued identification requirements were discussed at the May 2 hearing [DE 51, Hrg. Tr. at 676–79], in the Miller Declaration [DE 55 at 1050], and in Plaintiffs' findings of fact and conclusions of law [DE 54 at 812–13] the Attorney General failed to substantively address this issue. Again, that the Attorney General chose not to refute anything put forth on this issue does not mean that the Court failed to give the Attorney General the opportunity to respond or shifted the burden.

In short, as set forth above in the sworn declarations submitted by the parties [DE 3-1; DE 41-1; DE 55; DE 56; DE 62] and in the Court's Preliminary Injunction [DE 65], there were substantial facts and arguments in the record on which the Court found that Plaintiffs had met their burden and granted the Plaintiffs' preliminary injunction. [DE 65 at 1260–70, 79–80]. The Court went through virtually every section of HB 3 and made a finding as to whether the Plaintiffs could comply or whether the provision was constitutional based on the numerous affidavits provided. [*Id.*] If the Attorney General chose not to refute these facts and arguments, or failed to persuade the Court otherwise, that does not mean that the Court shifted the burden to the Attorney General.

iii. Other Arguments of Alleged "Legal Errors"

The Attorney General also claims that the Court "made other legal errors in issuing its preliminary injunction." [DE 67 at 1297–98]. The Attorney General argues that the Court "failed to properly apply the Sixth Circuit's good-faith standard for challenging laws regulating abortion." [DE 67 at 1297 (citing *EMW Women's Surgical Ctr., P.S.C. v. Friedlander* ("EMW II") [16]]. However, this argument is logically inconsistent. In *EMW II*, the Cabinet had created a waiver that could be obtained every 90 days that would relieve abortion clinics of certain requirements under Kentucky law. 978 F.3d 418, 440 (6th Cir. 2020). [17] The Sixth Circuit held that plaintiffs must prove (1) their facilities would close if the law would take effect and (2) they "attempted *in good faith*" to obtain waivers. *Id.*

***11** As explained in the Court's Preliminary Injunction [DE 65], Plaintiffs presented proof that they would be unable to operate their business if they were forced to immediately comply with HB 3 in its entirety [DE 3-1 at 134] and they presented affidavits that demonstrated that they attempted to contact vendors and hospitals in a good-faith attempt to comply [DE 55 at 1044]. Also, the Cabinet has represented that it may not create any forms or promulgate any regulations required by HB 3. [DE 53 at 795]. And there is no indication that the Cabinet intends to create a waiver as it did in *EMW II.* [DE 53]. It is impossible for Plaintiffs to even attempt compliance with the vast majority of provisions because compliance would require forms, programs, regulatory guidance, or a waiver from the Cabinet. For example, it is logically inconsistent to assert Plaintiffs should attempt in good faith to comply with the Kentucky Abortion-Inducing Drug Certification Program under Section 15 since it has not been created.

The Plaintiffs also submitted the Abate Declaration detailing correspondence with the Attorney General where the Attorney General refused to forgo enforcement of HB 3 until the Cabinet created a means of compliance. [DE 22-1]. As there is no waiver provision in HB 3, counsel's attempt to get the Attorney General to agree to nonenforcement is a good-faith attempt to get some type of waiver where none exists in the language of the bill or Cabinet regulations. The ample evidence presented was enough for the Court to find that Plaintiffs would be unable to operate their businesses despite a good-faith attempt to comply. [DE 65 at 1275]. The Attorney

General's argument must fail because Plaintiffs have proven that they proactively attempted in good faith to comply with HB 3, but compliance remains impossible without forms and regulatory guidance from the Cabinet.

The Attorney General also argues that "[t]he Court failed to narrowly tailor the injunction." [DE 67 at 1297]. Yet this argument is contrary to the Court's Preliminary Injunction Order. [DE 65]. Unlike *Ayotte v. Planned Parenthood of N. New England*, the Court did not enjoin the entirety of HB 3 simply because some provisions were unconstitutional as enacted. 546 U.S. 320, 325 (2006). As the Attorney General noted, the parties did not dispute that compliance was possible with several sections. [DE 63 at 1148–49]. So the Court did not enjoin provisions when the parties that compliance was possible. [DE 49 at 644–45]. In an effort to narrow the scope of its injunction, the Court painstakingly analyzed every section of HB 3. [*Id.* at 1260–70]. Based on the interplay between sections, the Court did not enjoin Section 7 because Plaintiffs could comply with it once Sections 8, 9, and 26 were enjoined. [*Id.* 65 at 1264]. To further narrow the scope of its injunction, the Court enjoined four sections only to the extent that they may be enforced against Plaintiffs. [*Id.* 65 at 1290]. Enforcement provisions were only enjoined to the extent the Court also enjoined the underlying law. [*Id.*]. By narrowly tailoring its Preliminary Injunction in these ways, the Court followed the Supreme Court's mandate to "limit the solution to the problem" by "enjoin[ing] only the unconstitutional applications of a statute." *Ayotte*, 546 U.S. at 329.

The Attorney General argues that "[t]he Court also failed to apply ordinary rules of statutory interpretation." [DE 67 at 1297]. He asserts that the Court failed to adopt an interpretation consistent with the statute's presumption of constitutionality. [*Id.*]. Yet the Court followed doctrines of statutory interpretation required by the Kentucky Supreme Court and the Sixth Circuit. [DE 65 at 1258–59]. In Kentucky, "[t]he cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." *Wade v. Poma Glass & Specialty Windows, Inc.*, 394 S.W.3d 886, 888 (Ky. 2012). Courts must presume that when the Kentucky Legislature creates a requirement in the statute that it "meant exactly what it said, and said exactly what it meant." *Univ. of Louisville v. Rothstein*, 532 S.W.3d 644, 648 (Ky. 2017). Because Section 39 included an emergency clause, the Court must read the plain language of HB 3 as requiring immediate compliance regardless of whether the Cabinet has created forms or promulgated regulatory guidance. *See id.* The Attorney General cites no law to the contrary.

***12** The Attorney General argues that this interpretation ignores HB 3's presumption of constitutionality. [DE 67 at 1297]. Yet under the Attorney General's interpretation, seemingly no law could ever be unconstitutional. Such an interpretation would require the Court to strip all operative meaning from HB 3. This would violate "the idea that 'every word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.' " *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (alteration in original) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012)); *Donovan v. FirstCredit, Inc.*, 983 F.3d 246, 257–58 (6th Cir. 2020). Although the Court began with a presumption that HB 3 was constitutional, it must not "give constitution-ally permissible meaning where none would otherwise exist." *Commonwealth v. Kash*, 967 S.W.2d 37, 44 (Ky. App. 1997) (quoting *Diemer v. Commonwealth, Transp. Cabinet, Dept. of Highways*, 786 S.W.2d 861, 863 (Ky. 1990)). Therefore, the Court's plain language interpretation was the correct and intended interpretation of HB 3.

Also, the Attorney General argues that "[t]he Court adopted a novel theory of procedural due process that is contrary to the law and would effectively prohibit States from exercising their legislative police power over even ordinary businesses." [DE 67 at 1298]. The Attorney General does not elaborate on this argument beyond the above-quoted single sentence. [*Id.*]. He does, however, cite *37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 619 (6th Cir. 1997), which involved a local option referendum that would strip local liquor retailers of their licenses to sell alcohol. Even so, the Sixth Circuit has held that "due process protects an interest in the continued operation of an existing business," which includes "a protected property interest in the continued operation of [an abortion] clinic." *Women's Med. Pro. Corp. v. Baird*, 438 F.3d 595, 611–12 (6th Cir. 2006). Without further elaboration, the Court must reject Attorney General Cameron's argument as contrary to Sixth Circuit precedent.

Finally, the Attorney General argues that "the Court purported to resolve incorrectly an important question about state budgeting laws that was not part of Plaintiffs' claims and was

not briefed by the parties." [DE 67 at 1298]. The Court did not resolve any issues of state budgeting law in its Preliminary Injunction. It did not direct the Cabinet to do anything or relieve them of any obligations under Kentucky law. This argument presumably refers to a status report filed by the Cabinet revealing that it may not create forms and promulgate regulations because HB 3 was an unfunded mandate. [DE 53 at 794]. This status report was filed on May 5, 2022. [*Id.*]. Plaintiffs' findings of fact and conclusions of law were due on May 6 and Attorney General Cameron's findings of fact and conclusions of law were due on May 12. [DE 48]. As the Court noted in the Preliminary Injunction this issue goes solely to the possible length of the preliminary injunction.

The Attorney General does not explain how this issue was resolved incorrectly, only that it was not part of Plaintiffs' claims and not briefed by the parties. [DE 67 at 1298]. Despite the short notice, Plaintiffs address the Cabinet's status report as it relates to roughly a dozen separate sections of HB 3. [DE 54 at 810 (Section 1), 818 (Sections 4 and 13), 824 (Sections 8 and 13), 828 (Sections 9, 13, and 26), 834 (Sections 13 and 26), 836 (Sections 13 and 27), 839 FN 4 (Sections 28 and 29), 854–55 (Sections 20, 21, and 22)]. In response, the Attorney General gave the Court a single footnote: "Whether any other entity—including the Cabinet—can comply with HB 3's requirements is not before the Court." [DE 63 at 1148]. "It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to ... put flesh on its bones." *McPherson*, 125 F.3d at 995–96 (quoting *Citizens Awareness Network, Inc*, 59 F.3d at 293–94). Based on the law and information presented by the Cabinet but unaddressed by the Attorney General, the Court found that its Preliminary Injunction should be in place until the Cabinet creates forms and promulgates regulations necessary for compliance. [DE 65 at 1282]. Entering a preliminary injunction for 60 days would have been futile because the Cabinet represented that it would not create a means for compliance within 60 days. The Court finds no merit in the Attorney General's assertions because he failed to make these arguments in response to Plaintiffs' findings of fact and conclusions of law and because they do not accurately reflect the Court's findings.

b. Irreparable Harm

***13** The Attorney General must prove that the Commonwealth will be irreparably harmed if the Court does not issue a stay pending appeal. *Crookston*, 841 F.3d at 398. To evaluate any harm, the Court will examine "(1) the substantiality of the injury alleged, (2) the likelihood of its occurrence, and (3) the adequacy of the proof provided." *Ohio ex rel. Celebrezze*, 812 F.2d at 290. As the movant, it is the Attorney General's burden to prove that the Commonwealth will suffer irreparable harm absent a stay. *DV Diamond Club of Flint, LLC*, 960 F.3d at 746.

The Attorney General cites *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) for the proposition that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." [DE 67 at 1296]. *Thompson*, however, is distinguishable because the very next sentence after the Attorney General's quote includes qualifying language: "So [u]nless the statute is unconstitutional, enjoining a 'State from conducting [its] elections pursuant to a statute enacted by the Legislature ... would seriously and irreparably harm [the State].' " *Id.* (quoting *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020) (alterations in original)). Therefore, a state only suffers an irreparable injury when the Court enjoins a law that does not violate the Constitution. *See id.* The Attorney General offers no affidavits or additional evidence of any irreparable harm other than this single assertion of law.

The Court has held that multiple provisions of HB 3 are unconstitutional. [DE 65 at 1272, 1288]. The case law recognizes a constitutionally protected right to a pre-viability abortion under the Fourteenth Amendment. *See* *Planned Parenthood of Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2135 (2020) ("*Casey* reaffirmed the most central principle of *Roe v. Wade*, a woman's right to terminate her pregnancy before viability."). Because Plaintiffs cannot comply with certain provisions of HB 3 and thus cannot legally perform abortion services, their patients face a substantial obstacle to exercising their rights to a pre-viability abortion. *EMW II*, 978 F.3d at 433–34. As the Court's Preliminary Injunction explains in more detail [DE 1286–88], HB 3's 15-week ban also places an undue burden on Plaintiffs' patients' right to a pre-viability abortion. *EMW II*, 978 F.3d at 433–34. Provisions of HB 3 that place an undue burden on women seeking an abortion of a nonviable fetus violate substantive due process rights under the Fourteenth Amendment. *See* *Casey*, 505 U.S. 833, 846 (1992). Because these provisions are unconstitutional, the Commonwealth can suffer no harm

from the Court's Order enjoining their enforcement against Plaintiffs. *See* *Thompson*, 976 F.3d at 619.

As explained above, the Commonwealth suffers no irreparable harm due to the Court's order enjoining unconstitutional provisions of HB 3. However, the harm suffered by Plaintiffs if the Court were to stay its Preliminary Injunction would be severe. The Court held that provisions of HB 3, as currently enacted, likely violate substantive due process. [DE 1272, 1288]. The Sixth Circuit has held that "if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Am. Civil Liberties Union of Ky. v. McCreary Cty.*, 354 F.3d 438, 445 (6th Cir. 2003), *aff'd sub nom.* *McCreary Cty., Ky. v. Am. C.L. Union of Ky.*, 545 U.S. 844 (2005) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The Court is not enjoining HB 3 in its entirety, only the provisions that are unconstitutional as enacted. [DE 65 at 1189–90]. The Attorney General has conceded that enjoining provisions that require Plaintiffs to submit forms created by the Cabinet is harmless because they impose no obligation. [DE 63 at 1150]. Compared to Plaintiffs' potential deprivation of a constitutional right, Plaintiffs will suffer far greater irreparable harm if the Court stays its Preliminary Injunction pending appeal. *See* *McCreary Cty.*, 354 F.3d at 445. Therefore, the Attorney General has failed to carry his burden to prove the Commonwealth will suffer irreparable harm absent a stay.

c. Harm to the Public

***14** Finally, the Court addresses the prospect that others will be harmed by the stay and the public interest in the stay. As noted, these two factors are merged where the state is the moving party. *SawariMedia*, 963 F.3d at 596. "When constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). And no cognizable harm results from stopping unconstitutional conduct, so "it is always in the public interest to prevent violation of a party's constitutional rights." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001) (citation omitted). For the reasons above and stated in the Court's Preliminary Injunction [DE 65], constitutional rights would be impaired absent the Court's Preliminary Injunction, thus there is no harm to the public in denying the Attorney General's motion.

IV. CONCLUSION

The standard for a stay of an injunction pending appeal requires the Court to re-engage in the analysis that it recently undertook granting the Preliminary Injunction, even though the Attorney General has not cited a change in law or facts relevant to the Court's previous analysis. This Court found that the Plaintiffs demonstrated a likelihood of success on the merits and threat of irreparable harm sufficient to entitle them to a preliminary injunction. [DE 65]. For the reasons stated above, the Attorney General fails to show that he is entitled to a stay. **IT IS ORDERED** that the Attorney General's Emergency Motion for Stay Pending Appeal [DE 67] is **DENIED**.

All Citations

Slip Copy, 2022 WL 1698085

Footnotes

1 No response was necessary because of the urgency of the Attorney General's motion and because the ruling does not prejudice Plaintiffs as the Attorney General was unable to meet his burden for a stay.

2 Based on the procedural nature of the Attorney General's arguments, a detailed procedural background is provided and the factual background of the Preliminary Injunction [DE 65] is incorporated by reference.

3 The Complaint alleges HB 3 violates: (1) procedural due process on its behalf, "[b]y taking effect immediately, without providing Plaintiff and other abortion providers time to comply, and by subjecting Plaintiff to HB 3's penalties when the Cabinet has not yet created the forms that Plaintiff is required to use, or promulgate

the required regulations," (2) substantive due process on its behalf, "[b]y requiring plaintiff to comply ... despite compliance being impossible - ... prevent[ing] Plaintiff from providing abortions and operating its business ...," (3) substantive due process on its patients' behalf in violation of patient's rights to liberty and privacy by taking "effect immediately, and making compliance impossible by requiring Plaintiff to use agency forms and processes not yet available," and (4) substantive due process on its patients' behalf in violation of Plaintiff's patients' rights to informational privacy. [DE 1 at 21–23].

4 Defendants, Eric Friedlander, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services, Michael S. Rodman, in his official capacity as Executive Director of the Kentucky Board of Medical Licensure, and Thomas B. Wine, in his official capacity as Commonwealth's Attorney for the 30th Judicial Circuit of Kentucky, did not respond in writing to any of Plaintiffs' briefs.

5 Under Federal Rule of Civil Procedure ("FRCP") 65(b)(2), a TRO can remain in effect for a time "not to exceed 14 days" unless extended for good cause for a like period. Thus, the TRO was in place until Thursday, May 4, absent a request for extension or agreement otherwise by the parties.

6 The Court modified its TRO to reflect the parties' agreement regarding provisions of HB 3 for which compliance was possible. [DE 42-1].

7 a. Sections 1(2) and (9)–(11), 4(2)–(5), 6(1), 8, 9, 15, 16(2)–(3), 17, 20(2)–(3), 21(3)–(4), 22, 23(15), 25, 26, 29(1)–(4);

b. Sections 13, 16(1), 18(1), 19 only to the extent they may be enforced against Plaintiffs; and

c. Sections 2(27), 3(12) and (39), 4(8), 11, 18(2), 28(6), 29(5)–(6), 31, 35 only to the extent the Court also temporarily restrains the underlying law.

8 Notably, this case is only at the preliminary injunction phase and not after the Court has "fully considered the merits of the underlying action."

9 The Court notes that it did not consolidate the preliminary injunction hearing with the trial on the merits under FRCP 65(a)(2).

10 Sixth Circuit precedent is clear that "an argument not raised before the district court is waived on appeal." *Johnson v. Ford Motor Co.*, 13 F.4th 493, 503–04 (6th Cir. 2021)(quoting *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008)); *Frazier v. Jenkins*, 770 F.3d 485, 497 (6th Cir. 2014) ("Generally, we will not address arguments raised for the first time on appeal."). To the extent this Motion is being used to raise new issues not before the Court in any of the prior extensive briefings or reconsider the Courts ruling, those arguments are also waived on appeal. *Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 692 (6th Cir. 2012); ("[a]rguments raised for the first time in a motion for reconsideration are untimely and forfeited on appeal," because a "motion for reconsideration may not be used to raise issues that could have been raised in the previous motion." (internal quotation marks and citation omitted)); *Morgan v. Fed. Bureau of Alcohol, Tobacco & Firearms*, 509 F.3d 273, 277 (6th Cir. 2007).

11 Indeed, the standard is highly deferential in determining whether a state's interest in passing abortion legislation is reasonably related to a legitimate state interest. *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 7 F.4th 478, 483 (6th Cir. 2021).

12 The Attorney General also had an opportunity to respond to the Notice filed by the Cabinet, but chose not to, arguing that the Cabinet's filing was not "at issue" in the case and declining to address it.

13 The Attorney General confuses its argument that the Court shifted the burden from the Plaintiff and denied the Attorney General a fair opportunity to respond. The Plaintiffs put facts and arguments into the record. The Court found Plaintiffs' affidavits and arguments sufficient to meet their burden from a factual and legal standpoint. While the Court provided the Attorney General with several opportunities to respond to those facts and arguments, the Attorney General did not challenge any of the facts asserted or provide any contradictory facts or affidavits. The Court then granted injunctive relief. [DE 65]. Because there were instances in which the Attorney General did not respond or persuasively refute facts and arguments of the Plaintiffs does not mean that the Court shifted the burden.

14 Plaintiffs inadvertently listed the incorrect case number on DE 57 and refiled the same declaration with a corrected case number as DE 62. To avoid confusion, the Court will only cite DE 62.

15 These arguments were not forfeited as a matter of law [DE 65 at 1257–58].

16 This was case referenced as "*EMW II*" in the Court's Preliminary Injunction [DE 65 at 1271–72] and will be referenced as "*EMW II*" in this opinion for consistency.

17 *EMW II* involved KRS § 216B.0435, which requires abortion providers to have a written transfer agreement with a licensed acute-care hospital. *Id.* at 423. The Cabinet promulgated regulations implementing compliance with that statute, and those regulations authorized a 90-day waiver of the written agreement requirement. *Id.* at 424. The ability to obtain a waiver depended in part upon "whether the facility has made 'a good faith effort to obtain a transfer or transport agreement.' " *Id.* citing 902 KAR 20:360 § 10(5)(b)(1)–(3). The statute and regulations at issue in *EMW II*, including the 90-day waiver, are not at issue in the present case and HB 3 does not provide an ability to seek a waiver.

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Only the Westlaw citation is currently available.
United States District Court, E.D.
Michigan, Southern Division.

Christopher GRAVELINE, et al., Plaintiffs,
v.
Ruth JOHNSON, et al., Defendants.

Case No. 18-12354
|
Signed 08/30/2018

Attorneys and Law Firms

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Denise C. Barton, Heather S. Meingast, MI Department of Attorney General, Lansing, MI, for Defendants.

ORDER DENYING DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING EMERGENCY APPEAL [ECF No. 14]

Victoria A. Roberts, United States District Judge

I. INTRODUCTION

***1** In this ballot access case, Christopher Graveline and three of his supporters ("Plaintiffs") challenge three Michigan statutes which they say operate in combination to deprive them of substantial associational and equal protection rights under the First and Fourteenth Amendments to the United States Constitution.

On August 27, 2018, the Court entered an opinion and order granting Plaintiffs' motion for preliminary injunction and directing Defendants—Michigan Secretary of State Ruth Johnson and Director of the Michigan Bureau of Elections Sally Williams ("Director Williams"; collectively, "the State")—to review Graveline's qualifying petition and place him on the November 6, 2018 general election ballot if his petition contained 5,000 valid signatures.

In addition to the fact that Plaintiffs showed that the challenged statutes severely burden their constitutional rights, the Court granted Plaintiffs' motion in large part because the State failed to address highly relevant issues, including: (1) the combined effect of the challenged statutes; (2) the State's precise interests; (3) the extent to which those interests make it necessary to burden Plaintiffs' rights; and (4) the historical evidence of independent candidates' lack of access to the ballot. Now the State moves for an emergency stay of the injunction—relying almost entirely on new arguments and evidence not previously presented.

The State's emergency motion for stay pending emergency appeal is **DENIED**.

II. BACKGROUND

Plaintiffs filed this case on Friday, July 27, 2018. Aware of the time sensitive nature of relief sought, the Court emailed Plaintiffs' counsel on July 30, 2018 to arrange a phone conference for that afternoon with counsel for the State. Counsel for the State was not available until August 1.

On August 1, 2018, the Court held a phone conference. During the call, Plaintiffs informed the Court that they were planning to file a motion for preliminary injunction. In determining the briefing schedule, the Court asked what was the last possible day on which the motion could be decided so that the State would still have sufficient time to place Graveline on the ballot. Counsel for the State replied that September 7, 2018 was the date by which the motion and any appeal would need to be decided to allow sufficient time.

Based on those discussions, and the parties' requests for additional time for briefing, the Court set the briefing schedule on Plaintiffs' motion for preliminary injunction. On August 22, 2018, the Court held a hearing.

On August 27, 2018 the Court entered an opinion granting the motion and ordering that: (1) Graveline must immediately present his qualifying petition to the Bureau of Elections; (2) the State must accept Graveline's filing and determine the validity of the signatures in time to place Graveline on the ballot if he has sufficient valid signatures; and (3) if Graveline has at least 5,000 valid signatures, and at least 100 valid signatures from registered voters in each of at least half of the 14 congressional districts of the state, the State must place him on the November 6, 2018 ballot.

***2** Graveline filed his petition with the Bureau of Elections on August 28, 2018 at approximately 11:00 a.m.

On August 29, 2018, the State filed a notice of appeal and the underlying emergency motion for stay pending emergency appeal. Plaintiffs responded to the motion on August 30.

III. DISCUSSION

In deciding whether to issue a stay pending an appeal under Rule 62(c), the Court considers the following four factors:

> '(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.'

SEIU Local 1 v. Husted, 698 F.3d 341, 343 (6th Cir. 2012) (per curiam) (citation omitted). The factors are "interrelated considerations that must be balanced together." *Id.* Because the Court considered these factors when it granted the preliminary injunction, the State must essentially show a likelihood of reversal. *George S. Hofmeister Family Trust v. Trans Indus. of Indiana, Inc.*, No. 06-13984, 2007 WL 128932, at *1 (E.D. Mich. Jan. 12, 2007).

A. The Court Has Limited Jurisdiction Since the State Filed a Notice of Appeal

Because the State filed a notice of appeal, the Court must address the limit of its jurisdiction before considering the merits of the State's motion. *See* *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance —it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.").

"Generally, a federal district court is deprived of jurisdiction over an order once a notice of appeal of that order is filed." *George S. Hofmeister Family Trust*, 2007 WL 128932, at *1 (citing *Griggs*, 459 U.S. at 58 (holding that "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously")). While some exceptions exist, *see Newton v. Consol. Gas Co. of New York*, 258 U.S. 165, 177 (1922) ("after appeal the trial court may, if the purposes of Justice require, preserve the status quo until decision by the appellate court"), the Court "may not finally adjudicate substantial rights directly involved in the appeal." *Id.*

Rule 62(c) provides that, "[w]hile an appeal is pending from an interlocutory order ... that grants ... an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c). Courts interpret Rule 62(c) narrowly, "but in narrowing degrees." *George S. Hofmeister Family Trust*, 2007 WL 128932, at *2. Two interpretations prevail:

> The first interprets the rule to mean that the district court's authority to suspend or modify an injunction pending appeal is limited to modifications that preserve the status quo between the parties already before the circuit court by virtue of the notice of appeal. At least three circuits have applied this rule. *Coastal Corp. v. Texas E. Corp.*, 869 F.2d 817, 820 (5th Cir. 1989); *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1392 n. 1 (9th Cir. 1984); *Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623, 625 (2d Cir. 1962).
>
> ***3** Other circuits have gone beyond the status quo rule to allow, for example, substantive modification imposing more requirements in an injunction order pending appeal when the district court's action 'preserve[s] the integrity of the proceeding in the court of appeals.' *Ortho Pharm. Corp. v. Amgen, Inc.*, 887 F.2d 460, 464 (3rd Cir. 1989); *see also* *Bd. Of Educ. of St. Louis v. State of Missouri*, 936 F.2d 993, 996 ([8]th Cir. 1991). *Ortho* did state that Rule 62(c) does not grant district court 'open-ended' authority to reconsider a preliminary injunction order. 887 F.2d at 464.
>
> Citing each of the above five case[s], the Sixth Circuit has held that it 'need not weigh in on this controversy....' *Basicomputer Corp. v. Scott*, 973 F.2d 507, 513 (6th Cir. 1992). *Basicomputer* involved an action to enforce noncompetition covenants and confidentiality agreements in employment contracts. *Id.* at 508. The district court modified its preliminary injunction order after it was appealed by shortening the time period when two parties could not compete. *Id.* at 513. Acknowledging that this modification altered the status quo, the Sixth Circuit avoided choosing between the two interpretations of Rule 62(c), holding that it would in any event vacate the district

court's injunction because 'it is based on an erroneous view of Ohio law.' *Id.*

George S. Hofmeister Family Trust, 2007 WL 128932, at *2 (footnote omitted and paragraph break added).

Based on the foregoing, the Court finds that its jurisdiction is limited; it may only act to: (1) preserve the status quo between the parties; or (2) preserve the integrity of the proceedings before the court of appeals. It is important to note that the "relevant status quo" is "the new status quo between the parties that the court's grant of the injunction creates." *Id.*, at *2 n. 1.

The State asks the Court to stay the injunction. However, a stay would go well beyond preserving the status quo or preserving the integrity of the proceedings in the court of appeals. For this reason alone, the State's motion is denied. *See id.* ("The relief Defendants seek is total reconsideration, which bears no resemblance to preserving the status quo or the more forgiving rule of preserving the integrity of the case for appellate proceedings. Accordingly, and for the reasons stated below, the court is not persuaded that Defendants' motion should be granted.").

Moreover, as discussed below, the Court finds that a stay is not warranted after weighing the four factors set forth above.

B. The State's Motion is Based on New Arguments and Evidence Not Previously Submitted, Which the Court Cannot Consider

In weighing the four factors in consideration of a motion to stay, the Court is not permitted to examine new evidence. *See George S. Hofmeister Family Trust*, 2007 WL 128932, at *3 ("The Sixth Circuit will simply not hear any issues that Defendants failed to raise, and preserve for appeal, when this court considered Plaintiff's motion for a preliminary injunction.") (citing *United States v. $100,375 in U.S. Currency*, 70 F.3d 438, 441 (6th Cir. 1995)). *See also United States v. Power Eng'g Co.*, 10 F. Supp. 2d 1165, 1170 (D. Colo. 1998) (" 'Once the appeal is taken, ... jurisdiction passes to the appellate court. Thereafter the appellant is not usually entitled as of right to present new evidence or argument to the trial court.' ") (quoting *Ideal Toy Corp.*, 302 F.2d at 625).

C. The State's New Claims of Irreparable Harm and Damage to the Public Ring Hollow

***4** The State's motion for stay is based primarily on irreparable harm and damage to the public. It argues generally that the September 7 deadline for certifying the ballot will not allow the State time to review Graveline's ballot, and that several other deadlines are related to the September 7 date.

The State also says that, "[a]s Defendants understand the Court's order," it requires the State to depart from its ordinary review procedures to conduct a more burdensome review of the signatures accompanying Graveline's petition. On this basis, the State says it will not be able to review Graveline's petition in time for the September 7 deadline for certifying the ballot.

The State says that this will cause irreparable harm and damage to the public because: (1) the citizens of Michigan have an interest in seeing their laws enforced; and (2) any delay after the September 7 deadline intrudes into the two-week period for final ballot preparation and jeopardizes the State's ability to comply with statutory requirements regarding preparation of absentee ballots.

First, nothing in the Court's order suggests that the State should abandon its ordinary procedure for examining nominating petitions. The Court merely reduced the signature requirement for Graveline from 30,000 to 5,000.

Furthermore, the State raised none of these issues in response to Plaintiffs' motion for preliminary injunction or at the hearing. The State informed the Court at the outset of this case —during the August 1 phone conference—that September 7, 2018 was the "drop-dead" date by which it needed a decision. During the hearing, counsel for the State confirmed this date and questioned what the lower number of signatures may be. [*See* Hearing Transcript, p. 45]. However, the State never raised or even hinted that it would have an issue canvassing the signatures. Indeed, when Plaintiffs' counsel stated that the relief should be to place Graveline on the ballot outright, the State's counsel balked at that idea and stated, "In terms of automatic placement on the ballot, essentially that would mean that whatever signatures [Graveline] has gathered would not be canvassed ... which in all candor, I have [not] seen ... happen." [Hearing Transcript, p. 46].

Considering the State's previous representations that it would be able to arrange for Graveline to be placed on the ballot if the motion was decided by September 7, and the State's failure to raise any concern about reviewing Graveline's petition until now, "[the State's] new claims of irreparable harm,

which were plainly foreseeable, ring hollow, self-serving and exaggerated." *See George S. Hofmeister Family Trust*, 2007 WL 128932, at *3 (emphasis added). The Court abided by that date and did not order the State to do anything other than what it would normally do. Its argument of irreparable harm fails.

D. The State Does Not Demonstrate that it is Likely to Prevail on the Merits of Its Appeal

In arguing that it will likely prevail on the merits of its appeal, the State similarly raises new arguments and relies on evidence not previously presented. The State argues for the first time that the challenged statutes—in combination—are not unconstitutional. Much of the evidence the State relies upon (e.g., deadlines for reviewing petitions and preparing ballots) was never presented in response to Plaintiffs' motion for preliminary injunction. As already stated, however, the Court cannot consider this new argument in evaluating the merits of the State's motion for stay. *See George S. Hofmeister Family Trust*, 2007 WL 128932, at *3; *Power Eng'g Co.*, 10 F. Supp. 2d at 1170.

***5** The State also argues that each of the challenged statutes is constitutional. But the Court never found any statute unconstitutional standing alone.

Even if the Court considered new arguments and evidence, the State falls far short of showing a likelihood of prevailing on the merits of its appeal. Of particular note, although the State summarily states that the statutes, alone or in combination, are constitutional, it never *actually* addresses the combined effect of the challenged statutes. Additionally, the State does not address the historical evidence demonstrating independent candidates' lack of access to the ballot for statewide office. Nor does the State show that the statutes are narrowly tailored.

Finally, the State argues that the Court's selection of 5,000 signatures as the threshold requirement for Graveline's qualifying petition is arbitrary and ignores the facts of this case and Michigan law. This argument lacks support.

The selection of 5,000 signatures was not arbitrary. Plaintiffs presented unrebutted evidence from an expert that 5,000 signatures is enough to satisfy the State's interests to preserve the integrity of the election process, regulate the number of people on the ballot, and ensure that candidates have a substantial modicum of support. As discussed during the hearing and set forth in the opinion, other courts have reduced the signature requirement when presented with ballot access challenges.

After finding that Plaintiffs demonstrated a likelihood of success on the merits, the Court had to fashion a remedy specific to Plaintiffs. Ordering the State to place Graveline on the ballot outright would ignore the State's interests of ensuring that candidates have a substantial modicum of support before gaining ballot access. Selecting any other signature requirement would be arbitrary. Thus, the Court followed established precedent and based its signature number on the only record evidence—i.e., the declaration of Richard Winger submitted by Plaintiffs.

IV. CONCLUSION

Based on the foregoing, the Court finds that the State fails to sustain its burden to show that it is entitled to a stay pending an appeal under Rule 62(c).

"In First Amendment cases, 'the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits [since] the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the state action.' " *Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012) (citations omitted); *see also* *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("When a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor."). Where, as here, Plaintiffs show a strong likelihood of success on the merits of their First Amendment claim—warranting a preliminary injunction—and the State fails to show that it is likely to succeed on appeal in its motion for stay, the remaining three factors are significantly impacted.

"With regard to the factor of irreparable injury, for example, it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.' " *Connection Distrib. Co.*, 154 F.3d at 288 (citation omitted). Moreover, "the determination of where the public interest lies also is dependent on a determination of the likelihood of success on the merits of the First Amendment challenge because 'it is always in the public interest to prevent the violation of a party's constitutional rights.' " *Id.* (citation omitted). Relatedly, although the State and Michigan residents have an interest in seeing the state law enforced, that is only so for constitutional laws. *See id.*

***6** Because Plaintiffs show a strong likelihood of success on the merits of their claim that the challenged statutes are unconstitutional as applied to them, the public interest and the State's interest in having those laws enforced are less weighty. *See id.*

The State's emergency motion for stay pending emergency appeal is **DENIED**.

IT IS ORDERED.

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United States District Court, W.D.
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Bret A. LEWIS, et. al., Plaintiffs/Counter–Defendants,
v.
UNITED JOINT VENTURE,
Defendant/Counter–Plaintiff.

No. 1:07–CV–639.
|
June 10, 2009.

Attorneys and Law Firms

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Elizabeth L. Sokol, Law Offices of Elizabeth L. Sokol PLLC, Royal Oak, MI, for Defendant/Counter–Plaintiff.

OPINION AND ORDER

ROBERT J. JONKER, District Judge.

***1** This matter is before the Court on United Joint Venture's motion to stay execution of judgment pending resolution of its motion for remittitur or new trial (docket # 107). Plaintiffs do not oppose the stay, but have requested that United Joint Venture ("UJV") be required to post a bond approximately equal to the current net value of the judgement rendered against UJV in this case. (Response to Motion for Stay, docket # 109.) UJV argues it should not be required to post any bond, because it does not have the finances to do so. (Affidavit in Support of Stay, docket # 115.)

Under FED. R. CIV. P. 62(b), the Court has the authority to stay execution of judgment, "[o]n appropriate terms for the opposing party's security." What constitutes "appropriate terms" is a matter left to the trial court's discretion, but normally the party seeking a stay is required to post a bond sufficient to protect fully the prevailing party's interest in the judgement. *See In re Apollo Group Inc. Sec. Litig.,* 2008 WL 410625, at *1 (D.Ariz.2008); *Cf. Arban v. West Publ'g Corp.,* 345 F.3d 390, 409 (6th Cir.2003) (analyzing the supersedeas bond requirement of FED. R. CIV. P. 62(d)). The trial court may forego the bond requirement under certain circumstances, such as, for example, "where the defendant's ability to pay the judgment is so plain that the cost of the bond would be a waste of money." *Arban,* 345 F.3d at 409 (quoting *Olympia Equip. Leasing Co. v. W. Union Tel. Co.,* 786 F.2d 794, 796 (7th Cir.1986)). However, there is a presumption in favor of requiring a bond, and the party seeking an unsecured stay bears the burden of showing why a bond should not be required under Rule 62(b). *See Apollo Group,* 2008 WL 410625, at *1; *see also Fed. Prescription Srv., Inc. v. Am. Pharm. Ass'n,* 636 F.2d 755, 760 (D.C.Cir.1980) (noting that, under Rule 62(d), "a full supersedeas bond should be the requirement in normal circumstances").

The net value of the judgment against UJV in this case is $786,109.28, plus costs and interest as allowed by law. [1] (*See* Judgment, docket # 105.) UJV argues it should not be required to post any security because it does not have enough liquid assets to obtain a bond for that amount. (*See* Affidavit in Support of Stay, docket # 115.) UJV relies on dicta from *International Wood Processors v. Power Dry, Inc.,* 102 F.R.D. 212, 214 (D.S.C.1984), for the proposition that a party seeking a stay is not required to post a security if doing so would be "impossible or impractical." But the *International Wood* Court ultimately ordered the defendant to post a bond equal to the full value of the damages award plus interest. *Id.* at 216 n. 2. UJV fails to cite a single case where a court allowed an unsecured stay because the judgment debtor had difficulty posting a bond.

More importantly, UJV's argument contradicts the very purpose of FED. R. CIV. P. 62(b). The rule is meant to protect the prevailing party's interest in the judgment while preserving the status quo pending disposition of post trial motions. *Slip 'N Slide Records, Inc. v. TVT Records, LLC,* 2007 WL 1098751, at *2 (S.D.Fla.2007); *Cf. Poplar Grove Planting & Refining Co., Inc. v. Bache Halsey Stuart, Inc.,* 600 F.2d 1189, 1191 (5th Cir.1979) (analyzing the purpose of a Rule 62(d) supersedeas bond). UJV's purported inability to post a bond does not in any conceivable way show that Plaintiff's interest in the full value of the judgment is secure. In fact, it shows just the opposite. UJV's alleged

illiquidity[2] strengthens, not weakens, the need for an appropriate bond. *See Slip 'N Slide,* 2007 WL 1098751, at *2 ("Thus, if a Court finds that the defendant's ability to satisfy its obligations, now or in the future, is uncertain then it is not appropriate to stay execution of a judgment.").

***2** The same rationale would—and potentially could—apply to Plaintiffs if, after resolution of the parties' post-trial motions, the net value of the judgment in this case favors UJV. To hold otherwise would contradict the plain language of Rule 62(b) and frustrate the purpose underlying the rule. *See Apollo Group,* 2008 WL 410625, at *1 (noting that an unsecured stay should be granted only "in unusual circumstances," where doing so "will not unduly endanger the judgment creditor's interest in ultimate recovery" (quoting *Federal Prescription Services,* 636 F.2d at 760–61)); *International Wood,* 102 F.R.D. at 214 ("Rule 62, taken in its entirety, indicates a policy against any unsecured stay of execution after the expiration of the time for filing a motion for a new trial."). Of course, the parties are free to structure their own agreement on appropriate security, no matter who the net judgment ultimately favors.

At this time, the net judgment favors Plaintiffs. **ACCORDINGLY, IT IS ORDERED** that United Joint Venture shall have 20 days from the date of this Opinion and Order to post a bond or other adequate security[3] in the amount of $786,109.28—that total corresponding to the net value of the judgment rendered against United Joint Venture in this case. If United Joint Venture fails to post such security by that time, and if the net judgment continues to favor Plaintiffs at that time, the Court will lift the temporary stay currently in effect.

All Citations

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Footnotes

1 Plaintiff also has moved for an award of attorney fees in the amount of $218,674.00 (docket # 108), but the Court has not yet ruled on that motion.

2 The balance sheet is difficult to analyze in the abstract. The most significant dollar items have footnotes, which is typical but the footnotes are not included with the exhibit. These footnotes undoubtedly detail material information about the listed assets and obligations, including without limitation, the terms of payment or receipt, and whether affiliated entities are involved with the entries. From the exhibit in its current form, it is not possible to conclude by a preponderance much about UJV's ability to post security.

3 Commercial parties often arrange and agree to letters of credit, for example, in lieu of a bond because the market for supersedeas bonds is sometimes quite limited. The form of security is less important than the substantive protection of the secured party.

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