No. 20-50581

In the United States Court of Appeals for the Fifth Circuit

Jack Darrell Hearn; Donnie Lee Miller; James Warwick Jones,
Plaintiffs-Appellants,

v.

Steven McCraw, in his Official Capacity as Director of the Texas Department of Public Safety; Sheila Vasquez, in her Official Capacity as Manager of the Texas Department of Public Safety – Sex Offender Registration Bureau,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

BRIEF FOR DEFENDANTS-APPELLEES

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Certificate of Interested Persons

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Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellees, as governmental parties, need not furnish a certificate of interested persons.

/s/ Lanora C. Pettit
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Statement Regarding Oral Argument

Defendants-Appellees respectfully suggest that oral argument is unnecessary in this case. Multiple procedural faults prevent federal courts from ordering the relief Plaintiffs seek—namely, a judicial exception from Texas's mandatory sex-offender-registration laws. But even if Plaintiffs could overcome these hurdles, the Supreme Court held nearly two decades ago that a State may apply its registration laws retroactively to those who pleaded guilty (or *nolo contendere*) before the laws were enacted. *Smith v. Doe*, 538 U.S. 84, 105-06 (2003); *c.f. United States v. Kebodeaux*, 570 U.S. 387, 395-96 (2013) (applying same to the federal government). Since then, this Court has repeatedly rejected efforts to plead around this clear rule in both published, *e.g.*, *Does 1-7 v. Abbott*, 945 F.3d 307, 313 (5th Cir. 2019) (per curiam), and unpublished decisions, *e.g.*, *King v. McCraw*, 559 F. App'x 278, 292 & n.2 (5th Cir. 2014) (per curiam). This case should meet the same fate. Though lower courts and litigants may benefit from binding precedent addressing the specific issues raised in Plaintiffs' brief, this Court does not need argument to provide such guidance.

If the Court nonetheless concludes that argument would be helpful in its decisional process, Defendants-Appellees request to participate.

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Introduction

In the early 1990s, Plaintiffs admitted to having committed sexual assault, a crime carrying a substantial prison sentence under Texas law. Plaintiffs were able to avoid that sentence by entering into deferred-adjudication agreements, requiring each to serve a period of supervised release of between five and ten years. In 1997, the Texas Legislature exercised its power to protect the public by amending its sex-offender-registration laws to require individuals in Plaintiffs' position—indeed all individuals with a conviction or deferred adjudication for sexual assault—to register for the remainder of their lives. Two decades later, Plaintiffs ask the federal courts to create an exception to this rule for anyone who pleaded guilty under a plea agreement before 1997. The Court should decline that invitation, which would upend Texas's sex-offender-registration system, for both procedural and substantive reasons.

Procedurally, Plaintiffs have sought relief in the wrong court, using the wrong claim, at the wrong time.[1] Plaintiffs assert that the State's retroactive lifetime registration requirement violates the terms of their plea agreements and, by extension, the principles of fairness discussed in *Santobello v. New York*, 404 U.S. 257 (1971). Prevailing on such a claim would necessarily imply the invalidity of Plaintiffs' convictions. Such relief may be sought only by means of a petition for habeas corpus unless and until Plaintiffs have satisfied the requirements in *Heck v. Humphrey*, 512

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[1] As local officials both entered the relevant plea bargain and actually provide the data for the registry, Plaintiffs have also sued the wrong defendants.

U.S. 477 (1994). Moreover, the claim is time-barred because any so-called breach of Plaintiffs' plea agreements occurred in 1997—well outside the two-year statute of limitations.

Substantively, Plaintiffs' claims are without merit. Plaintiffs rely entirely on a substantive-due-process right that does not exist. Moreover, Plaintiffs never proved that prosecutors *made* any express promise about their duty to register—let alone that prosecutors broke such a promise. Plaintiffs allege only that the background regulatory regime changed. Such a change, however, does not violate substantive or procedural due process. That is the end of the matter. Contrary to Plaintiffs' repeated insistence, the Supreme Court has never held that every plea bargain incorporates an implicit but enforceable promise that underlying regulatory rules will not change. And this Court should not do so here.

Statement of Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1291. Plaintiffs brought suit under 42 U.S.C. § 1983, which affords the district court jurisdiction under 28 U.S.C. §§ 1331 and 1343. Plaintiffs filed a timely notice of appeal on July 15, 2020. ROA.859-60.

Issues Presented

1. Whether Plaintiffs' suit is *Heck*-barred because their claim, if successful, would imply the invalidity of their deferred adjudications.
2. Whether Plaintiffs' claim based on a 1997 change to Texas's sex-offender-registration laws is time-barred.

3. Whether Plaintiffs' plea agreements give them a substantive-due-process right not to be subject to changes to Texas civil laws.

Statement of the Case

I. Sex-Offender Registration in Texas

"Texas's sex-offender registration statute was first enacted in 1991." *Rodriguez v. State*, 93 S.W.3d 60, 66 (Tex. Crim. App. 2002) (citing Act of June 15, 1991, 72d Leg. R.S., ch. 572, 1991 Tex. Gen. Laws 2029, 2029-32). Texas recognized that "[a] substantial and disproportionate amount of the total number of serious sex offenses are committed" by "multiple and repeat sex offenders." Senate Research Center, Bill Analysis at 1, Tex. S.B. 259, 72d Leg., R.S. (1991). Texas joined twelve other States in adopting a registration program designed to "address the problem that repeat offenders create for society." *Id.*

In the beginning, the requirements imposed by Texas's program were relatively modest. An adult convicted of a reportable offense after 1991 had to provide local law enforcement with identifying data similar to that provided when applying for a driver's license (*e.g.*, name, date of birth, physical characteristics) as well as information regarding his offense.[2] Act of June 15, 1991, *supra*, § 2(a)-(b). Reportable offenses were limited to indecency with a child, sexual assault, aggravated sexual assault, incest, and a fourth conviction for indecent exposure. *Id.* § 5(a)-(b). The duty to register also expired "on the day that the [adult sex offender] discharge[d] parole

[2] Juvenile sex offenders were subject to different rules, but those are not currently before the Court as Plaintiffs were all adults when they pleaded guilty.

or probation." *Id.* § 9(b). Individual offenders could petition for an exemption from the registration requirement with a state trial court, which was to grant such relief upon a showing of good cause. *Id.* § 8(b).

Since 1991, "the Texas Legislature has made a series of amendments to the sex offender registration and notification statute." *Rodriguez*, 93 S.W.3d at 65. For example, the original 1991 statute did not address whether those who received deferred adjudication for their offenses were required to register; the Legislature clarified that they were during the next session. Act of May 30, 1993, 73rd Leg., R.S., ch. 866, §§ 2-4, 1993 Gen. Laws 3420, 3420-21. And it has made at least one adjustment or amendment in nearly every session since.[3] Some of these amendments have been necessitated by changes in federal law starting with the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act of 1993, tit. 17, subt. A, Pub. L. No. 103-322, 108 Stat. 1796 (1994) ("Wetterling Act").

"The Wetterling Act established a [federal] statutory 'baseline' standard and enabled the Attorney General to establish guidelines governing state programs that

[3] *E.g.*, Act of May 19, 1995, 74th Leg., R.S., ch. 258, 1995 Tex. Gen. Laws 2197; Act of June 1, 1997, 75th Leg., R.S., ch. 933, 1997 Tex. Gen. Laws 2931; Act of May 26, 1999, 76th Leg., R.S., ch. 1193, 1999 Tex. Gen. Laws 4178; Act of May 30, 2003, 78th Leg., R.S., ch. 347, 2003 Tex. Gen. Laws 1505; Act of May 25, 2005, 79th Leg., R.S., ch. 1273, 2005 Tex. Gen. Laws 4049; Act of May 18, 2007, 80th Leg., R.S., ch. 593, 2007 Tex. Gen. Laws 1120; Act of May 26, 2009, 81st Leg., R.S., ch. 566, 2009 Tex. Gen. Laws 1281; Act of April 7, 2011, 82nd Leg., R.S., ch. 1, 2011 Tex. Gen. Laws 1; Act of May 26, 2015, 84th Leg., R.S., ch. 332, 2015 Tex. Gen. Laws 1499; Act of May 28, 2017, 85th Leg., R.S., ch. 685, 2017 Gen. Laws 3038; Act of May 17, 2019, 86th Leg., R.S., ch. 273.

register the addresses of persons convicted" of specified sex offenses. Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation and the Future*, 64 Drake L. Rev. 741, 749 (2016). Under that "baseline," state programs were to require individuals with reportable offenses to register at least "until 10 years have elapsed since the person was released from prison, placed on parole, supervised release, or probation." Wetterling Act § 170101(b)(6)(A). Like the Texas Legislature, Congress and the federal Executive have also repeatedly amended that "baseline." McPherson, *supra*, at 749-56 (describing at least six statutes and five major executive actions between 1994 and 2005). Congress passed its most recent attempt at a comprehensive set of federal rules in 2005 with the Sex Offender Registration and Notification Act (SORNA), tit. 1, subt. A, Pub. L. No. 109-248, 120 Stat. 587 (2006).

Plaintiffs focus entirely on a single amendment passed by the Texas Legislature in 1997. Act of June 1, 1997, 75th Leg., R.S., ch. 668, § 1, 1997 Tex. Gen. Laws 2253, 2260-61 ("1997 Act").[4] Enacted in the wake of the Wetterling Act, that law responded to "new ideas as well as enhancements [that] became evident as [registration] laws were practiced within the community." Senate Research Center, Bill Analysis at 1, Tex. S.B. 875, 75th Leg., R.S. (1997); *see also* House Research

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[4] Plaintiffs occasionally refer to the "Act of June 13, 1997," the date on which the Governor signed the law. *See, e.g.*, Opening Br. 14 n.47. To avoid confusion, Appellees describe Texas's sex-offender-registration laws in the manner adopted by the Texas Court of Criminal Appeals in *Rodriguez*, 93 S.W.3d at 65, or the *Texas Rules of Form: The Green Book* (14th ed.).

Organization, *Debate Continues on Texas' Sex Offender Notification Law*, Tex. Focus Report No. 74-23 (July 24, 1996) (summarizing existing law and proposed amendments). After significant debate, "the Legislature expanded the class" of those who must register to all who have "had a 'reportable conviction or adjudication' since September 1, 1970, and who continued to be under some form of state supervision." *Rodriguez*, 93 S.W.3d at 66. The statute also required lifelong registration for certain offenses including the offenses to which Plaintiffs pleaded guilty. *Id.* at 77. The Legislature also amended—and ultimately removed—the ability of state trial courts to exempt an individual from registration upon showing of good cause. 1997 Act, supra; Act of May 26, 1999, *supra*.

Whether examined in isolation or in the context of both earlier and subsequent amendments, this 1997 extension to the registration requirement is not a punishment imposed on any particular individual. *See Smith*, 538 U.S. at 104. Instead, "[s]ex offender registration is in operation[,] . . . regulatory in nature: its provisions become and remain effective automatically upon conviction for certain offenses." *Rodriguez*, 93 S.W.3d at 74. "[T]he individual circumstances" of the registration process typically "do not vary among offenders." *Id.* On rare occasions, courts have recognized some discretion where an offender is charged with a reportable offense but pleads guilty to a nonreportable offense. *Littlepage v. Trejo*, No. 1:17-cv-190-RP, 2017 WL 3611773, at *3, *5 (W.D. Tex. Aug. 21, 2017). Here, however, the record reflects that Plaintiffs pleaded guilty to the same second-degree felonies for which they were indicted.

II. Plaintiffs' Sexual-Assault Convictions and Subsequent Registration

As the district court noted in its ultimate ruling, the facts in this case are "generally uncontested, and resolution of this case turns chiefly on legal disputes." ROA.835. In the early 1990s, Plaintiffs each admitted to committing an offense that is reportable under Texas's sex-offender-registration laws. Jack Darrell Hearn was indicted on July 24, 1992, for vaginal rape "by the use of physical force and violence," ROA.958, a second-degree felony punishable by twenty years' imprisonment, ROA.959. He pleaded guilty to that charge on August 12, 1993, ROA.960, in return for a recommendation of "five (5) years deferred adjudication + condition of no contact" with his victim, ROA.960, and 240 hours of community service, ROA.965. He completed his period of community supervision in August 1998. ROA.968.

Donnie Lee Miller was indicted on November 12, 1993, for "causing his finger to penetrate the female sexual organ" of his victim "by the use of physical force or violence." ROA.981. This too was a second-degree felony and punishable by twenty years' imprisonment. ROA.986. He pleaded guilty to this charge on May 18, 1995, in exchange for a recommendation of ten years' community supervision, a no-contact order with his victim, and an agreement to "pay for all (medical) costs incurred by the victim as a result of this offense" for a year. ROA.982-95. Miller completed his period of community supervision on April 21, 2004. ROA.992.

James Warwick Jones was indicted on August 21, 1993, for "penetration of the anus" of his victim without consent when Jones "knew that as a result of mental disease and defect," his victim was "incapable of either . . . appraising the nature of

the act or resisting it." ROA.994. Once again, this was a second-degree felony and punishable by twenty years' imprisonment. ROA.995. Jones pleaded *nolo contendere* in exchange for a recommendation of ten years' community supervision with a number of conditions, including "no unsupervised contact with anyone under 18 years old + no contact" with his victim.[5] ROA.995-96. Jones completed his period of community supervision on May 3, 2004. ROA.1001.

By statute, at the time of their pleas, Miller and Jones were required to register as sex offenders during their period of supervised release, *supra* at 4, and they were apprised of that obligation, ROA.984, 998. Hearn, by contrast, was not required to register because he pleaded guilty in the brief window between when the Texas Legislature created the requirement and before it extended the requirement to those who receive deferred adjudication. *Compare* ROA.960-65, *with* Act of May 30, 1993, *supra*. Plaintiffs do not maintain that any agent of the State ever made separate representations regarding their duty to register as sex offenders. To the contrary, they have testified that their understanding came entirely from the relevant statute and their discussions with their own lawyers. ROA.939, 943-44, 948.

Each Plaintiff has testified that he was told "[i]n late 1997 or early 1998" that the Legislature had changed the law, and that they would need to register as sex offenders for life. ROA.939. Plaintiffs each experienced emotions ranging from "shock[]," ROA.939 (Hearn); to "fear," ROA.944 (Miller); to fury, ROA.949

[5] With one exception not relevant here, a plea of *nolo contendere* has the same legal effect as a guilty plea under Texas law. Tex. Code Crim. Proc. art. 27.02(5).

(Jones). But, for the most part, Plaintiffs have remained registered as sex offenders since that time. ROA.939-49. The only exception appears to be that Hearn failed to notify appropriate authorities when he moved between counties in 2006. ROA.969-80. He pleaded guilty to failing to update his registration and placed on probation in both counties. ROA.969-70 (Kerr County), 976-77 (Kendall County).

Plaintiffs do not allege and have not shown that they ever sought to challenge the registration requirement through any state judicial proceeding. Plaintiffs have each testified that they immediately complained to their parole officers that the requirement was inconsistent with their plea bargains. ROA.940, 945, 949. And Jones asserts that he e-mailed the former head of the Sex Offender Registration Bureau to make a similar complaint in 2014. ROA.950. But none of the Plaintiffs alleges that he raised the issue with the court that discharged him from community supervision or petitioned for an exemption from lifetime registration before the Legislature removed that ability in the Act of May 26, 1999, *supra*. The record does not reflect that any sought review through a petition for a writ of habeas corpus.

III. Procedural History

Instead of promptly seeking an exemption from registration (or other state relief) based on the alleged breach of their plea agreements, the record reflects that Plaintiffs waited more than twenty years to seek equitable relief in federal court. They filed this lawsuit on June 18, 2018. ROA.12. Instead of naming the prosecutors with whom they negotiated their pleas or the local officials who handle their registration, they named as defendants the head of the Texas Department of Public Safety and the former Manager of the Department's Sex Offender Registration Bureau, each in

their official capacity. ROA.13-14. Plaintiffs do not claim that they have ever interacted with these Defendants regarding their plea agreements or registration. They insist, however, that Defendants were in "privity" with the prosecutors who negotiated their pleas and that the alleged breach of their plea agreements is an act of "the State of Texas itself." ROA.75.

In the operative complaint, Plaintiffs seek (1) a declaration that Texas breached their plea agreements by amending its sex-offender-registration laws and thereby violated substantive due process; (2) an injunction ordering the removal of their information from Texas's centralized database and enforcement of the registration requirement against them going forward; and (3) attorney's fees. ROA.835-36.

Following several rounds of pre-trial briefing, the district court held a short bench trial on August 27, 2019, to allow the parties to submit whatever evidence they deemed necessary for its consideration. ROA.862-936. The only witness was the former head of the Sex Offender Registration Bureau, who explained that his role was functionally limited to serving as a custodian of electronic records that are collected and submitted by local officials from around the State. ROA.884-87, 890-91. He acknowledged members of his (former) staff could enter information received from local entities. ROA.893-94. Other than this testimony, the only evidence consisted of court records and affidavits submitted by Plaintiffs and their former defense lawyers reflecting Plaintiffs' subjective belief that they expected to be released from any registration requirements at the end of their periods of community supervision. ROA.937-1001.

Following the trial, Plaintiffs were allowed to file the operative complaint. ROA.615-48. This unusual procedure was followed to address Plaintiffs' objections that Defendants had not filed an answer objecting to the timeliness of their original complaint until shortly before trial. ROA.501, 702. The parties ultimately stipulated that the Department had maintained the central registration database during the limitations period and that Plaintiffs' information would not be removed so long as they had a duty to register. ROA.830. The parties agreed that this stipulation obviated the need for any further discovery or trial testimony.

Having considered both sides' arguments, the district court concluded that clearly established law "has foreclosed relief on these facts." ROA.839. The court explained that retrospective imposition of a sex-offender-registration requirement was non-punitive and therefore constitutional. ROA.839. It dismissed Plaintiffs' reliance on *Santobello* rather than the Ex Post Facto Clause as a distinction without a difference under this Court's prior case law. ROA.839-40. The court also noted that Plaintiffs' claims were untimely under Texas's two-year statute of limitations. ROA.840-41. It did not reach many of Defendants' remaining assertions about why the claim was invalid. ROA.836, 838.[6] Following an unsuccessful motion for a new trial, ROA.858, this appeal followed, ROA.859-60.

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[6] The district court concluded that Defendants were sufficiently connected to the database to stand in the shoes of the State as proper defendants. ROA.837-38. Defendants do not challenge the district court's factual finding that Vasquez has a connection to the implementation of the registration system, which (if it exists) would establish jurisdiction under the test in *K.P. v. LeBlanc*, 627 F.3d 115 (5th Cir.

Summary of the Argument

On appeal, Plaintiffs assert that, as employees of the State of Texas, these Defendants have violated their plea agreements every day since 1997 when the Legislature imposed a lifetime requirement that Plaintiffs register as sex offenders. Therefore, Plaintiffs maintain, the district court erred in concluding that their substantive-due-process claims were untimely and without merit. The Court need not reach either of those contentions, however. The gravamen of Plaintiffs' claims is that their deferred adjudications were unconstitutional. *E.g.*, ROA.734. Such a claim impugns the validity of those adjudications, which have not been overturned. Under *Heck*, Plaintiffs cannot seek relief under 42 U.S.C. § 1983. *See* 512 U.S. at 489.

Even if Plaintiffs could overcome this hurdle, the district court correctly held that Plaintiffs are not entitled to relief. Plaintiffs do not dispute that they have been aware of the basis of their claim for twenty years; they assert this does not matter under the continuing-violation doctrine. Opening Br. 27-28. As their own authority demonstrates, however, that doctrine is "to be applied sparingly." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). This Court has applied the doctrine only under principles of equitable tolling or when a plaintiff's claim arises as the result of the cumulative effect of a series of otherwise nonactionable occurrences. *See Texas v. United States*, 891 F.3d 553, 561-62 (5th Cir. 2018). Neither circumstance exists here. Any breach of Plaintiffs' plea agreements occurred in 1997 when the Legislature rendered impossible—and thereby repudiated—any promise regarding

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2010). The Court need not reach whether Defendants are the correct defendants for a *Santobello* claim because no *Santobello* violation exists.

registration requirements. That state employees have continued to act in accordance with that repudiation does not continually restart the clock on Plaintiffs' long-time-barred claims.

Moreover, even if Plaintiffs could overcome this hurdles too, their claims are without merit. Plaintiffs have not proven that any promise regarding registration was made, let alone that it was breached. Contrary to Plaintiffs' repeated assertions, *Santobello* does not give every criminal defendant a substantive-due-process right to enforce the civil regulatory regime in place at the time they pleaded guilty regardless of any subsequent changes the Legislature might make. To hold otherwise would be to upend the entire registration system: Most criminal defendants plead guilty. And, under Plaintiffs' theory, *every one of those pleas* incorporated a promise that the registration system would not change, and that promise can be enforced through specific performance. Such a ruling cannot be squared with longstanding precedent.

Standard of Review

"The standard of review for a bench trial is well established: findings of fact are reviewed for clear error and legal issues are reviewed *de novo*." *One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 262 (5th Cir.2011). This Court "may affirm a judgment following a bench trial on any basis supported by the record." *Meche v. Doucet*, 777 F.3d 237, 244 n.5 (5th Cir. 2015).

ARGUMENT

I. Plaintiffs' Challenges to the Validity of Their Convictions Are Not Cognizable Under Section 1983.

This Court need not reach the two questions raised by Plaintiffs because their claims are barred under the principles announced in *Heck v. Humphrey*, 512 U.S. 477 (1994). Plaintiffs' theory *as they litigated it* is that the State induced them to plead guilty through a false promise in violation of *Santobello*. Though Plaintiffs tried to back away from the implications of that theory in the district court, ROA.807, the gravamen of such a claim is that their pleas were invalid because they were not "knowing and voluntary." *Santobello*, 404 U.S. at 261-62. The notion that the subsequent breach of a plea agreement retroactively invalidates the plea and entitles the defendant to specific performance has been rejected by the Supreme Court. *Puckett v. United States*, 556 U.S. 129, 138 n.1 (2009). Nevertheless, to prevail on their chosen theory, Plaintiffs must show that their deferred adjudications are unconstitutional. Such a claim is not cognizable under section 1983 because they have never had their convictions overturned.

A. Plaintiffs' claims for breach of their plea agreements are barred by the *Heck* favorable-termination requirement.

For more than twenty-five years, it has been established that "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Heck*, 512 U.S. at 486. For that reason, a claim is not cognizable under 42 U.S.C. § 1983 if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487. "If so, the claim is barred unless the plaintiff demonstrates that the conviction or sentence has been reversed on direct

appeal, expunged by executive order, declared invalid by a state tribunal . . . , or called into question by a federal court's issuance of a writ of habeas corpus." *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 652 (5th Cir. 2007). Until this favorable-termination requirement is satisfied, the court must "deny the existence of a cause of action" under section 1983. *Heck*, 512 U.S. at 489. For purposes of the *Heck* bar, it is irrelevant what relief the plaintiff seeks. *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005).

Plaintiffs are subject to—and cannot overcome—the *Heck* bar. Each Plaintiff received a deferred adjudication, which this Court has held to be "a conviction for the purposes of *Heck*'s favorable termination rule." *DeLeon*, 488 F.3d at 656.

Plaintiffs' chosen theory requires them to establish that either their convictions or sentences are invalid. They claim that the State breached their plea agreements. *See* Opening Br. 4. And they have argued that those breaches undermined the "knowing, intelligent[,] and voluntary" nature of their pleas. *E.g.*, ROA.50-51, 54-55, 134-36. For plaintiffs to succeed on that theory, a federal court would have to call into question the validity of their pleas, and, consequently, their deferred adjudications. *See Matthews v. Johnson*, 201 F.3d 353, 364 (5th Cir. 2000) ("A plea not voluntarily and intelligently made has been obtained in violation of due process and is void.").

The reason that *Santobello* stated that a possible remedy for breach of a plea agreement could include "the opportunity to withdraw [the] plea" was because the breach in that case called into question whether the plea was "voluntary and knowing." *Santobello*, 404 U.S. at 263. The Supreme Court has since clarified that holding, stating that "automatic reversal is warranted" in the event of a breach only

"when objection . . . has been preserved." *Puckett*, 556 U.S. at 141.[7] But even if Plaintiffs' challenge did not implicate the validity of their deferred adjudications, their requested remedy implicates one of the collateral consequences of their sentence. ROA.734-35. Challenges to the terms of a sentence fall within *Heck* even apart from any challenge of the underlying conviction. *Cf. Wilkinson*, 544 U.S. at 82.

Because Plaintiffs' theory requires each to show that his conviction or sentence was improper, it follows that a judgment in Plaintiffs' favor would necessarily imply the validity of their deferred adjudications. For that reason, this Court has held on more than one occasion that a "[section] 1983 action is not the proper vehicle to bring" a claim that Texas's sexually-violent-predator and sex-offender-registration programs "amount[ed] to a breach of [a plaintiff's] plea agreements." *Day v. Seiler*, 560 F. App'x 316, 319 (5th Cir. 2014) (per curiam).[8] Although these decisions are unpublished, they are "highly persuasive" because the Court "explicitly rejected the identical argument . . . advance[d] here." *United States v. Pino Gonzalez*, 636 F.3d 157, 160 (5th Cir. 2011). As the district court noted, Plaintiffs have failed to cite a

[7] *Puckett* also clarified that because *Santobello* is a procedural protection (*infra* at III.A.2), a defendant who has slept on his rights cannot subsequently use an alleged breach to impugn his conviction without showing plain error. 556 U.S. at 141-42.

[8] *See also, e.g.*, *Mann v. Denton County*, 364 F. App'x 881, 883 (5th Cir. 2010) (per curiam) (holding that plaintiff's section 1983 suit for declaratory and injunctive relief was barred by *Heck* because "a successful outcome for [his] claims alleging breach of his plea bargain could imply the invalidity of his plea and therefore his conviction"); *accord Bonner v. Castloo*, 193 F. App'x 325, 325 (5th Cir. 2006) (per curiam); *Garner v. Doe*, 61 F. App'x 918, 2003 WL 1107093, at *1 (5th Cir. 2003) (per curiam) (unpublished table decision); *Fuller v. Garrett*, 235 F.3d 1340, 2000 WL 1672807, at *1 (5th Cir. 2000) (per curiam) (unpublished table decision).

single published decision holding that plea agreements are exempt from *Heck*'s favorable-termination requirement. *See* ROA.840.

Heck's favorable-termination requirement therefore applies to Plaintiffs. To proceed with their section 1983 claims, each of them "must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the" deferred adjudication. *Muhammad v. Close*, 540 U.S. 749, 751 (2004) (per curiam). Because Plaintiffs have not satisfied this requirement, their claims are *Heck*-barred and must be dismissed. *See DeLeon*, 488 F.3d at 657.

B. Plaintiffs' contrary arguments presented to the district court are unavailing.

In the district court, Plaintiffs pointed to three reasons that *Heck* should not apply: (1) they cannot challenge the requirement that they register through a habeas petition, (2) they should not have to seek a state remedy because they completed the terms of their deferred adjudication, and (3) they seek to enforce rather than invalidate their plea agreements. These arguments are squarely foreclosed by caselaw, are inconsistent with the rationale behind *Heck*, or both.

1. Plaintiffs first argued in the district court that, based on *Muhammad*, 540 U.S. at 755, *Heck* was "inapplicable to a Section 1983 claim for which federal habeas relief is unavailable." ROA.810. They asserted that because "Plaintiffs are not and have never been 'in custody' within the meaning of" the federal habeas statute, "federal habeas is unavailable to them." ROA.810. Plaintiffs contended that this excuses them from *Heck*'s favorable-termination requirement. ROA.810. But *Muhammad* stands for no such proposition, and this Court has held the opposite.

The statement from *Muhammad* on which Plaintiffs have relied is dictum. *See Thomas v. La. Dep't of Soc. Servs.*, 406 F. App'x 890, 898 n.5 (5th Cir. 2010) (per curiam). The case arose from a confrontation between a prison guard and an inmate that resulted in the inmate being placed in special detention on a charge of "Threatening Behavior." *Muhammad*, 540 U.S. at 752. After a hearing, Muhammad was found guilty of the lesser infraction of "Insolence" and brought a section 1983 claim that the more serious charge had been retaliatory. *Id.* In *Muhammad*, the Supreme Court reiterated the rule that *Heck* applies when a lawsuit "would implicitly question the validity of conviction or duration of sentence." *Id.* at 751. *Heck* did not bar Muhammad's claim because he had not "sought to expunge the misconduct charge from his prison record"—he sought only recompense for the initial alleged over-charging. *Id.* at 754. As an aside, the Court noted that certain former "Members of the Court ha[d] expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement." *Id.* at 752 n.2 (citations omitted). But it explicitly stated that *Muhammad* was "no occasion to settle the issue." *Id.*

The footnote in *Muhammad* on which Plaintiffs relied is therefore of no legal consequence. But circuit precedent is. This Court "views *Heck* foremost as a section 1983 decision, narrowing the reach of that civil-rights statute." *DeLeon*, 488 F.3d at 654. "The fact that [Plaintiffs are] no longer . . . 'in custody' for [their] offense and thus may not seek habeas relief does not excuse [them] from the 'favorable termination' rule of *Heck*." *Morris v. McAllester*, 702 F.3d 187, 192 (5th Cir. 2012). What's more, even if this Court were to "relax *Heck*'s universal favorable termination requirement," it would require a showing that Plaintiffs "have no procedural vehicle

to challenge their conviction." *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000). Plaintiffs have not attempted to "show[] that such a procedural vehicle is lacking;" they argued "only of inability to obtain habeas relief." *Id.* Such an argument is insufficient.

2. Plaintiffs also asserted that *Heck* does not apply to them because their completed deferred adjudications do not trigger the favorable-termination requirement. *See* ROA.809. Though this Court has previously declined to consider "whether a successfully completed deferred adjudication . . . is also a conviction for the purposes of *Heck*," *DeLeon*, 488 F.3d at 656 (citing *McClish v. Nugent*, 483 F.3d 1231, 1251-52 (11th Cir. 2007)), this too is incorrect. Plaintiffs are correct that the *Heck* bar "protects only a conviction or sentence, that is to say, an outstanding criminal judgment." *Id.* at 654 (quotation marks omitted). Under Texas law, however, a deferred adjudication for a sex offense *is* an outstanding criminal judgment for *Heck* purposes—regardless of whether the period of community supervision has been completed.

This Court held in *DeLeon* that a pending deferred adjudication is a conviction for *Heck* purposes. Even though a deferred-adjudication order does not include a "finding of guilt, there is at least a judicial finding that the evidence substantiates the defendant's guilt, followed by conditions of probation." *Id.* at 656. *DeLeon* explained that these consequences sufficed to make deferred adjudication equivalent to a conviction for *Heck* purposes. *Id. DeLeon* did not need to reach the question of whether a *completed* deferred adjudication remains a conviction even though "the charge against [the defendant] will be dismissed." *Id.* at 653. Given the "more limited

collateral consequences under Texas law" of a completed adjudication, the Court deferred that question to a case where it was squarely presented. *Id.* at 656.

The Court should now hold that a deferred adjudication for a sex crime remains a conviction for *Heck* purposes even after the deferral period ends. Release from a period of community supervision does not automatically release an individual from the collateral consequences of his offense—or the Legislature's ability to amend those consequences. "Ordinarily, [u]nder Texas law, deferred adjudication probation is neither a conviction nor a sentence." *United States v. Ary*, 892 F.3d 787, 789 (5th Cir. 2018) (quotation marks omitted). Not so with sex offenses. Tex. Code Crim. Proc. art. 62.001(5). "[P]rior deferred adjudications for certain offenses," including sexual assault, "are counted as 'convictions' for the purpose of enhancing sentences of repeat and habitual offenders, even if the defendant successfully completed the community supervision term." *United States v. Mills*, 843 F.3d 210, 214 n.1 (5th Cir. 2016).[9] These consequences are sufficient under *DeLeon* to constitute a conviction for *Heck* purposes. *DeLeon*, 488 F.3d at 656. Indeed, the very existence of this lawsuit—which protests the severity of these ongoing collateral consequences—confirms as much.

3. Finally, Plaintiffs maintained that *Heck* is inapplicable because of the kind of relief they have asked for. ROA.806. As Plaintiffs see it, their suit does not

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[9] *See* Tex. Penal Code §§ 12.42(c)(2), (c)(2)(B)(ii) (requiring life imprisonment if a defendant has previously been convicted of sexual assault); *id.* § 12.42(g) (explaining that a "deferred adjudication" counts as a conviction even when "the defendant was subsequently discharged").

"necessarily imply the invalidity of" their "conviction[s] or sentence[s]" because they "seek to enforce their plea agreements," not to challenge the "lawfulness" of their deferred adjudications. ROA.806-07 (quoting *Heck*, 512 U.S. at 487) (alterations in original). This argument misunderstands how the *Heck* bar and plea-agreement challenges work.

The Supreme Court could not have been more explicit that a section "1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief)." *Wilkinson*, 544 U.S. at 81-82. A plaintiff need not ask a federal court to invalidate the conviction; *Heck* itself was a claim for damages. 512 U.S. at 486. All that matters is whether "success in [the] action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson*, 544 U.S. at 82.

Here, it would. Plaintiffs seek a declaration that their constitutional rights have been violated, and specific performance to cure that violation. ROA.734-35. Although Plaintiffs take aim at the plea agreements, "[a] plea bargain standing alone is without constitutional significance." *Mabry v. Johnson*, 467 U.S. 504, 507 (1984). "[U]ntil embodied in the judgment of a court," the agreement "does not deprive an accused of [a] . . . constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution." *Id.* at 507-08. Thus, Plaintiffs may only obtain relief by showing that *their pleas* are constitutionally suspect. Plaintiffs' success would necessarily imply the invalidity of their deferred adjudications, an outcome barred by *Heck*.

II. Plaintiffs' Challenge to the 1997 Imposition of a Lifetime Registration Requirement Is Untimely.

Even if this case were not *Heck*-barred, it is time-barred. Plaintiffs acknowledge (at 27-28) that "[t]he registration obligations" they challenge were "imposed . . . more than 20 (twenty) years ago" when Texas's sex-offender-registration program "was amended in 1997," and thus their claim is "based on events outside the limitations period." They nonetheless maintain that their suit is timely because Defendants have "a continuing duty" to administer the registration system, Opening Br. 29-30, and that they have periodically updated that system with information received about Plaintiffs from other state or local officials, *id.* at 30. Plaintiffs insist that these ministerial actions, which flow automatically from the lifetime-registration obligation imposed in 1997, are part of one continuous violation of their substantive-due-process rights. The district court properly rejected this "innovative" attempt "to bypass Texas's statute of limitations." ROA.841.

A. Plaintiffs' claims for breach of their plea agreements are barred by Texas's two-year statute of limitations.

Plaintiffs' claims have been time-barred for twenty years. Because Congress has never provided a statute of limitations for a section 1983 claim, federal courts borrow "that which the State provides for personal-injury torts." *Wallace v. Kato*, 549 U.S. 384, 387 (2007) (citing *Owens v. Okune*, 488 U.S. 235, 249-50 (1989)); *see also* 13D Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3573.4 (3d ed.). In Texas, the applicable statute of limitations for a suit under section 1983 "is two years." *Redburn v. City of Victoria*, 898 F.3d 486, 496 (5th Cir. 2018); *see also* Tex. Civ. Prac. & Rem. Code § 16.003.

Plaintiffs' claims accrued no later than late 1997 or early 1998. In 2007, the Supreme Court held that "the accrual date of a [section] 1983 cause of action is a question of federal law that is *not* resolved by reference to state law." *Wallace*, 549 U.S. at 388. As this Court has since reaffirmed, however, the limitations period "begins to run 'the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.'" *Jackson v. City of Hearne*, 959 F.3d 194, 205 (5th Cir. 2020) (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001)). Whether and when the plaintiff is injured is claim-specific. *See, e.g.*, *Bradley v. Sheriff's Dep't of St. Landry's Parish*, 958 F.3d 387, 391-92 (5th Cir. 2020). As a result, though accrual is determined by federal law, "the accrual date . . . tracks the state law of torts" except as altered by federal law. *Morgan v. Chapman*, 969 F.3d 238, 249-50 (5th Cir. 2020).

Plaintiffs are pursuing a single theory: that the State of Texas breached their respective plea agreements when its Legislature passed the 1997 Act. ROA.620. That is, each Plaintiff claims that this law is fundamentally inconsistent with his assumption that he would not have to register as a sex offender for life. *See* Opening Br. 27-28. As this change was well-publicized, Plaintiffs' claims arguably became stale in June 1999, or at least when they learned of the change. *See Jackson*, 959 F.3d at 205. This lawsuit was not filed until June 2018—nineteen years later. ROA.1.

Plaintiffs do not—and cannot—argue that their claim is timely under principles of equitable tolling. Unlike accrual, whether and to what extent the statute of limitations may be tolled is governed by state law. *Wallace*, 549 U.S. at 394; *see also Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 484-86 (1980). Texas

recognizes principles of equitable tolling, but only where a plaintiff *could not* bring suit within the relevant time period—for example, when the pendency of another suit prevents a plaintiff from pursuing his claims, *Holmes v. Tex. A&M Univ.*, 145 F.3d 681, 684 (5th Cir. 1998), or when a plaintiff is unaware of his claim(s) due to the fraudulent concealment of the defendant, *Moon v. City of El Paso*, 906 F.3d 352, 359 (5th Cir. 2018). Here, Plaintiffs simply *chose not* to make these claims on time. Miller admits that he learned of the newly imposed lifetime registration requirement "[i]n or about October of 1997." ROA.944; Jones during the fourth quarter of 1997, ROA.949; and Hearn in "late 1997 or early 1998," ROA.939.[10] As Plaintiffs appear to acknowledge (at 24-25), state law would not permit tolling under these circumstances. As a result, Plaintiffs' claims were filed nearly twenty years too late.

B. Plaintiffs cannot avoid this conclusion by resorting to the continuing-violation doctrine.

Plaintiffs' claims do not become less time-barred because Plaintiffs invoke the continuing-violation doctrine recognized in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), and *Heath v. Board of Supervisors of Southern University and Agricultural and Mechanical College*, 850 F.3d 731 (5th Cir. 2017). Plaintiffs do not contest that under pre-*Morgan* caselaw, the continuing-violation doctrine would not

[10] Though Hearn was charged with violating this requirement in 2006, he does not appear to have raised the alleged breach of his plea agreement as a defense. ROA.940. Even if this later charge could have temporarily reinvigorated his stale claim, it would have become untimely again in 2008, two years after the law was last enforced against him. *Cf. Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997).

apply to the circumstances presented in this case. But they assert (at 23-27) that under *Morgan* and *Heath* a section 1983 claim "will not be time-barred so long as all acts which constitute the claim are part of the same unlawful practice or policy, and at least one act falls within the time period." This assertion misreads *Morgan*, which *contracted* the availability of the continuing-violation doctrine rather than expanded it. *See Bird v. Dep't of Human Servs.*, 935 F.3d 738, 747-48 (9th Cir. 2019) (per curiam), *cert denied sub nom. Bird v. Hawaii*, 140 S. Ct. 899 (2020). Since *Morgan*, courts have recognized that the doctrine is "'rarely' applied in [section] 1983 cases." *Robinson v. Kandulski*, Nos. 19-1221/1288, 2019 WL 8165865, at *2 (6th Cir. Dec. 6, 2019) (quoting *Sharpe v. Cureton*, 319 F.3d 259, 266-67 (6th Cir. 2003)). This case does not fit within the narrow category of cases to which it does apply—as numerous courts have found in similar contexts.

1. "The continuing violations doctrine embodies a 'muddled,' difficult body of law that has long bedeviled courts and commentators alike." *Texas*, 891 F.3d at 561 (citing, *inter alia*, *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1560 (5th Cir. 1985) ("On at least three occasions, we have stated that the case law on the subject of continuing violations is inconsistent and confusing.")). Two things are clear: The doctrine is to be used "sparingly." *Morgan*, 536 U.S. at 113. And it does *not* permit "discrete acts that fall within the statutory time period" "to make timely acts that fall outside the time period." *Id.* at 112. Beyond that, the doctrine is best understood as taking "two different forms": (1) a form of equitable tolling, and (2) a rule of accrual when the *claim itself* derives from the cumulative effect of multiple, otherwise non-actionable occurrences. *Texas*, 891 F.3d at 561-62. Whether a plaintiff's claim falls

within either variation "depends on the claim asserted." *Lewis v. City of Chicago*, 560 U.S. 205, 214 (2010). Neither applies here.

"The vast majority of cases in this Circuit have understood this doctrine" as a form of equitable tolling. *Texas*, 891 F.3d at 561-62. To determine whether such tolling is "appropriate," this Court "focus[es] the inquiry 'on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights.'" *Doe v. United States*, 853 F.3d 792, 802 (5th Cir. 2017) (quoting *Messer v. Meno*, 130 F.3d 130, 135 (5th Cir. 1997)). Because, in this case, that event occurred no later than early 1998, this species of the continuing-violation doctrine avails Plaintiffs nothing.

Equally unavailing is Plaintiffs' reliance on the even-more-sparingly used accrual species of the continuing-violation doctrine. "Like too many legal doctrines," this version of the continuing-violation doctrine is "misnamed." *Limestone Dev. Corp. v. Village of Lemont*, 520 F.3d 797, 801 (7th Cir. 2008). This is not a doctrine that applies any time a plaintiff can portray a series of acts by the defendant as part of a common policy. *Id.* Instead, as *Heath* explained, it applies only when the claim *itself* "is based on the cumulative effect of a thousand cuts, rather than on any particular action taken by the defendant." 850 F.3d at 737 (quoting *O'Connor v. City of Newark*, 440 F.3d 125, 128 (3d Cir. 2006)). That is, the "doctrine [is] not about a continuing violation, but about a cumulative violation." *Limestone Dev.*, 520 F.3d at 801. "[T]he filing clock cannot begin running with the first act because the full course of conduct is the actionable infringement." *O'Connor*, 440 F.3d at 128.

Such cumulative violations are almost, if not entirely, unknown in the common law. *Morgan* recognized the doctrine in the employment context because Title VII's

definition of an adverse-employment action includes creating a "hostile work environment," which encompasses a course of conduct. 536 U.S. at 116-17. And the doctrine has not been extended broadly outside that context. Indeed, this Court has gone so far as to describe it as "shorthand for an exercise in statutory interpretation" that applies "when a court determines that a statute or regulation is most naturally read as treating injuries as ongoing or continually accruing." *Texas*, 891 F.3d at 561-62; *accord Bird*, 935 F.3d at 748 (noting that, post-*Morgan*, the doctrine "is virtually nonexistent" outside the "hostile work environment" context). Plaintiffs' claims do not arise from a statute creating a continually accruing claim, and thus their claim does not fall within the two spheres of continuing violation that this Court has recognized.

2. Even if the second species of the continuing-violation doctrine could exist without specific statutory authorization, Plaintiffs cannot meet the standard this Court has adopted. Specifically, Plaintiffs must show that (a) the separate violations are related, (b) there has been no "intervening action" that "will sever the acts" that fall within the limitations period from those that preceded it, and (c) the doctrine can be applied consistent with concepts of equity and "without negating the particular purpose" of the statute of limitations. *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 328 (5th Cir. 2009).

As an initial matter, Plaintiffs cannot show multiple violations of their plea bargains. To the contrary, the Texas Legislature supposedly breached their plea bargains by amending its sex-offender-registration law in 1997. The only in-period actions about which Plaintiffs complain are ministerial acts to manage a regulatory system that do not work any independent injury on Plaintiffs. To use the contract

analogy proffered by Plaintiffs: If the 1997 amendment breached their respective pleas (and it did not for the reasons discussed *infra* at III.B), it also rendered future performance impossible, thereby repudiating any ongoing promise about Plaintiffs' registration requirements. *Restatement (Second) of Contracts* § 250 (1981). The ongoing ministerial duty to manage the registration requirement might "give[] present effect to [that] past act." *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). But that does not make the claim timely because it does not state a present violation. *Id.*[11]

Assuming that Plaintiffs can show more than one breach of their plea, they cannot show that the actions are related. In assessing this factor, this Court typically asks whether the "incidents involved the same type of [misconduct] and were perpetrated by the same [malefactor]." *Stewart*, 586 F.3d at 329. Here, the pleas were entered by local prosecutors; any breach in 1997 was committed by the Legislature; and all conduct alleged during the limitations period was committed by employees managing a subdivision of the Department of Public Safety.

The only way that Plaintiffs can argue that the actions are in any way related is to define the bad actor to be the State of Texas. *E.g.*, ROA.732. Texas has over 100,000 employees (not counting city or county employees such as prosecutors),

[11] *See also, e.g.*, *Minidoka Irrigation Dist. v. Dep't of Interior*, 154 F.3d 924, 926-27 (9th Cir. 1998) (discussing federal law regarding accrual of contract claims in the event of repudiation); *accord Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982) (distinguishing statutory claims based on discrete misleading communications from claims based on the cumulative impact of a policy of such communications).

who generally are not considered to be in "privity" for most purposes under Texas law. *State v. Brabson*, 976 S.W.2d 182, 185 (Tex. Crim. App. 1998); *id.* at 187 (Womack, J., concurring) (noting that "[b]ecause the state government has been so deliberately decentralized," "there is not . . . privity between the Department of Public Safety and the local prosecutor"). Nor should the Court concluded otherwise for this purpose: If one's conduct can be imputed to another for the purposes of determining whether there has been a continuing violation, the first limitation that *Stewart* and *Morgan* placed on the continuing-violation doctrine would no longer have any teeth. It will also be virtually impossible to apply the second, which would normally consider whether some other employee of the State has taken action that severs the two violations. *Stewart*, 586 F.3d at 329; *cf. United States v. Loza-Gracia*, 670 F.3d 639, 642 (5th Cir. 2012) (refusing to impute a promise made by a federal prosecutor to judicial-branch personnel in the Probation Office).

Even if Plaintiffs could overcome these difficulties, the doctrine must be "tempered by the court's equitable powers." *Id.* at 328. In particular, *Morgan* recognized that the Court may not apply the continuing-violation doctrine where the plaintiff has unreasonably delayed in filing his claim, and the defendants were prejudiced. *See* 536 U.S. at 121-22 (discussing defense of laches). It is hard to imagine a clearer example of unreasonable delay than here: Without explanation, Plaintiffs waited twenty years after the alleged breach of their plea agreements. This delay has been highly prejudicial because "[t]he measure of compliance would be the agreement's express terms, not any 'implied-in-law' terms read into the agreement by later courts." *United States v. Cates*, 952 F.2d 149, 153 (5th Cir. 1992). At this point,

neither Plaintiffs nor Defendants could produce any original plea agreements or even witnesses that could testify to the actual content of plea negotiations—only affidavits about what was *likely* to have been discussed. ROA.937-1001. Statutes of limitations are designed to provide certainty, *United States v. Briggs*, 19-108, 2020 WL 7250099, at *3 (U.S. Dec. 10, 2020); and to avoid adjudicating claims when such crucial evidence is missing, *Morgan*, 536 U.S. at 125 (O'Connor, J., concurring) (citing *R.R. Telegraphers v. Ry. Exp. Agency*, 321 U.S. 342, 348-49 (1944)). It would be impossible to apply the continuing-violation doctrine to this case without negating those purposes.

3. In light of these considerations, courts have routinely rejected similar appeals to the continuing-violation doctrine even when the delay has been far less egregious. These cases fall into three general groups.

First, the only other court of which Appellees are aware that has addressed a directly analogous claim has refused to apply the doctrine to a claim that ongoing registration requirements continually breach a plea agreement. In *Doe v. Gwyn*, No. 3:17-cv-504, 2018 WL 1957788 (E.D. Tenn. Apr. 25, 2018), the plaintiff entered an *Alford* plea to aggravated sexual battery and six *nolo contendere* pleas to other sex offenses in 1999. *Id.* at *1. In 2004, Tennessee—like Texas—responded to federal policy by revising its sex-offender laws. *Id.* In 2015, Doe brought a number of challenges to his then-current registration requirements, including based on a breach of his plea agreement. *Id.* at *2. The court noted a "dearth of authority addressing the statute of limitations for a challenge such as this," but proceeded to apply the general principles discussed above to each individual claim. *Id.* at *5. The court allowed some

claims to proceed because there was a serial injury to the plaintiff—for example, the plaintiff's ability to travel was impeded each time the law was applied. *Id.* at *6. It dismissed Doe's claim based on breach of his plea agreement, however, because the court concluded that any harm was the "result of the original imposition of [the registration] requirements"—not any ongoing actions to maintain the registry. *Id.*

Second, at least two courts (including this one) have held more generally that the continued existence of allegations of criminal activity do *not* constitute a continuous violation of due process. In *Doe v. United States*, this Court rejected as untimely a request to expunge allegations about the plaintiff from the criminal indictment of a former business associate. 853 F.3d at 802. In *Bird*, the Ninth Circuit did the same when the wife of a convicted child abuser requested that a report identifying her as a "'confirmed' child abuser" be removed from Hawaii's child-abuse registry. 935 F.3d at 742-43. Both courts examined *Morgan*, and both held that the harm to the plaintiff came from a "discrete act"—namely the initial publication of the data or entry into the registry—which was "not entitled to the shelter of the continuing violation doctrine." *Doe*, 853 F.3d at 802; *Bird*, 935 F.3d at 748. The "continual lack" of process to remove the data did not change that outcome. *Bird*, 935 F.3d at 748.

Third, at least three courts have rejected the notion that ongoing ministerial acts related to an initial violation reinvigorate a stale claim. In *Gorelick v. Costin*, the First Circuit rejected an argument similar to Plaintiffs' that a state board continued to violate a plaintiff's due-process rights because the relevant "Board routinely updates and maintains its website, thereby 'republishing'" allegedly unlawful material. 605 F.3d 118, 122 (2010). Similarly, the Tenth Circuit has held that the ongoing

garnishment of a prisoner's income to satisfy a child-support judgment does not form a continuing violation of his due-process rights predicated on judicial bias in the original proceeding. *Carroll v. Routh*, 812 F. App'x 770, 773 (10th Cir. 2020) (per curiam). And the Eleventh Circuit has twice concluded that any constitutional violation resulting from a retroactive change to prisoners' eligibility for parole accrued when the law changed—not when the State subsequently applied that law to individual prisoners. *Brown v. Ga. Bd. of Pardons & Paroles*, 335 F.3d 1259, 1261 (11th Cir. 2003) (per curiam) (rejecting ex-post-facto challenge); *see Smith v. Pate*, 741 F. App'x 610 (11th Cir. 2018) (per curiam) (breach-of-plea-agreement claim).

* * *

In sum, Plaintiffs' theory is that the Texas Legislature breached their plea agreements in 1997 when it enacted a lifetime registration requirement for a class of sex offenders that included Plaintiffs. That claim is based on a discrete act, and Plaintiffs' claims accrued when that act occurred—or, at least, no later than when Plaintiffs learned of that act in late 1997 or early 1998. Because the applicable statute of limitations is two years, Plaintiffs' claims are untimely by two decades.

III. Plaintiffs' Claims Are Without Merit.

Even if Plaintiffs' case were not procedurally barred, Plaintiffs' claim that Texas violated their substantive-due-process rights by amending its sex-offender-registration laws is without merit. As an initial matter, there is no substantive-due-process right to specific performance of a plea agreement. But if there were, that right would be limited to terms agreed to by the prosecutor. Plaintiffs have not shown that any promise was made about their requirements to register—let alone that it was broken.

Their claim that their plea bargains incorporated not only the existing registration requirements but also a promise that those regulations would never change is without support in law or logic.

A. The Supreme Court has already rejected substantive-due-process claims like the ones Plaintiffs raise.

Plaintiffs have attempted to bring a substantive-due-process challenge to the lifetime-registration requirement. But the principal case on which Plaintiffs rely says nothing about substantive due process, and the Supreme Court has since refused to recognize the right Plaintiffs seek to enforce. Moreover, Plaintiffs offer no other basis for this Court to create such a right now, in light of the Supreme Court's expressed reluctance to extend substantive due process beyond its current bounds.

1. Plaintiffs assert a single claim: that under *Santobello v. New York*, 404 U.S. at 262, they have a "federally protected constitutional right" that sounds in "substantive due process under the Fourteenth Amendment" to specifically enforce the terms of their plea agreements. ROA.728. Plaintiffs have expressly disclaimed any reliance on other principles such as procedural due process or the *Ex Post Facto* Clause. *See, e.g.*, ROA.731. Instead, they confirmed to this Court (at 20) that they are pursuing only a "substantive due process claim[] of the genre recognized by the [U.S.] Supreme Court in *Santobello v. New York*, 404 U.S. 257 (1971)." There are many problems with this assertion, but one is particularly glaring: *Santobello* is a case about *procedural* due process.

"This procedural/substantive distinction is indispensable to § 1983 analysis because" it affects the nature of the right, what remedy might be available, and whether

the plaintiff must pursue state means of relief before claiming that those means are inadequate under section 1983. *Castellano v. Fragozo*, 352 F.3d 939, 969 (5th Cir. 2003) (en banc) (Barksdale, J., concurring); *see id.* at 951-52 (majority op.). A substantive-due-process claim asks for the recognition of a "fundamental liberty interest[]," which the government may not infringe without compelling justification "*at all*, no matter what process is provided." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (quotation marks omitted). A procedural-due-process challenge, on the other hand, "call[s] into question . . . the adequacy of procedures." *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989) (plurality op.). That is, the plaintiff asserts that the government may not deprive him "of [his] asserted liberty interest . . . on the basis of the procedures it provide[d]." *Reno*, 507 U.S. at 306. In other words, procedural due process is implicated when a plaintiff alleges some defect in the *method* by which an interest was taken away; substantive due process is implicated only when a plaintiff contends that the interest may *never* be taken away.

Though the Supreme Court was not explicit in its reasoning, *Santobello* falls into the procedural genre of due-process claims. There, a criminal defendant in state court agreed to plead guilty based on the prosecutor's agreement "to make no recommendation as to the sentence." *Santobello*, 404 U.S. at 258. Instead, the prosecutor recommended—and the judge ordered—the *maximum* sentence. *Id.* at 259-60. The Supreme Court held that principles of fairness require that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. The majority's reasoning resounds with the language of

procedural due process. For example, the Court reasoned that "[t]his phase of the process of criminal justice . . . must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Id.* at 262. Justice Douglas's concurrence similarly focuses on how a defendant's plea waives procedural protections such as the right "to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt." *Id.* at 264 (Douglas, J., concurring) (citations omitted). And he agreed with the majority that waiver of these rights may not be "unfairly obtained." *Id.*

Both the majority and the concurrence are thus clear that the Court's concern in *Santobello* was not that the State had infringed some inviolable liberty interest (as substantive due process prohibits), but rather that the *procedure* by which the defendant had given up his rights was unfair. Indeed, its language closely tracks the Court's explanation in other cases that "[p]rocedural due process rules" ensure individuals receive the "process constitutionally [] due" in the relevant context to "minimize substantively unfair or mistaken deprivations." *Carey v. Piphus*, 435 U.S. 247, 259-60 (1978); *see also, e.g.*, *Gilbert v. Homar*, 520 U.S. 924, 931 (1997) (considering "procedural safeguards" among the factors that the Court uses to "determine what process is "constitutionally due").

"When the fault lies in a denial of fundamental procedural fairness, the question is one of procedural due process." *Jauch v. Choctaw County*, 874 F.3d 425, 430 (5th Cir. 2017) (quotation marks omitted). That is, "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey*, 435 U.S. at 259; *id.* at 262. For

example, there is no dispute that individuals have a fundamental constitutional right not to be arrested without probable cause, but that right sounds in procedural due process, not substantive due process. *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (plurality op.). Because *Santobello* speaks in terms of fair procedure and not in terms of a fundamental liberty that cannot be taken away, it did not involve substantive due process. *Id.*; *see also* 1 Wayne R. LeFave, et al., *Criminal Procedure* § 2.7(d) (4th ed.) ("[T]he Court has treated all due process claims governing procedures utilized in the adjudicatory process as procedural due process claims rather than substantive due process claims."). And a plaintiff must avail himself of procedures the State made available before he may bring a section 1983 suit claiming those procedures were insufficient. *Castellano*, 352 F.3d at 969 (Barksdale, J., concurring); *see also, e.g.*, *Carmody v. Bd. of Trustees of Univ. of Ill.*, 747 F.3d 470, 478-79 (7th Cir. 2014). The record does not reflect that Plaintiffs did so.

Plaintiffs also suggest that *Petition of Geisser* assists their argument. 627 F.2d 745 (5th Cir. 1980); *see* Opening Br. 41. It does not. Like *Santobello*, that opinion says nothing about substantive due process but instead characterizes a breach of a plea agreement as a violation of "the constitutional due process rights guaranteeing a fair trial." *Geisser*, 627 F.2d at 749. As this Court and others have held, the right to a fair trial is a procedural right, not a substantive one. *See Holloway v. Walker*, 784 F.2d 1287, 1293 (5th Cir. 1986); *see also Vogt v. Churchill*, 81 F.3d 147 (1st Cir. 1996) (per curiam) (table decision).

2. If there were any doubt about the basis of *Santobello*'s holding, the Supreme Court has since clarified that there is no substantive-due-process "right to enforce a

plea bargain agreement after it has been breached by the government." Opening Br. 39; *see* ROA.735 (asking the district court to "[g]rant . . . 'specific performance' under the terms of the[] plea bargain agreements").

In *Mabry v. Johnson*, for example, the Court considered a challenge to a withdrawn plea-agreement offer. *See* 467 U.S. at 506. The Court recognized that "*Santobello* expressly declined to hold that the Constitution compels specific performance of a broken prosecutorial promise as the remedy for such a plea; the Court made it clear that permitting Santobello to replead was within the range of constitutionally appropriate remedies." *Id.* at 510 n.11. Instead, *Santobello* "le[ft] to the discretion of the state court" the decision whether to grant specific performance or permit the defendant to withdraw the guilty plea. *Santobello*, 404 U.S. at 263. Discussing *Santobello* more generally, *Mabry* also observed that the "concern" that it raised regarding the "Due Process Clause . . . is with the *manner* in which persons are deprived of their liberty." 467 U.S. at 511 (emphasis added). That is, *Mabry* recognized that *Santobello* was not a substantive-due-process case. The "requirement" that "government action depriving a person of life, liberty, or property . . . be implemented in a fair manner . . . has traditionally been referred to as 'procedural' due process." *United States v. Salerno*, 481 U.S. 739, 746 (1987).

Similarly, in *Puckett v. United States*, Justice Scalia was clear that plea agreements do not create fundamental liberty interests and are not specifically enforceable unless an alleged breach is raised promptly: "A plea breach does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt

or innocence." 556 U.S. at 141 (quotation marks omitted). Rather, a breach of a plea agreement is no different from "other procedural errors at sentencing." *Id.*

Plaintiffs' *only* claim is for a violation of substantive due process. ROA.734-35. That claim rests on *Santobello*. The district court was correct to conclude that *Santobello* did not create a substantive-due-process right of the sort that Plaintiffs seek. And having said nothing about procedural due process in the district court or in their opening brief here, it is too late for Plaintiffs to rely on it now. *See Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016).

3. Even if the Supreme Court had not rejected Plaintiffs' position, this Court should not adopt a new substantive-due-process right to enforce thirty-year-old plea bargains. The Supreme Court "has always been reluctant to expand the concept of substantive due process." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). The lack of "guideposts for responsible decisionmaking" and the "doctrine of judicial self-restraint require[] [courts] to exercise the utmost care whenever [they] are asked to break new ground in this field." *Id.* As a result, "[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright*, 510 U.S. at 272 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-49 (1992)). Claims based on any right that is "markedly different from those recognized in this group of cases" are routinely rejected. *Id.*

To determine whether Plaintiffs' claims fit within the narrow category of recognized substantive-due-process claims, a court must "focus on the allegations in the complaint to determine how [plaintiff] describes the constitutional right at stake and

what the [government] allegedly did to deprive" the plaintiff "of that right." *Collins*, 503 U.S. at 125; *see also Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (requiring "a 'careful description' of the asserted fundamental liberty interest"). On appeal, Plaintiffs disclaim any view that they have "a fundamental substantive-due-process right to be free from registering as a sex offender." Opening Br. 44 (quotation marks omitted). Instead, they insist that they are seeking to enforce only "the substantive due process right that was actually recognized in *Santobello*." *Id.* But as discussed above, the right protected by *Santobello* was a *procedural*-due-process right.

Nor would a right to specific enforcement fit within the rubric current jurisprudence uses to recognize a new substantive-due-process right. "Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998); *see also Albright*, 510 U.S. at 273. Because Plaintiffs' claim is "covered by" either procedural due process or by the Ex Post Facto Clause (*see infra* at III.B.3), "[s]ubstantive due process analysis is therefore inappropriate." *Lewis*, 523 U.S. at 843.

B. Plaintiffs have not alleged or proven a violation of their plea agreements.

Even if a Court were to recognize a substantive-due-process right of the kind Plaintiffs seek, it would not help them here. Plaintiffs did not allege—let alone prove—that they were made any specific promise regarding registration requirements. Caselaw is clear that a State does not breach a plea agreement by altering the

law after the entry of a plea, so long as there are no ex-post-facto concerns. Plaintiffs have disavowed (*see* 20, 36) and would not have been able to establish any ex-post-facto claim.

1. Assuming that there is a substantive-due-process right to demand specific performance of a plea agreement, Plaintiffs' claims would fail because they do not allege—and certainly did not prove—any promise or representations by local prosecutors regarding their duty to register as sex offenders. Instead, whatever understanding they may have had came entirely from the relevant statute and their discussions with their own lawyers. ROA.939, 943-44, 948. Assuming that the prosecutors both knew about and had a duty to correct any errors in these discussions, there is no allegation that the attorneys misrepresented then-existing state law. And this Court has previously declined to interpret a lawyer's "accurate representation of [state] law as it then stood" as an "assurance that the law was immutable." *Garrett v. Maggio*, 685 F.2d 158, 160 (5th Cir. 1982). Moreover, Plaintiffs' subjective beliefs about the contents or consequences of their plea agreements cannot alter the unambiguous terms of those agreements. *See United States v. Scott*, 857 F.3d 241, 244 (5th Cir. 2017) (per curiam). Nor could any statements by the trial court as to the consequences of the plea constitute "a representation that [the sex-offender-registration laws] would never be amended." *Doe v. Cuomo*, 755 F.3d 105, 114 (2d Cir. 2014).

Plaintiffs secured the benefit of their plea agreements by avoiding the risk of a harsher, custodial sentence if they had been found guilty after trial—a term of imprisonment ranging between two and twenty years. ROA.959; *see Scott*, 857 F.3d at 244. The future content of Texas civil law was not a term of their agreements. And

though Plaintiffs recognize that a defendant may seek to include "governmental promises" about the civil consequences of a plea in a plea agreement, Plaintiffs do not claim to have done so here. Opening Br. 37-38.[12] The State's decision to amend its civil laws and impose a lifetime registration requirement did not, therefore, violate the terms of Plaintiffs' plea agreements or the Constitution.

2. Plaintiffs nonetheless maintain that they were "induced to enter their pleas of guilty or 'no contest' . . . by the plea bargain which the State prosecutors offered them and by then-existing Texas statutory law which limited their respective duties to register to the lengths of their community supervision." ROA.727-28. The implication is that the law that existed at the time of the pleas became incorporated into the agreements and incapable of change without breaching those agreements. *See* ROA.729-30; Opening Br. 40. The argument lacks legal or factual support.

In the district court, Plaintiffs tried to justify their theory by invoking Texas law regarding the interpretation of plea agreements. ROA.60, 642, 729-30. Although federal courts regularly characterize plea bargains as contracts, they do so by way of "analogy" that "may not hold in all respects." *Puckett*, 556 U.S. at 137. So whatever the practice of state courts, this Court "applies *general principles* of contract law in interpreting the terms of a plea agreement." *United States v. Long*, 722 F.3d 257, 262

[12] In their brief, citing to their complaint, Plaintiffs make vague assertions that the State made "assurances that they would not be required to register as 'sex offenders.'" Opening Br. 3 & n.7. But the evidence Plaintiffs presented at trial reflects only that they likely discussed registration requirements with their own lawyers. ROA.938-57.

(5th Cir. 2013) (emphasis added). Applying those principles, this Court has held that "[t]here is no implied warranty that state law will not change." *Smith v. Blackburn*, 785 F.2d 545, 548 (5th Cir. 1986); *accord James v. Cain*, 56 F.3d 662, 666 (5th Cir. 1995); *McNeil v. Blackburn*, 802 F.2d 830, 832-33 (5th Cir. 1986) (per curiam).

Even if Texas law were to apply, however, Texas's highest criminal court has held that "[a] court cannot imply an element of a plea bargain to achieve what it believes to be a fair plea agreement or to remedy an unwise or imprudent plea." *Ex parte Moussazadeh*, 64 S.W.3d 404, 411-12 & n.9 (Tex. Crim. App. 2001), *rev'd in part on other grounds*, 361 S.W.3d 684, 689 (Tex. Crim. App. 2012). Here, there is no evidence that the parties to the plea agreements ever discussed the terms of any registration requirement. Therefore, the State's ability to impose a registration requirement in the future never formed part of those agreements. *Id.* at 410-11.[13]

Even looking to Texas contract law more generally does not help Plaintiffs. Under state law, an individual may ordinarily "reasonably expect" that the State will not change the *substantive law* governing a contract; this rule "protects settled expectations." *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 144-45 (Tex. 2010). Put another way, "[a] substantive right conferred by the existing law constitutes a

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[13] *See Ex parte Williams*, 758 S.W.2d 758, 786 (Tex. Crim. App. 1988) ("A party to an agreement has no contractual rights to demand specific performance over terms not appearing in the agreement or record."); *see also Davis v. State*, No. 03-13-00459-CR, 2015 WL 4464894, at *2 (Tex. App.—Austin July 17, 2015, no pet.) (mem. op.) (explaining that the terms of a plea agreement presented to the court control over an earlier written agreement); *Warterfield v. State*, No. 05-13-00017-CR, 2014 WL 4217837, at *2 (Tex. App.—Dallas Aug. 27, 2014, pet. ref'd) (mem. op.) (holding that a plea agreement's silence does not "restrict[] the parties").

part of the agreement by implication and may not be defeated by a subsequent amendment of the law." *Griffin's Estate v. Sumner*, 604 S.W.2d 221, 230 (Tex. App.—San Antonio 1980, writ ref'd n.r.e.).

This rule does not hold for laws that "are considered remedial in nature." *Ex parte Abell*, 613 S.W.2d 255, 260 (Tex. 1981). The State is free to change remedial laws and to introduce new ones that are retroactive. *See Univ. of Tex. Sw. Med. Ctr. at Dall. v. Estate of Arancibia ex rel. Vasquez-Arancibia*, 324 S.W.3d 544, 548 (Tex. 2010). As a result, a person cannot "reasonabl[y] rel[y]" on the assumption that remedial statutes will not be changed. *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003).

Again, Texas's highest criminal court has concluded that the registration statute at issue here is "civil and remedial," and can be applied retroactively consistent with state law. *Rodriguez*, 93 S.W.3d at 79. So a party entering into a plea agreement may not reasonably assume that they will never have to register. *See, e.g.*, *In re A.V.*, 113 S.W.3d at 361; *In re Commitment of Dodson*, 434 S.W.3d 742, 748 (Tex. App.—Beaumont 2014, pet. denied); *accord In re Commitment of Mailhot*, No. 09-13-00270-CV, 2015 WL 182699, at *2 (Tex. App.—Beaumont Jan. 15, 2015, pet. denied) (mem. op.) ("The [sexually-violent-predator] statute does not fix liability for prior criminal conduct, and thus has no effect on prior plea agreements.").

3. On appeal, Plaintiffs try to avoid this conclusion by pointing to state-court decisions applying the Ex Post Facto Clause. Opening Br. 40 & n.109. Plaintiffs have, however, disclaimed reliance on that Clause. *See* ROA.731 ("Plaintiffs have not alleged, and do not assert in this complaint, that Defendants' acts or omissions violate the Ex Post Facto Clause of the U.S. Constitution.") (emphases and alterations

omitted). For good reason: This Court has already held that there is "no question" Texas's registration scheme does not violate the Ex Post Facto Clause because it is a civil regulatory scheme, and "was not intended to be punitive." *Does 1-7*, 945 F.3d at 314; *see also King*, 559 F. App'x at 281-82.

This conclusion too is consistent with how Texas interprets its registration law and applies its own Ex Post Facto Clause. Tex. Const. art. I, § 16. *Ex parte Kubas*, 83 S.W.3d 366 (Tex. App.—Corpus Christi 2002, pet. ref'd), examined the exact 1997 amendments to Texas's sex-offender-registration laws at issue here. Like Plaintiffs, Kubas pleaded guilty to a reportable offense and received "deferred adjudication community supervision." *Id.* at 368. While on community supervision, he registered as a sex offender "according to the conditions of his deferred adjudication." *Id.* After five years, the court "approved an order terminating community supervision and releasing Kubas from all penalties and disabilities." *Id.* But due to the 1997 amendments taking effect, he was required to continue registering. *Id.* The court rejected an ex-post-facto challenge because "Kubas had only an expectation that the Registration Program" would remain unchanged. *Id.* at 370. And although the defendant had previously been required to register, that was "as a condition of his deferred adjudication, and not under the statutory Registration Program." *Id.* The imposition of the statutory registration obligation, therefore, was nothing more than the addition of a new collateral consequence and "d[id] not disturb Kubas's" reasonable expectations. *Id.* at 371.

So too here—the most the record reflects is that the plea agreements provided for community supervision, a requirement of which was registration. ROA.938, 943-

44, 947-48, 955, 960, 995. The prosecutors made no representation as to the application of the statutory reporting obligations, and Plaintiffs requested none. If they assumed that their plea agreements immunized them from any remedial statute that might be passed in the future, that assumption was unreasonable as a matter of state law. *Cf. Rogers v. State*, No. 05-06-00567-CR, 2007 WL 2447125, at *3 (Tex. App.—Dallas Aug. 30, 2007, pet. ref'd) (rejecting the "novel argument" that the plea agreement "necessarily included . . . the then existing law" on "use of DWI convictions for enhancement purposes").

4. Finally, Plaintiffs seek to justify their proposed rule with decisions from other state courts. *See* Opening Br. 38, 40, 43-44. Plaintiffs do not explain how other States' interpretations of their own contract law, structuring of their own registration requirements, or applications of their own constitutions is relevant. Their plea agreements were entered in Texas, Plaintiffs are subject to Texas's registration requirements, and their plea agreements are interpreted under federal law. Moreover, the weight of out-of-state authority is consistent with this Court's precedent as well as that of state courts in Texas.

The California Supreme Court, for example, has considered and rejected the exact challenge to retroactive registration requirements that Plaintiffs raise:

> [T]he general rule in California is that a plea agreement is deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws . . . . It follows . . . that requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement, nor does the failure of a plea agreement to reference the possibility the law might change translate into an implied promise the

defendant will be unaffected by a change in the statutory consequences attending his or her conviction."

Doe v. Harris, 302 P.3d 598, 605 (Cal. 2013) (citations and quotation marks omitted).

So too have other state supreme courts around the country. *See, e.g.*, *Kentucky v. Jackson*, 529 S.W.3d 739, 747 (Ky. 2017) (holding that the "fact that subsequent legislative measures may unforeseeably alter the consequences and effects of the criminal conviction does not" violate a plea agreement); *Smith v. Virginia*, 743 S.E.2d 146, 150 (Va. 2013) ("[C]ontracts are deemed to implicitly incorporate the existing law and the reserved power of the [S]tate to amend the law or enact additional laws for the public welfare . . . . When Smith entered into the plea agreement he had no contractual right that his sex offense would never be subject to future sex offender legislation."); *Ohio ex rel. Matz v. Brown*, 525 N.E.2d 805, 808 (Ohio 1988) (per curiam) ("Except with regard to constitutional protections against ex post facto laws . . . felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.").

Whether Plaintiffs' claims are subject to this Court's case law, Texas contract law, or—somehow—the law of other States, they cannot show a breach of their plea agreement. As a result, the district court correctly entered judgment for Defendants.

Conclusion

The Court should affirm the judgment below.

Respectfully submitted.

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Certificate of Service

On December 17, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,932 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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