Case 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
Western District of Texas
Austin Division

APPELLANTS' REPLY BRIEF

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APPELLANTS' BRIEF

TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

I.

SCOPE OF REVIEW

The Plaintiffs generally agree with Defendants' observation that the Courts of Appeals "may affirm a judgment following a bench trial on any basis supported by the record."[1] However, Plaintiffs would note three principles of appellate procedure *which do* operate to limit the scope of the Court of Appeals' review. First, it is an "inveterate and certain" rule that in the absence of a cross-appeal by an appellee, the Court of Appeals is without jurisdiction to affirm the District Court's judgment on the basis of an argument made by an appellee *that was considered and rejected* by the District Court.[2] Second, when arguing for affirmation of the District Court's judgment an appellee may not properly raise for the first time on appeal, and the Court of Appeals therefore may not consider, an affirmative defense that

[1] *Appellees' Brief* ("*State's Brief*"), 13, quoting *Meche v. Doucet*, 777 F.3d 237, 244 n.5 (5th Cir. 2015).

[2] *Morely Const. Co. v. Maryland Casualty Co*., 300 U.S. 185, 191-192 (1937); *Art Midwest Inc. v. Atlantic Ltd. Partnership XII*, 742 F.3d 206, 211 (5th Cir. 2014).

the appellee never pled in the District Court (even after trial) when the defense was not considered by the District Court *sua sponte*.[3] Third, under the "basis of decision" doctrine, Rule 52(a)(1) of the Federal Rules of Civil Procedure, as recently interpreted in *Eni U.S. Operating Co. v. Transocean Deepwater Drilling, Inc*., 919 F.3d 931, 935-936 (5th Cir. 2019), prevents the Court of Appeals from affirming the District Court's judgment on the basis of "implied facts" when findings of fact have not been entered by the District Court with sufficient specificity to disclose the factual basis, if any, that would support an alternative ground to affirm.

II.

PLAINTIFFS' REPLY ARGUMENT

Although Defendants have framed their arguments as presenting only two issues,[4] they have in fact presented three principal issues which are scattered throughout their brief. The manner in which Defendants have presented their issues thus makes it difficult, analytically, to discern which of their arguments are responsive to the two issues that Plaintiffs have presented on this appeal. In the interest of coherence, and insofar as possible

[3] *E.g*., the affirmative defense of "laches." *See*, Fed. R. Civ. P. 8(c)(1); and, *Baylor Univ. Med. Ctr v. Heckler*, 758 F.3d 1052, 1057 n. 8 (5th Cir. 1985).

[4] *State's Brief*, 2, presenting their first issue as "Whether Plaintiffs' suit is *Heck*-barred because their claim, if successful, would imply the invalidity of their deferred adjudications"; and presenting their second issue as "Whether Plaintiffs' claim based on a 1997 change to Texas's sex-offender-registration laws is time-barred."

within the page limitation imposed on this reply brief, Plaintiffs have therefore attempted to assign, and reply to, each of Defendants' arguments as they appear to be responsive to the issues Plaintiffs have presented on appeal.

A) **Plaintiffs' Issue One:** *Whether under 42 U.S.C §1983 a "Separately Actionable" Claim Remains Viable under the "Continuing Violation Doctrine," Regardless of When a Plaintiff "Knew or Should Have Known" the Basis for an Earlier Claim had Accrued, if the Alleged Subsequent, Separately Actionable Violation Arises from a Repetitious Application of the Same Policy During the Relevant Limitations Period that Governs the Subsequent Claim.*[5]

1) *The Defendants Misstate the Contention that Plaintiffs Alleged and Proved at Trial*.

In some circumstances the "continuing violation doctrine" ("CVD") may be applied to allow a federal plaintiff to recover compensatory damages for unlawful acts engaged in by a defendant when the defendant's unlawful acts were undertaken by the defendant prior to and outside the ordinary limitations period that would otherwise apply to a claim. The merit of such a claim to past damages *incurred outside* the limitations period is restricted by several factors. However, when, as in the present case, a plaintiff seeks only declaratory and prospective relief, the CVD recognizes that each

[5] *Plaintiffs' Opening Brief on Appeal*, 12.

application of an unlawful policy causes a limitations period to begin "anew."[6]

In a transparent attempt to mislead or confuse the Court, Defendants mischaracterize the nature of the issues on this appeal by asserting Plaintiffs' claims rest *solely* on Texas' amendment of its sex offender registration statute in 1997.[7] The Court should not be confused by Defendants' efforts in this regard, or diverted from the determinative facts upon which the limitations issue in this case actually depends. The determinative facts pertaining to the limitations issue on this appeal, which facts are "uncontested," are these: Plaintiffs have alleged "separately actionable" claims arising from 1) Defendants' application of the challenged policy to Plaintiffs during the applicable limitations period (including the requirement that Plaintiffs involuntarily update their registration information on an annual basis);[8] and 2) Defendants publicly disclose at least annually the

[6] *See*, *Plaintiffs' Opening Brief*, at 27-36.

[7] *See*, *State's Brief*, 2 ("Plaintiffs allege only that the background regulatory regime changed"); id., at 5 ("Plaintiffs focus entirely on a single amendment passed by the Texas Legislature in 1997"); *id*., at 10 ("Plaintiffs seek…a declaration that Texas breached their plea agreements by amending its sex-offender-registration laws and thereby violated substantive due process"); *id*., at 12 ("The gravamen of Plaintiffs' claims is that their deferred adjudications were unconstitutional"); *id*., at 12-13 ("Any breach of Plaintiffs' plea agreements occurred in 1997 when the Legislature rendered impossible—and thereby repudiated—any promise regarding 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").

[8] *Plaintiffs' First Amended Complaint*, **ROA.712** (alleging Plaintiff Hearn involuntarily "complied" with the sex offender registration requirements imposed by Defendants

registration information thus acquired from Plaintiffs.[9] Both of these actions by Defendants constitute a breach of Plaintiffs' plea agreements, *during the applicable limitations period* as to each Plaintiff. Furthermore, with respect to statute of limitations issues, federal law does not distinguish, as Defendants contend, between "ministerial" and "non-ministerial" constitutional violations that occur during a limitations period.[10]

The Defendants also contend Plaintiffs' "separately action" claims (arising from their conduct within the limitations period) are barred for three additional reasons. First, Defendants contend Plaintiffs claims are barred because the State of Texas employs a large number of agents to carry out its policies.[11] Second, Defendants contend Plaintiffs' claims are barred because Texas' amendment to its sex offender registration program in 1997 *is not related* to separately actionable conduct carried out by State agents to enforce State policy.[12] Third, Defendants contend "[t]he only way that Plaintiffs can argue that the actions" of Defendants are actionable and not

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"within the applicable statute of limitations period that immediately preceded the filing of his claims in this case"); *id*., at **ROA.719** (pertaining to Plaintiff Miller); and, *id*., at **ROA.727** (pertaining to Plaintiff Jones).

[9] *Plaintiffs' First Amended Complaint*, **ROA.712** (alleging Defendants acts of public disclosure pertaining to Plaintiff Hearn, and); *id*., at **ROA.719** to **ROA.720** (same, pertaining to Plaintiff Miller); and, *id*., at **ROA.727** (same, pertaining to Plaintiff Jones).

[10] *But see*, *State's Brief*, 27 ("The only in-period actions about which Plaintiffs complain are ministerial acts").

[11] *State's Brief*, 28-29.

[12] *State's Brief*, 28.

barred by limitations is if the State of Texas is "defined" as "the bad actor."[13]

The Plaintiffs have already explained why the existence a "relationship" between unlawful acts occurring *outside a limitations period* is irrelevant to whether Plaintiff have a viable "separately actionable" claim within the limitations period that is timely.[14] Furthermore, the District Court correctly found the "bad actor" in this case IS the State of Texas.[15] The Defendants' failure to challenge that ruling by the District Court in a cross-appeal is fatal to their contrary contention.[16]

2) *The Plaintiffs' Proof at Trial Established, at a Minimum, Genuine Issues of Fact that were Not Reached by the District Court, and a Determination that Defendants Did Not Apply the Challenged Policy During the Limitations Period Would Not be Supported by the Record.*

In its opinion the District Court observed that "[t]he facts" in this case "are generally uncontested, and resolution of this case turns chiefly on legal disputes."[17] The Defendants nonetheless contend, as a factual matter, that Plaintiffs failed to prove at trial the occurrence of any "separately actionable" claims, within the limitations period, arising from 1)

[13] *State's Brief*, 29.
[14] *Plaintiffs' Opening Brief*, 33-34.
[15] *District Court's Findings of Fact and Conclusions of Law*, **ROA.841**; **RX TAB 4, p. 5-6**.
[16] *Morely Const. Co. v. Maryland Casualty Co*., 300 U.S. 185, 191-192 (1937); *Art Midwest Inc. v. Atlantic Ltd. Partnership XII*, 742 F.3d 206, 211 (5th Cir. 2014).
[17] *District Court's Findings of Fact and Conclusions of Law*, **ROA.835**; **RX TAB 4, p. 3**.

Defendants' application of the challenged policy to Plaintiffs during the applicable limitations period (including the requirement that Plaintiffs involuntarily update their registration information annually); or 2) Defendants' annual public disclosure of the registration information thus acquired from Plaintiffs. However, both a stipulation entered into by the parties (which the Court quotes in its decision),[18] and the uncontroverted trial testimony of the former manager of the Texas Sex Offender Registration Bureau, Vincent Castilleja,[19] conclusively established these facts. An "implicit" finding of fact to the contrary by the District Court, or by this Court on appeal, would not be supported by the record.

3) *Having Failed to Plead the Affirmative Defense of "Laches" (Even After Trial), Defendants May Not Raise, and the Court of Appeals may not Consider, that Affirmative Defense on this Appeal*.

The Defendants and Plaintiffs are in general agreement that the availability of relief on the basis of the CVD may be affected by the equitable principle of "laches."[20] For two reasons however, Plaintiffs assert that laches has no application on this appeal.

[18] *District Court's Findings of Fact and Conclusions of Law*, **ROA.835**; **RX TAB 4, p. 3**. For quoted passage, see *Plaintiffs' Opening Brief*, 34 n. 99.
[19] *Transcript of Bench Trial*, **ROA.893-894**; **RX TAB 6, pp. 32-33.** For quoted passage, see *Plaintiffs' Opening Brief*, 34 n. 100.
[20] *Plaintiffs' Opening Brief on Appeal*, 25; *State's Brief*, 29.

First, "laches" is a "discrete" affirmative defense that is separate from an affirmative defense based on expiration of a "limitations" period.[21] The affirmative defense of "laches" was never pled by Defendants in the District Court (even after trial) or considered by the District Court *sua sponte*.[22] The Court of Appeals therefore may not consider for the first time on appeal whether Plaintiffs' "separately actionable" claims brought within the limitations period are foreclosed by laches.[23]

Second, as Defendants have acknowledged, the U.S. Supreme Court has ruled that under 42 U.S.C. §1983 ("Section 1983") federal courts must "borrow" the limitations period that a forum state has "provide[d] for personal-injury torts."[24] When, as in the present case, a "separately actionable" claim has "accrued" during the applicable limitations period (as

[21] *See*, Fed. R. Civ. P. 8(c)(1).
[22] The Defendants' omission to plead the affirmative defense of "laches" appears par for the course at the Texas Attorney General's office. Contrary to Defendants' statement that they pleaded limitations "shortly before trial," *State's Brief*, at 11, Defendants actually failed to file any answer whatsoever, much less one containing the affirmative defense of "limitations," until after trial of this case, over Plaintiffs' strenuous objection, but with special leave granted by the District Court. *See*, Trial Transcript, **ROA.874** (Statement by the District Court: "Is the State going to file an answer?"). The Plaintiffs on this appeal have elected not to seek relief from the District Court's decision to grant Defendants leave in that regard.
[23] *See*, *Baylor Univ. Med. Ctr v. Heckler*, 758 F.3d 1052, 1057 n. 8 (5th Cir. 1985).
[24] *State's Brief*, 22; accord, *Plaintiffs' Opening Brief on Appeal*, 27.

determined by federal law)[25] the equitable defense of laches may not operate to bar the cause of action.[26]

4) *The Doctrine Recognized in Heck v. Humphrey does not Pretermit, or Extinguish, Plaintiffs' Contention that the Limitations Period "Accrued Anew" When Defendants Applied the Registration Requirement to Plaintiffs within a Year Prior to the Filing Plaintiffs' Original Complaint.*

Based on the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), Defendants contend the Court of Appeals need not reach the question of whether, when a plaintiff seeks declaratory and prospective relief, each application of an unlawful policy by a defendant causes a limitations period to begin "anew."[27] Although the District Court did not

[25] *Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731, 739-740 (5th Cir. 2017)(the continuing violation doctrine is not a "tolling" doctrine which is governed by state law, but is instead an "accrual" doctrine that is governed by federal law).

[26] *Petrella v. Metro-Goldwyn-Mayer, Inc*., 572 U.S. 663, 667 (2015)(ruling that when a "suit seeks relief solely for conduct occurring within the limitations period… courts are not at liberty to jettison Congress' judgment on the timeliness of suit"); *accord*, *Am. Trucking Associations Inc. v. New York Thruway Auth*., 199 F.Supp. 3d 855, 871 (S.D. N.Y. 2016)(noting federal appellate courts have described *Petrella's* legal reasoning "as 'categorical' and [have] applied its holding to equitable claims filed within an applicable statute of limitations, whether or not that statute of limitations was enacted by Congress"); *and see*, *id*., at 872 (observing that were a contrary rule adopted "*Brown v. Board of Education* would have been thrown out of court, on the ground that the Kansas statute authorizing Topeka to maintain segregated public schools had been on the books since 1879").

[27] E.g., *State's Brief*, 14 ("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)"); *id*., at 1-2 ("Prevailing on [a claim under *Santobello v.New York,* 404 U.S. 257 (1971)] 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 U.S. 477 (1994)"); *id*., at 14 ("Plaintiffs must show that their deferred adjudications are

reach Defendants' contentions under *Heck* in its memorandum opinion or separate order denying Plaintiffs' motion for new trial below,[28] the record discloses the District Court at trial was more than slightly disinclined to sustain Defendants' arguments on this point. Thus, when Defendants presented this issue at trial the District Court succinctly interjected:

> THE COURT: Well, how is this an attack on their conviction? They remain convicted. The question is just how long do they have to continue to register…. It's not an attack on the conviction. Whatever happened at the court happened at the court. I don't see the *Heck v. Humphrey* argument here because I don't see this case attacking that.[29]

Should the Court of Appeals exercise discretion to consider Defendants' defense under the *Heck* doctrine, Plaintiffs would incorporate by reference the post-trial brief they submitted to the District Court prior to judgment, which fully describes why the *Heck* defense is of no avail to

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unconstitutional…[and] [s]uch a claim is not cognizable under section 1983 because they have never had their convictions overturned"); *id*., at 15-16 ("Challenges to the terms of a sentence fall within *Heck* even apart from any challenge of the underlying conviction"); id., at 17 ("*Heck's* favorable-termination requirement…applies to Plaintiffs…[and] [b]ecause Plaintiffs have not satisfied this requirement, their claims are *Heck*-barred and must be dismissed").

[28] *District Court's Findings of Fact and Conclusions of Law*, **ROA.841**; **RX TAB 4, p. 9** ("Because the court has concluded that Fifth Circuit precedent forecloses the Plaintiffs' claims based both on their substance and timing, the court need not analyze arguments concerning the *Heck* doctrine").

[29] *Trial Transcript*, **ROA.915 – ROA.916.**

Defendants.[30] In addition to the arguments they presented to the District Court in that post-trial brief however, Plaintiffs would note the following.

The Defendants concede in their brief that under *Heck* "[a]ll that matters is whether 'success in [the] action would necessarily demonstrate the invalidity of confinement or its duration.'"[31] The Plaintiffs agree. Ostensibly applying the foregoing rule, Defendants nonetheless contend the Fifth Circuit "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.'"[32] The Defendants thus argue that the decisions they cite for this contention have *categorically* ruled *all* Section 1983 claims based on breached plea bargains "necessarily imply the invalidity of [a] conviction or sentence,"[33] or necessarily affect "the fact or duration of confinement."[34] This contention does not survive scrutiny.

The facts supplied in the decisions cited by Defendants do not disclose whether the relief sought by those Section 1983 plaintiffs was confined to "specific performance" by the government (that would have no

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[30] *See*, *Plaintiffs' Response to Defendants' Brief Concerning Defensive Issues Presented at Trial*, 2-6, beginning at **ROA.806**.
[31] *State's Brief*, 21, citing *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005).
[32] *State's Brief*, 16.
[33] *Heck v. Humphrey*, *supra,* 512 U.S. at 487.
[34] *Wilkinson v. Dotson*, *supra*, 544 U.S. at 78-82.

effect on the "validity" of the underlying convictions or sentences), or to withdrawal of those plaintiffs' pleas (which *would* have affected the validity of their underlying convictions or sentences).[35] Accordingly, Defendants by this argument are requesting the Court to adopt a broad *per se* legal conclusion unsupported by Fifth Circuit precedent that directly conflicts with binding precedent of the Supreme Court.

B) **Plaintiffs' Issue Two:** *Whether the Substantive Due Process Right under the Fourteenth Amendment, as Recognized by the U.S. Supreme Court in Santobello v. New York, is violated by the Government's Material Breach of a Plea Bargain Agreement, Regardless of whether the Consequences of the Government's Breach Constitute a "Criminal Punishment" as defined by the Ex Post Facto Clause.*[36]

The Defendants contend the State of Texas is vested with a general power to breach plea bargain agreements at will; that the Due Process right announced in *Santobello v. New York*, 404 U.S. 257 (1971)("*Santobello*") is an "exception" to their otherwise unlimited power to breach plea bargains at will; but that the *Santobello* "exception" does not apply in this case.[37] The Defendants arguments in support of this contention are without merit.

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[35] *See, State's Brief*, 16, citing *Day v. Seiler*, 560 Fed. Appx. 316 (5th Cir. 2014)(per curiam); *Mann v. Denton County*, 364 Fed. Appx. 881 (5th Cir. 2010)(per curiam); *Bonner v. Castloo*, 193 Fed. Appx. 325 (5th Cir. 2006)(per curiam); *Garner v. Doe*, 61 Fed. Appx. 918, 2003 WL 1107093 (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).

[36] *Plaintiffs' Opening Brief on Appeal*, 12.

[37] *State's Brief*, 1 ("Plaintiffs ask the federal courts to create an exception to this rule for anyone who pleaded guilty under a plea agreement before 1997").

1) *Federal Courts of Appeals have Ruled the Right Recognized in Santobello v. New York Constitutes a "Substantive" Constitutional Right Protected by the Due Process Clause of the Fourteenth Amendment.*

The Defendants contend the constitutional right to enforce plea bargain agreements, as recognized in *Santobello*, is not a "substantive" right to Due Process, but is instead a "procedural" right to Due Process.[38] On this basis Defendants further contend Plaintiffs have failed to state a claim. The Defendants are in error.

The federal appellate courts that have considered the source of the federal constitutional right in question, as well as scholars, have concluded *Santobello* recognized a "substantive" right to "fundamental fairness" protected by the Due Process Clause, and not a "procedural" right.[39] It is true that "fundamental unfairness" may occur during a trial, in which case constitutionally protected "procedural" rights might be violated as Defendants suggest (e.g., by deprivation of the right to confront one's

[38] *State's Brief*, 33-39.

[39] *Cooper v. United States*, 594 F.2d 12, 19 (4th Cir. 1979)(referring to "this general constitutional framework of substantive due process"), *overruled on other grounds*, *Mabry v. Johnson*, 467 U.S. 504, 506-507 n. 2. (1984); *Johnson v. Mabrey*, 707 F.2d 323, 326 (8th Cir. 1983)("The source of the fairness requirement is constitutional, presumably substantive due process"), *overruled on other grounds*, *Mabry v. Johnson*, *supra*, 467 U.S. at 511; Westen & Westen, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 Cal. L. Rev. 471, 518 n. 161 (1978)(noting *Santobello* "could be a decision that substantive due process also requires that the state protect the expectations it creates in the minds of criminal defendants with respect to the disposition of their cases….[I]f the Court genuinely intends to protect expectation interests, it must be basing its decision on the substantive commands of the due process clause").

accuser, or not to be compelled to testify in one's own criminal case, etc…).[40] However, when, as here (and as in *Santobello*) the alleged fundamental unfairness arises *after a determination of guilt*, or when the impact of a breached plea bargain arises *after* judicial approval of a plea bargain agreement, the breach can no longer be described as procedural "trial error." The remedy for the breach of a plea bargain agreement in these circumstances does not involve an "adjudication" of a person's guilt or sentence. In this sense, the right to substantive due process is violated by the breach of a plea bargain agreement "no matter what process" was provided at trial, sentencing, or at any other adjudicative proceeding.[41]

2) *The* "*Lex Loci*" *Doctrine Applies to Plaintiffs' Santobello Claims.*

The Defendants suggest that statutes which existed at the time of a criminal defendant's plea, unlike a prosecutor's inducements (whether authorized by a statute or not), cannot form the sort of "inducement" which may cause entry of a plea under *Santobello*.[42] Such a contention is in error.

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[40] *State's Brief*, 36, *quoting* 1 Wayne R. LaFave, 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")(emphasis added).

[41] *Reno v. Flores*, 507 U.S. 292, 301-302 (1993); accord, *Brown v. Poole*, 337 F.3d 1155, 1162 (9th Cir. 2003)("Since he has already performed his side of the bargain, fundamental fairness demands that the state be compelled to adhere to the agreement as well.").

[42] *State's Brief*, 41 (disputing that "the law that existed at the time of the pleas became incorporated into the agreements" and asserting such a principle "lacks legal or factual support").

A statute, wholly apart from any plea negotiations by a prosecutor, can alone "induce" a person to enter a plea.[43]

Insofar as Defendants deny that "the law" which "existed at the time of the pleas became incorporated into the agreements," and further contend such a principle "lacks legal" support,[44] they are likewise in error. A fundamental principle of common law concerning contracts provides that the meaning of a contract must be interpreted according to statutory laws of the location *where the contract was formed*, and as those laws existed *at the time the contract was formed*. The *lex loci* doctrine has been applied in the earliest federal decisions;[45] in more recent decisions of the U.S. Supreme Court;[46] and in decisions of the Fifth Circuit.[47] According to one leading treatise this doctrine has been adopted in all federal courts of appeals and by 41 States.[48]

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[43] *United States v. Jackson*, 390 U.S. 570 (1968); *People v. Temelkoski*, 905 N.W.2d 593, 593 (Mich. 2018)("[T]he *Santobello* principle applies with equal force to a statutory provision…that induces a defendant to plead guilty").
[44] *State's Brief*, 41.
[45] *Camfranque v. Burnell*, 4 F. Cas. 1130, 1131 (D. Pa. 1806)("[L]aws, which, in any manner, affect a contract, whether in its construction, in the mode of discharging it, or which control the obligation which the contract imposes, are essentially incorporated with the contract itself.").
[46] *McCracken v. Haywood*, 43 U.S. 608, 612 (1844)("The obligation of a contract…depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation"); *accord*, *Von Hoffman v. City of Quincy*, 71 U.S. 535, 550 (1866); and, *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n. 17 (1977).
[47] *United States v. Sentinel Fire Ins. Co*., 178 F.2d 217, 228 (5th Cir. 1949)(listing cases).
[48] 11 Williston & Lord, *A Treatise on the Law of Contracts*, §30.19 (4th ed., 1999).

3) *A Genuine Issue of Fact Exists Concerning Whether Plaintiffs Were Reasonable Induced, Subjectively and Objectively, to Enter their Pleas in Reliance on Official Representations Concerning the Consequences of their Pleas.*

The Supreme Court in *Santobello* ruled 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."[49] With regard to the "inducement" to "any significant degree" inquiry, Fifth Circuit precedent provides that a court must consider whether the government's conduct is consistent with "the defendant's reasonable understanding" of the agreement.[50] This test, in turn, requires courts to consider both a defendant's "subjective beliefs" and the "objective reasonableness" of the defendant's understandings; but the defendant's "subjective beliefs," standing alone, are insufficient to establish a breach of the agreement by the government.[51]

Notwithstanding the fact that the District Court did not reach the "subjective/objective" understanding issue, Defendants urge the Court of Appeals to find, for the first time on appeal, that Plaintiffs have failed to produce, as a matter of law, sufficient evidence to demonstrate a genuine

[49] *Santobello v. New York, supra,* 404 U.S. at 262.
[50] *United States v. Valencia*, 985 F.2d 758, 761 (5th Cir. 1993).
[51] *Matthews v. United States*, 569 F.2d 941, 943 (5th Cir. 1978)("The law of this Circuit, however, holds that the defendant's subjective belief alone is not sufficient to invalidate a guilty plea.").

issue of fact concerning the reasonableness of their claims to having been "induced" to enter their pleas by official representations made by the State of Texas.[52] For primarily two reasons the Court of Appeals should decline Defendants' invitation.

First, wholly apart from any evidentiary weight derived from the *lex loci* doctrine, Plaintiff trial exhibits, which by agreement included affidavits in lieu of live testimony from Plaintiffs and from of their respective criminal defense counsel, directly controvert the factual assertions made by Defendants. The Plaintiffs' trial evidence, at a minimum, created genuine issues of material fact concerning whether they could have reasonably understood or believed, both subjectively and objectively, that the State of Texas could be trusted to keep its end of the bargain. This is particularly apparent with regard to the plea papers that were prepared by the prosecutor in Plaintiff Jones' criminal case, which *expressly* informed Plaintiff Jones

[52] *State's Brief*, 2 ("Plaintiffs never proved that prosecutors made any express promise about their duty to register"); *id.,* at 8 ("Plaintiffs do not maintain that any agent of the State ever made separate representations regarding their duty to register as sex offenders); *id.,* at 13 **(**"Plaintiffs have not proven that any promise regarding registration was made"); *id.,* at 32 **(**"Plaintiffs have not shown that any promise was made about their requirements to register"); *id.,* at 39 and 40 **(**"Plaintiffs did not…prove—that they were made any specific promise regarding registration requirements"); *id.,* at 40 **(**"Whatever understanding they may have had came entirely from the relevant statute and their discussions with their own lawyers"); *id.,* at 40 **(**"Plaintiffs' subjective beliefs about the contents or consequences of their plea agreements cannot alter the unambiguous terms of those agreements"); *id.,* at 41, n.12 **(**"[T]he evidence Plaintiffs presented at trial reflects only that they likely discussed registration requirements with their own lawyers"); and *id.,* at 42 **(**"There is no evidence that the parties to the plea agreements ever discussed the terms of any registration requirement").

that his duty to register would expire upon his successful completion of community supervision.[53] The testimonial affidavits admitted in support of Hearn's and Miller's claims, along with other evidence in the record, similarly establish genuine issues of fact on these questions.

Second, the course of action urged by Defendants (affirmance of the District Court's judgment on the basis of "implied findings of fact" supported by the record) would violate the "basis of decision" doctrine, derived Rule 52(a)(1) of the Federal Rules of Civil Procedure ("Rule 52(a)(1)"), which the Fifth Circuit recently reaffirmed in *Eni U.S. Operating Co. v. Transocean Deepwater Drilling, Inc*., 919 F.3d 931, 935-936 (5th Cir. 2019). Rule 52(a)(1) provides in relevant part:

> "In an action tried on the facts without a jury…the court must find the facts specially…. The findings…may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court."

Whether Plaintiffs were induced to enter their pleas in reasonable reliance on official promises made by the State of Texas, either verbally through its prosecutors, or within the plea papers in question, or on the basis of Texas statutory law that existed at the time of Plaintiffs' pleas, involves

[53] Jones Trial Exhibit P-3, **ROA.948**; Jones Trial Exhibit P-8, **ROA.998** ("Your duty to register ends on the day your probation is discharged or if you have received an order of Deferred Adjudication for the offense your duty to register ends on the date the court dismisses the criminal proceeding against you and discharges you….").

questions of fact (or at least mixed questions of law and fact). The District Court did not enter any findings of fact on those questions, nor did it enter any other findings of fact with sufficient specificity to disclose the factual basis, if any, for its decision to grant final judgment in Defendants favor (other than with respect to the issues raised by Plaintiffs on appeal). Consequently, the Court of Appeals is prevented from making those findings of fact *ab initio*.[54]

4) *Santobello Requires that Ambiguous Terms in a Plea Agreement be Construed against the State, and it is Irrelevant, for Purposes and Proving a Breach, that the Terms of the Agreement did not Expressly Include an Affirmative Representation that the Government's Obligations Would Not Change in the Future.*

The Defendants contend that because Plaintiffs' plea bargain agreements did not expressly include representations by the State of Texas that it reserved the right to breach its agreement at will through future legislation, Plaintiffs' *Santobello* claims must fail as a matter of law.[55] This contention is without merit.

First, the legal rule that Defendants propose would ignore the factual circumstances presented by, and upon which the Supreme Court found a

[54] *Eni U.S. Operating Co. v. Transocean Deepwater Drilling, Inc*., *supra,* 919 F.3d at 935-936.

[55] ***State's Brief*, 40** ("The future content of Texas civil law was not a term of their agreements"); ***State's Brief*, p. 45** ("If [Plaintiffs] 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").

substantive due process violation in, *Santobello* itself. In *Santobello* the first prosecutor merely "agreed to make no recommendation" as to the defendant's sentence.[56] The first prosecutor did not expressly "promise" or "represent" to the defendant that other prosecutors "would also be bound" by the agreement.

Second, at best, Defendants' argument is that in the absence of such an express reservation by the State of Texas, the agreements it made with Plaintiffs were "ambiguous" about whether the State reserved the right to breach its agreement at will through future legislation. The "ambiguity" emphasized by Defendants, if any exists, may not defeat Plaintiffs' claims. To the contrary, "ambiguities" in plea bargain agreements must be interpreted against the government.[57]

5) *Whether the State of Texas Constitutionally Retains a "Reserved Power" to Breach Plea Bargain Agreements.*

The Defendants argue that the State of Texas cannot be constitutionally bound by plea bargain agreements because they retain, under the *lex loci* doctrine, what is commonly referred to as a "reserved power" to amend their statutory laws at will in defiance of their obligations

[56] *Santobello v. New York*, *supra*, 404 U.S. at 258 ("The [first] prosecutor agreed to make no recommendation as to the sentence.").
[57] *United States v. Farias*, 469 F.3d 393, 397 (5th Cir. 2006)("We construe the agreement like a contract, seeking to determine the defendant's 'reasonable understanding' of the agreement and construing ambiguity against the Government").

under such agreements.[58] As with any other federal constitutional right, institutional uniformity commands that the meaning of the right recognized in *Santobello* be guided by federal and not state law. The Defendants agree with this conclusion.[59] For at least two reasons Defendants' "reservation of powers" contention must fail.

First, there can be no dispute that the decision in *Santobello* rested on a federal right of constitutional dimension.[60] The Defendants do not contend otherwise. Yet in view of the Supremacy Clause,[61] Defendants' contention that states retain a "reserved power" which enables them to breach plea bargains at will, irreconcilably conflicts with the U.S. Constitution as interpreted by *Santobello*.

Second, even if it is conceded that states *as a general matter* hold "reserved powers," that conclusion would not necessarily establish that states retain *unlimited* reserved powers unregulated by the U.S. Constitution. The decision which Defendants cite to support of their contrary view, *i.e.*, the California Supreme Court's decision in *Doe v. Harris*, 302 P.3d 598 (Cal. 2013),[62] does not support Defendants' assertion that a state's "reserved

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[58] *State's Brief*, 45-46.
[59] *State's Brief*, 45 ("plea agreements are interpreted under federal law").
[60] *See* Westen & Westen, supra, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 Cal. L. Rev. at 474 n. 10; and *id*., at 476 n. 16.
[61] U.S. Const., Art. VI, cl. 2 (This Constitution…shall be the supreme law of the land").
[62] *State's Brief*, 45-46.

power" may be indiscriminately used to unilaterally negate a negotiated plea bargain at will.

In *Doe v. Harris*, *supra*, the California Supreme Court made clear that the scope of the "reserved powers" it described, as a matter of state common law, remained "subject to the limitations imposed by the federal and state Constitutions."[63] That Court also observed "it is not impossible that the parties to a particular plea bargain might…implicitly understand the consequences of a plea will remain fixed despite amendments to the relevant law."[64]

Ultimately, after certification to the California Supreme Court, the Ninth Circuit ordered dismissal of the plaintiff's *Santobello* claim in *Doe v. Harris*, *supra*.[65] This was not because the Court concluded plaintiff's understanding of his plea agreement was unsupported by an "objectively reasonable" reliance on existing law. Rather, the Ninth Circuit dismissed the *Santobello* claim in *Doe* because the U.S. District Court had entered a finding of fact that the plaintiff had not "subjectively" relied on existing law. In other words, because the District Court had entered a finding of fact

[63] *Doe v. Harris*, *supra,* 302 P.3d at 603.
[64] *Id*., 302 P.3d at 603, citing *People v. Harvey*, 602 P.3d 396 (Cal. 1979). In *People v. Harvey*, the California Supreme Court ruled that a negotiated dismissal of an offense as part of a plea agreement "implicitly" prohibited the prosecution from using facts, which formed the basis of the dismissed offense, in a subsequent prosecution. *Id*., 602 P.3d at 398.
[65] *Doe v. Harris*, 535 Fed. Appx. 630 (9th Cir., Aug. 1, 2013)(unpublished).

which determined the state's "reserved power" (to later alter the plea agreement) "was neither negotiated nor discussed between Doe or his counsel and the prosecutor";[66] and because the plaintiff in *Doe* had not "challenge[d] the validity of the district court's factual findin[g]" on this point,[67] the plaintiff had not shown he "subjectively" understood the terms of his agreement, at the time of his plea, would "remain fixed despite amendments to the relevant law."[68] The facts in the present case are thus distinguishable from the facts in *Doe v. Harris*, *supra*.

With regard to legal theory relied upon by Plaintiff, Plaintiffs have specifically alleged Defendants' claim to an unlimited "reserved power" to breach plea bargain agreements at will cannot be sustained.[69] While Plaintiffs expressly disavow any notion that their constitutional claims rest on an interpretation of the Contract Clause of the U.S. Constitution,[70] they nonetheless contend that any "reserved powers" held by the State of Texas in this context is regulated by the U.S. Constitution. More specifically, Plaintiffs contend, by analogy to "contract law" of constitutional dimension, that any "reserved powers" held by the State of Texas must be guided and

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[66] *Doe v. Harris*, *supra,* 535 Fed. Appx. at 631.
[67] *Id*., 535 Fed. Appx. at 631 n. 2.
[68] *Doe v. Harris*, *supra,* 302 P.3d at 603.
[69] *Plaintiffs' First Amended Complaint*, 29-30, **ROA.731 – ROA.732.**
[70] U.S. Const., Art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

limited by the analysis which applies to Contract Clause cases between a state government and private individuals.[71]

In *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977) the Supreme Court established a constitutional test which provided limitations on a state's "reserved powers," including those which are exercised contractually to advance "remedial schemes."[72] Relevant to that test is whether the state's breach of a contractual agreement, as a factual matter, is *both* "reasonable" *and* "necessary."[73]

The Plaintiffs contend the scope and limitations on a state's "reserved powers" is not categorical, but may depend on the particular facts in a given case, as was recognized by the Supreme Court in *United States Trust Co. of New York v. New Jersey*, *supra*.[74] Because the District Court did not enter findings of fact necessary to resolve whether Defendants' conduct is within a reserved power claimed by the State of Texas, the Court of Appeals under

[71] *Plaintiffs' First Amended Complaint,* 30, **ROA.732**.
[72] *United States Trust Co. of New York v. New Jersey*, *supra,* 431 U.S. at 56.
[73] *Id*., 431 U.S. at 25 ("[A]n impairment may be constitutional if it is reasonable and necessary to serve an important public purpose"); and *id*., 431 U.S. at 29 ("We can only sustain the repeal of the 1962 covenant if that impairment was both reasonable and necessary to serve the admittedly important public purposes claimed by the State").
[74] A fuller outline of the factual issues relevant to this legal theory appears in Plaintiffs' *Motion for Summary Judgment*, 29-33, beginning at **ROA.138**.

Rule 52(a)(1) may not determine those facts *ab initio* consistently with the "basis of decision" doctrine.[75]

CONCLUSION

The continuing violation doctrine is designed in part to "shield" Section 1983 defendants from unrelated claims for compensatory damages arising outside the limitations period. In the present case Defendants have not directly attempted to defend the District Court's ruling that the continuing violation doctrine, may also be used as a "sword" to defeat "separately actionable" claims that seek only equitable relief which arise within a federally defined accrual period. Similarly, Defendants have not directly interposed any argument to defend the District Court's decision which ruled that in order to state a claim for the government's breach of a plea bargain agreement under *Santobello* an aggrieved party must demonstrate the government's breach resulted in a "criminal punishment."

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray, for the reasons stated in their opening brief, that the Judgment of the District Court in this case will be REVERSED, and that this case will be remanded to the District Court for further proceedings.

[75] *See ante*, this reply brief, at 18-19.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel of record for Appellants hereby certifies that two true and correct paper copies of the foregoing brief and an electronic copy of this brief have been served on the Appellees' attorney-in-charge in this case, Lanora C. Pettit, Assistant Solicitor General of Texas, by U. S. mail and by use of this Court's electronic filing system, respectively, on this 7th day of January, 2021, addressed to:

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CERTIFICATE OF COMPLIANCE

This is to further certify that this brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B)(i); that it contains 4,401 words; and that it therefore does not exceed the 6,500 word limitation imposed by that rule.

/s/*Richard Scott Gladden*