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' BRIEF

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October 13, 2020

CERTIFICATE OF INTERESTED PARTIES

This is to certify that, in the opinion of the undersigned counsel for Appellee, the persons listed below may have an interest in the outcome of this case. These representations are made in order that the Judges of the Court may evaluate possible disqualification or recusal.

U.S. Magistrate and District Judge

Hon. Mark Lane, U.S. Magistrate,
Presiding under 28 U.S.C. § 636 (b)(1)(B); and,

Hon. Lee Yeakel, U.S. District Judge.

Parties

Plaintiffs/Appellants:	**Defendants/Appellees:**
Jack Darrell Hearn;	Steven McCraw, Director of the Texas Department of Public Safety; and,
Donnie Lee Miller; and,	Sheila Vasquez, Manager of the Texas Department of Public Safety – Sex Offender Registration Bureau.
James Warwick Jones.	

Attorney for Plaintiffs/Appellants

Richard Scott Gladden, and
Scott A. Smith (Trial Court Only)

Attorneys for Defendants/Appellees

Seth Byron Dennis (Trial Counsel), and
Lenora C. Pettit (Appellate Counsel).
Office of the Attorney General of Texas

/s/*Richard Gladden*

STATEMENT REGARDING ORAL ARGUMENT

This appeal requires the Court of Appeals to review the District Court's application of the "continuing violation" doctrine as modified by a panel of the Court of Appeals in *Heath v. Bd. Of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731 (5th Cir. 2017), as well as the District Court's interpretation of the substantive constitutional right to due process under the Fourteenth Amendment recognized by the U.S. Supreme Court in *Santobello v. New York*, 404 U.S. 257 (1971). The Appellants respectfully submit oral argument on this appeal would significantly aid the Court for two reasons, and for these reasons Appellants request this case be submitted with oral argument.

First, in *Heath* a panel of the Court of Appeals, on the basis of intervening Supreme Court authority, disapproved consideration by District Courts of when a plaintiff "knew or should have known" the basis for his claims for purposes of determining when a claim under 42 U.S.C. §1983 has "accrued." No published decision of the Court of Appeals since *Heath* has applied the continuing violation doctrine to a claim arising under §1983 and, as the Court of Appeals has recently observed, the doctrine "embodies a muddled, difficult body of law that has long bedeviled courts and

commentators alike."[1] Due the complexity of this issue and the District Court's apparent confusion when applying the doctrine as modified by *Heath*, the Court of Appeals' deliberations in this case would be significantly aided by oral argument.

Second, the District Court's decision to impose a "punitive consequence" element to *Santobello* claims that allege the breach of a plea bargain by the government radically departs from, and is literally unprecedented in, the Fifth Circuit. The recurring nature of claims which allege the breach of plea bargains by the government, and the Court of Appeals' interest in uniform application of its decisional law, warrants particular scrutiny in the present case including oral argument.

[1] *State of Texas v. United States of America*, 891 F.3d 553, 561 (5th Cir. 2018).

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APPELLANTS' BRIEF

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

COME NOW Jack Darrell Hearn; Donnie Lee Miller; and, James Warwick Jones; Appellants in the above captioned and numbered cause, and, pursuant to the Federal Rules of Appellate Procedure, and the Local Rules of the United States Court of Appeals for the Fifth Circuit, files this *Appellants' Brief on Appeal* and in this connection would respectfully show unto the Court as follows:

JURISDICTIONAL STATEMENT

The Appellants filed their original complaint in the United States District Court for the Western District of Texas, Austin Division, on June 8, 2018, pursuant to Title 42 U.S.C. §1983.[1] The District Court exercised jurisdiction under Title 28 U.S.C. §1331,[2] and Plaintiffs seek appellate

[1] See, *Plaintiffs' Original Complaint*, **ROA.12**. Hereinafter, Record Excerpts will be assigned the abbreviation "**RX**" followed by its "TAB" and an associated page number, *e.g.*, "**RX TAB 4, p. 1**."

[2] *District Court's Findings of Fact and Conclusions of Law*, **ROA.834**; **RX TAB 4, p. 2**.

review of the District Court's final judgment entered on May 27, 2020, pursuant to Title 28 U.S.C. §1291.[3]

STATEMENT OF ISSUES

1) *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.*

2) *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.*

[3] *Final Judgment*, **ROA.842**; **RX TAB 3, p. 1**; *Notice of Appeal*, **ROA.859**; **RX TAB 2, p. 1**.

STATEMENT OF THE CASE

A) Prior Proceedings

The Appellants ("Plaintiffs") filed their original complaint in the United States District Court for the Western District of Texas, Austin Division, on June 8, 2018, pursuant to Title 42 U.S.C. §1983 ("Section 1983" or "§1983").[4] With leave of Court, on October 2, 2019, Plaintiffs subsequently filed a first amended complaint upon which, as discussed below, the District Court ultimately entered its final judgment.[5]

In their amended complaint Plaintiffs alleged they entered into negotiated plea bargain agreements with the State of Texas and were induced to waive their respective federally protected constitutional rights to a criminal trial premised on the State's plea bargain agreements.[6] More specifically, Plaintiffs alleged they were induced to plead guilty and waive their rights to trial in objectively reasonable reliance on the State's assurances that they would not be required to register as "sex offenders" under Texas law based on their pleas.[7] Additionally, Plaintiffs alleged they entered their pleas of guilty in objectively reasonable reliance on the State's assurance that, upon satisfactory fulfillment of their obligations under their

[4] *Plaintiff's Original Complaint*, **ROA.12**.
[5] *District Court's Order Granting Motion for Leave*, **ROA.702**; *Plaintiff's First Amended Complaint*, **ROA.703**.
[6] *Plaintiff's First Amended Complaint*, **ROA.727**.
[7] *Plaintiff's First Amended Complaint*, **ROA.732**.

plea agreements, all "disqualifications and disabilities imposed by law" arising from their pleas plea would expire.[8] Finally, Plaintiffs alleged they fully satisfied their obligations under their plea agreements but that, in breach of their agreements, the State of Texas is unconstitutionally requiring them to comply "for life" with Texas' Sex Offender Registration Program ("SORP") solely on the basis of their pleas.[9]

In lieu of filing an answer to Plaintiff's original complaint Appellants Stephen McCraw and Sheila Vasquez ("Defendants") filed a motion to dismiss on July 10, 2018.[10] Thereafter, on August 21, 2018, Plaintiffs filed a motion for summary judgment.[11] On February 25, 2019, by mutual agreement of the parties which was aided by a conference with the District Court in chambers, Defendants agreed to the District Court's dismissal of their motion to dismiss and Plaintiffs agreed to the District Court's dismissal of their motion for summary judgment. On March 28, 2019, the District Court entered an order accordingly.[12] As part of the foregoing agreement,

[8] *Plaintiff's First Amended Complaint*, **ROA.707**; **ROA.715**; **ROA.722**.
[9] *Plaintiff's First Amended Complaint*, **ROA.621**; **ROA.627**; **ROA.634**.
[10] *Defendants' Motion to Dismiss*, **ROA.38**. In their original complaint Plaintiffs named Vincent Castilleja, who was then-manager of the Texas Sex Offender Registration Bureau, as a defendant in this case in his official capacity. Mr. Castilleja was thereafter succeeded in that office by Defendant Vasquez, and Defendant Vasquez was substituted as a defendant-party in this case, in place of Mr. Castilleja, pursuant to Rule 25(d), Federal Rules of Civil Procedure. **ROA.865**.
[11] *Plaintiffs' Motion for Summary Judgment*, **ROA.246**.
[12] *District Court's Order Setting Trial and Dismissing Pleadings*, **ROA.464**.

with consent of the District Court, and in lieu of those pleadings, the parties agreed to submit their claims and defenses at a bench trial on stipulated facts and on the trial court record as it existed at the time of their agreement.

The instant case came on to be heard by a bench trial on August 27, 2019. However, shortly before trial Defendants attempted to interpose for the first time the affirmative defense of limitations, notwithstanding the fact that they had neglected to file an answer to Plaintiffs' original complaint after agreeing to the dismissal of their motion to dismiss.[13] At trial, Defendants for the first time sought leave from the District Court to file an answer to Plaintiffs original complaint for the purpose of pleading that affirmative defense of limitations.[14] The District Court at trial, over Plaintiffs' objections, granted Defendants leave to file an original answer which included that affirmative defense.[15] Later, in accord with its stated inclination at trial,[16] the District Court granted Plaintiffs leave to file their amended complaint for the purpose of engaging Defendants' belated, and previously unanticipated, affirmative defense of limitations.[17]

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[13] *Defendants' Proposed Findings of Fact and Conclusions of Law*, **ROA.501**.
[14] *Bench Trial Transcript*, **ROA.874**.
[15] *Bench Trial Transcript*, **ROA.875**.
[16] *Bench Trial Transcript*, **ROA.878**.
[17] *District Court's Order Granting Plaintiff Leave to File Amended Complaint*, **ROA.702**.

Following submission of substantial post-trial pleadings by the parties, including but not limited to the filing of Plaintiffs' amended complaint and Defendants' original answer, the District Court on May 27, 2020, issued an order containing findings of fact and conclusions of law and a final judgment which concluded Plaintiffs should take nothing on their claims.[18] On June 10, 2020, Plaintiffs filed a motion for new trial and motion to alter or amend judgment,[19] which was denied by the District Court on June 19, 2020.[20] The Plaintiffs thereafter timely filed notice of appeal on July 15, 2020, and this appeal followed.[21]

B) <u>Statement of Facts</u>

1) *Plaintiff Hearn.*

On December 10, 1992, Plaintiff Hearn was indicted by a Grand Jury in Tarrant County, Texas, for the second degree felony offense of sexual assault in violation of Section 22.011 of the Texas Penal Code, allegedly committed on July 24, 1992.[22] On August 12, 1993, Plaintiff Hearn entered into a negotiated plea agreement with the State of Texas ("State"), by and through an Assistant Tarrant County District Attorney appearing on its

[18] *District Court's Findings of Fact and Conclusions of Law*, **ROA.833**; *Final Judgment*, **ROA.842**; both appended hereto at **RX TAB 4** and **RX TAB 3**, respectively.
[19] *Plaintiffs' Motion for New Trial or to Alter or Amend Judgment*, **ROA.843**.
[20] *District Court's Order Denying Plaintiffs' Motion for New Trial or to Alter or Amend Judgment*, **ROA.857; RX TAB 5**.
[21] *Plaintiffs' Notice of Appeal*, **ROA.859; RX TAB 2**.
[22] Hearn Trial Exhibit P-1, **ROA.938**; Hearn Trial Exhibit P-6, **ROA.958**.

behalf.[23] The plea agreement between Plaintiff Hearn and the State provided that in exchange for Plaintiff Hearn's entry of a plea of guilty and waiver of his right to trial, the State would recommend to the State District Court that Plaintiff Hearn be placed on deferred adjudication community supervision for a period of five (5) years.[24] The 372nd Judicial District Court of Tarrant County, Texas ("State District Court"), approved the plea agreement as recommended by the State and, by order entered the same day, August 12, 1993, placed Plaintiff Hearn on deferred adjudication community supervision for a term of five (5) years.[25] The fact that there was a plea agreement between the State and Plaintiff Hearn is confirmed by a notation on the inside front jacket cover of the file in Plaintiff Hearn's criminal case, signed by the State District Court, which states "plea bargaining agreement followed."[26]

On August 21, 1998, the State District Court entered an order which discharged Plaintiff Hearn from community supervision.[27] The District Court's order was entered in accordance with the terms of the negotiated plea between the State and Plaintiff Hearn of August 12, 1993. The effect of this order by the State District Court, as required by then-applicable Texas

[23] Hearn Trial Exhibit P-1, **ROA.938**.
[24] Hearn Trial Exhibit P-1, **ROA.938**; Hearn Trial Exhibit P-6, **ROA.960**.
[25] Hearn Trial Exhibit P-1, **ROA.939**; Hearn Trial Exhibit P-6, **ROA.963**.
[26] Hearn Trial Exhibit P-6, **ROA.967**.
[27] Hearn Trial Exhibit P-1, **ROA.940**; Hearn Trial Exhibit P-6, **ROA.968**.

statutory law, resulted in the case against Plaintiff Hearn being dismissed and, subject to exceptions not relevant to the present case, Plaintiff Hearn being released from all "disqualifications and disabilities imposed by law for conviction of an offense." *See*, Act of May 29, 1989, 71st Leg., R.S., ch. 785, § 4.17, 1989 Tex. Gen. Laws 3471, 3501 (former Article 42.12, §5(c), Texas Code of Criminal Procedure). Since the State District Court's discharge of Plaintiff Hearn's from community supervision and its dismissal of the criminal charge against Plaintiff Hearn on August 21, 1998, Plaintiff Hearn has not been accused, convicted, or placed on community supervision for any sexual offense defined by the laws of Texas, the laws of any other State, or the laws of the United States.[28] In late 1997 or early 1998 however, Plaintiff Hearn was notified by his community supervision officer that due to a change in Texas law he would be required to register as a "sex offender" for life.[29] Plaintiff Hearn's objections to this change in law were ignored by Texas officials.[30]

On August 12, 1993, when Plaintiff Hearn accepted the plea bargain offer made by the State and agreed to enter his plea of guilty and waive his constitutional right to trial, he reasonably relied upon the fact that under the

[28] Hearn Trial Exhibit P-1, **ROA.940**.
[29] Hearn Trial Exhibit P-1, **ROA.939**.
[30] Hearn Trial Exhibit P-1, **ROA.940**.

terms of his negotiated plea, and then-existent Texas statutory law, he would not be required to register as a sex offender because he received deferred adjudication community supervision.[31] It was his understanding, based on a correct explanation of Texas law given by his legal counsel at that time, that he would be able to put "the entire matter behind him" (meaning the criminal accusation against him) if he successfully completed and was favorably discharged from his deferred adjudication community supervision.[32] Had registration for life been a term of agreement of his plea bargain agreement, Plaintiff Hearn would not have waived his constitutional right to trial by entering into the plea agreement offered by the State of Texas.[33]

Plaintiff Hearn's reasonable understanding of his plea agreement with the State of Texas is supported by the affidavit of his former criminal defense attorney, Attorney Paul Lewallen. Mr. Lewallen negotiated Plaintiff Hearn's plea bargain and represented Plaintiff Hearn at the time he entered his plea. In his affidavit Mr. Lewallen states that in the usual course of representing a person in Plaintiff Hearn circumstances he would have advised his client, prior to the time of their plea, of the benefits of deferred

[31] Hearn Trial Exhibit P-1, **ROA.941**.
[32] Hearn Trial Exhibit P-1, **ROA.939**.
[33] Hearn Trial Exhibit P-1, **ROA.939-940**.

adjudication including the removal of future legal "disabilities" should he successfully complete and be favorably discharged from his community supervision.[34]

Since the Texas legislature's amendment to SORP in 1997, and through the present date, SORP has required Plaintiff Hearn to register as a sex offender and to otherwise periodically comply with other legal obligations attendant to that requirement.[35] These legal disabilities have been imposed by the State of Texas notwithstanding the fact that Plaintiff Hearn was assured, at the time of his negotiated plea, that his favorable discharge from community supervision would prevent imposition of future legal "disabilities" against him arising from his plea. Although Plaintiff Hearn successfully completed and was discharged favorably from his deferred community supervision on August 21, 1998, since that time he has twice been arrested, prosecuted, and placed on community supervision for the felony offense of "failure to comply" with SORP's registration requirements. These offenses allegedly occurred twice the very same day (May 5, 2006) in two separate counties (Kerr and Kendall counties).[36]

[34] Hearn Trial Exhibit P-4, **ROA.951-953**. (Lewallen Affidavit).
[35] Hearn Trial Exhibit P-1, **ROA.941**.
[36] Hearn Trial Exhibit P-1, **ROA.940**; Hearn Trial Exhibit P-6, **ROA.969**; Hearn Trial Exhibit P-6, **ROA.976**.

2) *Plaintiff Miller.*

On November 12, 1993, Plaintiff Miller was indicted by a Grand Jury in Travis County, Texas, for the second degree felony offense of sexual assault in violation of Section 22.011 of the Texas Penal Code, allegedly committed on March 16, 1993.[37] After a trial by jury which resulted in a mistrial based on the jury's inability to reach a unanimous verdict on April 24, 1995;[38] on May 18, 1995, Plaintiff Miller entered into a negotiated plea agreement with the State of Texas by and through an Assistant Travis County District Attorney appearing on its behalf.[39] The plea agreement between Plaintiff Miller and the State provided that in exchange for Plaintiff Miller's entry of a plea of guilty and waiver of his right to trial and other important federal constitutional rights, the State would recommend to the State District Court that Plaintiff Miller be placed on deferred adjudication community supervision for a period of ten (10) years.[40] The 299th Judicial District Court of Travis County, Texas, approved the plea agreement as recommended by the State and, by order entered the same day (May 18,

[37] Miller Trial Exhibit P-2, **ROA.942**; Miller Trial Exhibit P-7, **ROA.981**.
[38] Miller Trial Exhibit P-2, **ROA.942**.
[39] Miller Trial Exhibit P-2, **ROA.942**; *id*., at **ROA.944**.
[40] Miller Trial Exhibit P-2, **ROA.943-944**.

1995), placed Plaintiff Miller on deferred adjudication community supervision for a term of ten (10) years.[41]

Approximately nine (9) years after Plaintiff Miller was placed on deferred adjudication community supervision on May 18, 1995, the State District Court on April 21, 2004, entered an order which favorably discharged Plaintiff Miller from community supervision early.[42] The State District Court's order was based upon its finding that Plaintiff Miller had complied with all conditions of his community supervision.[43] Other than the early termination of community supervision, the State District Court's order was entered in accordance with the terms of the negotiated plea between the State and Plaintiff Miller of May 18, 1995. The effect of this order by the State District Court, as required by then-applicable Texas statutory law, resulted in the case against Plaintiff Miller being dismissed and, subject to exceptions not relevant to the present case, Plaintiff Miller being released from all "disqualifications and disabilities imposed by law for conviction of

[41] Miller Trial Exhibit P-7, **ROA.982-991**. The State District Clerk's record in Plaintiff Miller's criminal case reflects that two orders were executed concerning Plaintiff Miller's placement on deferred adjudication: the first order was signed by Judge Flowers, a visiting Judge sitting by assignment on May 18, 2005; a second order was signed later, on September 29, 2005, by Judge Wisser, the duly elected Judge of the 299th State District Court. As stated by Plaintiff Miller in his affidavit, Miller Trial Exhibit P-2, **ROA.942-944**; Plaintiff Miller accepted the State's plea offer, duly entered his plea, and was placed on deferred adjudication community supervision, all at the same proceeding on May 18, 2005.

[42] Miller Trial Exhibit P-7, **ROA.992**.

[43] Miller Trial Exhibit P-7, **ROA.992**.

an offense." *See*, Act of May 29, 1989, 71st Leg., R.S., ch. 785, § 4.17, 1989 Tex. Gen. Laws 3471, 3501 (former Article 42.12, §5(c), Texas Code of Criminal Procedure).

At the time Plaintiff Miller's plea was negotiated with the State (from April 24 through May 18, 1995), Texas statutory law provided that Plaintiff Miller's duty to register as a "sex offender" with State authorities would expire on the date the State District Court discharged Plaintiff Miller from community supervision and dismissed the criminal offense against him. *See*, Act of May 30, 1993, 73rd Leg., R.S., ch. 866, § 4, 1993 Tex. Gen. Laws 3420, 3421. Since the State District Court's discharge of Plaintiff Miller's from community supervision and its dismissal of the criminal charge against him on April 21, 2004, Plaintiff Miller has not been accused, convicted, or placed on community supervision for any sexual offense defined by the laws of Texas, the laws of any other State, or the laws of the United States.[44]

On May 18, 1995, when Plaintiff Miller accepted the plea bargain offer made by the State, and agreed to enter his plea of guilty and waive his constitutional right to trial, he reasonably relied upon the fact that under the terms of his negotiated plea, and then-existent Texas statutory law, his duty to register as a "sex offender" would expire on the date he was successfully

[44] Miller Trial Exhibit P-2, **ROA.946**.

discharged from community supervision.[45] Further, it was Plaintiff Miller's understanding, based on a correct explanation of Texas law given to him by his legal counsel at that time, that he would be able to put "the entire matter behind him" (meaning the criminal accusation against him) if he successfully completed and was favorably discharged from his deferred adjudication community supervision.[46]

Since the Texas legislature's amendment to SORP in 1997,[47] and through the present date, SORP has required Plaintiff Miller to register as a sex offender and periodically comply with other legal obligations attendant to that requirement.[48] These legal disabilities have been imposed on Plaintiff Miller by the State of Texas notwithstanding the fact that Plaintiff Miller was assured, at the time of his negotiated plea, that his favorable discharge from community supervision would prevent imposition of future legal "disabilities" against him arising from his plea.[49]

3) ***Plaintiff Jones.***

Plaintiff Jones was charged by complaint and later indicted by a Grand Jury in Tarrant County, Texas, on March 3, 1994, for the second degree felony offense of sexual assault in violation of Section 22.011 of the

[45] Miller Trial Exhibit P-2, **ROA.945**.
[46] Miller Trial Exhibit P-2, **ROA.945-946**.
[47] Act of June 13, 1997, 75th Leg., R.S., ch. 669, § 1, 1997 Tex. Gen. Laws 2253, 2261.
[48] Miller Trial Exhibit P-2, **ROA.945-946**.
[49] Miller Trial Exhibit P-2, **ROA.945**.

Texas Penal Code, allegedly committed on August 27, 1993.[50] On May 2, 1994, Plaintiff Jones entered into a negotiated plea agreement with the State of Texas by and through an Assistant Tarrant County District Attorney appearing on its behalf.[51] The plea agreement between Plaintiff Jones and the State provided that in exchange for Plaintiff Jones' entry of a plea of "no contest" and waiver of his right to trial, the State would recommend to the State District Court that Plaintiff Jones be placed on deferred adjudication community supervision for a period of ten (10) years.[52] The 371st Judicial District Court of Tarrant County, Texas ("State District Court"), approved the plea agreement as recommended by the State and, by order entered the same day, May 2, 1994, placed Plaintiff Jones on deferred adjudication community supervision for a term of ten (10) years.[53] The fact that there was a plea agreement between the State and Plaintiff Jones is confirmed by a notation on the inside jacket cover of the file in Plaintiff Jones' criminal case, signed by the State District Court, which states "plea bargaining agreement followed."[54]

[50] Jones Trial Exhibit P-3, **ROA.947**; Jones Trial Exhibit P-8, **ROA.993-994**.
[51] Jones Trial Exhibit P-3, **ROA.947**.
[52] Jones Trial Exhibit P-3, **ROA.947**; Jones Trial Exhibit P-8, **ROA.995**.
[53] Jones Trial Exhibit P-3, **ROA.947-948**; Jones Trial Exhibit P-8, **ROA.996**.
[54] Jones Trial Exhibit P-8, **ROA.999**.

On May 3, 2004, the State District Court entered an order which discharged Plaintiff Jones from community supervision based upon its finding that Plaintiff Jones had satisfactorily fulfilled all conditions of his community supervision.[55] The State District Court's order was entered in accordance with the terms of the negotiated plea between the State and Plaintiff Jones of May 2, 1994.[56] Furthermore, as required by then-applicable Texas statutory law, the State District Court ordered the case against Plaintiff Jones be dismissed and ordered that, subject to exceptions not relevant to the present case, Plaintiff Jones be released from all "disqualifications and disabilities imposed by law for conviction of an offense." *See*, Act of May 29, 1989, 71st Leg., R.S., ch. 785, § 4.17, 1989 Tex. Gen. Laws 3471, 3501 (former Article 42.12, §5(c), Texas Code of Criminal Procedure).

Another paper in Plaintiff Jones' criminal case, entitled "NOTICE OF SEX OFFENDER REGISTRATION REQUIREMENT," was presented to Plaintiff Jones by the State, and was signed by Plaintiff Jones prior to Plaintiff Jones' plea and his placement on deferred adjudication community supervision. This document assured Plaintiff Jones that:

[55] Jones Trial Exhibit P-3, **ROA.949**; Jones Trial Exhibit P-8, **ROA.1000**.
[56] Jones Trial Exhibit P-3, **ROA.949**.

> "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…."[57]

At the time Plaintiff Jones' plea was negotiated with the State (on May 2, 1994), Texas statutory law provided that Plaintiff Jones' duty to register as a "sex offender" with State authorities would expire on the date the State District Court discharged Plaintiff Jones' community supervision and dismissed the criminal offense against him. *See*, Act of May 30, 1993, 73rd Leg., R.S., ch. 866, § 4, 1993 Tex. Gen. Laws 3420, 3421.

On May 2, 1994, when Plaintiff Jones accepted the plea bargain offer made by the State, and agreed to enter his plea of guilty and waive his constitutional right to trial, he reasonably relied upon the fact that under the terms of his negotiated plea, and then-existent Texas statutory law, his duty to register as a "sex offender" would expire on the date he was successfully discharged from community supervision.[58] Plaintiff Jones' reasonable understanding of his plea agreement with the State of Texas is supported by the affidavit of his former criminal defense attorney, Attorney Richard C. "Dick" Price. Mr. Price negotiated Plaintiff Jones' plea bargain and represented Plaintiff Jones at the time he entered his plea. In his affidavit

[57] Jones Trial Exhibit P-3, **ROA.948**; Jones Trial Exhibit P-8, **ROA.998**.
[58] Jones Trial Exhibit P-3, **ROA.948**.

Mr. Price further states that in the usual course of representing a person in Plaintiff Jones' circumstances, he would have advised his client, prior to the time of their plea, of the benefits of deferred adjudication including the removal of future legal "disabilities" should he successfully complete and be discharged from his community supervision. Mr. Price also states that he would have advised his client that the duty to register as a sex offender would expire on the date the client's community supervision was favorably discharged.[59]

Since the State District Court's discharge of Plaintiff Jones from community supervision and its dismissal of the criminal charge against Plaintiff Jones on May 3, 2004, Plaintiff Jones has not been accused, convicted, or placed on community supervision for any sexual offense defined by the laws of Texas, the laws of any other State, or the laws of the United States.[60]

Since the Texas legislature's amendment to SORP in 1997, and through the present date, SORP has required Plaintiff Jones to register as a sex offender and to periodically comply with legal obligations attendant to that requirement.[61] These legal disabilities have been imposed by the State of

[59] Jones Trial Exhibit P-5, **ROA.954-957**.
[60] Jones Trial Exhibit P-3, **ROA.950**.
[61] Jones Trial Exhibit P-3, **ROA.950**.

Texas notwithstanding the fact that Plaintiff Jones was assured, at the time of his negotiated plea, that his favorable discharge from community supervision would prevent imposition of future legal "disabilities" against him arising from his plea.

On February 17, 2014, Plaintiff Jones corresponded directly with then-manager of SORB Vincent Castilleja ("Castilleja") by email and demanded that Castilleja immediately remove him from the registry and from the publicly accessible database maintained by the Texas Department of Public Safety. In his response dated February 18, 2014, Castilleja replied to Plaintiff Jones by email and stated as follows:

> "The Sex Offender Registration Bureau is in receipt of your email regarding the request for removal from the Texas Sex Offender Registry. You have provided our office with a copy of the Order Discharging Defendant from Community Supervision. Your inquiry was forwarded to our Legal staff for review. We have determined that the attached order does not affect your reportable conviction and therefore have [sic] a continuing duty to register. Your registration record will remain in the registry until you duty [sic] to register has expired or other relief from registration is granted pursuant to statute."[62]

SUMMARY OF ARGUMENT

The Plaintiffs present two legal issues on this appeal. First, Plaintiffs contend the District Court erred when it concluded Plaintiffs' claims were barred by limitations because they "knew or had reason to know" that the

[62] Jones Trial Exhibit P-3, **ROA.950**.

factual basis for their claims existed more than two years before the filing of their original complaint.[63] The Plaintiffs contend the District Court erred in this regard because in *Heath v. Bd. Of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731 (5th Cir. 2017) the U. S. Court of Appeals for the Fifth Circuit recognized the "accrual" of an action under §1983, under the "continuing violation" doctrine, is no longer determined by when a plaintiff "knew or should have known" the basis for his claims.

Second, the District Court ruled a valid substantive due process claim, of the genre recognized by the U. S. Supreme Court in *Santobello v. New York*, 404 U.S. 257 (1971), required Plaintiffs to prove the breach of their plea bargain agreements by the State of Texas caused a criminally "punitive" consequence adverse to Plaintiffs, such as would be required to state a claim for violation of the *Ex Post Facto* Clause.[64] The Plaintiffs contend the District Court erred when reaching this legal conclusion because such a ruling conflicts with the Supreme Court's decision in *Santobello v. New York*, *supra*; because it conflicts with prior precedent of the Fifth Circuit; because it would render the constitutional protections of the *Ex Post Facto* Clause superfluous; and because the District Court's "punitive effect"

[63] *District Court's Findings of Fact and Conclusions of Law*, **ROA.841**; **RX TAB 4, p. 9**.
[64] *District Court's Findings of Fact and Conclusions of Law*, **ROA.838-840**; **RX TAB 4, pp. 6-9**.

requirement is unknown to and unprecedented under general principles of contract law by which, through analogy, *Santobello* claims must be guided.

STANDARD OF REVIEW

The District Court correctly found the facts in this case are "generally uncontested, and resolution this case turns chiefly on legal disputes."[65] When a case comes before the Court of Appeals after a bench trial it reviews legal issues *de novo* and findings of fact for clear error.[66] A finding of fact is "clearly erroneous" when the reviewing court, on the whole of the evidence, is left with the definite and firm conviction that a mistake has been committed though there may be evidence to support the district court's finding.[67]

ARGUMENT

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" that the Basis for an Earlier Claim had Accrued, if the Alleged Subsequent, Separately Actionable Violation Arises from a Repetitious Application of the*

[65] *District Court's Findings of Fact and Conclusions of Law*, **ROA.835**; **RX TAB 4, p. 3**.
[66] *Guzman v. Hacienda Records and Recording Studio, Inc*., 808 F.3d 1031, 1036 (5th Cir. 2015).
[67] *Ibid.*

Same Policy During the Relevant Limitations Period that Governs the Subsequent Claim.

The District Court concluded Plaintiffs' *Santobello* claims were barred by limitations because they "knew or had reason to know" that the factual basis for their claims existed more than two years before the filing of their original complaint.[68] In short, Plaintiffs contend the District Court erred because in *Heath v. Bd. Of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731 (5th Cir. 2017) the Court of Appeals recognized the "accrual" of an action under §1983, under the circumstances presented by this case, is no longer determined by when a plaintiff "knew or should have known" the basis for his claims.

A) *The Federal Origins and Current Application of the "Continuing Violation" Doctrine in the Fifth Circuit.*

The U.S. Supreme Court first adopted the "continuing violation" doctrine in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). In *Havens Realty* the Court considered whether a statute of limitations defense foreclosed the plaintiffs' claims that alleged the defendants had engaged in "racial steering" in violation of Section 812(a) of the Fair Housing Act of 1968, 42 U.S.C. §3612(a)("FHA"). The Court observed that "[s]tatutes of

[68] *District Court's Findings of Fact and Conclusions of Law*, **ROA.840-8411**; **RX TAB 4, pp. 8-9**.

limitations such as that contained in § 812(a) are intended to keep stale claims out of the courts," but that "[w]here the challenged violation is a continuing one…the staleness concern disappears."[69] The Court further ruled that a "wooden application of § 812(a)" would "ignor[e] the continuing nature of the alleged violation [and] only undermin[e] the broad remedial intent of Congress embodied in the Act."[70] Thus, the Court ultimately ruled that "where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed."[71]

In *Heath v. Bd. Of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731 (5th Cir. 2017) the Fifth Circuit recognized that the "continuing violation" doctrine, as originally adopted in *Havens Realty Corp. v. Coleman*, *supra*, extends generally to all claims brought under §1983, including those that do not allege racial or racially-based employment discrimination.[72] This view is consistent with the legislative history of

[69] *Havens Realty Corp. v. Coleman*, *supra,* 455 U.S. at 380.
[70] *Id*., 455 U.S. at 380.
[71] *Havens Realty Corp. v. Coleman*, *supra,* 455 U.S. at 380-381.
[72] *Heath v. Bd. Of Supervisors for S. Univ. & Agric. & Mech. College*, *supra,* 850 F.3d at 740, *citing inter alia*, *Shomo v. City of New York* , 579 F.3d 176, 182 (2d Cir. 2009) (finding that, under *Morgan*, the continuing violation doctrine "can apply when a prisoner challenges a series of acts that together comprise an Eighth Amendment claim of

§1983, which unambiguously discloses it was intended to afford "a remedy to all people" who "may be deprived of rights to which they are entitled under the Constitution." *Monell v. New York City Dept. of Soc. Servs*., 436 U.S. 658, 683 (1978).

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.[73] In order to conform Fifth Circuit decisional law to the Supreme Court's decision in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), a panel of the Fifth Circuit in *Heath v. Bd. Of Supervisors for S. Univ. & Agric. & Mech. Coll.*, *supra,* overruled several of the Court's prior decisions and reaffirmed its prior decision in *Stewart v. Mississippi Transport Commission*, 586 F.3d 321 (5th Cir. 2009). Under the *Stewart/Heath* standard, whether the continuing violation doctrine applies now depends on: 1) whether the plaintiff has demonstrated the occurrence of a series of unlawful acts that are related; 2) whether, after the initial unlawful act, the defendants intervened in a way that severed the prior act from subsequent unlawful acts which occurred during the limitations period

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deliberate indifference to serious medical needs"); *see also, Neel v. Rehberg*, 577 F.2d 262, 263-264 (5th Cir. 1978); and, *Heard v. Sheahan*, 253 F.3d 316, 320 (7th Cir. 2001).

[73] *Heath v. Bd. Of Supervisors, supra,* 850 F.3d at 739-740.

immediately preceding the filing of the plaintiff's complaint; and 3) whether an equitable defense, such as laches, overrides application of the doctrine.[74]

In accord with *Nat'l R.R. Passenger Corp. v. Morgan*, *supra*, the Fifth Circuit in *Heath* also expressly disapproved its prior decisional law which had previously held the continuing violation doctrine did not apply when, due to "degree of permanence" of the defendant's unlawful practice or policy, the plaintiff "was or should have been aware of a duty to assert his rights within the statute of limitations."[75]

Prior to *Nat'l R.R. Passenger Corp. v. Morgan*, *supra*, there was a circuit split concerning application of the "practice" or "policy" theory, often referred to as the "systemic" theory, which commonly supported application of the continuing violation doctrine. The Ninth Circuit had held a "continually operative policy" could be challenged "at any time" provided a plaintiff "remained subject" to the policy at the time his complaint was filed, regardless of whether the policy had been applied to a plaintiff during the

[74] *Heath v. Bd. Of Supervisors for S. Univ. & Agric. & Mech. College*, *supra,* 850 F.3d at 738; and *id*., 850 F.3d at 740; *see also*, *Nat'l R.R. Passenger Corp. v. Morgan*, *supra,* 536 U.S. at 121-122.

[75] *Heath v. Bd. Of Supervisors for S. Univ. & Agric. & Mech. College*, *supra,* 850 F.3d at 739.

limitations period.[76] In contrast, the Sixth Circuit had ruled the continuing maintenance of an unlawful policy by a defendant, after an initial unlawfully act in accordance with policy, would not alone constitute a continuing violation *unless* the plaintiff demonstrated he was actually subjected to a subsequent unlawful act, undertaken pursuant to the challenged policy, during the limitations period immediately preceding the filing of the plaintiff's complaint.[77]

In *Nat'l R.R. Passenger Corp. v. Morgan*, *supra*, the Supreme Court resolved the aforementioned circuit split by ruling that a 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 immediately preceding the filing of the plaintiff's complaint.[78] In this regard, the Supreme Court's decision in *Morgan* approved the approach previously adopted by the Fifth Circuit in *Abrams v. Baylor Coll. of Medicine*, 805 F.2d 528, 533-534 (5th Cir. 1986)("We hold…that to establish a continuing violation, a plaintiff must show some application of the illegal

[76] *See*, Reid, *Confusion in the Sixth Circuit: The Application of the Continuing Violation Doctrine to Employment Discrimination*, 60 U. Cin. L. Rev. 1335, 1355 and n. 159 (1992)("Reid"); see also Wright, *Civil Rights – Time Limitations for Civil Rights Claims-Continuing Violation Doctrine*, 71 Tenn. L. Rev. 383, 391 and n. 86 (2004)("Wright").
[77] Reid, *supra*, 60 U. Cin. L. Rev. at 1355-1356 and n. 160; Wright, *supra*, 71 Tenn. L. Rev. at 391-392 and nn. 85 and 86.
[78] *Nat'l R.R. Passenger Corp. v. Morgan*, *supra,* 536 U.S. at 122 (ruling a claim "will not be time barred so long as all acts which constitute the claim are part of the same [practice]… and at least one act falls within the time period").

policy to him (or to his class) within the [limitations period] preceding the filing of his complaint.").[79]

B) ***The Affirmative Acts and Applications of Policy by Defendants During the Limitations Period Immediately Preceding the Filing of Plaintiffs' Original Complaint.***

In Plaintiffs' view the answer to whether the continuing violation doctrine applies to this case depends on whether Defendants applied an illegal policy to Plaintiffs (*i.e.*, one which deprived them of their constitutional rights under *Santobello v. New York*, 404 U.S. 257 (1971)), within the limitations period that preceded the filing of their original complaint on June 18, 2018. The limitations period for §1983 cases filed in Texas is two (2) years.[80] Thus, under the continuing violation doctrine, the two-year the limitations period that preceded the filing of Plaintiffs' original complaint requires examination of events that occurred on or after June 19, 2016.

The registration obligations that Plaintiffs challenge were first unlawfully imposed against them after they completed their terms of community supervision more than 20 (twenty) years ago, when SORP was

[79] *See also*, *Hendrix v. City of Yahoo, Miss*., 911 F.2d 1102, 1103 (5th Cir. 1990)(observing the continuing violation doctrine analytically encompasses two types of cases).

[80] *Piotroski v. City of Houston*, 237 F.3d 567, 576 and n. 10 (5th Cir. 2001), *citing* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon Supp. 1998).

amended in 1997. Were Plaintiffs' claims directed solely at the passage of SORP, or directed solely at Defendants' initial application of SORP act at that time, Plaintiffs' claims would be based on events outside the limitations period and therefore time-barred. However, there is no genuine factual dispute, and the parties have stipulated, that Defendants have continued to periodically apply to this date the policy about which Plaintiffs complain "into the limitations period" that preceded the filing of Plaintiffs' original complaint.[81] That is the feature of this case which renders Plaintiffs' claims timely under the "continuing violation" doctrine.

Chapter 62 of the Texas Code of Criminal Procedure ("Chapter 62"), as a matter of state policy, imposed affirmative duties on Defendants to act, and there is no factual dispute that Defendants have affirmatively performed some if not all of those duties within the limitations period that preceded the filing of Plaintiffs' original complaint.[82] Wholly apart from the exhaustive duties and burdens imposed on Plaintiffs since 1997 (which are directly related to the requirement that Plaintiffs "register" and "update" the registration periodically under Chapter 62); Defendants, in their official capacities have continuously had, and at all times relevant to this suit have performed, certain "corresponding duties and powers…in relation to [a]

[81] See *post*, this brief, at page 34 nn. 99 and 100.
[82] See *post*, this brief, at page 34 nn. 99 and 100.

person required to register."[83] These duties include, but are not limited to, a continuing duty to:

1) determine which local law enforcement authority serves as Plaintiffs' primary registration authority;[84]

2) designate the local registering authority to which Plaintiffs *must appear and register* (or verify their registration) at least annually;[85]

3) maintain a computerized central database containing the information required for Plaintiffs' registration;[86]

4) post on any department website related to the database any photographs of Plaintiffs that are available through the process of Plaintiffs obtaining or renewing their personal identification certificates or driver's licenses;[87]

5) update the photographs of Plaintiffs in the database and on the website annually, or as those photographs otherwise become available through the renewal process for Plaintiffs' personal identification certificates or driver's licenses;[88]

6) provide any licensing authority with notice of any person, including Plaintiffs, who are required to register and who hold or seek a license that is issued by the authority;[89]

7) send notice identifying any person required to register, including Plaintiffs, who is or will be employed, carrying on a vocation, or a student at a public or private institution of higher education, to various public authorities or agencies;[90]

[83] Article 62.002(b), Texas Code of Criminal Procedure.
[84] Article 62.004(a), Texas Code of Criminal Procedure.
[85] Article 62.05(b), and Article 62.058(a), Texas Code of Criminal Procedure.
[86] Article 62.005(a), Texas Code of Criminal Procedure.
[87] Article 62.005(c), Texas Code of Criminal Procedure.
[88] Article 62.005(c), Texas Code of Criminal Procedure.
[89] Article 62.005(e) and (f), Texas Code of Criminal Procedure.
[90] Article 62.005(h), Texas Code of Criminal Procedure.

8) provide local law enforcement authorities with a form for registering persons which describes the registration information Plaintiffs must disclose, and "any other information" Plaintiffs must disclose as "required by the department";[91]

9) provide local law enforcement authorities with a form which describes the duties which Plaintiffs "have or may have";[92]

10) inform local law enforcement authorities in the new area within Texas where any registrant, including Plaintiffs, may relocate and of the registrant's duty to register there;[93] and,

11) inform or notify law enforcement agencies, in States other than Texas, when any Texas registrant, including Plaintiffs, has relocated his residence in the other State.[94]

The publicly accessible database maintained by Defendants, for example, reveals several things. First, Defendants' database discloses that during the limitations period which preceded the filing of Plaintiffs' original complaint: 1) Defendants "updated" each of Plaintiffs' photographs on the database; 2) Defendants publicly reported on the database that each Plaintiff had timely "verified" their registration information as required by Chapter 62; and 3) Defendants publicly reported on the database that each Plaintiff had involuntarily disclosed "information required by the department."[95]

[91] Article 62.051(b) and (c)(9), Texas Code of Criminal Procedure.
[92] Article 62.051(d), Texas Code of Criminal Procedure.
[93] Article 62.055(f), Texas Code of Criminal Procedure.
[94] Article 62.055(h), Texas Code of Criminal Procedure.
[95] https://records.txdps.state.tx.us/SexOffenderRegistry/Search (last visited 10/12/2020). The Court of Appeals may take judicial notice of State-Agency websites, including an online website maintained by Defendants in their official capacities as agents of the State

It is true the Supreme Court in several cases has ruled "present *effects*" caused by a prior application of an unlawful policy, when application of the policy has only occurred *outside* a limitations period, cannot alone establish a continuing violation. However, as the Supreme Court has also observed, those cases "establish only" that for purposes of the continuing violation doctrine a plaintiff must show that a "present violation" has occurred within the limitations period preceding the filing of a plaintiff's complaint. *Lewis v. City of Chicago*, 560 U.S. 205, 214 (2010). In other words, as the Court stated in *Lewis*, "it does not follow" that no new actionable claim may be deemed timely, or that "no new claims [can] arise," when a state through its agents implements a prior unlawful (or unconstitutional) policy sometime "down the road" and does so within an applicable limitations period that precedes the filing of a complaint. *Id*., 560 U.S. at 214. Under Texas statutory law, as shown above, Defendants were required to "implement," and in fact did "implement" with regard to Plaintiffs during the applicable limitations period, the unconstitutional policy which Plaintiffs contend violated their constitutional rights under *Santobello v. New York*, *supra*.

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of Texas. *Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005)(per curiam)(on denial of pet. for reh'g); *Cantwell v. Sterling*, 788 F.3d 507, 509 (5th Cir. 2015).

The District Court's ruling perversely grants absolute immunity under §1983 to a governmental entity when it has applied an unconstitutional policy more than once, and the second application of the policy causes a constitutional violation after a limitations period has expired in relation to the first constitutional violation. While a limitations statute may properly be applied to further legitimate interests in repose, it surely may not be applied to absolve forever-after a governmental entity from liability when it applies the same unconstitutional policy, years later, and the subsequent application independently causes a federal constitutional violation.

For example, if a governmental entity had a policy which authorized a search of homes indiscriminately without probable cause and a warrant, the fact that a person's home was searched in 1997 pursuant to the policy would not bar the person's "separately actionable" constitutional claim arising from a search occurring in 2020 when the search is undertaken in accordance with the same policy. As the Supreme Court has observed: notwithstanding the fact that a statute of limitations may bar an earlier claim, "it does not follow" that no new actionable claim may be deemed timely, or that "no new claims [can] arise" when a state through its agents implements a prior unlawful (or unconstitutional) policy sometime "down the road" and does so within a limitations period that precedes the filing of a complaint. *Lewis v. City of*

Chicago, *supra*, 560 U.S. at 214. As explained in *Nat'l R.R. Passenger Corp. v. Morgan*, *supra*, under federal accrual principles "each discrete act starts a new clock for filing charges alleging that act." *Id*., 536 U.S. at 113.[96] This rule is well-settled in the Fifth Circuit:

> "[If] the statutory violation does not occur at a single moment but in a series of separate acts and if the same alleged violation was committed at the time of each act, then *the limitations period begins anew with each violation* and only those violations preceding the filing of the complaint by the full limitations period are foreclosed."[97]

The Plaintiffs' "separately actionable" claims do not rest on Defendants' original "classification" of Plaintiffs as "sex offenders" or, except for the purpose of providing "background evidence," on conduct of Defendants that occurred more than two years prior to the filing of their original complaint.[98] Rather, Plaintiffs' "separately actionable" complaints rest on affirmative acts taken by Defendants during the limitations period that immediately preceded the filing of Plaintiffs' original complaint, which were undertaken by Defendants independently from the original classification of Plaintiffs as "sex offenders." Those independent acts

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[96] In *Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll*., *supra,* the Fifth Circuit ruled the accrual principles stated in *Morgan* apply "with equal force" to claims brought under 42 U.S.C.§1983. Id., 850 F.3d at 740.

[97] *Perez v. Laredo Junior College*, 706 F.2d 731, 733-734 (5th Cir. 1983)(emphasis added).

[98] *Nat'l R.R. Passenger Corp. v. Morgan*, *supra,* 536 U.S. at 113 (a statute of limitations does not "bar a [plaintiff] from using the prior acts as background evidence to support a timely claim").

alleged by Plaintiffs (Defendants' collection and public disclosure online of Plaintiffs' "updated" information) thus "began the limitations period anew." Furthermore, the record in the present case contains uncontroverted evidence that shows the State of Texas actively breached its plea agreements with Plaintiffs during the applicable limitations period preceding the filing of their original complaint.

In 2018, as agents of the State of Texas, Defendants collected and placed Plaintiffs' "updated" identifying information on the publicly accessible online sex offender database (which is under the State's exclusive control). Both a stipulation entered into by the parties (which the Court cites in its decision),[99] and the uncontroverted trial testimony of the former manager of the Texas Sex Offender Registration Bureau, Vincent Castilleja, establish these facts.[100]

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[99] *District Court's Findings of Fact and Conclusions of Law*, **ROA.835**; **RX TAB 4, p. 3** ("[Defendants] continuously since 1997, ha[ve] published on the online computerized central database it maintains, information which Plaintiffs Hearn, Miller and Jones were (and are) required to report pursuant to their duties to register under Chapter 62 of the Texas Code of Criminal Procedure").

[100] Transcript of Bench Trial, **ROA.893-894**; **RX TAB 6, pp. 32-33** (QUESTION: "[Registration] information from the local registering authority is transmitted to the Sex Offender Registration Bureau that you were managing, correct?" ANSWER: "Yes"); *ibid*. (QUESTION: "And then people in your – under your authority as manager then put that information onto the centralized database, correct?" ANSWER: "That is one method of entry, yes"); and *ibid*. (QUESTION: "And, as a matter of fact, you did that with regard to these three plaintiffs in this case, that is, Mr. Hearn, Mr. Miller, Mr. Jones, and we can confirm that by looking at the centralized database that has photographs that are dated within the last year; isn't that correct?" ANSWER: "Yes").

Because "a freestanding violation may always be charged within its own charging period *regardless of its connection to other violations*," *Ledbetter v. Goodyear Tire & Rubber Co*., 550 U.S. 618, 636 (2007)(emphasis added), *superseded by statute on other grounds*, Pub. Law No. 111-2, 123 Stat. 5 (2009), the limitations question presented in this case is whether Defendants' collection and placement of Plaintiffs' "updated" identifying information on the publicly accessible online sex offender database, on or after June 19, 2016, as alleged by Plaintiffs, constitute a "present" breach or "violation" of Plaintiffs' plea bargain agreements.

The determination of whether such a "present violation" has occurred within a limitations period "depends on the claim asserted." *Lewis v. City of Chicago*, *supra,* 560 U.S. at 214-215. The Plaintiffs have alleged and have proven the State of Texas engaged in "separately actionable" conduct *by taking action* (as opposed to allowing its policy to remain dormant) within the limitations period immediately preceding (and after) the filing of Plaintiff's original complaint on June 18, 2018. That is, Plaintiffs have proven Defendants' *affirmative acts* when collecting and placing Plaintiffs' "updated" identifying information on the publicly accessible online sex offender database in 2018 were "related to" but "discrete" from *actions* they took against Plaintiffs in 1997. Thus, Defendants breached Plaintiffs' plea

agreements after June 19, 2016, and Defendants' conduct during that period properly forms the basis for a "new claim down the road" that is not barred by limitations. *Lewis v. City of Chicago*, *supra,* 560 U.S. at 214; *Nat'l R.R. Passenger Corp. v. Morgan*, *supra,* 536 U.S. at 113 ("The existence of past acts and the [plaintiff's] prior knowledge of their occurrence, however, does not bar [plaintiffs] from filing charges about related discrete acts so long as the acts are independently [actionable] and charges addressing those acts are themselves timely filed").

ISSUE TWO: *Whether the Substantive Due Process Right under the Fourteenth Amendment, 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.*

In *Santobello v. New York*, 404 U.S. 257 (1971) the U.S. Supreme Court succinctly ruled:

> "[W]hen 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., 404 U.S. at 262.

In its findings of fact and conclusions of law the District Court, in reliance on the Fifth Circuit's unpublished decision in *King v. McCraw* 559

Fed. Appx 278 (5th Cir., March 10, 2014), ruled a valid substantive due process claim of the genre recognized under *Santobello v. New York* requires a plaintiff to prove that a breach of a plea bargain agreement by the government has caused a criminally "punitive" consequence adverse to the plaintiff. In this connection, the District Court concluded the requisite showing of "punishment" by a plaintiff would be the same as is required to state a claim for violation of the *Ex Post Facto* Clause. On this point Plaintiffs contend the District Court reversibly erred.

To prevail on their constitutional claim under *Santobello* Plaintiffs were not required to prove a "punitive" consequence from the State's breach. Rather, Plaintiffs were only required to prove there was a "promise or agreement" by the State of Texas which, to a "significant degree," induced them to waive their constitutional rights to a fair trial. The Plaintiffs respectfully submit that by superimposing an additional "punitive consequence" element to Plaintiffs' *Santobello* claims the District Court reversibly erred.

Plea bargain "promises" and "agreements" made by the government can take many forms but they have never been confined by their terms to those which would inflict "punishment" on a criminal defendant were they breached by the government. Thus, terms of plea bargain agreements

commonly include governmental promises that affect civil forfeiture proceedings,[101] or prosecutions aimed at co-defendants or family members,[102] and awards of compensatory restitution to victims of an offense.[103] Similarly, plea bargain promises and agreements are often designed to ensure the safety of the community,[104] or even the safety of a defendant such as occurred in *Petition of Geisser*, 627 F.2d 745 (5th Cir. 1980) which the District Court has cited in its opinion.[105] These kinds of "non-punitive" terms within plea bargain agreements, when breached by the government, have uniformly been ruled "significant" in "degree" under *Santobello* to induce a reasonable person to plead guilty, and none have been deemed unenforceable on the ground that their breach failed to inflict "punishment" against a criminal defendant.[106] In this regard, the District Court's decision in the present case radically departs from and conflicts with settled constitutional law in this area.

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[101] *E.g.*, *In re Arnett*, 804 F.2d 1200, 1204 (11th Cir. 1986)("We hold that the government breached the terms of the plea agreement by seeking forfeiture of Arnett's farm").

[102] *E.g.*, *In re Snoonian*, 502 F.2d 110, 112 (1st Cir. 1974)(reproducing agreement stating "On behalf of the United States Government, I hereby represent and agree that no testimony of [defendant] before the Grand Jury, or its fruits, will be used in any way in any proceeding against his wife").

[103] *E.g.*, *United States v. Runck*, 601 F.2d 968 (8th Cir. 1979)(variance in amount of civil restitution ordered by court "constituted a material change in the plea bargain").

[104] *Rojas v. State*, 450 A.2d 490 (Md. App. 1982)(defendant's breach of plea bargain agreement not to oppose deportation).

[105] *District Court's Findings of Fact and Conclusions of Law*, ROA.839; RX TAB 4, p. 7.

[106] See cases cited *ante*, this brief, at nn. 101-104, and *Petition of Geisser*, *supra*.

The constitutional right to enforce a plea bargain agreement after it has been breached by the government would be rendered superfluous were *Santobello* construed to grant protection only against "punishments" already conferred by the *Ex Post Facto* Clause. The U.S. Supreme Court's analysis in *Smith v. Doe*, 538 U.S. 84 (2003), which considered only whether registration alone constituted "punishment" within the meaning of the *Ex Post Facto* Clause, did not rule registration *was not* a "disability." Rather, the Court in *Smith* ruled the registration requirement alone is only a "minor and indirect" disability for purposes of determining whether the registration arose to the level of "punishment" within the meaning of the *Ex Post Facto* Clause.[107] That legal conclusion certainly does not control whether Defendants' agreement not to impose a lifetime registration requirement, and not to publicly designate Plaintiffs as "sex offenders" online for the remainder of their natural lives, was sufficiently "significant" to induce Plaintiffs (or an objectively reasonable person) to waive their constitutional rights to trial and instead plead guilty. As the Supreme Court of Maine has candidly stated, "it defies common sense to suggest that a newly imposed

[107] *Smith v. Doe*, *supra*, 538 U.S. at 100 ("If the disability or restraint is minor or indirect, its effect are unlikely to be punitive.").

lifetime obligation" to register "is not a substantial disability or restraint on the free exercise of individual liberty."[108]

Texas decisional law has also recognized the "significance" to a criminal defendant of the benefit conferred by the removal of "disqualifications or disabilities." Texas decisional law has, of course, held that unforeseeable collateral consequences arising from a criminal defendant's plea "may," depending on the circumstances and the nature of the collateral consequence, permissibly result from the plea when the collateral consequence was not "statutorily restricted" at the time of the plea. However, Texas decisional law has also held that "when a statute explicitly restricts the collateral consequences of an offense" a criminal defendant "is entitled to rely on that restriction."[109] In this connection, Texas' court of last resort in criminal law matters, the Texas Court of Criminal Appeals, has ruled the Texas Legislature "intended [the words] 'disqualifications or disabilities' to be read broadly."[110]

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[108] *State v. Letalien*, 985 A.2d 4, 24-25 (Me. 2009); *see also*, *Plaintiffs' Motion for Summary Judgment*, **ROA.129-136** (discussing Texas' statutory promise which assured Plaintiffs they would be relieved of all "disabilities" in exchange for the waiver of their federal constitutional rights to trial).

[109] *Scott v. State*, 55 S.W.3d 593, 597 (Tex.Crim.App. 2001)(applying *Ex Post Facto* Clause).

[110] *Scott v. State*, *supra*, *55* S.W.3d at 597.

Furthermore, the question of whether a person has been subjected to greater "punishment" as the result of the government's breach has been deemd irrelevant by both the U.S. Supreme Court in *Santobello* itself and by the Fifth Circuit. *Petition of Geisser*, 554 F.2d 698, 704 (5th Cir. 1977)("The Court [in *Santobello*] reached this result even though the judge stated at sentencing that he was 'not at all influenced' by the district attorney's recommendation" which breached the earlier plea bargain agreement), *aff'd after remand*, 627 F.2d 745 (5th Cir. 1980). On the basis of *Santobello* (which noted the sentencing judge was 'not at all influenced' by the district attorney's recommendation) the Fifth Circuit thus ruled that so long as a term breached by the government would have been "material" to a person's deliberations at the time of their plea of guilty, it matters not whether the breach causes "harm," punitive or otherwise, to the person.[111] The District Court's decision in the present case directly conflicts with *Petition of Geisser*, *supra*.

The Fifth Circuit's unpublished decision in *King v. McCraw* 559 Fed. Appx 278 (5th Cir., March 10, 2014), which the District Court found "persuasive" for purposes of attaching a "punitive consequence" element to

[111] *United States v. Valencia*, 985 F.3d 758, 761 (5th Cir. 1993)(applying a different rule "would permit the government to make a plea bargain attractive to a defendant, subsequently violate the agreement and then argue harmless error, thereby defrauding the defendant").

Plaintiffs' substantive due process claim under *Santobello*,[112] does not support the District Court's legal conclusion. The plaintiff's pleadings in *King* never cited or raised a claim under *Santobello*,[113] and the District Court in *King* never considered or decided any claim based on *Santobello*.[114] Rather, in *King* the plaintiff's pleadings relied solely upon *Washington v. Glucksberg*, 521 U.S. 702 (1997),[115] and *the only argument* in support of the plaintiff's substantive due process claim in *King* was that the registration requirement was not "narrowly tailored" and that "the burdens of the SORA are excessive in relation to its stated purpose."[116]

Neither the plaintiff nor the defendants in *King* cited *Santobello* or discussed the implications of any plea bargain breach in their briefs on appeal,[117] and on appeal the Fifth Circuit in *King* did not consider or decide any claim based on *Santobello*.[118] In other words, no breach of any "plea

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[112] *District Court's Findings of Fact and Conclusions of Law*, **ROA.839-940**; **RX TAB 4, pp. 7-8**.

[113] *King v. McCraw*, No. 4:10-cv-00321 (S.D.Tex.); see, Plaintiff King's Original Complaint (ECM#1), Plaintiff King's Response in Opposition to Defendants' Motion for Summary Judgment, 8 (ECM#49).

[114] *King v. McCraw*, No. 4:10-cv-00321 (S.D.Tex.), District Court's Memorandum Opinion in *King* (ECM#53), and District Court's Amended Memorandum Opinion in *King* (ECM#57).

[115] *King v. McCraw*, No. 4:10-cv-00321 (S.D.Tex.), Plaintiff King's Response in Opposition to Defendants' Motion for Summary Judgment, 8 (ECM#49).

[116] *King v. McCraw*, No. 4:10-cv-00321 (S.D.Tex.), Plaintiff King's Response in Opposition to Defendants' Motion for Summary Judgment, 8 (ECM#49).

[117] *King v. McCraw*, No. 13-20092 (5th Cir. 2014); Appellant King's Brief on Appeal (filed July 3, 2013); Appellee's Brief on Appeal in *King* (filed Aug. 5, 2013).

[118] *King v. McCraw* 559 Fed. Appx 278 (5th Cir., March 10, 2014).

bargain agreement" was ever asserted as a basis for any claim by the plaintiff in *King*, and no decision on that basis was ever considered or decided by the District Court or the Fifth Circuit in *King*. The Plaintiffs respectfully suggest the "persuasive authority" assigned by the District Court to the Fifth Circuit's unpublished decision in *King* is egregiously misplaced and foreclosed by the Fifth Circuit's prior decision in *Petition of Geisser*, *supra*.

As the District Court has correctly observed, Plaintiffs have consistently contended throughout this litigation that "there is no punitive requirement for claims brought for breach of negotiated plea agreements under *Santobello*."[119] The Plaintiffs adhere to this contention and would note the "persuasive" authorities that have, unlike *King*, *supra*, actually addressed this particular question directly in the "sex-offense-registration" context. Each of these authorities has concurred with Plaintiffs' argument on this point.[120]

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[119] *District Court's Findings of Fact and Conclusions of Law*, **ROA.839**; **RX TAB 4, p. 7**.

[120] See, e.g., *Foley v. State*, No. M2018-01963-CCA-R3-PC, 2020 WL 957660, *6 (Tenn. Crim. App., Feb. 27, 2020)(breach of a plea agreement "need not be punitive" but "must have been a condition upon which Appellant's assent to the agreement was based"); *Commonwealth v. Martinez*, 147 A.2d 517, 527 (Pa. 2016)(although "registration under SORNA is a non-punitive collateral consequence" of a sex offense conviction, "the dispositive question is whether sexual offender registration was a term of the parties' agreement"); *see also*, *People v. Jerry Z.*, 133 Cal. Rptr. 3d 696, 713-714 (Cal. App. 2011)("Although not identified as punitive for other purposes…the state's promise that

Finally, Plaintiffs are concerned that the District Court has blurred what would otherwise be a fair and accurate description of Plaintiffs' claims under *Santobello*. Contrary to a certain statement made by the District Court in its decision (at Defendants' behest), Plaintiffs have never contended there is "a 'fundamental' substantive-due-process right to be free from registering" as a sex offender,[121] any more than they have ever contended the Supreme Court in *Santobello* recognized a constitutional "right to compel" a prosecutor to make a plea bargain offer. The Plaintiffs plainly invoke the substantive due process right that was actually recognized in *Santobello*, and they have never claimed "a 'fundamental' substantive-due-process right to be free from registering" as a sex offender.

The "benefits of the bargain" secured to a criminal defendant who enters into a plea agreement need not be "constitutionally protected interests" to which the defendant would otherwise be entitled apart from his agreement. For this reason Plaintiffs respectfully suggest the District Court should not have accepted, and reiterated, Defendants' rhetorical and misleading invitation to mischaracterize Plaintiffs' claims under *Santobello*

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appellant could be relieved of registration after ten crime-free years may nevertheless make the consequence of a broken promise a form of increased 'punishment' for a given defendant" that entitles him to relief under *Santobello*), *review dism'd*, 167 Cal. Reptr.3d 107 (Ca. 2014).

[121] *District Court's Findings of Fact and Conclusions of Law*, **ROA.840**; **RX TAB 4, p. 8**.

in this manner. Such a statement only obscures the true nature of Plaintiffs' constitutional claims.

CONCLUSION

The District Court in its conclusions of law, upon which the final judgment below was entered, erred in two respects. First, the District Court erred when it concluded Plaintiffs' claims are barred by limitations. Second, the District Court erred when it concluded a valid substantive due process claim, of the genre recognized by the U. S. Supreme Court in *Santobello v. New York*, 404 U.S. 257 (1971), required Plaintiffs to prove that the breach of their plea bargain agreements by the State of Texas caused a criminally "punitive" consequence adverse to Plaintiffs.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays 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.[122]

[122] Although Plaintiffs in their motion for new trial submitted argument demonstrating why *Heck v. Humphrey*, 512 U. S. 477 (1994) does bar Plaintiffs' claims for relief under §1983, ROA.855; that issue was not reached by the District Court in either its findings of fact and conclusions of law, **ROA.841**; **RX TAB 4, p. 9**; or in its order denying Plaintiff post-judgment relief. **ROA.858**; **RX TAB 5, p. 2**. For this reason Plaintiffs' respectfully submit Defendants' defense under the *Heck* doctrine should be considered and decided, in the first instance, by the District Court on remand.

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 13th day of October, 2020, 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) contains 8,472 words and therefore does not exceed the 13,000 word limitation imposed by that rule.

/s/*Richard Scott Gladden*