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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

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MARK S. WICKLUND, an individual,  
Plaintiff,

NO. CIV. 1:10-341 WBS

v.

MEMORANDUM AND ORDER GRANTING  
MOTION FOR SUMMARY JUDGMENT

PAMELA HUNTSMAN, an individual,  
THOMAS HEARN, an individual,  
GARY O. HORTON, an individual,  
MOSCELENE SUNDERLAND, an  
individual, and KATHY BAIRD, an  
individual, and SEXUAL OFFENDER  
CLASSIFICATION BOARD,  
Defendants.

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Plaintiff Mark Wicklund brought this 42 U.S.C. § 1983  
action against defendants Pamela Huntsman, Thomas Hearn, Gary  
Horton, Moscelene Sunderland, Kathy Baird, and the Sexual  
Offender Classification Board ("SOCB" or "Board") arising out of  
defendants' alleged violation of plaintiff's right to due  
process. Presently before this court is defendants' motion for  
summary judgment pursuant to Federal Rule of Civil Procedure 56.

I. Factual and Procedural Background

1 Plaintiff has been convicted of multiple sexual  
2 offenses in multiple states. (Baird Aff. Ex. 4 at 103, 178-314;  
3 Ex. 3.) Plaintiff was referred to the SOCB to determine whether  
4 he qualified as a "violent sexual predator" ("VSP") after  
5 violating his parole as to a 2001 conviction. (Id. at Ex. 4,  
6 SOCB 169-71.) Plaintiff was notified that the SOCB designated  
7 him as VSP in a notice dated April 25, 2008.

8 Defendants Huntsman, Hearn, Horton, and Sunderland were  
9 members of the SOCB when plaintiff's VSP determination was made.  
10 Baird served as secretary for the SOCB, but was not an SOCB  
11 member. Baird claims that she did not participate in the  
12 decision to categorize plaintiff as a VSP. (Id. ¶ 5.)

13 Plaintiff's VSP designation was conducted pursuant to  
14 the Sexual Offender Registration Notification and Community  
15 Right-to-Know Act ("Act"), Idaho Code Ann. § 18-8301 (2008),  
16 invalidated by Smith v. State, 146 Idaho 822 (2009). A VSP was  
17 defined as "a person who has been convicted of an offense listed  
18 in section 18-8314, Idaho Code, and who has been determined to  
19 pose a high risk of committing an offense or engaging in  
20 predatory sexual conduct." Id. § 18-8303(15). The Act described  
21 various factors that the SOCB could consider in making its  
22 determination, id. § 18-8314(5)(b), but regardless of the  
23 guideline, an offender could be designated a VSP based on a  
24 determination that the offender intends to reoffend, id. § 18-  
25 8314(6).

26 On February 10, 2009, the Idaho Supreme Court held in  
27 Smith v. State that there were "significant constitutional  
28 shortcomings in the statutory procedure [for determining VSP

1 status] . . . ." Smith, 146 Idaho at 827. As a result of the  
2 decision in Smith, the state district court issued an order on  
3 April 3, 2009, vacating plaintiff's VSP designation. See Order  
4 Vacating VSP Designation & Remand, No. CV OC 2008-08265 (Ada  
5 Cnty. Dist. Ct. Apr. 3, 2009). Plaintiff alleges that, following  
6 the order, the SOCB meeting minutes indicating that plaintiff was  
7 a VSP remained public and available on the internet. (Compl. ¶  
8 27.)

9 In October 2009, pursuant to plaintiff's request, the  
10 SOCB amended their meeting notes regarding plaintiff's  
11 designation to read:

12 Probationer Mark Wicklund, #64908 was designated a  
13 violent sexual predator.  
14 Amendment: This designation was vacated pursuant to the  
15 court's order in Ada County Case No. CV OC 2008-08265.

16 (Baird Aff. ¶ 9, Ex. 9.) Plaintiff alleges that the amended  
17 meeting notes were not published to the internet until February  
18 2010, and that the amended version of the notes continues to  
19 stigmatize him. (Compl. ¶¶ 30, 31.)

20 Plaintiff filed his Complaint in this case on July 6,  
21 2010, alleging claims under 42 U.S.C. § 1983. (Docket No. 1.)  
22 Plaintiff alleges that defendants violated "his due process  
23 rights by designating him a [VSP] without granting him the  
24 opportunity to participate or otherwise defend himself in the  
25 process." (Id. ¶ 37.) Defendants now move for summary judgment  
26 on the grounds that plaintiff's claims are untimely; plaintiff's  
27 claim against the SOCB and his official capacity claims against  
28 the individual defendants are barred by the Eleventh Amendment;  
defendants are not subject to § 1983 liability; plaintiff's claim

1 is barred by the Rooker-Feldman doctrine; defendants are entitled  
2 to absolute and qualified immunity; and plaintiff fails to plead  
3 facts supporting his claim for stigma damages.<sup>1</sup>

4 II. Discussion

5 Summary judgment is proper "if the movant shows that  
6 there is no genuine dispute as to any material fact and the  
7 movant is entitled to judgment as a matter of law." Fed. R. Civ.  
8 P. 56(a). A material fact is one that could affect the outcome  
9 of the suit, and a genuine issue is one that could permit a  
10 reasonable jury to enter a verdict in the non-moving party's  
11 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
12 (1986). The party moving for summary judgment bears the initial  
13 burden of establishing the absence of a genuine issue of material  
14 fact and can satisfy this burden by presenting evidence that  
15 negates an essential element of the non-moving party's case.  
16 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

17 Alternatively, the moving party can demonstrate that the  
18 non-moving party cannot produce evidence to support an essential  
19 element upon which it will bear the burden of proof at trial.

20 Id.

21 Once the moving party meets its initial burden, the  
22 burden shifts to the non-moving party to "designate 'specific  
23 facts showing that there is a genuine issue for trial.'" Id. at  
24 324 (quoting then-Fed. R. Civ. P. 56(e)). To carry this burden,  
25 the non-moving party must "do more than simply show that there is

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27 <sup>1</sup> Plaintiff has agreed to dismiss his claims against  
28 defendants SOCB and Baird. (Pl.'s Resp. to Mot. for Summ. J. at  
7.)

1 some metaphysical doubt as to the material facts." Matsushita  
2 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).  
3 "The mere existence of a scintilla of evidence . . . will be  
4 insufficient; there must be evidence on which the jury could  
5 reasonably find for the [non-moving party]." Anderson, 477 U.S.  
6 at 252.

7 In deciding a summary judgment motion, the court must  
8 view the evidence in the light most favorable to the non-moving  
9 party and draw all justifiable inferences in its favor. Id. at  
10 255. "Credibility determinations, the weighing of the evidence,  
11 and the drawing of legitimate inferences from the facts are jury  
12 functions, not those of a judge . . . ruling on a motion for  
13 summary judgment . . . ." Id.

14 A. Absolute Immunity

15 Defendants contend that they are entitled to absolute  
16 judicial immunity because they perform quasi-judicial functions  
17 as members of the SOCB. Plaintiff concedes that defendants are  
18 "entitled to absolute immunity as their actions meet the  
19 definition of quasi-judicial functions." (Pl.'s Resp. to Defs.'  
20 Mot. for Summ. J. at 5.) Instead, plaintiff argues that the case  
21 law surrounding quasi-judicial immunity "is ripe to be overturned  
22 and/or further limited." Id.

23 It is well-established that judges and those performing  
24 judge-like functions are absolutely immune from damage liability  
25 for acts performed in their official capacities. Stump v.  
26 Sparkman, 435 U.S. 349, 355-56 (1978); Ashelman v. Pope, 793 F.2d  
27 1072, 1075 (9th Cir. 1986). "[C]ourts have extended the  
28 protections of absolute immunity to qualifying state officials

1 sued under 42 U.S.C. § 1983." Olsen v. Idaho State Bd. of Med.,  
2 363 F.3d 916, 923 (9th Cir. 2004). "The determination of  
3 immunity is a question of law." Id. at 921.

4 "Absolute immunity flows not from rank or title . . .  
5 but from the nature of the responsibilities of the individual  
6 official." Cleavinger v. Saxner, 474 U.S. 193, 201 (1985). The  
7 Supreme Court has developed the "functional approach" in  
8 determining if immunity is appropriate. Olsen, 393 F.3d at 923.  
9 The court "must consider whether the actions taken by the  
10 official are 'functionally comparable' to that of a judge or a  
11 prosecutor." Id. Such activities are referred to as quasi-  
12 judicial. See Miller v. Davis, 521 F.3d 1142, 1145 (9th Cir.  
13 2008). The United States Supreme Court has outlined several  
14 factors that are characteristic of judicial decisionmaking under  
15 the functional approach:

16 (1) the need to insulate the official from harassment or  
17 intimidation; (2) the presence of procedural safeguards  
18 to reduce unconstitutional conduct; (3) insulation from  
19 political influence; (4) the importance of precedent in  
the official's decision; (5) the adversary nature of the  
process; and (6) the correctability of error on appeal.

20 Id. at 1145 (citing Cleavinger, 474 U.S. at 202). "This list of  
21 factors is nonexhaustive, however, and an official need not  
22 satisfy every factor to be entitled to absolute quasi-judicial  
23 immunity." Id.

24 The factual allegations against defendants concern only  
25 their role as official decisionmakers on the SOCB. This role  
26 bears significant resemblance to the decisionmaking conducted by  
27 parole board officers, for which the parole board officers are  
28 entitled to absolute judicial immunity. See Sellers v.

1 Procunier, 641 F.2d 1295, 1303 (9th Cir. 1981) (holding that  
2 parole board members are entitled to absolute immunity); Miller,  
3 521 F.3d at 1145-46 (holding that the governor's review of parole  
4 board decisions is entitled to absolute immunity); see also  
5 Stafford v. Powers, No. 10-35356, 2011 WL 3585621, at \*1 (9th  
6 Cir. Aug. 16, 2011) (holding that parole board members are  
7 entitled to absolute immunity for their decision to designate an  
8 individual as a predatory sex offender without an evidentiary  
9 hearing).

10 i. The Need to Insulate the Official from Harassment  
11 or Intimidation

12 As members of the SOCB, defendants were charged with  
13 "determin[ing] whether the offender should be designated as a  
14 violent sexual predator presenting a high risk of reoffense."  
15 Idaho Code Ann. § 18-8314(1) (2008). If individual board members  
16 were subject to suit by every disgruntled sexual offender who  
17 came before the SOCB, the Board's functioning would have been  
18 significantly impaired. Just as with judges or parole board  
19 members, if Board members knew they could be dragged into court  
20 over each VSP designation, "there is the same danger that the  
21 decision-maker might not impartially adjudicate the often  
22 difficult cases that come before them." Sellers, 641 F.2d at  
23 1303.

24 ii. The Presence of Procedural Safeguards to Reduce  
25 Unconstitutional Conduct

26 The Idaho statute establishing the SOCB requires the  
27 Board to promulgate and use "guidelines to determine whether an  
28 offender who meets the criteria of this section is a violent

1 sexual predator presenting a high risk of reoffense." Idaho Code  
2 Ann. § 18-8314(5) (2008). The Board was also required to make  
3 written findings that included the Board's risk assessment, the  
4 basis for the risk assessment, the Board's determination, and the  
5 basis for the determination. See id. § 18-8314(5)(b).

6 Consistent with the Idaho statute, the Board promulgated rules to  
7 determine if an offender's "risk of re-offending sexually or  
8 threat of violence is of a sufficient concern to warrant the  
9 [VSP] designation for the safety of the community." Smith, 146  
10 Idaho at 826. To make this determination, the Board "assess[ed]  
11 how biological, psychological, and situational factors, may cause  
12 or contribute to the offender's sexual behavior." Id. Following  
13 the Board's determination, it was required to provide the  
14 offender with notice of the proceeding's outcome. Idaho Code  
15 Ann. § 18-8319(1) (2008). The procedural safeguards governing  
16 the Board's determinations, including the requirement to make  
17 written findings, closely resembles judicial decisionmaking.

18           iii. Insulation from Political Influence

19           Defendants were appointed by the governor by and with  
20 the advice and consent of the Idaho Senate. Id. § 18-8312(1).  
21 Board members could only be removed "for reasons of inefficiency,  
22 neglect of duty, malfeasance in office, commission of a felony or  
23 inability to perform the duties of office." Id. § 18-8313. The  
24 SOCB thus was insulated from political influence because  
25 individual Board members could not be removed at will.

26           iv. The Importance of Precedent in the Official's  
27                 Decision

28           While defendants do not argue that the SOCB was



1 required to consider precedent, it does appear that the Board was  
2 required to consider the application of its promulgated rules in  
3 making its determination as to an individual's VSP status. This  
4 suggests that defendants were indeed required to consider  
5 precedent in reaching their decisions.

6 v. The Adversary Nature of the Process

7 The SOCB procedures were not adversarial in nature as  
8 offenders are not invited to participate in the proceedings.

9 vi. The Correctability of Error on Appeal

10 The SOCB was required to provide the offender notice of  
11 its determination. Id. § 18-8319(1). An offender was then able  
12 to challenge the VSP designation by judicial review. Id. § 18-  
13 8319(a); Lichtner v. Idaho, 142 Idaho 324, 326 (Ct. App. 2005)  
14 ("An offender's challenge to being designated as a VSP initiates  
15 a 'nonadversarial' proceeding which is civil and remedial in  
16 nature."). The Idaho Supreme Court noted in Smith that this  
17 review process was imperfect and violated offenders' procedural  
18 due process rights because "the offender is provided only a  
19 summary of the information considered by the Board, presenting  
20 little meaningful opportunity to respond to specific information  
21 considered by the Board." Smith, 146 Idaho at 830. Despite this  
22 problem, errors by the SOCB were subject to judicial review and  
23 were correctable on appeal. Id. at 1226-29.

24 The need to insulate Board members from harassment, the  
25 statutorily imposed procedural safeguards, the Board's political  
26 independence, the importance of precedent, and the availability  
27 of judicial review all functionally resemble judicial  
28 decisionmaking. Board members' determinations of offenders' VSP

1 status "shares enough of the characteristics of the judicial  
2 process," Butz, 438 U.S. at 513, to warrant absolute quasi-  
3 judicial immunity.

4           Despite the fact that defendants are entitled to  
5 absolute immunity, plaintiff urges this court to overturn or  
6 narrow the scope of the existing case law. First, plaintiff  
7 argues that current case law on absolute immunity should be  
8 overturned because it ignores the fact that "[s]imply because a  
9 choice involves discretion does not mean it is a judicial act."  
10 (Pl.'s Resp. to Defs.' Mot. for Summ. J. at 6.) Plaintiff's  
11 contention oversimplifies the absolute immunity jurisprudence --  
12 discretion alone is not determinative of whether a decision is  
13 quasi-judicial, rather courts apply a "functional approach" to  
14 distinguish whether an action is comparable to those taken by  
15 judges. Olsen, 393 F.3d at 923. Plaintiff argues that in the  
16 Board's work classifying individuals, they "act[ed] more [as]  
17 psychologists or mental health professionals than judges" and  
18 were not engaged in factfinding. (Pl.'s Resp. to Defs.' Mot. for  
19 Summ. J. at 5.) The fact that SOCB members are exercising their  
20 professional judgments as mental health professionals is not  
21 determinative, as professional judgment is often required by  
22 judges and prosecutors in their decisionmaking.

23           Second, plaintiff argues that his VSP designation, and  
24 the Board's actions generally, violate his Sixth Amendment right  
25 to have findings of fact made by a jury.<sup>2</sup> (Pl.'s Resp. to Defs.'  
26 Mot. for Summ. J. at 6.) Plaintiff fails to address how this is

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27  
28 <sup>2</sup> Plaintiff's has not alleged a § 1983 claim based on a  
violation of his Sixth Amendment right to a jury trial.

1 relevant to absolute immunity. This argument directly  
2 contradicts plaintiff's contention above that the SOCB was not  
3 engaged in factfinding, by contending that Board's determination  
4 was based on factfinding that should have been done by a jury.  
5 Furthermore, plaintiff's reliance on Ring v. Arizona, 536 U.S.  
6 584 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000), is  
7 misplaced because those cases dealt with non-jury factfinding  
8 being used to expose the defendant to a higher penalties under  
9 federal sentencing guidelines. In other words, the decisions in  
10 Ring and Apprendi objected to the punitive nature of the  
11 determination. Sexual offender registration laws have previously  
12 been upheld as both nonpunitive and not violations of the Ex Post  
13 Facto clause. Smith v. Doe, 538 U.S. 84, 105-06 (2003); Hatton  
14 v. Bonner, 356 F.3d 955, 961-67 (9th Cir. 2004). The SOCB does  
15 not determine if an offender should be registered as a sexual  
16 offender, it determines whether the offender should be registered  
17 at a higher classification as a VSP. Offenders classified as VSP  
18 must update their registration more often than non-VSP sexual  
19 offenders, but it is still a nonpunitive registration  
20 requirement.

21 Finally, plaintiff "asks this Court to carve out an  
22 exception from current case law for instances where agencies act  
23 outside a proper delegation of judicial authority." (Pl.'s Resp.  
24 to Defs.' Mot. for Summ. J. at 6.) There is no need to carve out  
25 a new exception, as such an exception already exists in the case  
26 law. See Stump v. Sparkman, 435 U.S. 349, 349-50 (1978) ("A  
27 judge will not be deprived of immunity because the action he took  
28 was in error, was done maliciously, or was in excess of his

1 authority, but rather he will be subject to liability only when  
2 he has acted in the 'clear absence of all jurisdiction.'" (quoting Bradley v. Fisher, 80 U.S. 335, 351 (1871))). In this  
3 case, however, plaintiff does not claim that defendants' action  
4 exceeded their delegation of authority from the legislature. To  
5 the contrary, plaintiff argues that defendants acted pursuant to  
6 that delegation, and it is the delegation which he contends was  
7 unconstitutional. This is not a case where it can be argued that  
8 defendants acted in the clear absence of all jurisdiction.  
9

10 Plaintiff's arguments for overturning existing  
11 precedent are not compelling. This court is bound to follow the  
12 precedent established by the Ninth Circuit Court of Appeals and  
13 the United States Supreme Court. Accordingly, because defendants  
14 are entitled to absolute immunity, the court will grant  
15 defendants' motion for summary judgment.

16 B. Remaining Summary Judgment Arguments

17 Because the court will grant defendants' motion for  
18 summary judgment on absolute immunity grounds, it need not  
19 address defendants' other arguments.

20 IT IS THEREFORE ORDERED that defendants' motion for  
21 summary judgment be, and the same hereby is, GRANTED.

22 DATED: October 28, 2011

23  
24 

25 WILLIAM B. SHUBB  
26 UNITED STATES DISTRICT JUDGE  
27  
28