STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 166339
Court of Appeals No. 358580
Presque Isle Circuit Court
No. 2020-093153-FC

v

DARYL WILLIAM MARTIN,

Defendant-Appellant.
_____/

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN AND THE AMERICAN CIVIL LIBERTIES UNION

Note: This brief is virtually identical to one filed by the same amici in *People v Kardasz*, Case No. 165008.

Miriam J. Aukerman (P63165)
American Civil Liberties Union
Fund of Michigan
1514 Wealthy St. SE, Ste. 260
Grand Rapids, MI 49506
(616) 301-0930

Daniel S. Korobkin (P72842)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6824

Allison Frankel
Nathan Freed Wessler
Lauren Yu
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

Attorneys for Amicus Curiae

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

QUESTIONS PRESENTED

I. Does registration under Michigan's Sex Offenders Registration Act (SORA) constitute punishment where SORA is automatically imposed for life with no individual review or opportunity for removal?

Amici answer: Yes

Mr. Martin answers: Yes

The prosecutor answers: No

The Court of Appeals answered: Yes

The trial court did not answer.

II. Is registration under SORA cruel or unusual punishment in violation of the Michigan Constitution or is it cruel and unusual punishment in violation of the federal Constitution where SORA is automatically imposed for life with no individual review or opportunity for removal?

Amici answer: Yes

Mr. Martin answers: Yes

The prosecutor answers: No

The Court of Appeals answered: No

The trial court did not answer.

III. Is lifetime electronic monitoring (LEM) cruel or unusual punishment in violation of the Michigan Constitution or cruel and unusual punishment in violation of the federal Constitution where LEM is automatically imposed for life with no individual review or opportunity to seek termination of such monitoring?

Amici answer: Yes

Mr. Martin answers: Yes

The prosecutor answers: No

The Court of Appeals answered: No

The trial court did not answer.

IV. Is imposing electronic monitoring for life where there is no individual review or opportunity to seek termination of such monitoring an unreasonable search in violation of Article 1, § 11, of the Michigan Constitution and the Fourth Amendment to the United States Constitution?

Amici answer: Yes

Mr. Martin answers: Yes

The prosecutor answers: No

The Court of Appeals answered: No

The trial court did not answer.

INTERESTS OF AMICI[1]

The American Civil Liberties Union of Michigan ("ACLU of Michigan") is the Michigan affiliate of a nationwide, nonpartisan organization dedicated to protecting core constitutional liberties. The ACLU of Michigan or its attorneys have been involved in numerous cases involving the constitutional rights of people convicted of sex offenses, including representing the plaintiffs in *Does #1-5 v Synder*, 834 F3d 696 (CA 6, 2016), cert den 583 US 814 (2017) (*Does I*), and a class of all Michigan registrants in *Does v Snyder*, 449 F Supp 3d 719 (ED Mich 2020) (*Does II*), and litigating lifetime electronic monitoring in *Corridore v Washington*, 71 F 4th 491 (CA 6, 2023). The ACLU of Michigan has filed amicus briefs before this Court on registration and electronic monitoring issues including in *People v Lymon*, __ Mich __; __NW3d __ (2024) (Docket No. 164685); *People v Betts*, 507 Mich 527, 560–561; 968 NW2d 497 (2021); and *People v Cole*, 491 Mich 325; 817 NW2d 497 (2012). ACLU of Michigan counsel currently represent a class of all Michigan registrants in *Does v Whitmer*, No. 22-cv-10209, __ F Supp 3d __ , 2024 WL 4340707 (ED Mich, 2024) (*Does III*).

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, non-partisan organization dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. Since its founding over a century ago, the ACLU has regularly appeared as counsel and as amicus curiae in this nation's courts on a variety of civil rights issues, including to advocate for the rights of the criminally accused and convicted. The ACLU has litigated sex-offense registry and lifetime electronic monitoring

[1] This brief was not authored in whole or part by counsel for a party, nor did such counsel or a party make a monetary contribution intended to fund the brief's preparation or submission.

cases such as *Corridore v Washington*, 71 F 4th 491 (CA 6, 2023), and *Does v Miami-Dade Co*, No 14-cv-23933, 2015 WL 3886841 (SD Fla, 2015), and authored a report, *Rethinking Electronic Monitoring: A Harm Reduction Guide* (2022) <https://www.aclu.org/publications/rethinking-electronic-monitoring-harm-reduction-guide>.

INTRODUCTION

Across Michigan today, tens of thousands of people who have completed their full prison sentences must follow onerous, stigmatizing, and counterproductive restrictions until their deaths. These requirements, pursuant to Michigan's Sex Offenders Registration Act ("SORA") and lifetime electronic monitoring statute ("LEM"), are automatically imposed for the duration of a person's life without any individualized review or opportunity for removal. They apply even after people live successfully in their community for decades, become ill, and grow old.

Automatic lifelong SORA and LEM are cruel or unusual punishment under Michigan's Constitution. First, both constitute "punishment": LEM is part of the criminal sentence and SORA 2021, like its predecessor, is punitive. Second, imposing these punishments *forever* on *all* people convicted under certain statutes, absent any individualized assessment or opportunity for removal, is both disproportionate and unusual. Further, these punishments counterproductively impede rehabilitation—a specific sentencing goal in Michigan—destabilizing people's lives and pushing them into homelessness, unemployment, and social isolation.

Additionally, LEM constitutes an unreasonable search because it does not fall within a recognized exception to the warrant requirement, and because its serious intrusion on a person's privacy and bodily integrity far outweighs any governmental interest in automatically imposing electronic monitoring for life with no opportunity for removal.

This Court should therefore reverse the decision of the Court of Appeals and hold that automatic lifetime SORA and electronic monitoring without any individual review or opportunity for removal constitute cruel or unusual punishment and that such electronic monitoring is an unreasonable search.

FACTS

I. Michigan's Sex Offender Registry

A. Who Is on Michigan's Registry

Experts in *Does III* analyzed Michigan registry data. Their report—the first such analysis—provides a detailed portrait of Michigan registrants that defies common assumptions. Ex 1 (Data Rep).[2] For example:

- ***The registry is huge.*** There were 45,145 registrants as of January 24, 2023, *id.*, ¶ 1, more people than live in Saginaw, Holland, or Eastpointe.[3] The registry has grown exponentially over time; there were only about 17,000 registrants in 1997. *Does III*, Plaintiffs' Statement of Material Facts ("SOMF"), ECF No. 123-1, ¶ 135.
- ***Almost three-quarters of registrants are on for life.*** 73% are Tier III (lifetime), 20% are Tier II (25-year), and 7% are Tier I (15-year). Data Rep, Ex 1, ¶ 5.
- ***SORA's tier levels are inversely correlated to risk***. Tiers—which determine the length of registration, frequency of reporting, and placement on the online registry—are based solely on the offense of conviction. But the offense of conviction is not empirically related to the likelihood of sexual recidivism. Indeed, people in Tier I

[2] The data report and several other key expert reports are attached as exhibits. Other *Does III* materials cited are available on PACER.

[3] World Population Review, *Michigan Cities by Population* (2024) <https://worldpopulationreview.com/us-cities/michigan>.

have the highest risk based on empirically validated risk instruments; Tier II, the next highest; and Tier III, the lowest. SORA's reliance on convictions to determine tiers results in a gross mismatch between actual risk and SORA requirements. *Id*., ¶¶ 19, 102–103.

- ***Most registrants have not committed the most serious offenses*.** Registrable offenses range from grave crimes like first-degree criminal sexual conduct (which includes child sexual assault), to lower-level offenses like fourth-degree criminal sexual conduct (which includes sexual contact with an underage teen partner). Of registrants living in the community with Michigan convictions, 84% have offenses that are less serious than first-degree criminal sexual conduct. *Id*., ¶¶ 15, 82–85.
- ***There are more than 2,000 child registrants*** who are subject to SORA for juvenile adjudications. *Id*., ¶ 18.
- ***Most registrants are older people.*** More than half of registrants living in the community are over 50 and more than a quarter are over 60. *Id*., ¶ 4. Older people are very low risk and are more likely to face difficulties complying with SORA. *Does III*, SOMF, ECF No. 123-1, ¶¶ 394–398.
- ***People remain subject to SORA even after living successfully in the community for decades.*** 31% of non-incarcerated registrants have been living in the community for more than twenty years since release without a new sexual conviction; 64% have done so for ten years or more since release. Data Rep, Ex 1, ¶ 10.

Understanding who is on Michigan's registry is important to understanding the implications of this case. This Court's decision will not just affect Mr. Kardasz and Mr. Martin. It will also affect people like Doe C, a *Does III* plaintiff who is on the registry for life because he slept with his now-wife, whom he met at an over-18 club which she'd entered using a fake ID. And people like Mary Roe, another plaintiff who, as an addicted, homeless teen, had sex with an underage boy, and who in the two decades since, earned a masters in counseling and became clinical director for a drug treatment facility. And people like Doe E, a disabled man with the developmental age of nine or ten, who, after himself being sexually assaulted, engaged in inappropriate sexual touching. He has not been convicted of another offense in thirty years, his 86-year-old mother fears he will not manage to comply with SORA's complex requirements without her help when she passes, and his victim supports his removal from the registry. *Does III*, SOMF, ECF No. 123-1, ¶¶ 18–23, 33–40, 49–56.

Mr. Kardasz and Mr. Martin's cases are the ones before this Court. But the lives and futures of 45,000 people—many of whom have lived in the community for decades,

demonstrated that they are rehabilitated, or grown old or ill—are at stake. See *Commonwealth v Muniz*, 640 Pa 699, 747-749; 164 A3d 1189 (2017) (analyzing constitutionality of registry statute not only as applied to appellant, but in light of entire statutory scheme).

B. SORA Has Devastating, Life-Altering Consequences.

SORA inflicts devastating, life-altering consequences because it (1) imposes an extensive regime of reporting and supervision under penalty of incarceration and (2) publicly displays people's pictures and personal information on an online sex offender registry, portraying them as dangerous.[4]

1. Reporting and Supervision

SORA is a "byzantine code governing in minute detail the lives" of Michigan registrants. *Does I*, 834 F3d at 697. Exhibit 2 details registrants' obligations, which are too extensive to list here. They include quarterly/bi-annual/annual in-person reporting to police; updating minutia of their lives within three days, often in person; updating their photograph on demand; providing fingerprints and palm prints; and paying supervision fees.

Tier III registrants who spend 50 years on the registry will have to report in-person at least 200 times, *not counting* reports to update information that changes between quarterly reporting dates. In-person reporting is particularly challenging for people who are elderly, disabled, lack transportation, or live far from a registering authority. There are no exceptions for people who are homebound or hospitalized. *Does III*, SOMF, ECF 123-1, ¶¶ 276–285.

[4] All lifetime registrants except children are on the online registry. MCL 28.728(2), (4)(a)-(b).

SORA's expansive requirements are difficult to parse. In *Does III*, the parties are litigating what is required. The state believes registrants must:

- Report within three days every time they
    - "Use" a phone (e.g. borrow a friend's phone to order pizza), MCL 28.725(2)(a);
    - "Use" a vehicle (e.g. move an absent roommate's car to let out a back-unit tenant), MCL 28.725(2)(a).
- Report *in person* within three days every time
    - They "volunteer" or do *de minimis* compensated labor (e.g. shoveling a neighbor's sidewalk), MCL 28.722(d);
    - An employer sends them to a new job site or there is a temporary lay-off, MCL 28.725(1)(b);
    - As part of their education, they are "present at any location" other than their home campus (e.g. class field trip), MCL 28.724a(1)(b).
- Report any nickname they ever had (e.g. being called "Spiderman" in kindergarten). MCL 28.727(1)(a).

Does III, ECF No. 162, 163, 163-1. The state's insistence in *Does III* that all such information is immediately reportable is totally at odds with any argument here that SORA imposes only minimal burdens.

Registrants live in fear of violating SORA's complicated requirements and therefore avoid many normal activities that could land them in prison. For example, registrants must report within three days if they "intend[] to temporarily reside at any place other than his or her residence for more than 7 days." MCL 28.725(2)(b). Unsure what constitutes an "intent"

to travel or how to report if travel plans change, many registrants simply don't travel, missing professional opportunities, family events, or even their own parents' funerals. *Does III*, SOMF, ECF No. 123-1, ¶¶ 360–378.

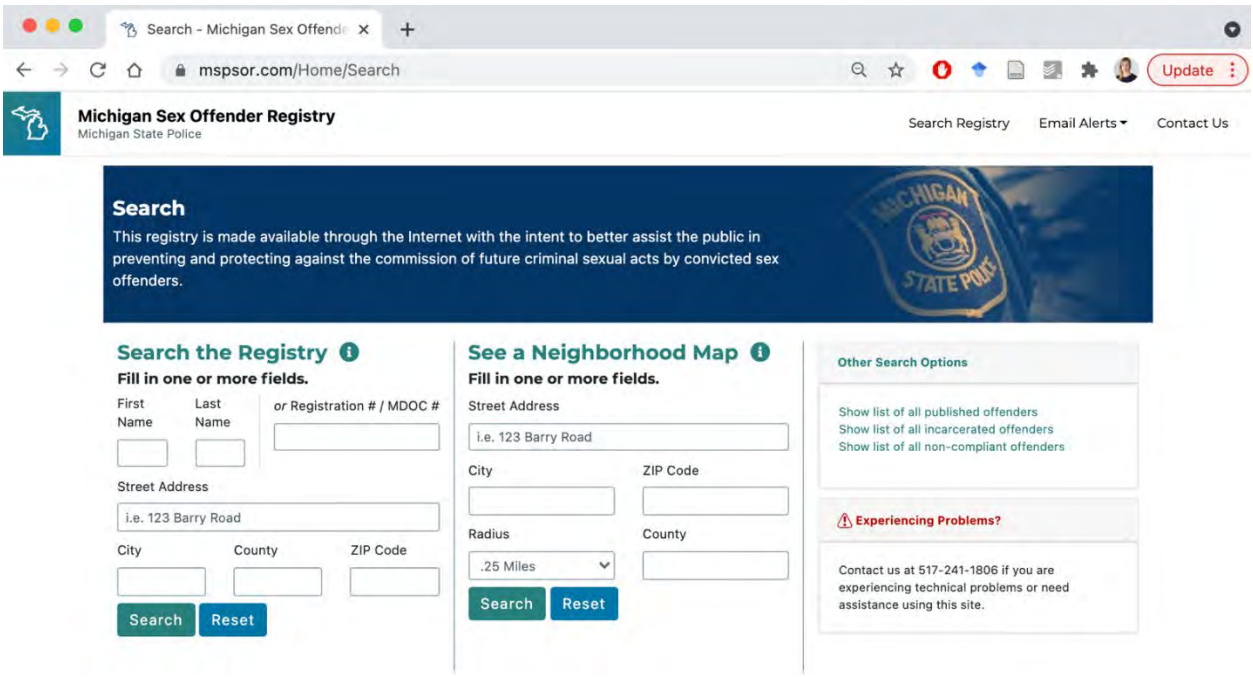
SORA—which carries penalties of up to ten years imprisonment, MCL 28.729—is aggressively enforced. Some 880-1,000 people are convicted annually of SORA violations. *Id.* ¶ 310. Law enforcement has regularly engaged in SORA sweeps, including random residence or employment checks, which may cause registrants to lose their housing or jobs. *Id.*, ¶¶ 292–308.

2. Public Stigmatization

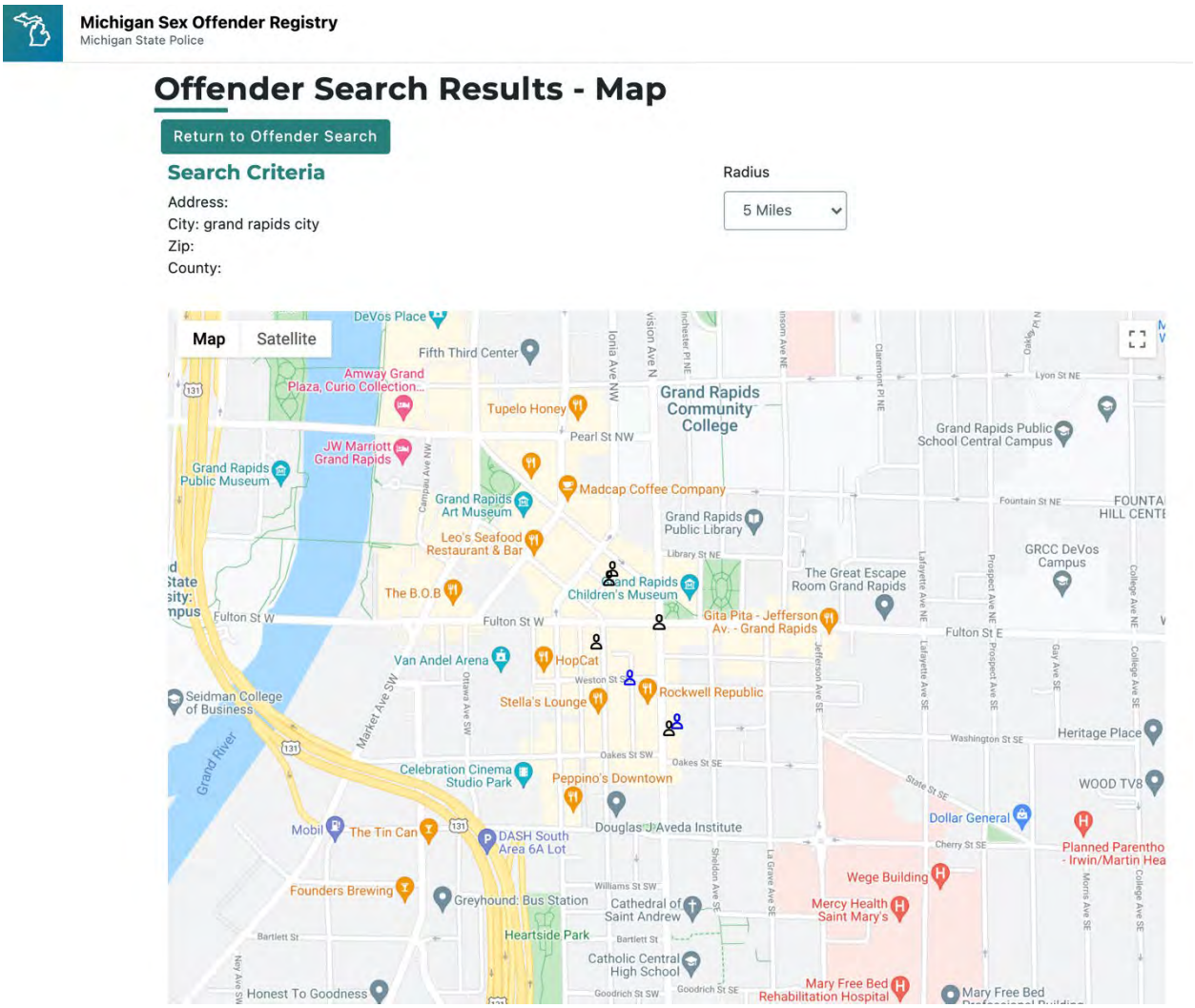
Michigan's registry website doesn't just list convictions. It provides detailed information that conveys that "each person listed [is] a current danger to society," and structurally "encourage[s] browsing, mapping, and tracking registrants, rather than accessing targeted archival information." Lageson Expert Rep, Ex 4, ¶¶ 16, 49–69. As this Court has recognized, today's registry is a world-wide wall of shame where registrants are "branded [as] a potentially violent menace by the state." *Betts*, 507 Mich at 561.

The initial registry search page, shown below, signals dangerousness, warning of "future criminal sexual acts by convicted sex offenders."[5] The website allows users to browse lists of registrants, rather than requiring (like most public criminal record repositories) a targeted name search. Users can discover that a neighbor or colleague is on the registry simply by entering a zip code.

[5] These images are registry screenshots. See Michigan Sex Offender Registry, available at <https://mspsor.com/Home/Search>.



Searching an address, city, county, or zip code generates an interactive map showing all registrants within a specified radius.



Users need only click on registrant icons to pull up a person's photo and registry details.

Each registrant's page contains their photograph (which they must keep current), physical description, aliases, home and work address, vehicle, registration number, Michigan Department of Corrections (MDOC) number, last verification date, registrable convictions, and SORA compliance status/violations. MCL 28.728(2). Presenting old offense information alongside a current photo, providing detailed personal information, and listing "compliance" status all suggest that the person is so dangerous as to require continuous supervision. Further, the listed convictions lack context that would likely be apparent in court files—e.g., the offense involved two teenagers, one of whom was under-age.

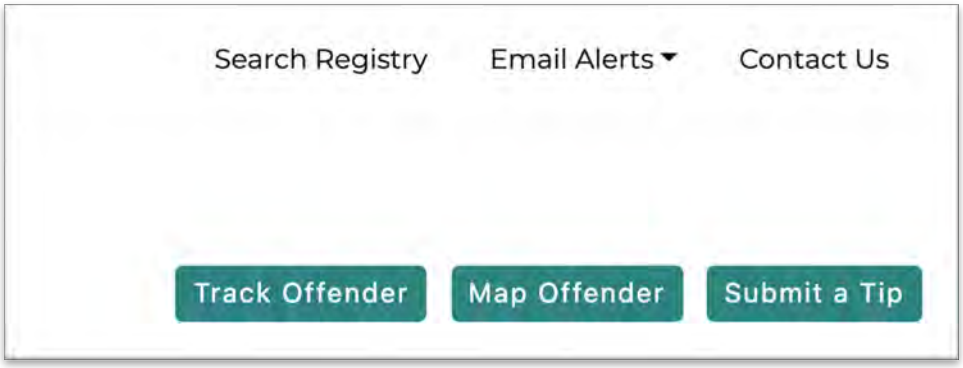
ate: 10/16/2017

Last Verification Date: **07/01/2021**

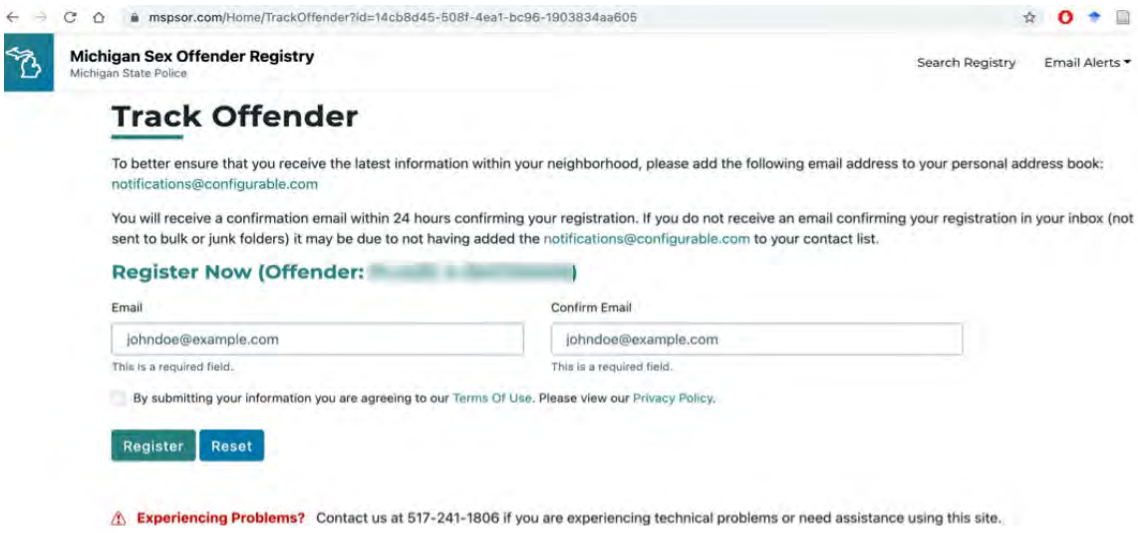
Compliance Status: **Non-Compliant**

- **Fee Violation**

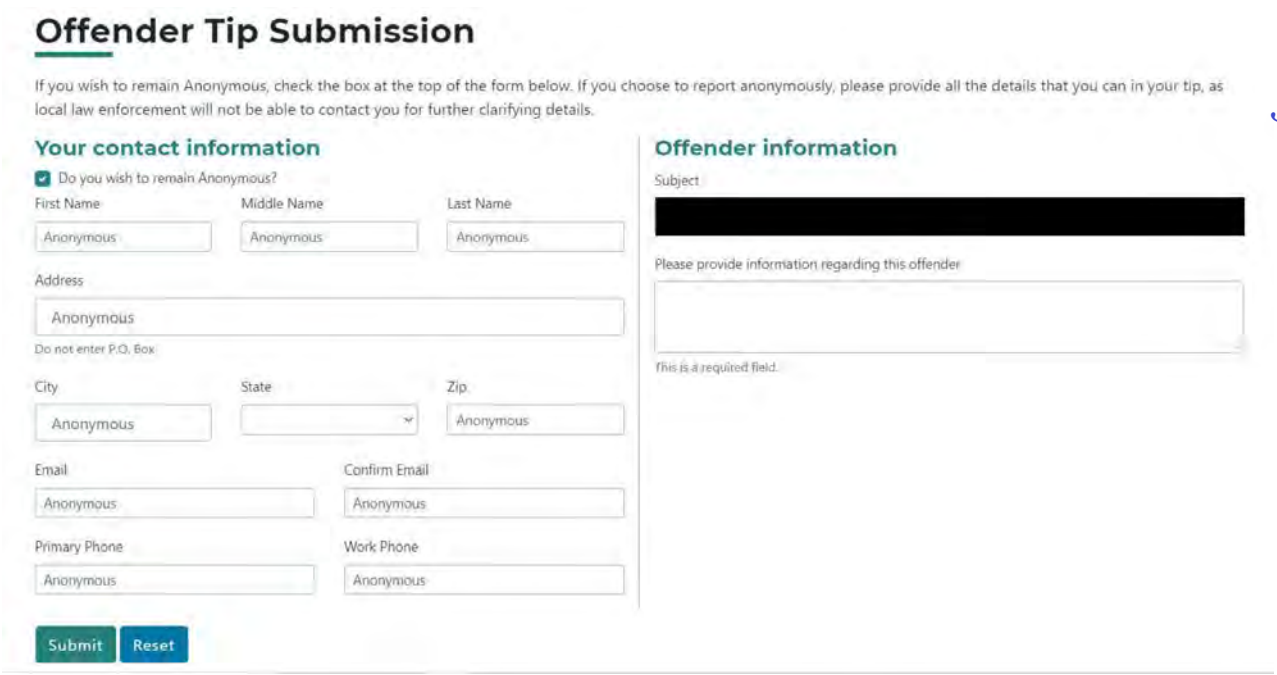
Prominent colored buttons on each registrant's page invite users to "track offender," "map offender," and "submit a tip," all of which likewise suggest the person is dangerous.



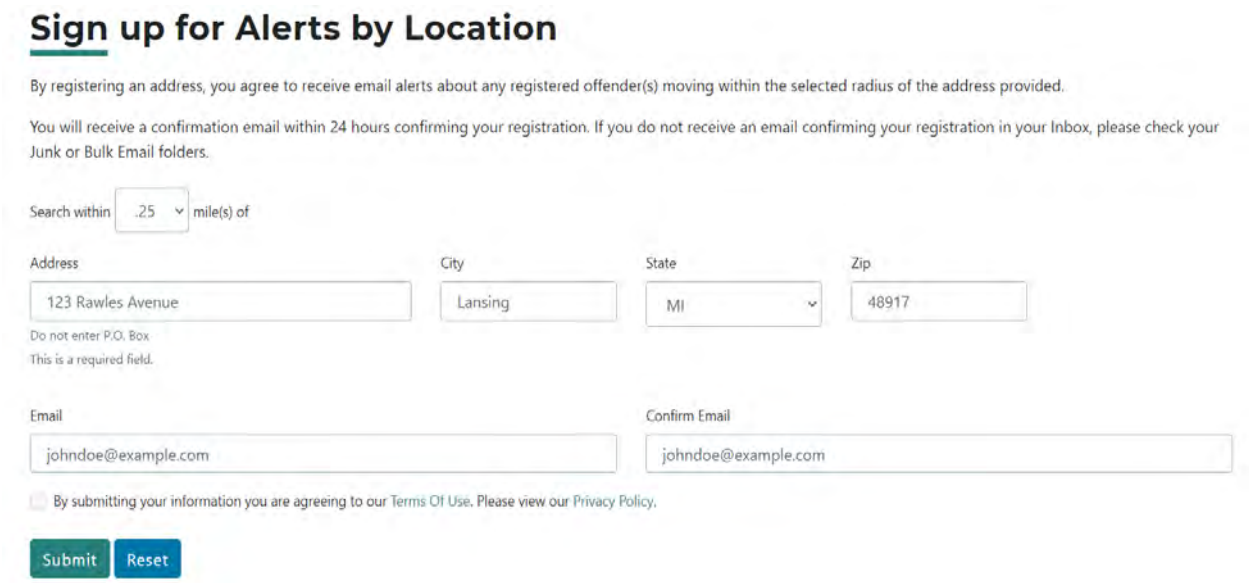
The "track offender" button allows the user, with one click, to sign up for updates about a registrant.



The "map offender" button reveals a map pinpointing the person's home, with a balloon showing personal details. Users who click "submit a tip" are asked to "provide information regarding this offender."



Users can also receive alerts about registrants.



Registry information goes not just to those who seek it out. Search engines often list registry information as the *top result*, meaning that registrant data is "pushed" on internet users who are not looking for it. Lageson Expert Rep, Ex 4, ¶¶ 16, 49–69.

In sum, the registry is unlike other forms of criminal records, which require a targeted

query about a specific person; do not permit browsing lists of convicted people; lack mapping, tracking, or alert capabilities; and provide historical conviction information, not up-to-date personal information. Rather, the interface, interactivity, format, and text of the registry publicly stigmatizes people and portrays them as currently dangerous.

3. SORA's Impact on Registrants' Lives

The combination of constant reporting and public stigmatization has devastating consequences far beyond those attributable to having a conviction. *Does III*, SOMF, ECF No. 123-1, ¶¶ 266–403. People find jobs and housing despite having convictions, only to lose them because they are on the registry. See *id*., ¶¶ 328–354; Wagner, *The Good Left Undone: How to Stop Sex Offender Laws from Causing Unnecessary Harm at the Expense of Effectiveness*, 38 Am J Crim L 263, 269–271 (2011). Indeed, 45% of Michigan registrants living in the community report no current employment. Data Rep, Ex 1, ¶¶ 20, 109-110. Of Michigan registrants who reported addresses for at least ten years, 12% reported being homeless at some point. *Id.*, ¶¶ 21, 111–115. The harassment, vigilantism and death threats registrants experience likewise directly result from registration. *Does III*, SOMF, ECF No. 123-1, ¶¶ 321–327 (e.g., being mailed a printout of one's registry page with the message "You will die").

As a direct result of SORA, registrants must follow myriad other federal, state and local laws. These restrictions—which assume that if the state designates someone a "registered sex offender," that person must be dangerous—affect everything from whether registrants can go to a church, library or park; whether they can access a hurricane shelter; or where they can vote. *Id.*, ¶¶ 399–400. Additionally, private companies, such as social media platforms—where much of public and private life is now conducted—routinely bar

registrants. *Id*., ¶¶ 401–402.[6]

II. Michigan's Lifetime Electronic Monitoring Program

The Michigan legislature amended the penal code in 2006 to mandate that courts "shall sentence" people convicted under certain statutes to lifetime electronic monitoring after release from prison. See MCL 750.520b(2)(d); MCL 750.520c(2)(b). Over the last decade, Michigan's use of LEM has skyrocketed. In 2014, an average of 62 people served LEM on a given day.[7] By 2023, that number ballooned to nearly 900.[8]

Michigan's Department of Corrections oversees LEM. See MCL 791.204(d); 791.285(1). LEM tracks an individual's movement and location "from the time the individual is released" "until the time of the individual's death" and determines an individual's movement and location "both in real time and recorded time." MCL 791.285(1)(a)–(b). Courts or law enforcement can retrieve recorded information. MCL 791.285(b). Michigan's "Electronic Monitoring Center is staffed 24 hours a day, 7 days a week, 365 days a year."[9]

LEM demands strict adherence to myriad requirements under threat of criminal penalties. Individuals must charge their monitor "on a standard 110 volt electrical current outlet for two (2) continuous hours in each 24 hour period." MDOC, *Lifetime Electronic*

---

[6] See, e.g., Facebook Help Center, *Report Convicted Sex Offenders on Facebook* <https://www.facebook.com/help/210081519032737>.

[7] Michigan Department of Corrections, *2015 Statistical Report*, Table H6a (May 12, 2017) <https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Statistical-Reports/Statistical-Reports/2015-Statistical-Report.pdf>.

[8] Michigan Department of Corrections, *2023 Statistical Report*, Table H6a (June 17, 2024) <https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Statistical-Reports/Statistical-Reports/2023-Statistical-Report.pdf>

[9] Michigan Department of Corrections, *Report to the Legislature Pursuant to P.A. 119 of 2023, Article 2, Section 501 - Electronic Monitoring Program*, p 1 (March 2024) <https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Legislative-Reports/2024/Electronic-Monitoring-Program.pdf>.

Monitoring Program Participant Agreement, p 2 (August 14, 2023) (Appellant's App'x K). In practice, this means that people are tethered to a wall for 14 hours a week, or 728 hours a year. **A person who spends 25 years on LEM will spend more than two years effectively chained to an outlet**. If the monitor or charging cord become damaged, or if law enforcement or medical personnel need to remove the monitor, the person must "immediately" notify MDOC. *Id*. at 1. Individuals further must "[r]espond to any vibrations and/or LED indicator lights"; be "immediately available" if MDOC "needs to change or replace" the equipment; monitor MDOC's website for any special instructions at least monthly; allow MDOC and law enforcement staff to "visually inspect" the monitoring equipment at any time; and pay for any damage to the equipment. *Id*., pp 1–2. The rules caution that exposure to water may damage or destroy the monitor. *Id*., p 2. Individuals must pay a $60 monthly fee for the rest of their lives. MCL 791.285(2). Intentionally removing, defacing, altering, destroying, or failing to maintain the equipment; failing to notify MDOC that the device is damaged; or failing to pay for the monitor constitutes a felony offense punishable by up to two years in prison and/or a fine of up to $2,000. MCL 750.520n(2)(a)–(c).

GPS monitors frequently cause pain. According to one study, one in five people on monitors suffered electric shocks, and 88 percent experienced psychological harm including anxiety, depression, sleep disruptions, and social isolation. Giustini et al., *Immigration Cyber Prisons: Ending the Use of Electronic Ankle Shackles*, Online Publications, Cardozo Law, pp 12, 14–15 (July 14, 2021).[10]

[10] Available at <https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1002&context=faculty-online-pubs>.

LEM further impedes rehabilitation. Stringent restrictions and high costs make it difficult to hold down a job, care for loved ones, maintain financial stability, and reintegrate into the community. ACLU, *Rethinking Electronic Monitoring: A Harm Reduction Guide*, p 9 (2022);[11] Zhang et al., Vera Inst of Just, *People on Electronic Monitoring*, p 8 (January 2024).[12] These harms fall disproportionately on people who are already marginalized. Those living in poverty struggle to pay their monthly fee. *Rethinking Electronic Monitoring*, p 8. Complying with charging requirements is especially onerous for people experiencing homelessness, who lack reliable access to a charging port. *Id*. Additionally, people with disabilities, including mobility limitations, mental health conditions, and intellectual/ developmental disabilities, regularly face heightened barriers to understanding and adhering to complex monitoring requirements. ACLU, *Reducing Barriers: A Guide to Obtaining Reasonable Accommodations for People with Disabilities on Supervision*, p 19 (March 2024).[13] As a result, people are regularly incarcerated for minor technical violations, further destabilizing their lives. *Rethinking Electronic Monitoring*, p 6.

III. There Is No Scientific Support for Automatic Lifetime Registration or Automatic Lifetime Electronic Monitoring.

A. There Is a Scientific Consensus on the Key Social Science Questions.

Both SORA and LEM impose severe restrictions for the ostensible purpose of protecting the public. Therefore, the key social science questions are:

[11] Available at <https://www.aclu.org/publications/rethinking-electronic-monitoring-harm-reduction-guide>.

[12] Available at <https://www.vera.org/downloads/publications/Vera-People-on-Electronic-Monitoring.pdf>.

[13] Available at <https://www.aclu.org/publications/reducing-barriers-a-guide-to-obtaining-reasonable-accommodations-for-people-with-disabilities-on-supervision>.

1. To what extent do people convicted of sex offenses present a higher risk of committing sex offenses than people who have not been convicted of a sex offense, and how long does any heightened risk last?

2. Are SORA and LEM effective in reducing reoffending by people convicted of sex offenses?

On the first question, this Court has "recognized that '[a] growing body of research' supports [] assertions 'that the dangerousness of sex offenders has been historically overblown and that, in fact, sex offenders are actually less likely to recidivate than other offenders[.]'" *Lymon*, __ Mich at __; slip op at 25, quoting *Betts*, 507 Mich at 560–561. On the second, the Court found that "at minimum, [] SORA's efficacy is unclear." *Id.* The Court also suggested, however, that universally accepted conclusions may be lacking. *Id.* at __; slip op at 26 n 18.

While there are divergent scientific opinions on some subsidiary issues, there is scientific consensus on the key facts that are relevant here. See Hanson Expert Rebuttal Rep, Ex 5 (summarizing areas of scholarly agreement/disagreement). There are also hard numbers for Michigan's registry—data specific to the very population at issue.

1. Recidivism Risk Varies and Drops Dramatically Over Time.

Scholars agree that:

- Risk levels and recidivism rates vary considerably across people convicted of sex offenses.
- The offense of conviction is unrelated to the risk of recidivism.
- The average sexual recidivism rate of people convicted of sexual offenses is low. Once convicted, most are never re-convicted of another sexual offense.
- Recidivism risk decreases significantly over time in the community offense-free and with age.[14]

[14] There was no dispute among the parties' experts in *Does III* that recidivism declines over time. Hanson Expert Rebuttal Rep, Ex 5, pp 7–10; *Does III*, Lovell Decl, ECF No. 128-

Id., pp 7–11. The undisputed fact that risk varies and decreases significantly over time is critical here because this appeal challenges the *automatic, lifetime* imposition of SORA and electronic monitoring.

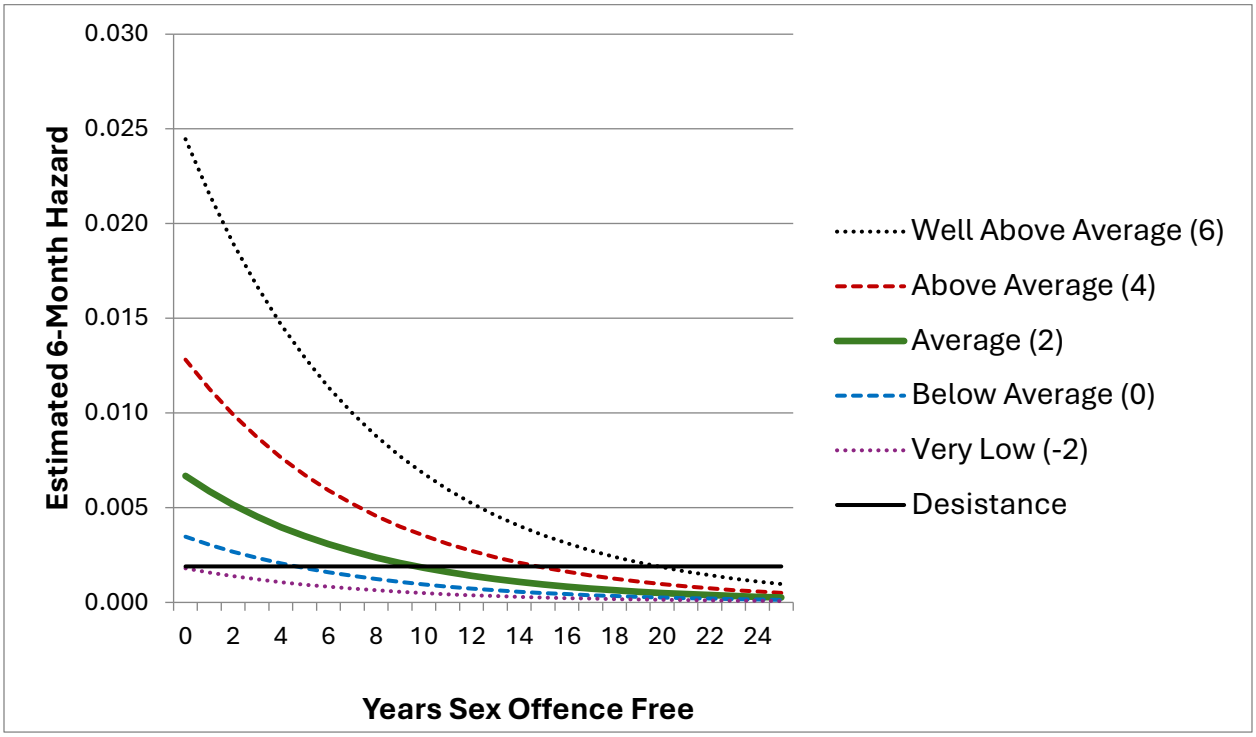
Moreover, there is no such thing as zero risk. Since the justification for automatic, lifetime SORA and electronic monitoring is that people convicted of sex offenses are much more dangerous than other people and will remain so for life, it is important to compare their recidivism rates with the rate at which people with no such criminal history are convicted of sexual crimes. The point at which people convicted of sex offenses are no more likely to be convicted of a new sex offense than people without such convictions is called "desistance."[15] Once a registrant reaches desistance, the likelihood that they will be convicted of a sexual offense is equivalent to, or lower than, that of a person in the general population.

How quickly people convicted of sex offenses reach desistance depends on their risk level, as shown below. *Does III*, SOMF, ECF No. 123-1, ¶ 193, citing Hanson Expert Rep, ECF No. 123-7.

19, ¶ 7. The Presque Isle prosecutor's assertion here that the likelihood of reoffending increases over time reflects a basic misunderstanding of how recidivism rates work. See Martin Supp Br in Opp'n to Def's App for Leave to Appeal, at 23, 43. A 5-year recidivism rate measures those reconvicted in years 0-5. A 20-year rate measures those reconvicted in years 0-20. The 20-year rate will be higher than the 5-year rate because it includes not just people convicted in years 0-5, but also the (ever decreasing) number of convictions in years 6-20. Data Rep, Ex 1, ¶¶ 52-61. But the cumulative recidivism rate from years 0-20 is completely different from the recidivism rate at year 20, since people become less likely to recidivate over time. For example, Michigan registrants released in 1995-1999 had a *cumulative 10.3%* recidivism rate over 20 years. But those who had lived in the community for 15 years had only a *1.4%* recidivism rate in *years 15-20* (as compared to a 4.9% rate in years 0-5). *Id*., ¶¶ 57, 61. As the experts explain, because cumulative recidivism rates are backward looking, they *overestimate* recidivism risk for current registrants, many of whom have lived in the community for decades. *Id*., ¶ 54.

[15] For men in the general population, the rate of first-time sex offense convictions is equivalent to a 5-year sexual recidivism rate of 1% and a lifetime rate of 2%. *Does III*, SOMF, ECF No. 123-1, ¶¶ 189-191.

Desistance Over Time Based on Risk Level



People who are very low risk (based on empirically-validated risk instruments) are, from the outset, no more likely to be convicted of a new sex offense than people who aren't subject to SORA and LEM. A person with an average risk score will reach desistance after ten years. After 20 years even those initially assessed to be well above average risk reach desistance. *Id*., ¶¶ 193–194.

The state's argument that many sex crimes go unreported is a red herring. The relevant question is whether people with past sex offense convictions commit more sex offenses than people without such convictions. There are undetected offenses for both groups. Because the two group's detection rates are equivalent (or if anything higher for people with past convictions), the existence of undetected offending does not affect the desistance analysis. See Hanson Expert Rebuttal Report, pp 14–23, Ex 5; *Kardasz* Scholars' Amicus Brief.

In sum, there is no scientific justification for *lifetime* registration or electronic monitoring, even assuming—contrary to the evidence—that registries or electronic monitoring reduce recidivism.

2. SORA and LEM Do Not Reduce Recidivism.

The government's own expert in *Does III* conceded that "the research has been pretty consistent that [registries are] not effective." *Does III*, SOMF, ECF No. 123-1, ¶ 158, citing Turner Dep, ECF No. 126, at 75. Study after study shows that online sex-offense registries, at best, make no difference in recidivism rates, and at worst, may counterproductively increase reoffending. See *Does III*, __ F Supp 3d at __; slip op at 17 & n 21 (citing studies). Indeed, research suggests that Michigan's registry contributes to sex-offense conviction rates that are up to five percent *higher* than they would be without SORA. *Does III*, SOMF, ECF No. 123-1, ¶ 157, citing Prescott Expert Rep, ECF No. 123-10, ¶¶ 13, 15. The state in *Does III* tried to cast doubt on this scientific consensus. But when one actually reviews the sources the state cited, those arguments don't hold up. See *Kardasz* Scholars' Amicus Brief.

SORA's inefficacy stems, in part, from "[t]he many burdens registrants experience" due to public registration. *Does III*, Prescott Expert Rep, ECF No. 123-10, ¶ 19. Registries "increase the likelihood of ex-offenders experiencing joblessness, homelessness, and disconnection from prosocial friends and family, which in turn *increase* sexual and non-sexual recidivism." *Does III*, Letourneau Expert Rep, ECF No. 123-9, ¶ 23. As a leading scholar explained based on a comprehensive review of the research, "registration and notification laws—and especially laws based largely on conviction offense versus validly estimated recidivism risk—simply do not reduce sexual (or nonsexual) recidivism… [Rather, they] have unintended effects that may imperil community safety." *Id.*, ¶¶ 11, 23.

Moreover, SORA misidentifies the source of the risk. As the government's own experts explained in *Does III*, 90 to 95 percent of sex crimes for which an arrest is made are committed by people *without* prior sexual convictions—and who thus are not listed on any registry. *Does III*, SOMF, ECF No. 123-1, ¶ 159, citing Salter Decl, ECF No. 128-21, at 9–10. And while SORA focuses on identifying strangers who might pose a danger, the vast majority of sex crimes generally and against children in particular are committed by family members or others who know the victim, rather than by strangers—another fact that the government's *Does III* experts conceded. *Id.*, ¶ 159, citing Lovell Decl, ECF No. 128-19, ¶ 10. Thus, online registries do not accurately depict the people who pose the greatest likelihood of committing sex crimes. To the contrary, they may provide a false sense of security. *Id.*, ¶ 170, citing Baliga Expert Rep, ECF No. 131-3, ¶ 34.

There is comparatively little research on the efficacy of electronic monitoring generally, or lifetime electronic monitoring specifically, despite its skyrocketing use. The existing research fails to show that electronic monitoring reduces recidivism. *People on Electronic Monitoring*, p 7 & n 17 (collecting sources). A 2017 meta-analysis concluded that "overall, the EM of offenders was not associated with a statistically significant reduction in re-offending rates." Belur et al., *A Systematic Review of the Effectiveness of the Electronic Monitoring of Offenders*, 68 J Crim Just 101686, pp 58–59 (2020).[16] In particular, "evidence does not support the use of electronic monitoring for low-risk or low-level offending populations who would otherwise be assigned to supervision as usual." Robina Inst of Crim L & Crim Just, *Use of Electronic Monitoring in Community Corrections*, p 2 (May 2020).[17]

[16] Available at <https://www.sciencedirect.com/science/article/abs/pii/S004723522030026X>.

[17] Available at <https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-03/electronic_monitoring_2.pdf>.

Moreover, electronic monitors are rife with technical malfunctions and false alarms, which divert law enforcement attention from real crime. See Arnett, *From Decarceration to E-Carceration*, 41 Cardozo L Rev 641, 715–716 (2019);[18] *People on Electronic Monitoring*, p 7 & n 19. Indeed, "studies show that officers spend a large amount of time sifting through electronic monitoring alerts and that they may ignore real-time alerts completely, which may affect officers' abilities to engage in other activities aimed at encouraging re-entry success." *Use of Electronic Monitoring*, p 2 & n 13.

B. Michigan Registry Data Provides Hard Numbers on the Recidivism Rates at Issue and Shows That Thousands of Registrants Are Just as Safe as Anyone Else.

In *Lymon*, the majority and dissent cited different studies and debated whether there is a social science consensus about recidivism rates. *Lymon*, __ Mich __; slip op at 25-26, 37; *Lymon*, __ Mich __ (ZAHRA, J., dissenting); slip op at 3-4, 24-25. Respectfully, that debate is unnecessary. A basic social science principle is that the sample set matters. Here, hard data is available about recidivism rates for Michigan registrants—*the very population at issue*—because experts in *Does III* analyzed Michigan's registry. That undisputed data should inform this Court's analysis.

Of Michigan registrants living in the community, 93% have never been convicted of a subsequent registrable offense.[19] Data Rep, Ex 1, ¶¶ 7, 52. This average recidivism rate is far lower than the recidivism rate of people convicted of virtually any other type of crime.[20]

---

[18] Available at <https://cardozolawreview.com/from-decarceration-to-e-carceration/>.

[19] When including incarcerated registrants, 90% have not been convicted of a new sexual offense. Data Rep, Ex 1, ¶¶ 7, 51. Because SORA is designed to monitor people in the community, the recidivism rate for in-community registrants is the relevant rate.

[20] A Department of Justice study found that 7.7% of people with sex-offense convictions are convicted of a subsequent sex-offense. In contrast, the recidivism rates for committing

Importantly, the average Michigan 7% recidivism rate still *overstates* the risk for many registrants.[21] The vast majority of current registrants have already lived in the community, sometimes for decades, without reoffending, whereas the 7% figure is an average re-offense rate across all at-risk years for all registrants. It thus does not represent the likelihood of *future* recidivism for *current registrants*. *Id*., ¶¶ 54–56.

To address this problem, researchers divided Michigan registrants into 5-year cohorts based on release dates. Recidivism rates were between 3-5% during the first five years, and dropped to 1.4% after 20 years in the community—which is similar to the rate of first-time sexual convictions for males in the general population. *Id*., ¶ 61.

Rates of New Recidivism of People by 5-year Cohorts, Based on Release Date

Cohort	Pop.	5-year	10-year	15-year	20-year
1995–1999	10,672	5.0%	2.1%	1.5%	1.1%
2000–2004	9,796	4.5%	1.9%	1.6%	N/A
2005–2009	8,065	3.6%	1.6%	N/A	N/A
2010–2014	6,176	2.7%	N/A	N/A	N/A

The Michigan data thus reconfirms one of the most well-established findings in criminology: recidivism risk drops significantly the longer a person lives in the community without

---

the same type of crime as the original offense are far higher for: robbery (16.8%); non-sexual assault (44.2%); drug offenses (60.4%); property offenses (63.5%); and public order offenses (70.1%). Alper, Durose, & Markman, *2018 Update on Prisoner Recidivism: A 9-Year Follow-Up Period (2005-2014)*, Bureau of Justice Statistics, p 4, tbl 2 (May 2018), <https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf>.

[21] Some subsets of registrants have even lower recidivism rates. For example, 99% of child registrants have never been convicted of a second registrable offense. Data Rep, Ex 1, ¶ 18.

recidivating. *Does III*, SOMF, ECF No. 123-1, ¶ 179.

Finally, researchers applied the normed research on recidivism rates of people with past sex convictions who have lived in the community without recidivating to Michigan's registry population. They concluded that between 17,000 and 19,000 Michigan registrants—about half of those living in the community—are no more likely to be convicted of a future sexual offense than men in the general population. Data Rep, Ex 1, ¶¶ 12, 69–71.

IV. MDOC Routinely Conducts Risk Assessments for People with Sex Offenses.

Experts for both sides in *Does III* agree that evidence-based, empirically validated actuarial risk assessments are far better than the offense of conviction at predicting recidivism. *Does III*, SOMF, ECF No. 123-1, ¶ 229, citing Hanson Expert Rep, ECF No. 123-7, ¶¶ 27–32; Salter Decl, ECF No. 128-21, at 14–16, 33-34; Turner Decl, ECF No. 128-22, at 10–11. Such instruments—which use known diagnostic indicators to determine the statistical likelihood that a person will recidivate—are widely employed by correctional authorities to make programming, release, and supervision decisions. Because risk drops with time in the community, *current* risk is calculated using a "Time Free in the Community Calculator" to adjust the baseline risk scores to present risk levels. *Does III*, SOMF, ECF No. 123-1, ¶ 236.

MDOC routinely evaluates people with sex offense convictions to assess recidivism risk and determine programming/treatment needs. Since approximately 2009, MDOC has used evidence-based, empirically validated risk instruments. *Does III*, ECF No. 126-5, Kissinger Dep, at 25–30. As MDOC's manager for sexual abuse prevention services testified, "we want to go with what the science says works." *Id.* at 35. Unlike with SORA and LEM, which are imposed indiscriminately without regard to risk, MDOC targets interventions based on what research shows is appropriate for people at various risk levels. Only people

assessed as "high risk" are assigned sexual offense programming; MDOC's sexual abuse prevention services unit does not recommend prison-based treatment interventions for those in lower risk levels. *Id*. at 75. Similarly, for both probationers and parolees with sex offenses, the intensity and duration of treatment in the community is based on empirical risk assessments. *Does III*, ECF No. 126-9, Spickler Dep, at 20.

Prior to parole consideration, adult men (like the appellant) are scored on both the Static-99, which is the most widely used and well-researched sex offense risk assessment instrument in the world,[22] and on the Stable 2007, which includes dynamic factors.[23] *Does III*, ECF No. 126-5, Kissinger Dep, at 39–41, 69. MDOC has about 150 staff trained in risk assessments, and also has a Static-99R "shop"—two people who do the bulk of empirical assessments at prison intake. *Id*. at 17, 53–56. Static-99s take from 15 minutes to an hour to complete. *Id.* at 63. In sum, MDOC is not only capable of empirically assessing risk, but routinely does so.

ARGUMENT

I. SORA Imposes Punishment.

A. This Court Should Continue to Reserve the Question Whether the Test for "Punishment" under the Michigan Constitution Differs from the Federal Test.

In *Lymon*, amicus ACLU of Michigan briefed why the federal intents-effect test should not apply to determine what is "punishment" under Const 1963, art 1, § 16, explaining that the test for what constitutes "punishment" can vary between different constitutional provisions, and that *both* criminal and civil punishments can be cruel or unusual. See *Lymon*,

[22] *Does III*, SOMF, ECF No. 123-1, ¶ 232.

[23] MDOC also uses the Static-99R and Stable-2007 for probationers. *Does III*, Spickler Dep, ECF No. 126-9, at 11–13, 20.

ACLU Amicus Br, at 15–21. Amicus further explained that numerous state supreme courts reject a "clearest proof" requirement in interpreting their state's Eighth Amendment analogs.[24] *Id.* at 21–24.

This Court found "some support" for the ACLU's analysis. *Lymon*, __ Mich at __; slip op at 9 n 8, citing *Austin v United States*, 509 US 602, 610 & n 6; 113 S Ct 2801; 125 L Ed 2d 488 (1993). However, this Court applied the federal test because the parties and lower courts had done so and because, "assuming that an alternative analysis would be less stringent," the result would not change. *Id*. If this Court applies the intents-effects test for that same reason here, the Court should again reserve this question. The test the Court ultimately adopts for what constitutes "punishment" under Const 1963, art 1, § 16 will have enormous consequences far beyond this case, including what constitutional limits apply to civil sanctions.

B. SORA Is Irrational and Excessive.

SORA 2021 retains the key defects of the unconstitutional 2011 statute. Little has changed since *Betts*, when this Court joined the Sixth Circuit and courts around the country—including the Supreme Courts of Alaska, Indiana, Maine, Montana, New Hampshire, Ohio, and Oklahoma—in recognizing that registration is punitive.[25] While the Legislature

[24] See, e.g., *State v Letalien*, 985 A2d 4, 28; 2009 ME 130 (Me, 2009) (Silver, J., concurring) ("One of the greater protections afforded by our Constitution should be a standard of proof that is not as onerous as the 'clearest proof' standard, which is both unnecessary and excessive."); *Doe v State*, 189 P3d 999, 1008 n 62 (Alas, 2008); *Wallace v State*, 905 NE2d 371, 378 n 7 (Ind, 2009); *Commonwealth v Cory*, 454 Mass 559, 567-568; 911 NE2d 187 (2009); *State v Nunez*, 129 NM 63, 76, 80; 2000-NMSC-013; 2 P3d 264 (1999); *Starkey v Okla Dep't of Corrections*, 305 P3d 1004, 1020-1021; 2013 OK 43 (2013).

[25] See, e.g., *State v Hinman*, 412 Mont 434, 443-444; 2023 MT 116; 530 P3d 1271 (2023) (it "defies common sense" not to recognize registration as punishment); *Letalien*, 985 A2d at 26 (registry punitive because no opportunity for removal); *Starkey*, 305 P3d at 1029; *State*

eliminated SORA's geographic exclusion zones, SORA 2021 retains the identical tier system, the identical lengthy/lifetime registration periods, very similar reporting requirements with frequent in-person reporting,[26] and an online registry, all without any individual review or opportunity for removal. See Comparison of 2011 and 2021 SORA, Ex 3; Obligations Summary, Ex 2.

This Court in *Lymon* held that SORA 2021 constitutes punishment for people not convicted of sex offenses. The Court's analysis of the first three *Mendoza-Martinez* factors—that SORA resembles the traditional punishments of parole and shaming, imposes significant affirmative disabilities and restraints, and serves the traditional aims of punishment, *Lymon*, __ Mich at __; slip op at 13–21—remains the same whether a registrant did or didn't commit a sex offense. *Lymon* analyzed the remaining two factors—whether SORA is rationally connected to a non-punitive purpose and whether it is excessive in relation to that purpose—in terms of SORA's application to people never convicted of sex offenses. Amici focus, therefore, on how those two factors apply here.

---

v Williams, 129 Ohio St 3d 344, 349; 2011-Ohio-3374; 952 NE2d 1108 (2011) (punitive to register for long periods absent finding of dangerousness); *Wallace*, 905 NE2d at 384 (registration without regard to risk is punitive); *Doe*, 189 P3d at 1017, 1019 (punitive because extensive burdens without distinctions based on risk or opportunity for removal); *Doe v State*, 167 NH 382, 411-412; 111 A3d 1077 (2015) (for registration to be non-punitive, must have periodic review to assess risk); *Muniz*, 640 Pa at 748-749; cf. *Does v Wasden*, 982 F3d 784, 791-792 (CA 9, 2020); cf. *Doe v Dep't of Pub Safety and Correctional Servs*, 430 Md 535, 568; 62 A3d 123 (2013); *State v Bani*, 97 Hawai'i 285, 297; 36 P3d 1255 (2001).

[26] While a few changes can now be reported by mail, many changes—including addresses, employment, volunteer work, enrolling/disenrolling in classes, name changes, inter-jurisdictional moves, student movement, and international travel—must still be reported in person. MCL 28.724a, MCL 28.725, MCL 28.725a(3); Obligations Summary, § 11, Ex 2; Explanation of Duties, Ex 6.

1. SORA 2021 Is Not Rationally Related to Non-Punitive Interests.

SORA is not rationally related to its purpose of "preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a. Indeed, there is no evidence that SORA promotes public safety; if anything, it *counterproductively undermines* public safety. SORA fails to reduce recidivism, and instead pushes people into unemployment, homelessness, and social isolation—factors associated with *increases* in recidivism. See Facts I.B, III.A. Further, research shows that registration discourages survivors from reporting abuse, makes it more difficult to obtain convictions for sex offenses, and diverts resources from programs that actually reduce sexual offending. *Does III*, SOMF, ECF No. 123-1, ¶¶ 166-172, citing Baliga Expert Rep, ECF No. 131-3, ¶¶ 15-26, 34, 44; Letourneau Expert Rep, ECF No. 123-9, ¶¶ 6, 15-18, 22; Letourneau Dep, ECF No. 125-4, at 50-60, 79-80, 86.

Courts have increasingly recognized that registries don't work. See, e.g., *Betts*, 507 Mich at 560 ("growing body of research" questioning efficacy); *Ortiz v Breslin*, 142 S Ct 914, 916; 212 L Ed 2d 51 (2022) (statement of Sotomayor, J.) (citing research that registry restrictions "may actually increase the risk of reoffending"); *Does I*, 834 F3d at 704 (questioning SORA's rationality based on evidence that registration "has, at best, no impact on recidivism"); *Cornelio v Connecticut*, 32 F4th 160, 173 & n 7 (CA 2, 2022) (collecting cases); *Hoffman v Pleasant Prairie*, 249 F Supp 3d 951, 960-962 (ED Wis, 2017) ; *Doe v Rausch*, 461 F Supp 3d 747, 767 (ED Tenn, 2020); *Hinman*, 412 Mont at 446; *Reid v Lee*,

476 F Supp 3d 684, 708 (MD Tenn, 2020); *In re TB*, 489 P3d 752, 768; 2021 CO 59 (Colo, 2021).[27]

Finally, applying SORA to incarcerated people like the appellant serves no purpose. Incarcerated people aren't subject to SORA's reporting requirements because the state knows where they are. They are on the online registry, but that serves no public protection function since they are behind bars. The only possible purpose of applying SORA to incarcerated people is to stigmatize them. That is punitive.

2. SORA 2021 Is Excessive in Relation to Non-Punitive Interests.

Even if this Court finds that SORA 2021 is somehow related to its avowed public safety goals, its burdens are excessive.[28] As with SORA 2011, "while the statute's efficacy is at best unclear, its negative effects are plain on the law's face . . . [SORA's] punitive effects . . . far exceed even a generous assessment of [its] salutary effects." *Does I*, 834 F3d at 705. The central features of SORA 2011 that this Court in *Betts* and the Sixth Circuit in *Does I* found excessive—the stigmatization of registrants, byzantine code of endless requirements,

[27] Because registries don't reduce recidivism, registry proponents have shifted to a different justification—informing the public. However, information is only useful if it is accurate, and SORA fails to accurately identify people who are dangerous. Moreover, the public can easily obtain conviction information from other sources that don't involve "state-sponsored condemnation," *Lawrence v Texas*, 539 US 558, 576; 123 S Ct 2472; 156 L Ed 2d 508 (2003), and burdensome restrictions under threat of incarceration. See also *Smith v Doe*, 538 US 84, 109; 123 S Ct 1140; 155 L Ed 2d 164 (2003) (Souter, J., concurring) (registry does "much more" than "simply make[] public information available in a new way").

[28] For many courts, the excessiveness of modern "super-registration" laws tips the balance of the *Mendoza-Martinez* factors to a finding of punishment. See, e.g., *Muniz*, 640 Pa at 748 (law over-inclusive in requiring registration of people who do not pose a risk); *Wallace*, 905 NE2d at 384 (excessive because no mechanism to end registration even on clear proof of rehabilitation); *Starkey*, 305 P3d at 1029-1030 (because statute imposes a "severe restraint on liberty without a determination of the threat a ... registrant poses to public safety," statute "notably exceeds" any legitimate civil purpose); *Doe*, 189 P3d at 1018; *Doe v Dep't of Pub Safety*, 444 P3d 116, 132 (Alas, 2019).

lack of individualized review—all remain. Thus, the *Does III* court recently concluded that "SORA 2021 is excessive" in relation to its public safety goals. *Does III*, __ F Supp 3d at __; slip op at 19.

Three aspects of SORA are especially relevant to excessiveness. **First, automatic *lifetime* registration is excessive.** Risk varies widely among registrants and declines with age and with time offense-free in the community. Even those initially considered "high risk" will reach desistance over time. See Facts III.A-B. Imposing extensive, lifelong burdens on thousands of people who have lived successfully in the community for decades and present no more risk than the general population is excessive. Indeed, as one court explained, "the lifetime inclusion of individuals who have a low risk of re-offending renders the registry over-inclusive and dilutes its utility by creating an ever-growing list of registrants that is less effective at protecting the public and meeting the needs of law enforcement." *Powell v Keel*, 433 SC 457, 466-467; 860 SE2d 344 (2021) (invalidating lifetime SORA absent opportunity for judicial review). Other courts agree. See *Doe*, 167 NH at 410 ("We find the lifetime duration of the registry in particular to be excessive" where imposed "without regard to whether [registrants] pose a current risk to the public."); *Letalien*, 985 A2d at 26 (retroactively imposing lifetime registration without an opportunity for removal is punishment); *Doe*, 430 Md at 563 (lifetime registration is punitive).

Second, there is no way for lifetime registrants to seek removal.[29] The only way to be removed from the registry is to die. Returning to the *Does III* plaintiffs, even people

[29] The only lifetime registrants who can petition for removal based on rehabilitation are children. MCL 28.728c(2). SORA's other "petitioning" procedures are to correct an erroneous registration for a non-registrable consent-based offense. MCL 28.722(v)(iv); MCL 28.728c(3), (14).

like Doe C, who had sex with his now-wife while she was underage, cannot seek removal, or people like Mary Roe, who have for decades led productive lives. As the Indiana Supreme Court explained, it is excessive to mandate lifelong registration with no option for registrants to "shorten their registration or notification period, even on the clearest proof of rehabilitation." *Wallace*, 905 NE2d at 384. In sum, lifetime registration with no individual review or opportunity for removal is excessive.

Third, SORA's onerous reporting requirements are excessive. SORA requires people to report the minutia of their lives within three days, often in person, under penalty of up to ten years imprisonment. MCL 28.729. Yet law enforcement doesn't need this information. The MSP legal advisor testified in *Does III* that "the legislature tagged us [MSP] with maintaining a registry that we don't even need for a law enforcement purpose … because all this information is already available to us[.]" *Does III*, SOMF, ECF No. 123-1, ¶ 173, quoting Beatty Dep, ECF No. 126-1, at 242. The MSP's former commander of government affairs, who'd worked as a trooper, testified that the registry "wasn't a value add to anything that I would have been working on… [and] nobody regularly consulted the registry for … an investigative purpose." *Id.*, ¶ 175, quoting Fitzgerald Dep, ECF No. 126-2, at 61-64. Indeed, while registrants are required to report all sorts of details within three days, law enforcement often fails to input those updates for weeks or may not enter them at all. *Id.*, ¶ 285. SORA's extensive yet unnecessary reporting requirements are excessive.

II. Subjecting All People with Certain Convictions to Automatic Lifetime SORA and Electronic Monitoring Is Cruel or Unusual Punishment.

A. Michigan's Cruel or Unusual Punishment Provision Is More Protective Than the Eighth Amendment.

This Court has long recognized that Michigan's "cruel or unusual" provision "is broader than the federal Eighth Amendment counterpart." *People v Parks*, 510 Mich 225,

241; 987 NW2d 161 (2022). This is because (1) "there are textual differences between the state and federal Constitutions; a bar on punishments that are either cruel *or* unusual is necessarily broader than a bar on punishments that are both cruel *and* unusual;" (2) "the framers and adopters of the 1963 Constitution had intended a broader view of the state constitutional protection"; and (3) "our state Constitution has historically afforded greater bulwarks against barbaric and inhumane punishments" than the United States Constitution. *Parks*, 510 Mich at 242-243, citing *People v Bullock*, 440 Mich 15, 30-33; 485 NW2d 866 (1992).

Accordingly, this Court applies a "heightened protective standard" to determine if a punishment is cruel or unusual in violation of Article 1, § 16. The Court conducts a "balancing test" that considers "(1) the severity of the sentence relative to the gravity of the offense; (2) sentences imposed in the same jurisdiction for other offenses; (3) sentences imposed in other jurisdictions for the same offense; and (4) the goal of rehabilitation, which is a criterion specifically 'rooted in Michigan's legal traditions[.]'" *Parks*, 510 Mich at 242-243, citing *Bullock*, 440 Mich at 33-34. Applying the factors here, this Court should hold that automatic imposition of lifetime SORA and LEM is cruel or unusual under the Michigan Constitution.[30]

B. Automatic Lifetime SORA and Electronic Monitoring—With No Individualized Review or Opportunity for Removal—Is Grossly Disproportionate.

Under the first *Bullock* factor, Michigan's lifetime SORA and electronic monitoring regimes are disproportionate for two interrelated reasons. First, these restrictions last *for life*,

[30] A decision under Article 1, § 16 makes it unnecessary to decide whether automatic, lifetime SORA and electronic monitoring violate the Eighth Amendment to the federal Constitution.

even though recidivism declines drastically over time. Second, Michigan imposes these onerous and stigmatizing punishments *automatically* for *everyone* convicted under certain statutes—with no individualized review or opportunity for removal. Where SORA and electronic monitoring are *both lifetime* and *automatic*, fully rehabilitated people will suffer these punishments until their deaths. This is grossly disproportionate.

1. SORA and LEM Are Cruel Because They Are Imposed for Life.

SORA and LEM are cruel because they are imposed forever. The longer a punishment lasts, the harsher it is. As this Court has said, lifetime sentences are "the most severe" punishment. *Parks*, 510 Mich at 257. SORA and LEM are particularly burdensome for older people. About one-third of Michigan registrants—nearly 10,000 people—are 60 or older. *Does III*, SOMF, ECF No. 123-1, ¶ 395. Many have mobility limitations, cognitive impairments, and health conditions that make tracking all their requirements and reporting in person exceedingly difficult. *Id*. ¶¶ 395-398; see also ACLU, *Reducing Barriers*. Yet Michigan law makes no exceptions: even people in nursing homes or who are terminally ill must follow SORA's "significant obligations" until they die. *Lymon*, __ Mich at __; slip op at 20. For people on LEM, ankle monitors track their whereabouts 24/7 "until the time of the[ir] death," MCL 791.285(1)(a)-(b), regardless of how infirm they become.

Meanwhile, there is no scientific support for lifelong SORA or electronic monitoring. "In order to determine" whether a punishment is cruel or unusual, the Court "must consider the scientific and social-science research." *Parks*, 510 Mich at 248. Here, lifetime SORA and electronic monitoring are grounded in a false assumption that everyone convicted of a wide range of sex offenses will be dangerous *forever*. But recidivism dramatically decreases over time. See Facts III.A-B. After ten years for most registrants, and twenty years for even the

highest risk registrants, individuals are no more likely to be convicted of a sex offense than non-registrants. See *id*. Where there is "no indication that [a] defendant poses a risk of committing sexual crimes in the future[,]" SORA and LEM are disproportionate. See *Lymon*, __ Mich at __; slip op at 31-32; *Commonwealth v Feliz*, 481 Mass 689, 705-706; 119 NE3d 700 (2019) (electronic monitoring unjustified absent evidence "defendant poses a threat of reoffending").

Nor can lifetime SORA or electronic monitoring be justified by any argument that people might otherwise be incarcerated for life. The Court of Appeals speculated in *People v Hallak*, 310 Mich App 555, 581; 873 NW2d 811 (2015), that "the Legislature presumably provided shorter prison sentences … because of the availability of lifetime monitoring." But like other post-incarceration sanctions, LEM and SORA are "meted out in addition to, not in lieu of, incarceration." *United States v Reyes*, 283 F3d 446, 461 (CA 2, 2002). Thus, the alternative is not prison, but freedom.

In any event, "the fact that the state might have incarcerated a defendant does not, in itself, justify a lesser intrusion of his or her rights." *State v Tally*, 103 Ohio St 3d 177, 182; 2004-Ohio-4888; 814 NE2d 1201 (2004) (rejecting supervision condition prohibiting procreation even though "if incarcerated, [defendant] would have been denied conjugal visits"). Likewise, "[t]he death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination." *Trop v Dulles*, 356 US 86, 99; 78 S Ct 590; 2 L Ed 2d 630 (1958) (invalidating denaturalization as cruel and unusual).[31] Thus, the existence of prison does not render SORA and LEM constitutional.

[31] See also Kilgore, Emmett, & Weisburd, *Carceral Surveillance and the Dangers of "Better-Than-Incarceration Reasoning*," Law & Pol Econ Project (June 27, 2024)

2. Lifetime SORA and Electronic Monitoring are Cruel Because They Are Imposed Automatically.

Michigan law carries a strong presumption that sentencing should be individualized. As this Court explained, "The modern view of sentencing is that the sentence should be tailored to the particular circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential." *People v McFarlin*, 389 Mich 557, 574; 208 NW2d 504 (1973). Indeed, "the policy expressed by the people, in providing by constitutional amendment for an indeterminate sentence law [in 1902], directed the Legislature to adopt a flexible law and the courts to fit the punishment in the exercise of their discretion to the needs of the particular case." *People v Lorentzen*, 387 Mich 167, 180; 194 NW2d 827 (1972), quoting *In re Southard*, 298 Mich 75, 82; 298 NW 457, 459 (1941).

Fittingly, this Court's proportionality standard favors an individualized analysis. Mandating punishment on *all* people convicted of certain crimes is "completely contrary to *Bullock*, which held that for a punishment to be 'constitutionally proportionate' it 'must be tailored to a defendant's personal responsibility and moral guilt.'" *Parks*, 510 Mich at 259, quoting *Bullock*, 440 Mich at 39; accord *Lymon*, __ Mich __; slip op at 31-32. In other words, under Michigan's Constitution, courts necessarily risk imposing a grossly disproportionate punishment *unless and until* they conduct an individualized analysis of the offense and the defendant. Where scientific data demonstrate that a significant number of the sentences imposed will be disproportionate, the mandatory nature of the punishment renders it unconstitutional.

<https://lpeproject.org/blog/carceral-surveillance-and-the-dangers-of-better-than-incarceration-reasoning/>.

This Court has accordingly invalidated sentencing regimes that automatically require the same harsh punishment for people with varying levels of culpability. In *People v Lorentzen*, this Court held that a mandatory 20-year minimum sentence for a drug offense "without consideration for defendant's individual personality and history is so excessive that it 'shocks the conscience.'" 387 Mich at 181. Indeed, the mandatory minimum was "equally applicable to a first offender high school student as it is to a wholesaling racketeer." *Id.* at 176. Then in *People v Bullock*, this Court departed from the United States Supreme Court to invalidate a mandatory life sentence for a drug offense under the more protective Michigan Constitution. 440 Mich at 35-37. The Court explained that the challenged law mandated the same harsh punishment "without regard for [individuals'] particular record or individual circumstances" and it "would apply to a teenage first offender who acted merely as a courier." *Id*. at 37-38 & n 22.

This proportionality analysis "applies equally to those who commit severe crimes." *Parks*, 510 Mich at 256-257. Thus, this Court held that mandatory life-without-parole sentences for 18-year-olds convicted of first-degree murder—a "grave and heinous" offense—"without consideration of mitigating factors is unconstitutionally excessive and cruel." *Id.* at 256, 260. And this Court departed from United States Supreme Court precedent to hold that, given Michigan's broader protections, life *with parole* sentences for young people convicted of murder constitutes cruel or unusual punishment absent consideration of "the mitigating qualities of youth[.]" *People v Stovall*, 510 Mich 301, 315; 987 NW2d 85 (2022).

Michigan courts have likewise invalidated non-carceral punishments, such as SORA, where the punishment was grossly disproportionate. In 2024, this Court invalidated

mandatory sex-offense registration where the "offense contained no sexual element and no indication that defendant poses a risk of committing sexual crimes in the future." *Lymon*, __ Mich at __; slip op at 31-32. Further, the Court of Appeals held that SORA was cruel or unusual where "the offense that defendant committed"—consensual sex between teenagers—"was not very grave, but the penalty has been very harsh." *People v Dipiazza*, 286 Mich App 137, 154; 778 NW2d 264 (2009).

Here, mandating *lifetime* registration and electronic monitoring for *every* defendant convicted of a vast range of crimes constitutes cruel or unusual punishment. As in *Bullock* and *Lorentzen*, SORA imposes lifetime punishment for a wide variety of conduct—from willing sex with an underage teen to the most serious rape. While LEM is limited to first-degree criminal sexual conduct and second-degree sexual conduct against younger individuals, those statutes still cover a wide range of people, such as *Does III* plaintiff Doe E, the disabled man with the developmental age of a nine or ten who has lived successfully in the community for three decades.[32] Lifetime SORA and electronic monitoring is even mandated for children, whom this Court has made clear "are generally capable of significant change" and thus may not be "automatically [subjected] to harsh punishment" without individualized consideration. *Parks*, 510 Mich at 258, 260.

Whether or for how long these punishments might be appropriate depends on the individual. It is the mandatory nature of the punishment that renders the *statutes* facially unconstitutional, even if the punishment *outcomes* could be constitutional in certain cases when imposed based on individualized consideration. Given the wide divergence in offense

[32] The only reason Doe E is not subject to LEM is that his offense predates the 2006 amendments to the penal code.

conduct, culpability, and rehabilitation, it is grossly disproportionate to *automatically* impose *lifetime* electronic monitoring and SORA in all cases absent any individual review or opportunity for removal.

C. Michigan's Automatic Lifetime SORA and Electronic Monitoring Regimes Are Unusual.

The second and third *Bullock* factors look at the "unusualness" of a punishment by comparing it to sentences imposed in the same jurisdiction for other offenses and sentences imposed in other jurisdictions for the same offense. The unusualness of a penalty alone is enough to violate Article 1, § 16. *Bullock*, 440 Mich at 31. It does here for both LEM and SORA.

1. Automatic LEM and SORA Are Unusual Compared to Other Sentences in Michigan.

Non-carceral sanctions differ from carceral sanctions in that they allow people to reintegrate into society while protecting the public. See Michigan Department of Corrections, *Parole & Probation*.[33] Automatic lifetime SORA and electronic monitoring are complete outliers when compared to other non-carceral sanctions in Michigan. Probation terms generally last only a few years. MCL 771.2 (2-year probation term limit for most misdemeanors; 3 years for felonies); MCL 771.2a (4) (5-year probation term limit for violent felonies in most cases). Similarly, parole terms typically are one to four years, and cannot extend beyond the person's prison maximum date. See MCL 791.242(2); Michigan Department of Corrections, *Parole & Probation*; *MDOC Policy Directive: Parole Process*,

[33] Available at <https://www.michigan.gov/corrections/parole-probation>.

PD 06.05.104, ¶ HH (August 14, 2023).[34]

Automatic lifetime SORA and electronic monitoring are also outliers because there is no opportunity to shorten the supervision term based on rehabilitation or good conduct. In the probation context, judges generally can terminate probation early. MCL 771.2(2)-(4). Similarly, parolees can be considered for early discharge, unless they are subject to SORA. *MDOC Policy Directive: Parole Process*, ¶ HH.

Michigan's mandatory LEM and SORA regimes are thus highly unusual because they are *lifelong* punishments imposed *after* people complete their full prison terms and because neither judges nor other decisionmakers have *any* ability to tailor the punishment to the person or to relieve people of these sanctions upon demonstrated rehabilitation.

Even compared to carceral punishments, LEM and SORA are unusual. Michigan mandates lifelong imprisonment in only a handful of circumstances. See MCL 791.234(6). Neither SORA nor LEM is required—or even authorized—for grave crimes such as second-degree murder, MCL 750.317, terrorism, MCL 750.543f, and torture, MCL 750.85. The incongruous result is that people convicted of such crimes are released from prison without public registration or lifelong GPS monitoring, while people who are much less culpable—like *Does III* plaintiffs Doe C, Mary Roe, and Doe E—are released from prison onto invasive public registration and surveillance regimes for the rest of their lives.

[34] Available at <www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Policy-Directives/PDs-06-Field-Operations/PD-06-05-Parole-Evaluation-Eligibility/06-05-104-Parole-Process-effective-10-04-21.pdf>.

2. Automatic Lifetime Electronic Monitoring and SORA Is Unusual Compared to Sentences for the Same Conduct Outside of Michigan.

Michigan's automatic LEM regime is uniquely harsh compared to sentences for similar conduct across the country. Michigan is one of only seven states that mandates electronic monitoring until death with no opportunity for removal.[35] To amici's knowledge, of those states, only Michigan imposes LEM as part of the sentence, distinct from any supervision term.[36] That is highly unusual.

Michigan's SORA is also particularly harsh. While all states have registries, they vary greatly in terms of who must register, for how long, what registration requirements apply, whether registration is based on individualized assessments, and whether there are opportunities for removal. This diversity makes accurate comparisons difficult. Nevertheless, Michigan's SORA is an outlier. Michigan has the fourth largest registry in the country, reflecting the high number of registrable offenses, the lifetime terms for most registrants, and the lack of paths off the registry. Gabriele, *Sex Offender Registry Statistics: 2024 Data for All 50 States*, SafeHome.org (September 17, 2024).[37] To amici's knowledge, only fourteen

[35] These states are California, Florida, Kansas, Louisiana, Oregon, and Rhode Island. Cal Penal Code 3004(b); Fla Stat 948.012(4); Kan Stat Ann 21–6604(r); La Rev Stat Ann 15:560.3(A)(3), 15:560.4(A); Or Rev Stat 144.103(2); RI Gen Laws 11–37–8.2.1(b). Three other states—Missouri, South Carolina, and Wisconsin—mandate LEM but provide an opportunity for removal after a period of years. Mo Rev Stat 217.735(4)-(5); SC Code Ann 23-3-540(H); Wis Stat 301.48(6). Georgia and North Carolina previously mandated LEM but their state supreme courts invalidated their LEM statutes as unconstitutional. See *Park v State*, 305 Ga 348; 825 SE2d 147 (2019); *State v Grady*, 372 NC 509; 831 SE2d 542 (2019).

[36] It appears that in the other six states, LEM is imposed as part of lifetime supervision. See Cal Penal Code 3004(b); Fla Stat 948.012(4); Kan Stat Ann 22-3717(v); La Stat Ann 15:560.3; Or Rev Stat 144.103(2); RI Gen Laws 11-37-8.2.1.

[37] Available at <https://www.safehome.org/data/registered-sex-offender-stats/>.

other states mandate lifetime registration based solely on the offense of conviction, without any individualized risk assessment or opportunity to seek removal.[38]

D. Automatic Lifetime SORA and Electronic Monitoring Are Cruel Because They Are Fundamentally Incompatible with the Goal of Rehabilitation.

This Court has made clear that "[r]ehabilitation is a specific goal of our criminal-punishment system" and, in fact, "it is the only penological goal enshrined in our proportionality test as a 'criterion rooted in Michigan's legal traditions[.]'" *Parks*, 510 Mich at 265, quoting *Bullock*, 440 Mich at 34. Lifetime SORA and LEM are in stark and irreconcilable conflict with that goal.

First, lifetime sentences are inherently suspect because they "'forswear[] altogether the rehabilitative ideal.'" *Parks*, 510 Mich at 265, quoting *Miller v Alabama*, 567 US 460, 473; 132 S Ct 2455; 183 L Ed 2d 407 (2012). This Court explained that "it is particularly antithetical to our Constitution's professed goal of rehabilitative sentences to uniformly deny [a] group of defendants the chance to demonstrate their ability to rehabilitate themselves." *Id.*, citing *Bullock*, 440 Mich at 34. Indeed, as discussed above, the assumption that people

[38] These states are Arizona, Ariz Rev Stat 13-3821(M); Connecticut, Conn Gen Stat 54-251(a), 54-252(a); the District of Columbia, DC Code 22-4002(a)-(b); Kentucky, Ky Stat 17.520(2), 17.578; Maine, Me Rev Stat tit 34-A, § 11285(5)-(7); Maryland, Md Code Ann, Crim Proc 11-707(a)(4)(iii); Minnesota, Minn Stat 243.166 subd 6(d); Mississippi, Miss Code Ann 45-33-47(1)(d), (f); Missouri, Mo Rev Stat 589.400(4)(3); Nebraska, Neb Rev Stat 29-4005(1)(b); Nevada, Nev Rev Stat 179D.490(2)(c); New Mexico, NM Stat Ann 29-11A-4(L); 29-11A-5(D), (F); Ohio, Ohio Rev Code Ann 2950.07(B); and South Dakota, SD Codified Laws 22-24B-2.1. Even among these states, some have individualized review of some aspects of registration. See Ariz Rev Stat 13-3825 (risk assessments to determine community notification requirements); Minn Stat 244.052 (same). These states also vary significantly in what offenses trigger lifetime registration. To amici's knowledge, all other states have individualized review or an opportunity for removal for some or all of those subject to lifetime registration. See also Collateral Consequences Resource Center, *50-State Comparison: Relief from Sex Offense Registration Obligations* (October 2022) <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations/>.

who commit sex offenses are beyond repair is false: risk decreases dramatically over time in the community offense-free. Thus, the very nature of mandatory LEM and lifetime SORA is fundamentally incompatible with rehabilitation.

Second, SORA and LEM counterproductively undermine critical factors for successful reentry. See *Does III*, SOMF, ECF No. 123-1, ¶ 163, citing Letourneau Rep, ECF No. 123-9, ¶¶ 6, 15; Letourneau Dep, ECF 125-4, at 35, 58–59; *From Decarceration to E-Carceration*, pp 685 & n 178, 712 (collecting sources). Michigan courts recognize that "even if [a] defendant needed rehabilitation, SORA's labeling him as a convicted sex offender works at an opposite purpose, preventing defendant from securing employment and otherwise moving forward with his life plans." *Dipiazza*, 286 Mich App at 156; see also *Feliz*, 481 Mass at 708 (government "has not established how the condition of GPS monitoring assists in the defendant's rehabilitation"); *People v McNair*, 87 NY2d 772, 775-776; 665 NE2d 167 (1996) (same), superseded by statute as stated in *People v Hawkes*, 32 NY3d 624; 118 NE3d 883 (2018).

SORA and LEM create steep obstacles to obtaining and maintaining employment. Given the stigma attached to sex offender registration and to ankle monitors, and the posting of employer addresses on the internet, employers are often reluctant to hire people subject to these restrictions. See *The Good Left Undone*, pp 270-271 (SORA); *Effectiveness of the Electronic Monitoring*, pp 36-37 (electronic monitoring). Monitors also make it difficult to work in environments traditionally open to the formerly incarcerated, such as warehouses and trucking.[39]

[39] Concrete warehouses typically interfere with GPS signals, requiring people to leave work and risk getting fired to get a signal. See Electronic Frontier Foundation, *Electronic*

Similarly, many landlords will not rent to people on registries (because they don't want their properties listed on the registry) or to people who wear monitors, making it exceedingly difficult to find housing. See *Lymon*, __ Mich at __; slip op at 27 (collecting sources); *The Good Left Undone*, p 269; *Rethinking Electronic Monitoring*, p 8. Moreover, lifetime registrants are barred from subsidized housing. 42 USC 13663. As a result, people subject to these punishments can easily wind up homeless. See *Does III*, SOMF, ECF No. 123-1, ¶ 164, citing Letourneau Rep, ECF No. 123-9, ¶¶ 6, 15; SOMF ¶ 336. Housing instability, in turn, makes it even harder to obtain a job, see Sarver, *Why Is It So Hard for People Experiencing Homelessness to "Just Go get a Job?"* Urban Inst (November 3, 2023),[40] and adhere to legal obligations such as reporting every address change, keeping the monitor charged, and attending required treatment and meetings. See *The Good Left Undone*, pp 269–270; *Rethinking Electronic Monitoring*, p 8. This puts unhoused individuals at heightened risk of incarceration for minor technical violations—fueling a cycle of poverty and instability. See *Rethinking Electronic Monitoring*, pp 8–9.

Far from advancing reintegration, SORA and LEM push people into social isolation. As this Court has recognized, "[t]he breadth of information available to the public—far beyond a registrant's criminal history—as well as the option for subscription-based notification of the movement of registrants into a particular zip code, increased the likelihood of social ostracism based on registration." *Betts*, 507 Mich at 551; see also *Does III*, __ F

Monitoring <https://sls.eff.org/technologies/electronic-monitoring> (accessed November 25, 2024); *Feliz*, 481 Mass at 704. Trucking requires being on the road away from charging outlets, making it impracticable to keep their monitor charged. See *Electronic Monitoring*, *supra*.

[40] Available at <https://www.urban.org/urban-wire/why-it-so-hard-people-experiencing-homelessness-just-go-get-job>.

Supp 3d at __; slip op at 15 (same for 2021 SORA). GPS monitors function as "a modern-day scarlet letter," *Commonwealth v Norman*, 484 Mass 330, 339; 142 NE3d 1 (2020) (cleaned up), that further "expos[e] the offender to persecution or ostracism[.]" *Commonwealth v Goodwin*, 458 Mass 11, 22; 933 NE2d 925 (2010) (internal citation and quotation marks omitted). Indeed, research reveals that people subjected to these punishments are "divorced from the civic life of their community . . . opportunity for social mobilization, and . . . political and educational life and opportunities," see *From Decarceration to E-Carceration*, p 675, and experience "isolation, shame, harassment, feelings of depression and hopelessness, and a lack of social support[.]" Calkins et al., *Sexual Violence Legislation: A Review of Case Law and Empirical Research*, 20 Psych Pub Pol'y & L 443, 452 (2014).[41]

SORA and LEM further destabilize people's lives by increasing their likelihood of returning to prison for technical violations, such as not charging their device or missing a required report date.[42] These technical slip-ups do not inherently raise public safety concerns and, studies show, "are not proxies of new crime." Campbell, *It's Not Technically a Crime: Investigating the Relationship Between Technical Violations and New Crime*, 27 Crim Just Pol'y Rev 646, 667 (2016);[43] *Does III*, SOMF, ECF No. 123-1, ¶ 165, citing Letourneau Rep, ECF No. 123-9, ¶¶ 19–21; Hanson Rep, ECF No. 123-7, ¶ 77; Socia Rep, ECF No. 123-11,

[41] Available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2672083>.

[42] *Rethinking Electronic Monitoring*, p 7 (collecting sources); *Use of Electronic Monitoring in Community Corrections* p 2; Vaughn, *Failure-to-Comply Arrests Reveal Flaws in Sex Offender Registries*, The Appeal (August 1, 2018) <https://theappeal.org/skyrocketing-charges-for-failing-to-comply-with-sex-offender-registries-reveal-their-flaws/>.

[43] Available at <https://journals.sagepub.com/doi/10.1177/0887403414553098>.

¶¶ 24–28. Instead, they trap people in an unyielding cycle of surveillance and incarceration—making it even harder to get on their feet. See *Rethinking Electronic Monitoring*, pp 7–8.

Finally, even assuming SORA and LEM advance rehabilitation—which they do not—such requirements would only make sense for people who need to be rehabilitated. Automatic, lifetime registration and electronic monitoring fails to recognize that people's recidivism risks vary and decrease over time. See Facts III. Absent individual review at the time of release, and periodically thereafter, to see if a person still needs rehabilitation, these punishments cannot advance rehabilitation.

In sum, subjecting people to LEM and lifetime SORA solely based on their statute of conviction, absent any individualized assessment or opportunity for removal, constitutes cruel or unusual punishment.

III. LEM Is an Unreasonable Search.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." US Const, Am IV. The Michigan Constitution similarly protects "[t]he person, houses, papers, possessions, electronic data, and electronic communications of every person" from "unreasonable searches and seizures." Const 1963, art 1, § 11. Although this Court has sometimes construed Article 1, § 11 to provide the same protections as the Fourth Amendment, e.g., *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011), it has also recognized that Article 1, § 11 can provide greater protections. See *Sitz v Dep't of State Police*, 443 Mich 744, 763–764; 506 NW2d 209 (1993). *Automatic* imposition of *lifetime* electronic monitoring violates both the Fourth Amendment and Article 1, § 11.

It is settled law that attachment of a GPS monitor to a person is a search.[44] *Grady v North Carolina*, 575 US 306, 309; 135 S Ct 1368; 191 L Ed 2d 459 (2015). The question here is whether the search effected by the lifetime electronic monitoring requirement is reasonable. See *id.* It is not. See *State v Grady*, 372 NC 509; 831 SE2d 542 (2019) (*Grady II*); *Park v State*, 305 Ga 348, 351-354, 360-361; 825 SE2d 147 (2019). No recognized exception to the warrant requirement applies, and, in any event, LEM's severe, 24/7 lifelong intrusion into a person's privacy far outweighs the state's interest, rendering LEM is an unreasonable search.

A. LEM Is an Unreasonable Warrantless Search Because No Exceptions Apply.

As a threshold matter, because LEM is a warrantless search, it can be upheld only if a recognized exception to the warrant requirement applies. *Carpenter v United States*, 585 US 296, 316–317; 138 S Ct 2206; 201 L Ed 2d 507 (2018); *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). "The government bears the burden of demonstrating an exception to the warrant requirement." *Taylor v Saginaw*, 922 F3d 328, 334 (CA 6, 2019); see also *Welsh v Wisconsin*, 466 US 740, 749–750; 104 S Ct 2091; 80 L Ed 2d 732 (1984). The state seeks to justify the search with reference to cases invoking the "special needs" exception, and by claiming that people subject to LEM have reduced expectations of privacy. See *Martin* State Supp Br, at 43–48. Neither rationale properly applies.

The special-needs exception to the warrant requirement is a "closely guarded category" that applies only when there is a "special need" that is "divorced from the State's

[44] LEM is also a seizure, because it involves both a trespass on the body and a restraint on freedom of movement. See Facts II; *California v Hodari D*, 499 US 621, 625–627; 111 S Ct 1547; 113 L Ed 2d 690 (1991) (defining seizure); *Gallo v City of Phila*, 161 F3d 217, 225 (CA 3, 1998) (supervised release conditions that restrain freedom of movement constitute a seizure).

general law enforcement interest." *Ferguson v City of Charleston*, 532 US 67, 68; 121 S Ct 1281; 149 L Ed 2d 205 (2001). Although the United States Supreme Court has sometimes characterized correctional supervision as a "special need," it has still required individualized reasonable suspicion that the supervisee was violating supervision conditions before dispensing with the warrant requirement. *Griffin v Wisconsin*, 483 US 868, 875–876; 107 S Ct 3164; 97 L Ed 2d 709 (1987). Here, by contrast, LEM is not imposed based on reasonable suspicion of a violation of supervision conditions, nor is such suspicion required before the government can access recorded location data. Indeed, LEM can extend for decades after supervision has ended, and law enforcement can access the recorded location information upon mere request.

Moreover, tracking a person's movement as part of a police investigation is a quintessential law enforcement function; "there is nothing 'special' in the need of law enforcement to detect evidence of ordinary criminal wrongdoing." *People v Chowdhury*, 285 Mich App 509, 517–518, 522; 775 NW2d 845 (2009) (citations omitted). The LEM statute expressly directs that "recorded information" about an "individual's movement and location" must be available "upon request" to "a law enforcement agency," without limitation. MCL 791.285(1)(b). And "even if the primary purpose of the statute is to prevent specific types of recidivism, . . . that purpose is not 'divorced from the State's general interest in law enforcement.'" *Park*, 305 Ga at 357. It is "indistinguishable from the general interest in crime control." *City of Indianapolis v Edmond*, 531 US 32, 44; 121 S Ct 447; 148 L Ed 2d 333 (2000). If the special-needs exception could be justified "solely [by] the benefits of deterrence," it would sanction virtually all searches. *Willis by Willis v Anderson Community Sch Corp*, 158 F3d 415, 423 (CA 7, 1998); cf. *Ferguson*, 532 US at 68 ("While the ultimate

goal of the program may well have been to get the women in question into substance abuse treatment and off drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal.").

The state's assertion that people on LEM have a reduced expectation in privacy, and therefore a warrantless search is justified, is similarly unavailing. As explained *infra*, Part III.B.1, the fact that the LEM statute imposes monitoring as part of the sentence does not, in itself, meaningfully reduce people's expectation of privacy against extraordinarily invasive ongoing GPS tracking. Moreover, the cases the state cites do not stand for the proposition that merely asserting a reduced expectation of privacy can justify a warrantless search. See Martin State Supp Br at 45-46. Instead, those cases involve searches serving special needs apart from ordinary law enforcement. See *Griffin*, 483 US at 873–874 (probation searches serve a "special need," probation supervision); *United States v Knights*, 534 US 112, 119; 122 S Ct 587; 151 L Ed 2d 497 (2001) (probation search "would further the two primary goals of probation"); *Samson v California*, 547 US 843, 849–850; 126 S Ct 2193; 165 L Ed 2d 250 (2006) (incorporating reasoning of *Knights*); *Vernonia Sch Dist 47J v Acton*, 515 US 646, 653; 115 S Ct 2386; 132 L Ed 2d 564 (1995) (drug testing student athletes is a "special needs" search).

B. LEM is an Unreasonable Search Because Its Intrusion on an Individual's Privacy Interest Outweighs the Government's Interest.

Even if this Court concludes that LEM falls within the special-needs exception, that does not end the analysis. A special-needs search is reasonable only if the government's legitimate interests outweigh the individual's privacy interests, and only "[i]n limited circumstances, where the privacy interests implicated by the search are *minimal*." *Chandler v Miller*, 520 US 305, 313–314; 117 S Ct 1295; 137 L Ed 2d 513 (1997) (emphasis added),

quoting *Skinner v R Labor Executives' Ass'n*, 489 US 602, 624; 109 S Ct 1402; 103 L Ed 2d 639 (1989). Here, LEM is unreasonable under the Fourth Amendment and Const 1963, art 1, § 11, because its intrusion on privacy far outweighs the government's proffered interest in automatically imposing electronic monitoring for life.

1. The Intrusion on Privacy Interests Is Severe.

The privacy intrusion effected by LEM is severe. See *Corridore*, 71 F4th at 496 ("Michigan's LEM scheme is undoubtedly intrusive."). In *Carpenter*, the United States Supreme Court explained that pervasive electronic location tracking—including GPS ankle monitoring—implicates Fourth Amendment rights because it achieves "near perfect surveillance." 585 US at 311–312 ("[W]hen the Government tracks the location of a cell phone it achieves near perfect surveillance, *as if it had attached an ankle monitor to the phone's user*." (emphasis added)). And while *Carpenter* involved the government obtaining an average of 101 location points per day over several months, *id.* at 302, LEM is permanent and unremitting—"a twenty-four-hour-a-day, seven-day-a-week, search of an individual . . . that reveals constant information about that person's whereabouts for the remainder of that person's life." *Park*, 305 Ga at 358. This location tracking "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Carpenter*, 585 US at 311, quoting *United States v Jones*, 565 US 400, 415; 132 S Ct 945; 181 L Ed 2d 911 (2012) (Sotomayor, J., concurring).[45] When monitoring "faithfully follows [an individual] beyond

[45] GPS monitoring data is even more invasive than the cell phone location information at issue in *Carpenter* and the vehicle GPS tracking in *Jones*. While the precision of cell site location information can vary widely, and while vehicle tracking can follow an individual's movements only on public thoroughfares, GPS monitors carried on the body reveal highly precise location coordinates, see GPS.gov, *GPS Accuracy* <https://www.gps.gov/

public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales," the government can reliably infer a person's activities and associations from a record of their locations and movements over time. *Id*. For that reason, unconstrained deployment of electronic tracking technology "risks Government encroachment of the sort the Framers, 'after consulting the lessons of history,' drafted the Fourth Amendment to prevent." *Carpenter*, 585 US at 320, quoting *United States v Di Re*, 332 US 581, 595; 68 S Ct 222; 92 L Ed 210 (1948); *Grady II*, 372 NC at 537–538 (finding lifetime GPS-based monitoring of registrants to be "uniquely intrusive").

LEM is also intrusive because it requires ongoing physical occupation of a person's body. As the North Carolina Supreme Court explained, "being required to wear an ankle appendage, . . . which requires the individual to remain plugged into a wall every day for two hours," and which serves as a "badge of past criminality," is a significant intrusion. *Grady II*, 372 NC at 536–537. Monitors cause electric shocks and pain, require multiple hours of charging every day, emit vibrations and indicator lights, and require immediate availability if the monitor needs to be changed or replaced. See Facts II; *Corridore*, 71 F 4th at 496. People further must avoid concrete buildings that interfere with GPS monitor signals and forgo jobs or activities that lack regular access to charging outlets. See Facts II. Thus, the state's argument that LEM doesn't limit people from working, traveling or moving about freely ignores the realities of having a GPS monitor strapped to one's ankle.

---

systems/gps/performance/accuracy> (last visited November 21, 2024) (typical GPS accurate to within 16 feet, and some systems accurate to within a few centimeters), and follow individuals inside homes and other constitutionally protected spaces, see *Kyllo v United States*, 533 US 27, 31, 34-35; 121 S Ct 2038; 150 L Ed 2d 94 (2001) (using technology to monitor presence or activity in home is a search).

This burden on privacy must be evaluated against a person's reasonable expectation of privacy. Although Michigan's statute imposes LEM as part of the defendant's sentence, see MCL 750.520n(1), this technical fact does not eliminate the expectation of privacy; a search is not exempt from Fourth Amendment requirements just because it can be labeled as punishment. See *Samson*, 547 US at 864 (Stevens, J., dissenting) ("Nor, to my knowledge, have we ever sanctioned the use of any search as a punitive measure."). Courts have held time and again that individuals do not have a reduced expectation of privacy simply by virtue of having been convicted of a crime. See *Friedman v Boucher*, 580 F3d 858 (CA 9, 2009); *Trask v Franco*, 446 F3d 1036, 1043–1044 (CA 10, 2006); *Grady II*, 372 NC at 561 (collecting cases).

Nor is LEM imposed as a condition of probation or parole. If it were, it could only be imposed based on an "individualized" determination "assess[ing] risks and needs of the parolee" or probationer and "be designed to reduce recidivism." MCL 791.236, MCL 771.3(11).

The state's argument that LEM falls somewhere "on a continuum of possible punishments," also cannot justify LEM. *Martin* State Supp Br, at 46, quoting *Griffin*, 483 US at 847. That courts have found reduced expectations of privacy for people subject to *other* punishments (incarceration, probation, and parole) says nothing about the expectation of privacy of people on LEM. Since LEM is imposed after incarceration, concerns about prison security and administration do not apply. See *Hudson v Palmer*, 468 US 517, 526–528; 104 S Ct 3194; 82 L Ed 2d 393 (1984). And LEM can apply for decades *after* the conclusion of any probation or parole term—there is not the same need to ensure compliance with supervision conditions. See *Griffin*, 483 US at 873–874 (probation); *Knights*, 534 US at 120

(probation); *Samson*, 547 US at 849–850 (parole). Further, a lifelong 24/7 search tracking a person's most intimate movements until their death is far more invasive than the one-off searches considered in *Samson*, *Knights*, and *Griffin*. As such, cases addressing the reasonableness of prison, probation, or parole conditions do not apply.

In any event, people in prison and under supervision still retain a protected privacy interest. Even in the prison context, where courts are generally deferential to prison security concerns, very invasive searches are not permitted. See, e.g., *Stoudemire v Mich Dep't of Corrections*, 705 F3d 560, 574 (CA 6, 2013) (strip search of prisoner in area where others could see her naked was unreasonable under Fourth Amendment). Likewise, "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" *Griffin*, 438 US at 873. Thus, courts have invalidated searches of supervisees that violate the Fourth Amendment's reasonableness requirement. See, e.g., *United States v Hill*, 776 F3d 243, 249–250 (CA 4, 2015) (finding warrantless search of a supervisee's home by probation officer unreasonable under the circumstances); *United States v Baker*, 221 F3d 438, 444 (CA 3, 2000) (search of parolee's car trunk was unreasonable due to lack of individualized suspicion). Even if people on LEM could be said to have some reduction in their expectation of privacy, the severity of the privacy invasion effected by mandatory lifetime around-the-clock tracking renders the search unreasonable.

2. Automatic Lifetime Electronic Monitoring Does Not Meaningfully Advance Any Legitimate Government Interest.

LEM's intrusiveness and burden on an individual's privacy must be weighed against the "degree to which it is needed for the promotion of legitimate governmental interests." *Riley v California*, 573 US 373, 385; 134 S Ct 2473; 189 L Ed 2d 430 (2014). A warrantless search is not justified when it is "untether[ed]" from the legitimate purposes justifying the

exception at issue. *Id.* at 386. In *Riley*, for example, the United States Supreme Court held that there is a weak nexus between warrantless searches of arrestees' cell phones and the purposes of the search-incident-to-arrest exception—protecting officer safety and preventing the destruction of evidence—because warrantless searches of the digital contents of an arrestee's phone do not sufficiently advance those goals. *Id.* at 387–391; see also *Florida v Royer*, 460 US 491, 500; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (warrantless searches "must be limited in scope to that which is justified by the particular purposes served by the exception").

A similar insufficient nexus plagues the LEM requirement here. The state's asserted interest in LEM is to deter individuals from reoffending and protect potential victims. See *Martin* State Supp Br, at 49; Senate Legislative Analysis, HB 5531, pp 1, 6 (November 13, 2006). But research fails to show that electronic monitoring reduces recidivism. See Facts III.A.2. To the contrary, LEM undermines rehabilitation and pushes people into unemployment, homelessness, and isolation—factors that increase recidivism. See *id*. Because LEM is counterproductive to preventing re-offense, the state's asserted interest cannot justify the privacy invasion.[46]

But even if electronic monitoring can be justified for some individuals at the moment incarceration ends, *automatically* imposing *lifetime* electronic monitoring—with no individual assessment or opportunity for removal—does not meaningfully advance the government's interests and is unreasonable.

[46] The Court of Appeals was also incorrect in suggesting that LEM "assists law enforcement efforts to ensure that these individuals . . . remain compliant with the Sex Offenders Registration Act." *Hallak*, 310 Mich App at 580 (citations omitted). Because SORA no longer has exclusion zones, GPS monitoring is not needed to detect such violations. See 2020 PA 295 (repealing exclusion zones).

a. *Automatic* LEM Does Not Meaningfully Advance the Government's Interests.

LEM is not always reasonable at the outset. The details of the offense and the characteristics of the offender (such as age and other indicia of recidivism risk) are relevant to the reasonableness of the search. The lack of individualized determinations means that Michigan mandates LEM even where it does not serve the state's asserted interest in reducing recidivism—for instance, where people leave prison to begin their LEM term elderly, terminally ill, or otherwise highly unlikely to commit another sex offense. See Facts II-III. That is why the South Carolina Supreme Court has held that courts can impose electronic monitoring "*only after* the court finds electronic monitoring would not be an unreasonable search based on the totality of the circumstances presented in an individual case." *State v Ross*, 423 SC 504, 514–515; 815 SE2d 754 (2018) (emphasis added).[47] Even assuming that electronic monitoring of some people could advance a legitimate state interest, the state has a negligible interest in imposing that monitoring without individualized review. Such review is necessary to maintain the required tethering between the state's interests and the scope of its search.

b. Automatic *Lifetime* Electronic Monitoring is Not Tethered to the Government's Interest.

Even if electronic monitoring is reasonable at its inception, it can become unreasonable over time. As courts have repeatedly explained, seizures deemed reasonable at their inception can become unreasonable due to the duration or manner of their execution.

[47] North Carolina also requires a risk assessment before imposing electronic monitoring. NC Gen Stat Ann 14-208.40A(c)-(e); see also *State v Hilton*, 378 NC 692, 695; 862 SE2d 806 (2021) (trial court held a two-day evidentiary hearing); *State v Strudwick*, 379 NC 94; 864 SE2d 231 (2021) (state administered a risk assessment test).

See *Asinor v District of Columbia*, __ US App DC __, __; 111 F4th 1249, 1256 (2024) ("When a person is seized, the Fourth Amendment requires reasonableness not only at the moment of arrest, but also for the seizure's entire duration."); *United States v Place*, 462 US 696, 707–708; 103 S Ct 2637; 77 L Ed 2d 110 (1983); *United States v Jacobsen*, 466 US 109, 125 n 25; 104 S Ct 1652; 80 L Ed 2d 85 (1984) (a seizure can become "unreasonable because its length unduly intruded upon constitutionally protected interests"). By the same logic, a search must also be reasonable for its whole duration to survive Fourth Amendment scrutiny.[48] See *Bell v Wolfish*, 441 US 520, 559; 99 S Ct 1861; 60 L Ed 2d 447 (1979) ("The test of reasonableness" requires courts to "consider the scope of the particular intrusion [and] the manner in which it is conducted.").

LEM's reasonableness decreases over time because, as the state's own experts said in *Does III*, the risk of recidivism is "highly dependent on how much time has passed after first being convicted and released." *Does III*, SOMF, ECF No. 123-1, ¶ 179, quoting Lovell Decl, ECF No. 128-19, ¶ 7. After ten years offense-free in the community, most registrants will pose no greater risk than the general male population. See Facts III. Further, recidivism declines markedly with age. *Id*. Nevertheless, under Michigan's LEM regime, people who have spent decades in the community without recidivating, grown old, and developed chronic health conditions remain shackled to an ankle monitor until their deaths, with no individualized assessment or opportunity to seek removal.[49] Where people no longer pose an

[48] As discussed above, LEM is both a continuing search (involving ongoing physical intrusion on a person's body, see *Grady*, 575 US at 310, and ongoing persistent tracking of sensitive location information laying bare a person's privacies of life, see *Carpenter*, 585 US at 311), and a continuing seizure, see *supra* note 44.

[49] In contrast, multiple other states provide a mechanism for removal after a period of years. See *supra* note 35. The feasibility and necessity of an opportunity to terminate

appreciable recidivism risk, the state's interest in reducing recidivism cannot outweigh LEM's severe privacy intrusion—an intrusion that compounds over time as ever-more location information is collected and stored. In other words, when the intrusive search is no longer tethered to the state's interest in reducing recidivism, LEM becomes unreasonable in violation of the Fourth Amendment and Const 1963, art 1, § 11. Only periodic individualized review or, at a minimum, an opportunity to seek termination could render an LEM program reasonable.

IV. Michigan Can Uphold Constitutional Rights While Monitoring People Who Present a Current Danger.

In its opinion, the Court should do two things. First, the Court should hold that the current SORA and LEM schemes are unconstitutional and explain why they fail constitutional scrutiny. After the Sixth Circuit invalidated SORA, the Legislature nevertheless kept SORA's core, punitive features intact. It is thus important that the Court clearly identify the key constitutional defects: SORA and LEM impose severe burdens (1) for life, and (2) automatically with no individual review or opportunity for removal, even upon the clearest proof of rehabilitation. That is both a disproportionate punishment and, for LEM, an unreasonable search.

Second, the Court should explain that there are multiple paths to remedying the constitutional defects, while still permitting the monitoring of people who are a current danger (provided that is done in a constitutional manner). For instance, the Legislature could require periodic individual review to determine if a person currently poses a danger to the

---

monitoring is reinforced by the probation and parole contexts, where there are opportunities to petition for early discharge. MCL 771.2; Michigan Department of Corrections, *MDOC Policy Directive: Discharge/Termination of Sentence*, PD 03.01.135, ¶ HH (December 9, 2024).

public. Such assessments would help ensure that SORA and LEM are proportionate under Const 1963, art 1, § 16, and that LEM constitutes a reasonable search under Const 1963, art 1, § 11, and the Fourth Amendment, not just at the outset but also over time. This approach would both protect constitutional rights and allow Michigan to monitor people who are a danger.

Importantly, requiring periodic, individualized review would also completely change the constitutional analysis for SORA. Limiting registration to people who currently pose a danger would turn Michigan's punitive scheme into a "regulatory" one. See *Kansas v Hendricks*, 521 US 346, 347, 357, 368–369; 117 S Ct 2072; 139 L Ed 2d 501 (1997) (civil commitment law was not punishment because it "unambiguously requires a finding of dangerousness" not just a past conviction; because it was imposed through a regularly-reviewed, procedurally-safeguarded finding that the person was likely to reoffend, and because the state "permitted immediate release upon a showing that the individual is no longer dangerous"). As in *Hendricks*, here individual review can ensure that SORA serves a regulatory public protection goal by guaranteeing that the devastating, life-altering consequences of registration are imposed only on people for whom such ongoing monitoring is justified. Further, the fact that the Legislature can convert SORA from a punitive regime into a regulatory one by basing registration on individualized determinations eliminates any concerns about unintended consequences of holding that SORA is punishment. See *Lymon*, __ Mich at __; slip op at 45 n 135 (ZAHRA, J., dissenting). While imposing severe restraints based solely on past convictions is unconstitutionally punitive, if a person is individually determined to be a current danger, those severe restraints can be imposed as a non-punitive, civil restriction.

Alternatively, Michigan could automatically impose SORA and LEM for limited, evidence-based time periods. To be clear, amici believe that shorter automatic SORA and electronic monitoring can also be unconstitutional because SORA and LEM are so harsh, invasive, and stigmatizing, and because both sanctions are untethered from, and excessive in relation to, legitimate public safety goals. Amici recognize, however, that the Legislature needs some flexibility and that it might respond to invalidation of automatic lifetime terms by imposing shorter automatic terms, rather than providing individual review at the outset.

The Court should therefore make clear that the length of any automatically imposed terms must be evidence-based. Post-carceral restrictions that are as harsh and intrusive as SORA and LEM cannot be justified by assumptions and stereotypes that are completely divorced from the science. Rather, they must be based on actual evidence about whether and for how long people with sexual convictions present a heightened risk—in other words, at what point they reach desistance. While desistance will vary by individual, at a minimum the Legislature must look at when people with convictions, as a group, reach desistance. Research shows that after ten years in the community without reconviction, a person with an average risk level is no more likely to be convicted of a sexual offense than men in the general population. See Facts III. Thus, automatic imposition of a ten-year SORA and electronic monitoring term might withstand constitutional scrutiny, provided that the person has the opportunity to seek removal from SORA/LEM before the ten years is up (since many people reach desistance sooner). The state could still seek to extend the term for longer—it would just need to demonstrate that the person continues to present such a risk that these burdens are justified.

Such an approach also addresses any concerns about the practicalities of individual review—concerns which are, in any event, overblown because the MDOC already conducts risk assessments as a matter of course.[50] See Facts IV. But with a presumptive ten-year term, the state would only be responsible for individually reviewing people whom it insists should continue to be subjected to registration or electronic monitoring even after they have already lived in the community successfully for ten years.[51]

In sum, this Court should make clear that:

1. *Automatic* imposition of *lifetime* SORA and electronic monitoring is unconstitutional.
2. SORA and LEM cannot be imposed *for life* without periodic, individualized determinations that a person is a current danger to public safety.
3. SORA and LEM cannot be imposed *automatically* unless the length of any automatic registration/monitoring term is evidence-based (e.g. ten years), and unless there is an opportunity for individuals to seek removal.

It would be up to the Legislature to implement that ruling.

CONCLUSION

This Court should reverse the decision of the Court of Appeals and hold that (1) automatic lifetime SORA is punishment; (2) automatic lifetime SORA and LEM are cruel or unusual punishment; and (3) automatic lifetime electronic monitoring is an unreasonable

[50] The prosecutor has provided no argument why, if the state objects to conducting individual reviews, people should not at least themselves be able to seek removal based on demonstrated rehabilitation.

[51] In addition to evidence-based terms and opportunities for review, the Legislature will need to make other changes to render SORA and LEM constitutional, e.g. addressing extensive reporting of the minutiae of everyday life.

search. The Court should make clear that these constitutional deficiencies arise both from the failure to provide periodic, individual review and from the excessiveness of imposing lifetime restrictions rather than shorter evidence-based time periods with an opportunity to seek removal.

Respectfully submitted,

/s/ Miriam Aukerman
Miriam J. Aukerman (P63165)
American Civil Liberties Union
Fund of Michigan
1514 Wealthy St. SE, Ste. 260
Grand Rapids, MI 49506
(616) 301-0930

Daniel S. Korobkin (P72842)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6824

Allison Frankel
Nathan Freed Wessler
Lauren Yu
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

Attorneys for Amici Curiae

February 18, 2025

WORD COUNT STATEMENT

This brief contains 15,984 words in the sections covered by MCR 7.212(C)(6)-(8).

/s/ Miriam Aukerman
Miriam J. Aukerman (P63165)
American Civil Liberties Union
Fund of Michigan
1514 Wealthy St. SE, Ste. 260
Grand Rapids, MI 49506
(616) 301-0930