STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

PAUL J. BETTS, JR.,

Defendant-Appellant.

SC No. 148981

COA No. 319642

Lower Court File No. 12-062665-FH
Muskegon County Circuit Court

---/

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL ANSWER TO DEFENDANT-APPELLANT'S SUPPLEMENTAL APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

WAS THE MICHIGAN LEGISLATURE'S IMPLEMENTATON OF THE FEDERAL SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) BY ADOPTING THE 2011 AMENDMENTS TO MICHIGAN'S SEX OFFENDER REGISTRATION ACT (SORA) DESIGNED TO PROTECT THE PUBLIC FROM HARM AND, AS SUCH, IS IT A CIVIL REGULATORY SCHEME RATHER THAN CRIMINAL PUNISHMENT THAT DOES NOT TRIGGER THE *EX POST FACTO* CLAUSE WHEN ENFORCED AGAINST DEFENDANT WHOSE LISTED OFFENSE PREDATES ITS EFFECTIVE DATE?

Plaintiff-Appellee says, "Yes."
Defendant-Appellant says, "No."
The trial court says, "Yes."
The Court of Appeals says, "Yes."

COUNTERSTATEMENT OF JURISDICTION

The Supreme Court may review by appeal a case after decision by the Court of Appeals. MCR 7.301(A)(2). The procedures for such appeal are outlined in MCR 7.302 *et seq*. An application for leave must be filed within 56 days of an opinion of the Court of Appeals. MCR 7.302(C)(2)(b). The Court of Appeals' order denying leave was entered on February 27, 2014. Accordingly, his application for leave to appeal is timely, having been filed within 56 days of the Court of Appeals' decision.

COUNTERSTATEMENT OF THE FACTS

Defendant applies for leave to appeal from the February 27, 2014, order of the Court of Appeals (Defendant's Appx, 93A) that denied his application for leave to appeal from the July 2, 2013, judgment of sentence entered by the 14th Judicial Circuit Court for the County of Muskegon (Defendant's Appx, 58a), the Honorable WILLIAM C. MARIETTI, presiding.

Defendant was convicted following a conditional plea of *nolo contendere* of violating the Sex Offender Registration Act (SORA), MCL 28.729, and by the trial court of being a habitual offender, third offense, MCL 769.11. In accepting Defendant's plea, the trial court relied on the police report that indicated that as of October 3, 2012, he had failed to register his address, his vehicle, and email address, although he had been residing at 766 West Larch, Apartment 2, in Muskegon for two months. (05/30/2013 Plea Tr, pp 10-11; Defendant's appendix, pp 40a-41a.) He was sentenced on July 2, 2013, to three years' probation with the condition that he serve one year in the Muskegon County Jail along with fines and costs. (07/02/2013 Sentence Tr, p 10; Defendant's appendix, p 54a.)

Defendant's obligation to register as a sex offender stems from his March 29, 1993, sex offense that resulted in his December 16, 1993, conviction by guilty plea of second-degree criminal sexual conduct (CSC-2) involving a child under 13 years of age. He was sentenced on January 26, 1994, to 5 to 15 years' imprisonment. See *People v Betts*, 14th Judicial Circuit Court File No. 93-035663-FC. On March 29, 1993, when this sex offense occurred, Defendant was 44 years old (d/o/b 08/27/1948). He was 45 years old when he pled guilty on December 16, 1993.

Leading up to this charge and conviction, an investigation was conducted by the Michigan State Police (MSP). It produced a report, which is attached as Appendix A (Appx, p 1b). It establishes that Defendant has a history of sexually assaulting young girls. His

conviction of second-degree criminal sexual conduct arose from an ongoing sexual relationship he developed with a girlfriend's 9- or 10-year-old daughter—DRU (03/05/1982) in 1991-1992. The sexual abuse occurred at 17678 Allen, Spring Lake; 13490 Leonard Street, Nunica; and 1414 Palmer, Muskegon (Appx, 1b). Defendant began to sexually assault DRU within a month and a half after her mother started dating him (Appx, 1b-2b). Defendant began by telling DRU about sex, and on one occasion he walked by her bedroom and told her to leave the door open as he watched her undress (Appx, 2b). On another occasion, Defendant was taking a bath with the door open and Defendant told her to go to the bedroom, which she did (Appx, 2b). He came into the bedroom naked, took off her clothes, and put his penis in her mouth and then licked her vaginal area (Appx, 2b). These acts continued two to three times a week when her mother had left for work and the two were alone in the house (Appx, 2b). He would also place his penis near her vagina, but never penetrated her vagina (Appx, 2b). He told her not to tell anyone (Appx, 1b). The last sexual acts occurred just prior to Halloween 1992 (Appx, 2b). These episodes included "perform[ing] 69"—her words—where she got on top of him with her head towards his feet and he would lick her vagina while she would give him "blow jobs" (Appx, 3b). He also instructed her on how to use her mother's vibrator, which she then used (Appx, 3b). He had her watch x-rated videos with him and gave her a book—the Joy of Sex, which depicted people giving "blow jobs"—and he asked her whether she got any ideas from it (Appx, 3b).

Defendant was charged with first-degree criminal sexual conduct, but was allowed to plead to second-degree criminal sexual conduct.

DRU was not Defendant's only sexual assault victim. He also raped "KB" when she was 16 years old (Appx, 8b), sexually assaulted his 12-year-old cousin—HJ—beginning in 1982 (Appx, 9b-11b), and sexually assaulted seven-year-old SJ (Appx, 12b).

While Defendant was in prison, the first version of SORA was adopted by 1994 PA 295, effective October 1, 1995. (Appendix C; App, 18b.) At that time, a "listed offense" included CSC-2. 1994 PA 295, § 2(d)(*iv*). SORA required that, "[w]ithin 10 days after" "[t]he individual changes his … address" or "is paroled[,]" the "individual … shall notify the local law enforcement agency … or the state police or the sheriff's department of the individual's new address[.]" 1994 PA 295, § 5(1)(a), (b). Defendant's registration thus began under SORA on November 10, 1995. (Appendix B [certified copy of Defendant's SORA registration record]; Appx, 15b.) His first address from November 11, 1995 to July 30, 1999 was 1002 South Park 3, Kalamazoo, Michigan. (Appendix B [certified copy of Defendant's SORA registration record]; Appx, 16b.)

From July 30, 1999 to October 7, 1999, his registered address was the Lakeland Correctional Facility at 141 First Street, Coldwater, Michigan. (*Id.*)

Effective September 1, 1999, which was almost three months before Defendant was paroled on November 30, 1999, the Legislature adopted 1999 PA 85. (Appendix F; Appx, 28b.) A "listed offense" continued to include CSC-2. 1999 PA 85, § 2(d)(*ix*). SORA required that, "[w]ithin 10 days after" "[t]he individual changes his … address, domicile" or "is paroled[,]" the "individual … shall notify the local law enforcement agency or sheriff's department [or state police] … of the individual's new residence or domicile[.]" 1999 PA 85, § 5(1)(a), (b).

From October 7, 1999 to December 1, 1999, Defendant's registered address was the Gus Harrison Correctional Facility at 2727 East Beecher Street, Adrian, Michigan. (Appendix B [certified copy of Defendant's SORA registration record]; Appx, 16b.)

Upon his parole on November 30, 1999, he had 10 days to notify the local law enforcement agency or sheriff's department or state police of his new residence or domicile.

1999 PA 85, § 5(1)(a), (b). This was apparently accomplished because as of December 1, 1999, his registered address was 400 West Laketon Avenue, Muskegon, until December 16, 1999. (*Id*.)

From December 16, 1999 to April 3, 2000, Defendant's registered address was 204 Oakhurst, Kalamazoo, Michigan. (*Id*.)

From April 3, 2000 to July 31, 2000, his registered address was 1002 South Park 3, Kalamazoo, Michigan 49001. (*Id*.)

From July 31, 2000 to November 13, 2000, his registered address was 1338 West G Avenue, Kalamazoo, Michigan. (*Id*.; Appx, 15b.)

From November 13, 2000 to April 16, 2002, his registered address was 41738 46th Street, Paw Paw, Michigan. (*Id*.; Appx, 15b.)

From April 16, 2002 to June 18, 2003, his registered address was 65817 56th Street, Lawrence, Michigan. (*Id*.; Appx, 15b.) During this period, Defendant was discharged from parole on November 30, 2002. Also, during this period, the 2002 version of SORA was adopted by 2002 PA 542. (Appendix G; Appx, 38b.) A "listed offense" continued to include CSC-2. 2002 PA 542, § 2(e)(*ix*). SORA required that, "[w]ithin 10 days after" "[t]he individual changes his … address, domicile[,]" the "individual … shall notify the local law enforcement agency or sheriff's department [or state police] … of the individual's new residence or domicile[.]" 2002 PA 542, § 5(1)(a).

From June 18, 2003 to October 13, 2006, Defendant's registered address was 5043 Gun Lake Road, Hastings, Michigan. (Appendix B [certified copy of Defendant's SORA registration record]; Appx, 15b.) During this period, the 2004 version of SORA was adopted by 2004 PA 240. (Appendix J; Appx, 57b.) A "listed offense" continued to include CSC-2. 2004 PA 240, §

2(e)(*ix*). SORA required that, "[w]ithin 10 days after" "[t]he individual changes his … address, domicile[,]" the "individual … shall notify the local law enforcement agency or sheriff's department [or state police] … of the individual's new residence or domicile[.]" 2004 PA 240, § 5(1)(a). Also during this period, the 2006 version of SORA was adopted by 2005 PA 301, effective February 1, 2006. (Appendix O; Appx, 78b.) A "listed offense" continued to include CSC-2. 2005 PA 301, § 2(e)(*x*). No change was made to SORA's requirement from the 2004 legislation that, "[w]ithin 10 days after" "[t]he individual changes his … address, domicile[,]" the "individual … shall notify the local law enforcement agency or sheriff's department [or state police] … of the individual's new residence or domicile[.]" 2004 PA 240, § 5(1)(a).

From October 13, 2006 to January 9, 2007, Defendant's registered address was 75625 ½ 26th Street, Lawton, Michigan. (Appendix B [certified copy of Defendant's SORA registration record]; Appx, 15b.)

From January 9, 2007 to August 27, 2008, Defendant's registered address was 15565 Pomona, Redford, Michigan. (*Id.*)

From August 27, 2008 to May 17, 2011, Defendant's registered address was 16741 Kentfield Street, Detroit, Michigan. (*Id.*) During this period, the 2011 version of SORA was adopted by 2011 PA 17, effective April 12, 2011. (Appendix S; Appx, 89b.) A "listed offense" continued to include CSC-2, which is a Tier III offense, where the victim was less than 13 years of age. 2011 PA 17, § 2(w)(*v*). SORA required that, "immediately after" "[t]he individual changes or vacates his … residence or domicile" the "individual … must report in person and notify the registering authority where his … residence or domicile is located[.]" 2011 PA 17, § 5(1)(a). The term "immediately" was defined to "mean[] within 3 business days." 2011 PA 17, § 2(g). The term "'[r]egistering authority'" was defined to "mean[] the local law enforcement

agency or sheriff's office having jurisdiction over the individual's residence, place of employment, or institution of higher learning, or the nearest department post designated to receive or enter sex offender registration information within a registration jurisdiction." 2011 PA 17, § 2(n).

From May 17, 2011 to February 27, 2012, Defendant's registered address was 32700 Barrington Road, Madison Heights, Michigan. (Appendix B [certified copy of Defendant's SORA registration record]; Appx, 15b.)

On February 27, 2012, Defendant moved to Indiana and his registered address became 2210 Central Street, Lafayette, Indiana. (*Id*.) Although he moved back to Michigan in August 2012, his registered address continued to be 2210 Central Street, Lafayette, Indiana, until October 3, 2012, when he was arrested for this offense whereupon his registered address became the Muskegon County Jail at 25 West Walton Avenue, Muskegon, Michigan. (*Id*.; Appx, 15b.)

The nature of Defendant's CSC-2 conviction makes him a Tier III sex offender under the 2011 version of SORA, 2011 PA 17, § 2(v)(*ii*); MCL 28.722(v)(*ii*), because CSC-2 is a Tier III offense under the 2011 version of SORA, see 2011 PA 17, § 2(w)(*v*); MCL 28.722(w)(*v*) ("'Tier III offense' means … [a] violation of section 520c … of the Michigan penal code, 1931 PA 328, MCL 750.520c …, committed against an individual less than 13 years of age").[1]

[1] Importantly, Michigan law requires a court to sever any portion of SORA that the court finds unconstitutional when applied retroactively, MCL 8.5. As a consequence, it is noteworthy that Defendant's conduct of failing to register his change of address from Indiana to Michigan constitutes a violation of every version of SORA since its inception in 1994 PA 295, effective October 1, 1995. The only change to the registration requirement from the various versions of SORA leading up to the 2011 version is that the individual had to register "within 10 days" in the first 5 versions and within "3 days" in the final 2011 version. Because Defendant's move from Indiana to Michigan occurred in August 2012, and he was arrested on October 3, 2012, for his failure to register, he was well outside even the 10-day registration requirement of the first 5 versions of SORA, and, therefore, he should receive no relief even if the 2011 version is deemed to violate the *Ex Post Facto* Clause. In other words, if any of the five versions that precede the

The trial court accepted the police report to support the factual basis for Defendant's no-contest plea. (05/30/2013 Plea Tr, p 10; Defendant's Appx, p 40a.) An investigation of Defendant began on October 1, 2012, when law enforcement received information about a sex offender, Paul J. Betts, who was listed on Indiana's sex offender registry rather than Michigan's, who was frequenting both Verdoni's Restaurant and The Coffee House in Norton Shores, and making inappropriate comments to some of their employees, including asking a male employee at Verdoni's whether "there were any waitresses working that had daddy issues because he likes young girls". (Appendix Y; Appx, 205b.) Law enforcement confirmed that Defendant had failed to register after moving back to Michigan from Indiana and confronted him on October 3, 2012, whereupon it was learned that he had been residing in Muskegon at 766 West Larch, Apartment 2, for at least two months, had a truck registered to him at 453 Martin Luther King Boulevard, Detroit, and he had been using the internet service at The Coffee House with the email address of giantkillerpjb@hotmail.com. (*Id*.) He was arrested for failing to register his address, his vehicle, and his e-mail address. (*Id*.)

Defendant filed a motion to dismiss based on an *ex post facto* argument. The trial court denied his motion, explaining its reasons on the record. (Defendant's Appx, pp 26a-29a.) Defendant then entered a conditional no-contest plea so he could raise the issue whether the *Ex Post Facto* Clause is violated by applying the 2011 version of SORA to him when his listed offense occurred before its adoption. (05/30/2013 Plea Tr, pp 6, 10-12; Defendant's Appx, pp 36a, 40a-42a.). The Court of Appeals denied leave on February 27, 2014 (Defendant's Appx, p 93a), and on June 27, 2018, this Court "direct[ed] the Clerk to schedule oral argument on whether to grant the application or take other action" to address:

2011 version survive an *Ex Post Facto* challenge, then Defendant's failure to register was still a violation of SORA and his conviction should be affirmed.

> (1) whether the requirements of the Sex Offender Registration Act (SORA), MCL 28.721 *et seq*., amount to "punishment" … and (2) whether the defendant's conviction pursuant to MCL 28.729 for failure to register under SORA is an ex post facto punishment, where the registry has been made public, and other requirements enacted, only after the defendant committed the listed offense that required him to register …. [Defendant's appendix, p 97a.]

SUMMARY OF ARGUMENT

Defendant's challenge to the Michigan Legislature's 2011 amendment to the Sex Offender Registration Act (SORA) as an *ex post facto* law is without merit because the amendment represents the implementation of the federal Sex Offender Registration and Notification Act of 2006 (SORNA) as mandated by Congress—"to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed[,]"[2]—and which expressly established a civil regularity scheme "to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders[,]"[3] and Defendant fails to satisfy his "heavy burden" of demonstrating "the clearest proof" or "unmistakable evidence" under the *Mendoza-Martinez/Smith* test that the statutory scheme is so punitive either in purpose or effect to negate the Legislature's clearly expressed intention to deem it remedial rather than punitive.

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[2] 42 USC 16901 (now 34 USC 20901).

[3] MCL 28.721a.

LAW AND ARGUMENT

THE MICHIGAN LEGISLATURE'S IMPLEMENTATON OF THE FEDERAL SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) BY ADOPTING THE 2011 AMENDMENTS TO MICHIGAN'S SEX OFFENDER REGISTRATION ACT (SORA) WAS DESIGNED TO PROTECT THE PUBLIC FROM HARM AND, AS SUCH, IS A CIVIL REGULATORY SCHEME RATHER THAN CRIMINAL PUNISHMENT, AND, THEREFORE, DOES NOT TRIGGER THE *EX POST FACTO* CLAUSE WHEN ENFORCED AGAINST DEFENDANT WHOSE LISTED OFFENSE PREDATES ITS EFFECTIVE DATE.

A. *Standard of review*

Questions of constitutional interpretation are reviewed de novo. *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007).

B. *Analysis of the issue*

On July 27, 1981, at a Sears department store in Hollywood, Florida, 6-year-old Adam Walsh was abducted at a mall. Two weeks later, some of Adam's remains were discovered in a canal more than 100 miles from his home. In 1984, 13-year-old Christy Ann Fornoff was abducted, sexually assaulted, and murdered in Tempe, Arizona. On October 22, 1989, 11-year-old Jacob Erwin Wetterling was abducted at gunpoint when returning to his home in St. Joseph, Minnesota, after walking to the neighborhood video store. His remains were not recovered until nearly 27 years later on September 1, 2016, in a pasture near Paynesville, Minnesota, about 30 miles from the site of his abduction.

Congress adopted the 1994 Violent Crime Control and Law Enforcement Act that included the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (a/k/a the "Jacob Wetterling Act"), PL 103–322 (HR 3355), Title XVII, Subtitle A, § 170101 (103rd Congress, Sept. 13, 1994), 108 Stat 2041, 42 USC 14071, which gave States discretion whether to adopt sex offender registration laws that would require released sex

offenders to register with law enforcement agencies in their communities and would authorize law enforcement to disseminate information about sex offenders including their names, addresses, and photographs.[4] The Attorney General reported that, "[s]ince the enactment of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act …, there have been national standards for sex offender registration and notification in the United States."[5] He also noted that "[a]ll states currently have sex offender registration and notification programs and have endeavored to implement the Wetterling Act standards in their existing programs."[6]

In 1990, 31-year-old Pam Lychner was attacked by a career offender in Houston, Texas. In 1993, 12-year-old Polly Klaas was abducted, sexually assaulted, and murdered in 1993 by a career offender in California. In 1994, 7-year-old "Megan Kanka … was sexually assaulted and murdered … by a neighbor who, unknown to the victim's family, had prior convictions for sex offenses against children." *Smith v Doe*, 538 US 84, 89; 123 S Ct 1140; 155 L Ed 2d 164 (2003). On September 11, 1995, 9-year-old Jimmy Ryce was kidnapped and murdered in Florida.

Megan's abduction and murder "gave impetus to laws for mandatory registration of sex offenders and corresponding community notification", *id*., 89-90; 123 S Ct at 1145, including Congress's unanimous amendment to § 170101(d), 42 USC 14071(d), of the Jacob Wetterling Act in 1996 to include Megan's Law, PL 104-145 (HR 2137) (104th Congress, May 17, 1996), 110 Stat 1345, 42 USC 14071(d), to establish public notification requirements and to require the

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[4] See https://www.smart.gov/legislation.htm, a website established by the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), which includes a brief history of sex offender registration laws with links to each law.

[5] Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, Docket No. OAG 121; AG Order No. 2978-2008, 73 FR 38030-01; 2008 WL 2594934.

[6] *Id.*

designated State law enforcement agency to release relevant information necessary to protect the public concerning a specific person required to register.[7] In 1996, along with Megan's Law, Congress further amended the Jacob Wetterling Act to include the Pam Lychner Sexual Offender Tracking and Identification Act of 1996, PL 104–236 (S 1675) (104th Congress, Oct. 3, 1996), 110 Stat 3093, 42 USC 14071 *et seq.*, which directed the Attorney General to establish a national database at the Federal Bureau of Investigation (the National Sex Offender Registry or NSOR) to track each person who: (1) has been convicted of a criminal offense against a minor or a sexually violent offense; or (2) is a sexually violent predator.[8] The Act also "required state registry officials to immediately transmit sex offender registration information to NSOR" and "allowed for the dissemination of information collected by the FBI necessary to protect the public to federal, state and local officials responsible for law enforcement activities or for background checks pursuant to the National Child Protection Act[.]"[9]

"By 1996, every State, the District of Columbia, and the Federal Government had enacted some variation of Megan's Law." *Smith*, 538 US at 89-90; 123 S Ct at 1145.

Michigan's version of Megan's Law—the Sex Offenders Registration Act (SORA)—was first adopted in 1994 through 1994 PA 295, effective October 1, 1995 (Appendix C; Appx, 18b.). Over the course of the next decade, Congress continued to work diligently to improve the sex offender registration and notification laws to protect the public from sex offenders,[10] and the Michigan Legislature followed suit.[11]

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[7] See SMART's website, https://www.smart.gov/legislation.htm.

[8] *Id.*

[9] *Id.*

[10] See the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, PL 105-119, § 115 (105th Congress, Nov. 26, 1997), 111 Stat 2440, 42 USC 14701 *et seq.*; the Protection of Children from Sexual Predators Act of 1998, PL 105–119, § 115 (105th Congress, Oct. 30, 1998), 111 Stat 2440, 42 USC 14701 *et seq.*; the

In 1998, 7-year-old Amanda Brown was abducted and murdered in Florida. In 2000, 16-year-old Molly Bish was abducted while working as a lifeguard in Warren, Massachusetts, where her remains were found 3 years later. In June 2002, 14-year-old Elizabeth Smart was abducted in Salt Lake City, Utah. On July 15, 2002, 5-year-old Samantha Runnion was abducted, sexually assaulted, and murdered in California.

1.

On July 27, 2006—the 25th anniversary of Adam Walsh's abduction——President George W. Bush signed the Adam Walsh Child Protection and Safety Act of 2006, PL 109-248 (HR 4472), Title I; 120 Stat 587 (2006), which included Title I—the Sex Offender Registration and Notification Act of 2006 (SORNA), 42 USC 16901 *et seq.*[12] See 42 USC 16902 (now 34 USC 20902). The 16 victims listed above, including Adam, were recognized by Congress in SORNA's Declaration of Purpose "to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed[.]" 42 USC 16901 (now 34 USC 20901). Accordingly, "Congress … etablishe[d] a comprehensive national system for the registration of those offenders." *Id.*

Victims of Trafficking and Violence Protection Act Of 2000 (that included the Campus Sex Crimes Protection Act), PL 106-386, § 1601 (106th Congress, Oct. 28, 2000), 114 Stat 1464, 20 USC 1001 *et seq*.; the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, PL 108–21 (108th Congress, April 30, 2003, 117 Stat 650.

[11] Between 1994 and 2006, SORA has been the subject of 15 public acts adopted in 7 separate years, which are included in Plaintiff's Appendices as follows: **1995**—1996 PA 10 (Appendix D; Appx, 23b); **1996**—1996 PA 494 (Appendix E; Appx 25b); **1999**—1999 PA 85 (Appendix F; Appx 28b); **2002**—2002 PA 542 (Appendix G; Appx 38b); **2004**—2004 PA 237 (Appendix H; Appx, 47b); 2004 PA 238 (Appendix I; Appx, 55b); 2004 PA 240 (Appendix J; Appx, 57b); **2005**—2005 PA 121 (Appendix K; Appx, 68b); 2005 PA 123 (Appendix L; Appx, 71b); 2005 PA 127 (Appendix M; Appx, 73b); 2005 PA 132 (Appendix N; Appx, 75b); 2005 PA 301 (Appendix O; Appx, 78b); 2005 PA 322 (Appendix P; Appx, 81b); **2006**—2006 PA 46 (Appendix Q; Appx, 85b); and 2006 PA 402 (Appendix R; Appx, 87b).

[12] Effective September 1, 2017, SORNA was transferred to 34 USC 20901 *et seq*. without alteration.

As observed in *Reynolds v United States*, 565 US 432; 132 S Ct 975; 181 L Ed 2d 935 (2012), SORNA "reflects Congress' awareness that pre-Act registration law consisted of a patchwork of federal and 50 individual state registration systems." *Id*., 435; 132 S Ct at 978 (citation omitted). SORNA's goal was "to make those systems more uniform and effective" "by repealing several earlier federal laws that also (but less effectively) sought uniformity; by setting forth comprehensive registration-system standards; by making federal funding contingent on States' bringing their systems into compliance with those standards; by requiring both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current); and by creating federal criminal sanctions applicable to those who violate the Act's registration requirements." *Id*. (citation omitted); see also *United States v Kebodeaux*, 570 US 387, 399; 133 S Ct 2496, 2505; 186 L Ed 2d 540 (2013) (SORNA's "general changes were designed to make more uniform what had remained 'a patchwork of federal and 50 individual state registration systems,' … with 'loopholes and deficiencies' that had resulted in an estimated 100,000 sex offenders becoming 'missing' or 'lost'").

Congress dangled the loss of federal funding—"10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968" (i.e., the Byrne Justice Assistance Grant [Byrne JAG] formula funds)—for any "jurisdiction that fails … to substantially implement this title." 42 USC 16927a (now 34 USC 20927[a]).[13] The initial deadline for each state's

[13] Adam Walsh Child Protection and Safety Act: A Legal Analysis. (Appendix U; Appx, 117b.). https://www.everycrsreport.com/files/20070406_RL33967_8fca15a3c588d5fcd259d43e22033150eabb11d1.pdf. See 34 USC 20927(a), which establishes a penalty for jurisdictions that fail to substantially implement Title I of the Adam Walsh Child Protection and Safety Act of 2006, the Sex Offender Registration and Notification Act (SORNA):

implementation of SORNA was July 27, 2009. 42 USC 16924(a)(1)-(2) (now 34 USC 20924[a][1]-[2]). This deadline was extended to July 27, 2011.[14] "To verify compliance, the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) reviews jurisdictional laws, policies and procedures across 14 SORNA categories, detailing if a jurisdiction has or has not met the standards. These SORNA substantial implementation reviews are available at https://smart.gov/sorna-map.htm."[15]

Among other things, SORNA requires:

Classification of offenders. SORNA classifies offenders into one of three "tiers" based on their offenses of conviction; the frequency and duration of an offender's reporting requirement is then determined by his tier level. 42 USC 16911(1)-(4) (now 34 USC 20911[1]-[4]). A state need not assign or label its offenders as "tier 1," "tier 2," and "tier 3," but it must ensure that an offender who would qualify for a particular tier under SORNA is subject to the minimum SORNA requirements for that tier. A state could meet this requirement by subjecting all offenders to SORNA's "tier III" requirements. National Guidelines for Sex Offender Registration and Notification, Federal Register, Vol. 73, No. 128 (July 2, 2008) (hereinafter "Guidelines"), pp 21-22.[16]

Required information for registry. SORNA requires states to include, at a minimum, the following offender information in their registries: names and aliases; internet identifiers and addresses (including "all designations used by sex offenders for purposes of routing or self-identification in Internet communications or postings"); telephone numbers; social security number; residence, lodging, and travel information (including any place in which the sex

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> For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this title shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968.

Thus, registration jurisdictions that fail to substantially implement SORNA are subject to a 10 percent penalty reduction in its Byrne Justice Assistance Grant (Byrne JAG) formula funds.

[14] https://ojp.gov/smart/pdfs/SORNA_Extensions_Granted.pdf (Appendix V; Appx, 162b).

[15] https://www.smart.gov/pdfs/SORNA-progress-check.pdf (Appendix W; Appx, 165b.)

[16] http://www.smart.gov/guidelines.htm. The page numbering refers to the pdf version of the Guidelines posted on SMART's website.

offender is staying for seven or more days); employment information and professional licenses; school information; vehicle information (including for any vehicle that the offender "regularly drives"); birthdate; physical description; text of registration offense; criminal history; current photograph; fingerprints and palm prints; DNA sample; and driver's license or identification card. 42 USC 16914 (now 34 USC 20914); Guidelines, pp 26-33.

Required information for website. In addition to information that must be available to law enforcement through the registry, SORNA requires states to publish on the Internet offenders' names, addresses or locations, vehicle descriptions and license plate numbers, physical descriptions, sex offenses for which convicted, and current photographs. 42 USC 16918 (now 34 USC 20918); Guidelines 33-34. States' online registries must be field searchable by zip code or geographic radius set by the user, as well as by name, county, and city or town. 42 USC 16918 (now 34 USC 20918); Guidelines, p 34. "The site shall include a warning that information on the site should not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address. The warning shall note that any such action could result in civil or criminal penalties." 42 USC 16916(f) (now 34 USC 20920[f]).

Community notification. SORNA requires community notification and targeted disclosures. Within three business days of registering a sex offender[17] or updating his or her registration, the information must be provided to specified entities and individuals, including schools and social services in the area, volunteer organizations in which contact with minors may occur, or any other organization or individual who requests notification. 42 USC 16921 (now 34 USC 20921); Guidelines, p 38.

In-person reporting of changes to registry information. States must require an offender to report in person within three business days of changes in name, residence, employment, or school attendance. 42 USC 16913(c) (now 34 USC 20913[c]); Guidelines, p 50. Offenders must also inform the jurisdiction if the offender intends to commence residence, employment, or school attendance in another jurisdiction. *Id.* States must require offenders to report within three business days any changes in vehicle information, temporary lodging information, or Internet identifiers, though an offender need not report these changes in person

[17] A "sex offender" is "an individual who was convicted of a sex offense", 42 USC 16911(a) (now 34 USC 20911[a]).

and the manner of reporting is left to the states' discretion. *Id.*, pp 52, 54. States must require offenders to report international travel 21 days in advance. Supplemental Guidelines for Registration and Notification, Federal Register Vol. 76, No. 7 (January 11, 2011), pp 1631, 1637 (hereinafter "Supplemental Guidelines").[18]

Periodic in-person verification. States must require in-person verification of registry information at periodic intervals based on the offender's tier level, including quarterly in-person verification for tier III offenders. 42 USC 16916 (now 34 USC 20916); Guidelines, pp 54-55. Like other requirements, "the in-person appearance requirements … are only minimum standards" and "are not meant to discourage" states from adopting more extensive verification measures. *Id.*, p 56.

Duration of registration. SORNA requires registration for set time periods depending on the offender's tier level, including lifetime registration for tier III offenders. 42 USC 16915 (now 34 USC 20915); Guidelines, pp 56-57.

Retroactive application. Finally, SORNA requires states to apply the registration and reporting requirements retroactively to certain categories of offenders, listed in the Guidelines, for which such application is feasible. Guidelines, pp 7-8, 45-47; see also Supplemental Guidelines, p 1639, and 28 CFR 72.3.

The nine federal circuit courts that have considered *ex post facto* challenges have rejected them vis-à-vis the retroactive application of SORNA's registration/notification requirements. *United States v Parks*, 698 F3d 1, 5-6 (CA 1, 2012), cert denied 569 US 960; 133 S Ct 2021; 185 L Ed 2d 889 (2013) ("we join every circuit to consider the issue and reject the main claim made by Parks" that "SORNA's registration requirements impermissibly increase his punishment for his earlier sexual offenses" and, therefore, violate "the Ex Post Facto Clause"); *United States v Brunner*, 726 F3d 299, 303 (CA 2, 2013); *United States v Young*, 585 F3d 199, 206 (CA 5, 2009) (noting that the defendant made no "effort to prove that the effect of SORNA is so punitive as to make it not a civil scheme, and any attempt to do so would have been futile"); *United States v*

[18] http://www.smart.gov/guidelines.htm.

Felts, 674 F3d 599, 606 (CA 6, 2012) ("circuit courts have consistently held that SORNA does not violate the Ex Post Facto Clause")[19]; *United States v Leach*, 639 F3d 769, 773 (CA 7, 2011) ("[w]e recognize that SORNA imposes significant burdens on sex offenders who, like Leach, may have committed their crimes and completed their prison terms long before the statute went into effect…. But whether a comprehensive registration regime targeting only sex offenders is penal, as Leach concedes, is not an open question" and "we join our sister circuits in concluding that SORNA is not an *ex post facto* law"); *United States v May*, 535 F3d 912, 919-920 (CA 8, 2008), cert denied 556 US 1258; 129 S Ct 2431; 174 L Ed 2d 229 (2009), abrogated on other grounds by *Reynolds v United States*, 565 US ___, 132 S Ct 975; 181 L Ed 2d 935 (2012) (rejecting an *ex post facto* challenge to SORNA explaining, "[t]he only punishment that can arise under SORNA comes from a violation of § 2250, which punishes convicted sex offenders who travel in interstate commerce after the enactment of SORNA and who fail to register as required by SORNA"); *United States v Elk Shoulder*, 738 F3d 948, 954 (CA 9, 2013), cert denied 572 US 1078; 134 S Ct 1920; 188 L Ed 2d 944 (2014); ("Elk Shoulder's conclusory statements and handful of anecdotal examples cannot carry the heavy burden of showing substantial changes in society that would require us to revisit the Supreme Court's conclusion" in *Smith*, and, therefore, "[w]e … reject Elk Shoulder's argument that application of the SORNA registration requirements to him on the basis of his earlier conviction violates the Ex Post Facto Clause"); *United States v Elkins*, 683 F3d 1039, 1049 (CA 9, 2012) ("Elkins has not presented the clear

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[19] Notwithstanding the Sixth Circuit's decision in *Felts* that rejected an *ex post facto* challenge to SORNA's retroactive provisions—followed later by at least two additional Sixth Circuit decisions in *United States v Shannon*, 511 Fed Appx 487, 490-492 (CA 6, 2013), cert denied sub nom *Shannon v United States*, ___ US ___; 133 S Ct 2014; 185 L Ed 2d 878 (2013), and *United States v Coleman*, 675 F3d 615, 619 (CA 6, 2012), cert denied sub nom *Coleman v United States*, 568 US 826; 133 S Ct 264; 184 L Ed 2d 45 (2012), respectively—the Sixth Circuit came to the opposite conclusion with Michigan's implementation of SORNA in *Does #1-5 v Snyder*, 834 F3d 696 (CA 6, 2016). A discussion of *Snyder* is included in part 7, *infra*.

proof required to transform the application of SORNA to him into a criminal penalty prohibited by the Ex Post Facto Clause"); *United States v Hinkley*, 550 F3d 926, 937-938 (CA 10, 2008), abrogated on other grounds by *Reynolds v United States*, 565 US ___, 132 S Ct 975; 181 L Ed 2d 935 (2012); and *United States v WBH*, 664 F3d 848, 860 (CA 11, 2011) ("when it enacted SORNA Congress did not intend to impose additional punishment for past sex offenses but instead wanted to put into place a civil and non-punitive regulatory scheme"). The two federal circuit courts that have yet to address this question have rejected *ex post facto* challenges to convictions arising from failing to register under SORNA although the offenses were committed pre-SORNA. *United States v Shenandoah*, 595 F3d 151 (CA 3), cert denied 560 US 974; 130 S Ct 3433; 177 L Ed 2d 341 (2010), abrogated on other grounds by *Reynolds v United States*, 565 US ___, 132 S Ct 975; 181 L Ed 2d 935 (2012); *United States v Gould*, 568 F3d 459, 466 (CA 4, 2009), cert denied 559 US 974; 130 S Ct 1686; 176 L Ed 2d 186 (2010). Finally, it is noteworthy that, in 2013, the United States Supreme Court "assume[d] that Congress has complied with the Constitution's *Ex Post Facto* and Due Process Clauses[,]" citing *Smith* as "upholding a similar Alaska statute against *ex post facto* challenge", and indicated that "the Court below correctly recognized, that 'SORNA's registration requirements are civil[.]'" *Kebodeaux*, 570 US at 389, 418; 133 S Ct at 2500, 2516.

In rejecting these *ex post facto* challenges to SORNA, each federal circuit court relied on the United States Supreme Court's decision in *Smith*, discussed in parts 5 and 6, *infra*, unpersuaded that SORNA's stricter registration requirements, broader class of offenders, and longer durations of registration made SORNA punitive when compared to Alaska's SORA reviewed in *Smith*.

3.

In 2011, to avoid loss of Byrne JAG funds, the Michigan Legislature met the federal deadline of July 27, 2011, by amending SORA that was signed by the Governor on April 12, 2011. See 2011 PA 17 (Appendix S; Appx, 89b) and 2011 PA 18 (Appendix T; Appx, 104b).[20] Defendant violated the 2011 version of SORA in 2012 (Appendix Y; Appx 205b) and was convicted, specifically, of violating § 5(1)(a), (f), and (g) of 2011 PA 17; MCL 28.725(1)(a), (f), and (g), because he failed to report the following within 3 business days: (**1**) his change of residence to 766 West Larch, Apartment 2, § 5(1)(a)[21]; (**2**) his establishment of electronic mail, § 5(1)(f); and (**3**) his purchase or beginning to regularly operate a vehicle, § 5(1)(g). (05/30/2013 Plea Tr, pp 10-11; Defendant's appendix, pp 40a-41a.). He was sentenced as a first-time offender under § 9(1)(a) of 2011 PA 18, § 9(1)(a); MCL 28.729(1)(a)—which is a felony punishable for not more than 4 years or a fine of not more than $2,000.00, or both.[22]

4.

The *Ex Post Facto* Clause is found in US Const, art I, § 10, cl 1, and it provides in relevant part: "No State shall … pass any … ex post facto Law …."

Justice CHASE's four-part definition of an "ex post facto law" in *Calder v Bull*, 3 (Dall) US 386, 390-391; 1 L Ed 648 (1798), has stood the test of time.[23] A new law does not violate

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[20] The Michigan Department of State Police provided SMART with Michigan's implementation package on April 19, 2011, which, in turn produced its report on May 9, 2011, regarding Michigan's compliance efforts (Appendix X; Appx, 196b), concluding that Michigan was in substantial compliance with SORNA. (Appendix X, pp 5-6; Appx, 200b-201b .)

[21] This reporting requirement has not changed much since the adoption of SORA in 1994. See 1994 PA 295, § 5(1)(a) (Appendix C), which required an individual to notify law enforcement of the individual's new address, within 10 days of changing that address.

[22] The same penalty would have applied to Defendant under the first version of SORA adopted in 1994. See 1994 PA 295, § 9(1) (Appendix C, p 4; Appx, 21b).

[23] "Although there has been some debate within the Court about the accuracy of the historical discussion in *Calder v Bull*, … the Court has consistently adhered to the view

the *Ex Post Facto* Clause unless it: "makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action" (*Calder* category 1); "aggravates a crime, or makes it greater than it was, when committed" (*Calder* category 2); "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed" (*Calder* category 3); or "alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender" (*Calder* category 4).

Defendant challenges SORA as falling within the third *Calder* category of an *ex post facto* law—"Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder*, 3 (Dall) US at 390.

5.

In answering the *ex post facto* question, the issue is whether the 2011 version of SORA is criminal punishment or serves a regulatory purpose. This is an objective inquiry—"whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the 'sting of punishment.'" *Dept of Revenue of Montana v Kurth Ranch*, 511 US 767, 777 n 14; 114 S Ct 1937, 1945 n 14; 128 L Ed 2d 767 (1994) (citation omitted). Generally, a statutory scheme that serves a regulatory purpose "is not punishment even though it may bear harshly upon one affected." *Flemming v Nestor*, 363 US 603, 614; 80 S Ct 1367, 1374; 4 L Ed 2d 1435 (1960). Several statutes that have imposed exceedingly harsh disabilities have been upheld against *ex post facto* challenges. See, e.g., *Kansas v Hendricks*,

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expressed by Justices CHASE, PATERSON, and IREDELL in *Calder* that the *Ex Post Facto* Clause applies only to penal statutes." *Collins v Youngblood*, 497 US 37, 42 n 2; 110 S Ct 2715, 2719 n 2; 111 L Ed 2d 30 (1990). *Youngblood* overruled *Kring v Missouri*, 107 US 221; 2 S Ct 443; 27 L Ed 506 (1883), and *Thompson v Utah*, 170 US 343; 18 S Ct 620; 42 L Ed 1061 (1898), that had strayed from the *Calder* definition of an *ex post facto* law.

521 US 346, 370-371; 117 S Ct 2072, 2086; 138 L Ed 2d 501 (1997) (commitment of sex offenders with "mental abnormality"); *Flemming*, 363 US at 612-621; 80 S Ct at 1373-1378 (termination of vested old-age social security benefits of eligible persons deported for participating in communist activities); *De Veau v Braisted*, 363 US 144, 160; 80 S Ct 1146, 1155; 4 L Ed 2d 1109 (1960) (prohibition of all ex-felons from working for waterfront unions); *Galvan v Press*, 347 US 522, 531; 74 S Ct 737, 743; 98 L Ed 911 (1954) (deportation for prior membership in the Communist Party); *Hawker v People of New York*, 170 US 189, 196; 18 S Ct 573, 576; 42 L Ed 1002 (1898) (prohibition of physicians, convicted of felony, from practicing medicine); *Hudson v United States*, 522 US 93, 95–96; 118 S Ct 488, 491; 139 L Ed 2d 450 (1997) ("monetary penalties and occupational debarment on petitioners for violation of federal banking statutes … were civil").

An *ex post facto* challenge to Alaska's Megan's Law reached the United States Supreme Court in *Smith, supra*, which, like Michigan's, contains two components (a registration requirement and a notification system). *Smith*, 538 US at 90; 123 S Ct at 1145. Alaska's law "require[d] any 'sex offender or child kidnapper who is physically present in the state' to register, [promptly] either with the Department of Corrections (if the individual is incarcerated) or with the local law enforcement authorities (if the individual is at liberty)." *Id.*, 90; 123 S Ct at 1145 (citation omitted). "The sex offender must provide his name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver's license number, information about vehicles to which he has access, and postconviction treatment history" and "must permit the authorities to photograph and fingerprint him." *Id.*, 90; 123 S Ct at 1145-1146 (citation omitted). In addition, Alaska's law made "[t]he following … available to the public: 'the sex offender's or child kidnapper's name, aliases, address, photograph, physical description,

description[,] license [and] identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with [the update] requirements ... or cannot be located.'" *Id*., 91; 123 S Ct at 1146.

Although it was "the first time [the Supreme Court had] considered a claim that a sex offender registration and notification law constitutes retroactive punishment forbidden by the Ex Post Facto Clause[, t]he framework for [its] inquiry [was] … well established." *Id*., 92; 123 S Ct at 1146. A two-step *intent-effects* analysis applied to "'ascertain whether the legislature meant the statute to establish "civil" proceedings.'" *Id*., 92; 123 S Ct at 1146-1147.

The *intent* prong as to "[w]hether a statutory scheme is civil or criminal" examines the legislature's intent, which is "a question of statutory construction." *Id*., 92; 123 S Ct at 1147 (citation and quotation marks omitted). The *effects* prong is addressed by applying "the seven factors noted in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963), as a useful framework." *Smith*, 538 US at 97; 123 S Ct at 1149. Although "the *Mendoza–Martinez* factors" are "useful guideposts," "they are 'neither exhaustive nor dispositive[.]'" *Smith*, 538 US at 97; 123 S Ct at 1149 (citation and quotation marks omitted).

Initially, under the *intent* prong, the Court looks to the objectives expressed by the Legislature and "[o]ther formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, [as] probative of the legislature's intent." *Id*., 93-94; 123 S Ct at 1147-1148. If the Court concludes that the Legislature intended the statutory scheme to be nonpunitive, the Court will ordinarily defer to that legislative intent. *Id*.

The *effects* prong, on the other hand, recognizes that the Legislature's remedial intent is not dispositive of the issue whether it is remedial or punitive *in effect*. Thus, the Legislature's remedial intent can be overcome if the challenger—i.e., Defendant in this case—can meet the "heavy burden" of demonstrating by the "clearest proof" that the statutory scheme is so punitive either in purpose or effect as to negate the Legislature's intention to deem it remedial rather than punitive. *Id*., 92, 105; 123 S Ct at 1147, 1154; see also *Hendricks*, 521 US at 361; 117 S Ct at 2082 ("[a]lthough we recognize that a 'civil label is not always dispositive,' … we will reject the legislature's manifest intent only where a party challenging the statute [overcomes the heavy burden of] provid[ing] 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil'"); *United States v Ward*, 448 US 242, 251; 100 S Ct 2636, 2642; 65 L Ed 2d 742 (1980) ("[n]or are we persuaded by any of respondent's other arguments that he has offered the 'clearest proof' that the penalty here in question is punitive in either purpose or effect"); see also *Flemming*, 363 US at 614, 619; 80 S Ct at 1374, 1377 (requiring the challenger to establish the "clearest proof" or "unmistakable evidence" of punitive intent).

It is this *effects* prong that involves the weighing of five of the seven factors that the *Smith* Court adopted from *Kennedy v Mendoza-Martinez*, 372 US 144; 83 S Ct 554; 9 L Ed 2d 644 (1963). The Court considered "most relevant to [the] analysis … whether, in its necessary operation, the regulatory scheme [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose." *Smith*, 538 US at 97; 123 S Ct at 1149. The *Smith* Court jettisoned "[t]he two remaining *Mendoza-Martinez* factors—whether the regulation comes into play only

on a finding of scienter and whether the behavior to which it applies is already a crime—[because they] are of little weight in this case." *Smith*, 538 US at 105; 123 S Ct at 1154.

6.

a.

In the first part of its two-step inquiry, the Court began its examination of legislative intent by determining whether the Alaska legislature had openly expressed its intent that Megan's Law is nonpunitive. It decided it had because "the Alaska Legislature expressed the objective of the law in the statutory text itself[,]" finding that "'sex offenders pose a high risk of reoffending,' and by "identif[ying] 'protecting the public from sex offenders' as the 'primary governmental interest' of the law." *Smith*, 538 US at 93; 123 S Ct at 1147 (citation omitted). "The legislature further determined that 'release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety.'" *Id*. (citation omitted). "As we observed in *Hendricks*, where we examined an *ex post facto* challenge to a postincarceration confinement of sex offenders, an imposition of restrictive measures on sex offenders adjudged to be dangerous is 'a legitimate nonpunitive governmental objective and has been historically so regarded.'" *Id*. (citation omitted). Thus, "as in *Hendricks*, '[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil ... scheme designed to protect the public from harm.'" *Id*. (citation omitted).

The same reasoning applies to Michigan's SORA. Under MCL 28.721a the Legislature stated the purpose behind SORA thusly:

> The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential

> serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.

Accordingly, this Court should defer to the Legislature's stated nonpunitive objective in concluding that registration under SORA is not punishment.

The Court in *Smith* rejected the respondent's attempt "to cast doubt upon the nonpunitive nature of the law's declared objective by pointing out that the Alaska Constitution lists the need for protecting the public as one of the purposes of criminal administration", stating that "even if the objective of the Act is consistent with the purposes of the Alaska criminal justice system, the State's pursuit of it in a regulatory scheme does not make the objective punitive." *Smith,* 538 US at 93-94; 123 S Ct at 1147-1148.

The Court also stated that "[o]ther formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent." *Smith,* 538 US at 94; 123 S Ct at 1148. It observed that Alaska's "notification provisions of the Act are codified in the State's 'Health, Safety, and Housing Code,' § 18, confirming [the Court's] conclusion that the statute was intended as a nonpunitive regulatory measure." *Id*. And, although "[t]he Act's registration provisions … are codified in the State's criminal procedure code," this was not considered dispositive because "[t]he location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." *Id*.

The Court observed that Alaska's Code of Criminal Procedure "contains many provisions that do not involve criminal punishment, such as civil procedures for disposing of recovered and seized property …; laws protecting the confidentiality of victims and witnesses …; laws

governing the security and accuracy of criminal justice information …; [and] laws governing civil postconviction actions[.]" *Smith*, 538 US at 95; 123 S Ct at 1148. "[U]nder Alaska law [these] are 'independent civil proceeding[s.]'". *Id*. "Although some of these provisions relate to criminal administration, they are not in themselves punitive. [Thus, t]he partial codification of the Act in the State's criminal procedure code is not sufficient to support a conclusion that the legislative intent was punitive." *Id*.

In Michigan, SORA is not contained in either the Penal Code or the Code of Criminal Procedure so the analysis is simpler. It is contained in Chapter 28 of the Michigan Compiled Laws that governs the Department of State Police. The Department of State Police like Alaska's Department of Public Safety is "an agency charged with enforcement of both criminal *and* civil regulatory laws." *Smith*, 538 US at 96; 123 S Ct at 1149. Accordingly, this militates in favor of finding that the legislative intent was nonpunitive.

The Court further explained that "[t]he procedural mechanisms to implement the Act do not alter our conclusion. After the Act's adoption Alaska amended its Rules of Criminal Procedure concerning the acceptance of pleas and the entering of criminal judgments. The rule on pleas now requires the court to 'infor[m] the defendant in writing of the requirements of [the Act] and, if it can be determined by the court, the period of registration required.'" *Smith*, 538 US at 95; 123 S Ct at 1148. This change, however, "to alert convicted offenders to the civil consequences of their criminal conduct does not render the consequences themselves punitive." *Id*., 95-96; 123 S Ct at 1149.

In Michigan no legislative change in policy was made. Thus, again, the analysis in Michigan is simpler. During plea proceedings, criminal defendants are not alerted to the civil consequences of their conduct that they may have to register as a sex offender. In addition, in

Michigan, court rules are the province of the judiciary, Const 1963, art 6, § 5,[24] and, therefore, the decision whether to include this change in the court rules has no bearing on *legislative* intent. Hence, this also militates in favor of finding that the Legislature intended SORA to be nonpunitive.

Finally, the Court in *Smith* found its "conclusion … strengthened by the fact that, aside from the duty to register, the statute itself mandates no procedures. Instead, it vests the authority to promulgate implementing regulations with the Alaska Department of Public Safety, ... an agency charged with enforcement of both criminal *and* civil regulatory laws[,]" including "enforcement of drug laws"; "motor vehicles and road safety"; and "protection of life and property". *Smith*, 538 US at 96; 123 S Ct at 1149 (emphasis by the Court). The Court added that "[t]he Act itself does not require the procedures adopted to contain any safeguards associated with the criminal process[,]" which led the Court "to infer that the legislature envisioned the Act's implementation to be civil and administrative." *Id*. Thus, "[b]y contemplating 'distinctly civil procedures,' the legislature 'indicate[d] clearly that it intended a civil, not a criminal sanction.'" *Id*.

In Michigan SORA contains the procedures for registering. MCL 28.724. This, however, does not make the Act punitive. Again, these procedures are contained in provisions separate from the Penal Code or Code of Criminal Procedure, which again militates in favor of finding that the legislative intent was nonpunitive.

The only criminal aspect of SORA is when an individual willfully fails to comply with its requirements. MCL 28.729. These punitive provisions, of course, do not change the Legislature's stated purpose that the goals of SORA are nonpunitive. Also, as observed by the

[24] Const 1963, art 6, § 5, provides in relevant part: "The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state."

Court in *Smith*, although "[a] sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, [such] … prosecution is a proceeding separate from the individual's original offense." *Smith*, 538 US at 101-102; 123 S Ct at 1152. In other words, the Court did not deem this aspect of Alaska's Megan's Law as overriding the deference to be given to the Legislature's stated intent that the law is nonpunitive.

Accordingly, under the *intent* prong, the intent of the Michigan Legislature was to create a civil, nonpunitive regime.

b.

The second consideration is the *effects* prong where the Court "must further examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Smith*, 538 US at 92; 123 S Ct at 1147 (citation and quotation marks omitted). Importantly, under the *effects* prong, Defendant carries a "heavy burden" to upset the "manifest intent" of the Legislature that SORA is nonpunitive. *Hendricks*, 521 US at 347; 117 S Ct at 2075. "Because [courts] 'ordinarily defer to the legislature's stated intent,' … 'only the clearest proof' [by Defendant] will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty[.]" *Smith*, 538 US at 92; 123 S Ct at 1147 (citation and quotation marks omitted).

Under the *effects* prong, applying the *Smith/Mendoza-Martinez* factors, Defendant has not satisfied his "heavy burden" by demonstrating through "the clearest proof" that SORA is so punitive in purpose or effect as to negate the Legislature's intention to deem it civil or remedial. Again, "[t]he factors most relevant to [the Court's] analysis are whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims

of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose." *Smith*, 538 US at 97; 123 S Ct at 1149.

i.

As for the first factor, the Court in *Smith* observed that "[a] historical survey can be useful because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." *Smith*, 538 US at 97; 123 S Ct at 1149. As in *Smith*, Michigan's SORA has not been regarded in our history and traditions as a punishment. The Court noted while assessing this factor that "[t]he Court of Appeals observed that the sex offender registration and notification statutes 'are of fairly recent origin,'" and how this "suggests that the statute was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing." *Id.* Thus, because sex-offender registration laws are of fairly recent origin, they have not been historically viewed as a form of punishment. *Id.*

The Court rejected the respondents' argument that the Alaska "Act—and, in particular, its notification provisions—resemble shaming punishment of the colonial period." *Id.*, 97; 123 S Ct at 1149-1150. "Any initial resemblance to early punishments is … misleading. Punishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public. Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information." *Id.*, 98; 123 S Ct at 1150. "By contrast, the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Id.*, 98-99; 123 S Ct at 1150. "On the contrary, our criminal law tradition insists

on public indictment, public trial, and public imposition of sentence" and this "[t]ransparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused." *Id*., 98-99; 123 S Ct at 1150. Although "[t]he publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism," when "contrast[ing this] to the colonial shaming punishments, … the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme." *Id*., 99; 123 S Ct at 1150. Hence, "[t]he fact that Alaska posts the information on the Internet" did not "alter [the Court's] conclusion" because "[i]t must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times." *Id.* "These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." *Id.* The Court further observed that Alaska's "Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record" and "[a]n individual seeking the information must take the initial step of going to the Department of Public Safety's Web site, proceed to the sex offender registry, and then look up the desired information." *Id*., 99; 123 S Ct at 1150-1151. This "process", the Court explained, "is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality" and "[t]he Internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry." *Id*., 99; 123 S Ct at 1151.

The foregoing discussion in *Smith* is equally true with Michigan's version of SORA and, therefore, Defendant fails to meet his "heavy burden" of demonstrating "the clearest proof" that Michigan's SORA is so punitive in purpose or effect as to negate the Legislature's intention to deem it civil or remedial.

ii.

"[N]ext [the Court] consider[s] whether the Act subjects respondents to an 'affirmative disability or restraint[,]'" where the Court "inquire[s] how the effects of the Act are felt by those subject to it" and, "[i]f the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith*, 538 US at 99-100; 123 S Ct at 1151.

The Court noted that "[t]he Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." *Smith*, 538 US at 100; 123 S Ct at 1151. It "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint[,]" observing that "[t]he Act's obligations are less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive[,]" citing as examples, *Hudson* (forbidding further participation in the banking industry); *De Veau, supra* (forbidding work as a union official); *Hawker, supra* (revocation of a medical license). *Smith*, 538 US at 100; 123 S Ct at 1151. The Court rejected the Court of Appeals' view as "conjecture" that the case was distinguishable from *Hawker* in that the disability there "was specific and 'narrow,' confined to particular professions, whereas 'the procedures under the Alaska statute are likely to make [respondents] completely unemployable' because 'employers will not want to risk the loss of business when the public learns that they have hired sex offenders'", because "[l]andlords and employers could conduct background checks on the criminal records of prospective employees or tenants even with the Act not in

force", and "[t]he record in this case contains no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords." *Id.* Indeed, "[t]he Court of Appeals identified only one incident from the 7-year history of Alaska's law where a sex offender suffered community hostility and damage to his business after the information he submitted to the registry became public" where "[t]his could have occurred in any event, because the information about the individual's conviction was already in the public domain." *Id.* Thus, "[a]lthough the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Id.*

The same reasoning generally applies to Michigan's SORA, which does not impose any physical restraint (beyond prohibiting a sex offender from working, residing, or loitering within 1,000 feet of a "student safety zone", which is not at issue here), and, therefore, it does not resemble imprisonment, "the paradigmatic affirmative disability or restraint." *Id.*, 100; 123 S Ct at 1151. Furthermore, SORA's requirements—even the "school safety zone" limitation—are less harsh than the sanction of occupational debarment, which the Supreme Court has held to be nonpunitive. See, e.g., *De Veau*, 363 US at 160; 80 S Ct at 1155; (prohibition of all ex-felons from working for waterfront unions); *Galvan*, 347 US at 531; 74 S Ct at 743; (deportation for prior membership in the Communist Party); *Hawker*, 170 US at 196; 18 S Ct at 576 (prohibition of physicians, convicted of felony, from practicing medicine); and *Hudson*, 522 US at 95-96; 118 S Ct at 491 ("monetary penalties and occupational debarment on petitioners for violation of federal banking statutes … were civil"). In point of fact, "[t]he Act does not restrain activities

sex offenders may pursue but leaves them free to change jobs or residences." *Id.*, 100; 123 S Ct at 1151. Indeed, as observed in *Smith*, "offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision." *Id.* Michigan's SORA is actually less restraining than Alaska's Megan's Law, which was considered nonpunitive in *Smith*, in that, although registrants "are not required to seek permission to do so", Alaska's law requires "registrants [to] … inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment", *id.*, 101; 123 S Ct at 1152, whereas Michigan's SORA neither requires permission nor requires such information to be provided to the authorities. Although "[a] sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, [such] … prosecution is a proceeding separate from the individual's original offense." *Id.*, 101-102; 123 S Ct at 1152.

Defendant seizes upon one observation by the Court in *Smith* on the subject of the requirement for in-person reporting. (Defendant's application, pp 6-7.) The *Smith* Court had rejected the Court of Appeals reasoning "that the requirement of periodic updates imposed an affirmative duty[,]" which the Court noted was based on "the Court of Appeals … misapprehension … that the offender had to update the registry in person." *Id.*, 101; 123 S Ct at 1151. This rejection, however—that "[t]he Alaska statute, on its face, does not require these updates to be made in person" and "the record contains no indication that an in-person appearance requirement has been imposed on any sex offender subject to the Act[,]" *id.*—should be read as merely correcting the factual error relied on by the Ninth Circuit rather than as Defendant suggests—that in-person reporting would have changed the Court's opinion that the Alaska statute did not implicate *ex post facto* concerns. To the contrary, although this in-person

reporting feature was not present in Alaska's Act, nothing in *Smith* indicates that the presence of such feature would have been enough for the Supreme Court to conclude that the Alaska Act subjects sex offenders to an "affirmative disability or restraint" or that, if this did subject sex offenders to an "affirmative disability or restraint", it meets Defendant's "heavy burden" of demonstrating by the "clearest proof" or "unmistakable evidence" that the statutory scheme is so punitive either in purpose or effect as to negate the Michigan Legislature's intention to establish a civil regulatory scheme.

An in-person reporting requirement does indeed support a civil regulatory scheme because the states have "primary responsibility" for tracking sex offenders *and* the national system of registries would otherwise be vulnerable to those who would evade registration by moving among jurisdictions and "slip through the cracks." *Carr v United States,* 560 US 438, 452-456; 130 S Ct 2229, 2238-2241; 176 L Ed 2d 1152 (2010). Hence, requiring in-person verification or in-person reporting for certain, limited changes is not punitive. Instead it is a reasonable measure to help ensure that the law enforcement agency is receiving accurate, up-to-date information from the registrant him- or herself, which has a rational connection to a nonpunitive purpose. In-person reporting has been specifically recognized as a legitimate, nonpunitive requirement by several courts. See, e.g., *Parks,* 698 F3d at 6 ("[t]o appear in person to update a registration is doubtless more inconvenient than doing so by telephone, mail or web entry; but it serves the remedial purpose of establishing that the individual is in the vicinity and not in some other jurisdiction where he may not have registered, confirms identity by fingerprints and records the individual's current appearance" and "the inconvenience is surely minor compared to the disadvantages of the underlying scheme in its consequences for renting housing, obtaining work and the like—consequences that were part of the package that *Smith*

itself upheld"); *Doe v Pataki*, 120 F3d 1263, 1285 (CA 2, 1997) ("[a]lthough we recognize that the duty to register in person every 90 days for a minimum of ten years is onerous, we do not believe that this burden is sufficiently severe to transform an otherwise nonpunitive measure into a punitive one"); *WBH*, 664 F3d at 857 ("[t]he in-person requirements help law enforcement track sex offenders and ensure that the information provided is accurate" and "[a]ppearing in person may be more inconvenient, but requiring it is not punitive"). The Michigan Court of Appeals was in accord in *People v Tucker*, 312 Mich App 645, 682-683; 879 NW2d 906 (2015), app dismissed 503 Mich 854; 916 NW2d 487 (2018) ("the reporting requirements do not necessarily promote deterrence or retribution, they are rationally connected to the nonpunitive purpose of protecting the public by ensuring that the registry is accurate, and they are not excessive"; "[r]egistrants are not precluded from many activities, such as changing residences or jobs, but are merely required to report them. And many of the considerations that *Smith* used to distinguish sex offender registration from supervised probation or parole still apply to the in-person reporting requirements"); see also *State v Boyd*, 1 Wash App 2d 501, 510-511; 408 P3d 362, 368 (2017), review denied 190 Wash 2d 1008; 414 P3d 578 (2018), cert denied sub nom *Boyd v Washington*, ___ US ___; ___ S Ct ___; ___ L Ed 2d ___; 2018 WL 3329204 (USSC No. 18-39, issued December 10, 2018) ("[w]hile we agree that the requirement for weekly, in person registration is more burdensome than the Supreme Court considered in [*State v*] *Ward*, [123 Wash 2d 488; 869 P2d 1062 (1994),] we disagree that the registration requirements violate the ex post facto clause"); *State v Shaylor*, 306 Kan 1049; 400 P3d 177 (2017); *Shaw v Patton*, 823 F3d 556, 568-569 (CA 10, 2016), ("the additional burden [of in-person reporting] does not render Mr. Shaw's requirements punitive in effect", noting "[o]ther circuits … ordinarily h[olding] that in-person reporting requirements are not considered punitive", and being "guided by precedents

addressing other harsh conditions that the Supreme Court has not regarded as punitive[, including] … a lifelong bar on work in a particular industry [such as in] … *Hudson* [restricting participation in the banking industry]; *De Veau* [prohibiting work as a union official]; *Hawker* [revocation of a medical license]).

Finally, although, perhaps, the statute might deter future crimes, this, in the words of the *Smith* Court, attempts to "prove[] too much. Any number of governmental programs might deter crime without imposing punishment. 'To hold that the mere presence of a deterrent purpose renders such sanctions "criminal" ... would severely undermine the Government's ability to engage in effective regulation.'" *Smith*, 538 US at 102; 123 S Ct at 1152 (citations omitted).

iii.

Third, SORA does not "promote[] the traditional aims of punishment—retribution and deterrence. Instead, as explained in *Smith*, "[t]he purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." *Smith*, 538 US at 99; 123 S Ct at 1150. The defendant's "stigma" argument was thus soundly rejected by the Court in *Smith*. "[T]he stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Smith*, 538 US at 98; 123 S Ct at 1150. It is clear, however, that, by saying "*most of which* is already public", the Court was not relying on the "already public" aspect of the compilation as the driving force for its conclusion on this factor.

Finally, as with Alaska's Megan's Law, "[t]he State's Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record." *Id.*, 99; 123 S Ct at 1150-1151. To the contrary, "[a]n individual seeking the information must take the initial step of going to the … Web site, proceed to the sex offender registry, and then look up the desired information." *Id.*, 99; 123 S Ct at 1151. This "process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality. The Internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry." *Id.* Again, however, although analogous to visiting the archives of criminal records, this point is not dispositive of whether the statute is punitive.

iv.

Fourth, SORA "has a rational connection to a nonpunitive purpose". The Court in *Smith* was impressed with "[t]he Act's rational connection to a nonpunitive purpose[, labeling it] … a '[m]ost significant' factor in [its] determination that the statute's effects are not punitive…. [T]he Act has a legitimate nonpunitive purpose of 'public safety, which is advanced by alerting the public to the risk of sex offenders in their communit[y].'" *Smith*, 538 US at 102-103; 123 S Ct at 1152. Even if Defendant contended that "the Act lacks the necessary regulatory connection because it is not 'narrowly drawn to accomplish the stated purpose'", as was contended by the respondent in *Smith*, it does not have to be. "A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 US at 103; 123 S Ct at 1152. Indeed, as in *Smith*, Defendant certainly does not suggest that "the Act's nonpunitive purpose is a 'sham or mere pretext.'" *Id.*

v.

Fifth, SORA is not "excessive with respect to this purpose." In addressing this issue, the *Smith* Court noted the erroneous conclusion reached by the lower court that "the Act was excessive in relation to its regulatory purpose [because,] … first, … the statute applies to all convicted sex offenders without regard to their future dangerousness; and, second, … it places no limits on the number of persons who have access to the information." *Smith*, 538 US at 103; 123 S Ct at 1152-1153. The Supreme Court stated, flatly, that "[n]either argument is persuasive." *Id*., 103; 123 S Ct at 1153. Thus, despite Defendant's efforts to try to prove the Legislature's findings and conclusions wrong (arguing that people like him should not be viewed as dangerous recidivists), Michigan, like "Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism." *Id*. "The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class." *Id*. This "risk of recidivism posed by sex offenders is 'frightening and high.' *McKune v Lile*, 536 US 24, 34; 122 S Ct 2017; 153 L Ed 2d 47 (2002)…. 'When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault'". *Id*. (citations omitted).

Accordingly, under the *intent-effects* analysis, in the words of the Court in *Smith*, Defendant "cannot show, much less by the clearest proof, that the effects of the law negate [Michigan's] intention to establish a civil regulatory scheme. The Act is nonpunitive, and its retroactive application does not violate the *Ex Post Facto* Clause." *Smith*, 538 US at 105-106; 123 S Ct at 1154.[25]

[25] This Court's order in *People v Temelkoski*, 501 Mich 960; 905 NW2d 593, 594 (2018), is distinguishable because it is not an *ex post facto* case, but rather, the defendant's due process rights were violated when the defendant did not receive the benefit afforded him by the Holmes

7. *Does #1-5 v Snyder*

The Sixth Circuit concluded that, under the *intents* prong, Michigan's SORA was nonpunitive. *Does #1-5 v Snyder*, 834 F3d 696, 700-701 (CA 6, 2016). Under the *effects* prong, it held that it was punitive. In reaching this conclusion, the court did not recognize that Michigan's SORA was an implementation of federal SORNA, which it had earlier upheld as not violative of the *Ex Post Facto* Clause. See *Felts*, 674 F3d at 606; *United States v Shannon*, 511 Fed Appx 487, 490-492 (CA 6, 2013), cert denied sub nom *Shannon v United States*, ___ US ___; 133 S Ct 2014; 185 L Ed 2d 878 (2013), and *United States v Coleman*, 675 F3d 615, 619 (CA 6, 2012), cert denied sub nom *Coleman v United States*, 568 US 826; 133 S Ct 264; 184 L Ed 2d 45 (2012).

Although the court recognized that "[t]he Supreme Court's decision in *Smith* is particularly germane to this case[,]" *Snyder*, 834 F3d at 700, and noted the *Mendoza-Martinez* factors, the *Snyder* court ignored *Smith*'s teachings, especially the "heavy burden" imposed on the challenger to demonstrate by the "clearest proof" that the statutory scheme is so punitive either in purpose or effect as to negate the Michigan Legislature's intention to establish a civil regulatory scheme. When reading Justice GINSBURG's dissent in *Smith*, it appears that the three judges in *Snyder* patterned the *Snyder* opinion after her views. *Smith*, 538 US at 115-117; 123 S Ct at 1159-1160 (GINSBURG, J., dissenting). What is particularly troubling about Justice GINSBURG's dissenting opinion is her rejection of the challenger's "clearest proof" burden, stating: "I would not demand 'the clearest proof' that the statute is in effect criminal rather than civil. Instead, guided by *Kennedy v Mendoza* …, I would neutrally evaluate the Act's purpose and effects." *Smith*, 538 US at 115; 123 S Ct at 1159 (GINSBURG, J., dissenting).

Youthful Trainee Act in effect at the time of his plea—i.e., he would "*not* suffer a civil disability or loss of right or privilege following his or her release from that status." *Id.*

As an example of how far afield the three-judge panel in *Snyder* was willing to go to ignore the *Smith* majority is its rejection of the views of Congress (in SORNA), the Michigan Legislature (in SORA), and the United States Supreme Court (in *Smith*) that "recidivism rates of sex offenders … are 'frightening and high[.]'" The Supreme Court, of course, had its own record to draw from in concluding that "[s]ex offenders are a serious threat in this Nation" and "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault." *Connecticut Dept of Pub Safety v Doe*, 538 US 1, 4; 123 S Ct 1160, 1163; 155 L Ed 2d 98 (2003) (quotation marks omitted), quoting *McKune v Lile*, 536 US 24, 32-33; 122 S Ct 2017, 2024; 153 L Ed 2d 47 (2002) (plurality opinion); see also Smith, 538 US at 103; 123 S Ct at 1153.

SORNA, in turn, was enacted by Congress with the expressed intent "[t]o protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims." Michigan's SORA was amended in 2011 to implement SORNA "to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a. In expressing this purpose, "[t]he legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state." *Id*. Accordingly, "[t]he registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger." *Id*.

The *Snyder* panel overruled the foregoing views of the United States Supreme Court in *Smith*, the stated reasons for SORNA by Congress, and the stated reasons for SORA by the Michigan Legislature, resting its constitutional *ex post facto* analysis on the abilities of the litigants before the district court trial judge in proffering statistics as "provid[ing] scant support for the proposition that SORA in fact accomplishes its professed goals" and this trial court record "gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that '[t]he risk of recidivism posed by sex offenders is "frightening and high."'" *Snyder*, 834 F3d at 704.

Thus, not only did the *Snyder* panel expressly reject the Supreme Court's observation in *Smith*, it failed to follow *Smith*'s directive that a State can "conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism[,]" that such "legislat[ive] findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class[,]" and that "[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences … *without any corresponding risk assessment*." *Smith*, 538 US at 103-104; 123 S Ct at 1153 (emphasis supplied).

It is, of course, bad enough that the *Snyder* court deemed it appropriate to reject the Supreme Court's view that there is a high recidivism rate for sex offenders, it also failed to give the deference required to the reasons given by Congress in adopting SORNA and the Michigan Legislature in implementing SORNA in SORA.

To put this deference requirement into perspective, one commentator[26] specifically criticizes the *Mendoza-Martinez* test because it imposes this "wall of deference around the legislative decision to call a statute civil rather than criminal."[27] This deference requirement was likewise noted in *Smith*—"considerable deference must be accorded to the intent as the legislature has stated it." *Smith*, 538 US at 92-93; 123 S Ct at 1147. "[O]nly the clearest proof" or "unmistakable evidence" can overcome this deference given that "[j]udicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed." *Flemming*, 363 US at 617, 619; 80 S Ct at 1376; *Smith*, 538 US at 92; 123 S Ct at 1147 ("[b]ecause we 'ordinarily defer to the legislature's stated intent,' … '"only the clearest proof"' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty").

Albeit true that SORNA and SORA impose some burdens or disadvantages on sex offenders—including, e.g., disallowing them from living, working, or "loitering" within 1,000 feet of a school; requiring them to report to law enforcement in person whenever they change residences, change employment, enroll (or un-enroll) as a student, change their name, register a new email address or other "internet identifier"; and imposing a threat of serious punishment, including imprisonment, for the failure to comply with these requirements and restrictions—these burdens or disadvantages do not establish "only the clearest proof" or "unmistakable evidence" to overcome the deference owed to the foregoing non-punitive reasons articulated by Congress and the Michigan Legislature in adopting SORNA and SORA. Neither do they overcome the analysis in *Smith* as outlined in part 6, *supra*.

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[26] John F. Stinneford, Associate Professor of Law, University of Florida Levin College of Law, Gainesville, Florida. John F. Stinneford, *Punishment Without Culpability*, 102 J Crim L & Criminology 653, 723 (2012) (hereinafter *Stinneford*).

[27] *Id.*, 679.

As Professor Stinneford explained, "[b]y engaging in a little reverse engineering, we can obtain a surprisingly clear picture of what the Supreme Court now means by 'punitive.'"[28] "[W]hen the Supreme Court says that a statute's purpose is punitive, it really means retributive."[29] Thus, "[d]espite the obfuscation of *Mendoza-Martinez* and *Flemming*, it is becoming increasingly clear that neither a purpose to deter, incapacitate, nor to rehabilitate can transform a putatively civil statute into a criminal one. Only a retributive purpose can."[30] "Once we understand that a purpose to deter, incapacitate, or rehabilitate will not serve to distinguish between a criminal and a civil statute, the substantive constitutional meaning of 'crime' comes into focus."[31] "A statute is criminal if it exhibits a retributive purpose, that is, if it authorizes the state to impose sanctions to express the community's blame or condemnation for the commission of an unlawful act."[32] "Although other purposes, such as deterrence or incapacitation, are often associated with punishment, these purposes are also compatible with civil regulatory statutes and so cannot serve to distinguish criminal from civil laws."[33]

The sole "retributive" factor noted by the *Snyder* court was that the law "looks back at the offense (and nothing else) in imposing its restrictions[.]" *Snyder*, 834 F3d at 704. This point is expressly rejected by the United States Supreme Court. Particularly germane is the Court's holding in *De Veau*. There, all ex-felons were barred from certain employment on the waterfront because of the "skullduggeries" occurring there—"[t]he presence on the waterfront of convicted felons in many influential positions" was viewed as "an important causative factor in this appalling situation" on the waterfront. *De Veau*, 363 US at 158; 80 S Ct at 1154. The Supreme

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28 *Id*., 679.
29 *Id*.
30 *Id*.
31 *Id*., 682-683.
32 *Id*., 683.
33 *Id*.

Court noted that "the Congress approved as appropriate if indeed not necessary a compact, one of the central devices of which was to bar convicted felons from waterfront employment, and from acting as stevedores employing others, either absolutely, or in the Waterfront Commission's discretion." *Id.* The legislatures involved made no effort to perform any risk assessments of particular felony offenses or of individual ex-felons. All ex-felons as a class were swept into the prohibitory law. Although the Court was "[d]uly mindful … of the promising record of rehabilitation by ex-felons, and of the emphasis on rehabilitation by modern penological efforts," it held that "it is not for this Court to substitute its judgment for that of Congress and the Legislatures of New York and New Jersey regarding the social surgery required by a situation as gangrenous as exposure of the New York waterfront had revealed." *Id.* Accordingly, it rejected the *ex post facto* claim, stating:

> The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession.... No doubt is justified regarding the legislative purpose of § 8. The proof is overwhelming that New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony. [*De Veau*, 363 US at 160; 80 S Ct at 1155.]

What is clear, here, is that courts are not supposed to second-guess legislative judgments even when it chooses not to make individual risk assessments. The Court in *Smith* affirmed this view. A State "could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism" and "[t]he legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class." *Smith*, 538 US at 103; 123 S Ct at 1153. "The *Ex Post Facto* Clause does not preclude a

State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Id*. It noted how it has "upheld against *ex post facto* challenges laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment," citing as examples, *De Veau*, 363 US at 160; 80 S Ct at 1155, and *Hawker*, 170 US at 197; 18 S Ct at 576-577. *Id*., 104; 123 S Ct at 1153. The *Snyder* court failed to appreciate this Supreme Court precedent, as did Justice GINSBURG's dissenting opinion in *Smith*. *Smith*, 538 US at 115-117; 123 S Ct at 1159-1160 (GINSBURG, J., dissenting).[34]

In lieu of following its own decisions in *Felts*, *Shannon*, and *Coleman*, the *Snyder* court found solace in "[m]any states confronting similar laws" as "hav[ing] said" that their versions of SORA were punitive, citing "*e.g.*, *Doe v State*, 167 NH 382; 111 A3d 1077, 1100 (2015); *State v Letalien*, 985 A2d 4, 26 (Me, 2009); *Starkey v Oklahoma Dep't of Corr*, 305 P3d 1004 (Okla, 2013); *Commonwealth v Baker*, 295 SW3d 437 (Ky, 2009); *Doe v State*, 189 P3d 999, 1017 (Alaska, 2008)." *Snyder*, 834 F3d at 705. Again, no analysis of these State decisions is provided.

The court's reliance on these state decisions is flawed. *First*, the state decisions relied on in *Snyder* were primarily concerned with the state constitutional prohibition against *ex post facto* laws rather than the federal version and, therefore, these state court decisions should have been unpersuasive. See *United States v Neel*, 641 Fed Appx 782, 794 (CA 10, 2016), wherein the Tenth Circuit rejected the request to follow state court decisions, noting that "they largely rely on *state* constitutional grounds to strike down the retroactive application of *state* registration

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[34] Justice SOUTER's concurrence in *Smith* is interesting in that he also disagreed with the "clearest proof" burden and said "the substantial evidence does not affirmatively show with any clarity that the Act is valid." Nevertheless, "[w]hat tip[ped] the scale for [him was] the presumption of constitutionality normally accorded a State's law. That presumption gives the State the benefit of the doubt in close cases like this one, and on that basis alone [he] concur[red] in the Court's judgment." *Smith*, 538 US at 110; 123 S Ct at 1156.

requirements, and are thus of limited relevance in assessing the federal Ex Post Facto Clause implications of SORNA." *Second*, the *Snyder* court's reference to Alaska is particularly telling (and supports the view that it ignored the majority opinion in *Smith*) because the Alaska state decision "directly conflicts with the United States Supreme Court's application of the same test to the same statute." *Doe v State*, 189 P3d 999, 1019 (Alaska, 2008) (FABE, CJ, dissenting). *Third*, the *Snyder* court's reference to the Maine Supreme Court's decision in *State v Letalien*, 985 A2d 4, 26 (Me, 2009), is, at best, misleading given that four years later the Maine Supreme Court "affirm[ed] the trial court's judgment, concluding that SORNA of 1999 as amended following our decision in … *Letalien*,… does not violate the constitutional rights of the litigants before us." *Doe I v Williams*, 61 A3d 718, 725 (Me, 2013). In reaching this conclusion, "[t]he trial court concluded that the Does failed to establish by the clearest proof that SORNA of 1999 is punitive." *Id*., 730. *Fourth*, the *Snyder* court's reference to the Kentucky decision in *Commonwealth v Baker*, 295 SW3d 437 (Ky, 2009), is also misleading because the issue in *Baker* was limited to the residency restrictions that applied retroactively to the defendant who was prosecuted for failing to move after the adoption of them. *Id*., 439, 447 ("[a]lthough the General Assembly did not intend KRS 17.545 to be punitive, the residency restrictions are so punitive in effect as to negate any intention to deem them civil"). Later, however, the Kentucky Supreme Court rejected the *ex post facto* challenges to "(1) … the various enhancements to the degree of offense for failing to register …, and (2) that post-*Hyatt* amendments have changed SORA to such a degree that the entire sex offender registration scheme is now punitive[.]" *Buck v Commonwealth*, 308 SW3d 661, 666 (Ky, 2010). The *Buck* court distinguished *Baker*, noting that "*Baker* dealt with the consequences of *compliance* with residency restrictions, and concluded that compliance was punitive in effect." *Id*., 667. "By contrast, SORA requires an

intervening, independent failure or omission (i.e., failure to register or providing false, misleading, or incomplete registration information) before it becomes punitive." *Id*. Thus, "[w]hen a statute is not expressly punitive, the relevant question for *ex post facto* purposes is what the statute *requires*—not the consequences of noncompliance." *Id*. Hence, because "Buck has demonstrated nothing in the 2006 amendments to SORA drastic enough to render SORA punitive[,]" the court held that "[a]nalyzing SORA and its 2006 amendments in light of what it requires from the registrant, we continue to believe that SORA is a remedial measure with a rational connection to the nonpunitive goal of protection of public safety, and we see no reason to depart from our holding in *Hyatt.*" *Id*., 667-668; see also *Stage v Commonwealth*, 460 SW3d 921, 923-925 (Ky Ct App, 2014) (the 2011 amendments to SORA reveals no evidence of the General Assembly's wish to transform SORA into a law which punished, as opposed to merely monitored, sex offenders; thus "SORA remains what it was prior to 2011 and what our Supreme Court has always professed it to be: 'a remedial measure with a rational connection to the nonpunitive goal of protection of public safety'").

Snyder's reliance on the foregoing state court decisions is also flawed because it chose to ignore other State decisions that upheld sex offender registration and notification laws against *ex post facto* challenges. See, e.g., *Roe v Replogle*, 408 SW3d 759, 767 (Mo, 2013) ("this Court already has determined that requiring pre-enactment offenders to register does not violate the Missouri Constitution's prohibition against *ex post facto* laws because the registration requirement is civil and not punitive"); *State v Rocheleau*, 307 Kan 761, 766; 415 P3d 422, 426 (2018), wherein the court held that "lifetime sex offender registration under KORA, as amended by the 2011 Legislature, was not 'punishment'", citing *State v Petersen–Beard*, 304 Kan 192, 197; 377 P3d 1127, cert denied sub nom *Petersen-Beard v Kansas*, ___ US ___; 137 S Ct 226;

196 L Ed 2d 175 (2016), and *Montoya v Driggers*, 320 P3d 987, 988 (NM, 2014) ("registration under SORNA is not considered punishment in New Mexico"); *Boyd*, 1 Wash App 2d at 510-511; 408 P3d at 369 ("[w]hile the weekly, in person check-in requirement is inconvenient, Boyd cannot show that the inconvenience constitutes punishment. In addition, he cannot show beyond a reasonable doubt that the law is an unconstitutional ex post facto law"); *In re AC*, 54 NE3d 952, 970 (Ill App Ct, 2016) ("[t]he Illinois Supreme Court has repeatedly held that SORA and the Notification Law do not constitute punishment"); *Stage*, *supra*; *Johnson v Dep't of Justice*, 60 Cal 4th 871, 888 n 10; 341 P3d 1075 (2015) ("[a]s respondent observes, sex offender registration is not punishment … , and a person may be required to register for crimes that were committed before they became offenses subject to registration").

Another flaw in the *Snyder* court's decision is its apparent reliance on philosophical discourse on the subject of punishment,[35] rather than on the *Mendoza-Martinez* test followed in *Smith* that examines, in part, "whether [the law's] operation will promote the traditional aims of punishment—*retribution and deterrence*[.]" *Mendoza-Martinez*, 372 US at 168; 83 S Ct at 567 (emphasis supplied). Indeed, if the Supreme Court "never tells us what a punitive purpose is[,]" other than using the *Mendoza-Martinez* test as a guide,[36] it follows that it is not the province of the Sixth Circuit to divine "punishment" vis-à-vis the *Ex Post Facto* Clause from what

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[35] The *Snyder* court cited a philosopher's definition of "punishment" as involving pain or unpleasant consequences following from an offense against the law, applying to the offender, being intentionally administered by people other than the offender, and being imposed and administered by an authority constituted by a legal system against which the offense was committed. *Snyder*, 834 F.3d at 701, citing H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of law* 4-5 (1968).

[36] *Stinneford*, 102 J Crim L & Criminology at 677, 678 ("in *Kennedy v Mendoza-Martinez*, the Court provided a confoundingly opaque test for determining whether a statute has a punitive purpose"; "[t]o call this multifactor test confusing and amorphous is an understatement. The Court never tells us how these factors relate to each other, nor how they are supposed to tell us whether a statute has a punitive purpose. More fundamentally, the Court never tells us what a punitive purpose is").

philosophers might say on the subject. Although, apparently, the Supreme Court's use of the *Mendoza-Martinez* factors has been criticized,[37] this is not cause to ignore them in favor of philosophers or to bend them to the will of three judges at the Sixth Circuit. Indeed, the *Snyder* panel failed to require the Does to meet their burden of "only the clearest proof" that SORA's purpose was punitive. *Flemming*, 363 US at 617; 80 S Ct at 1376.

Finally, *Snyder* is factually distinguishable. First, it focused on the 2006 amendment to SORA that included prohibitions on a sex offender from working, living, or loitering within 1,000 feet of a school. *Snyder*, 834 F3d at 698. That, of course, is not at issue here. And, even if it were at issue, a court could simply sever that portion of SORA when applied retroactively, MCL 8.5. Second, it found that the in-person registration requirement so burdensome, it amounted to punishment, because it could not see its "salutary effects": "The requirement that registrants make frequent, in-person appearances before law enforcement, moreover, appears to have no relationship to public safety at all. The punitive effects of these blanket restrictions thus far exceed even a generous assessment of their salutary effects." *Id*., 705.

This criticism of SORA's in-person reporting requirement is particularly absurd as discussed *supra* at pp 34-35, and in, *inter alia*, *Tucker*, 312 Mich App at 682-683; *Parks*, 698 F3d at 6; *Shaw*, 823 F3d at 568-570; *Pataki*, 120 F3d at 1285; *WBH*, 664 F3d at 857; *Boyd*, 1 Wash App 2d at 511; 408 P3d at 368; and *Shaylor*, 306 Kan at 1052; 400 P3d at 179.

[37] See, e.g., David A. Singleton, *What Is Punishment?: The Case For Considering Public Opinion Under Mendoza-Martinez*, 45 Seton Hall L Rev 435, 439 (2015) ("[t]he *Mendoza-Martinez* framework has been criticized on a number of grounds, including that it leads to unprincipled, results-oriented decisions" [footnotes omitted]).

RELIEF REQUESTED

For the foregoing reasons, Defendant's application for leave to appeal should be denied.

Respectfully submitted,
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/s/ Charles F. Justian

Dated: January 15, 2019

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