STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 153696

Plaintiff-Appellee, Court of Appeals No. 325449

v

DAVID ALLEN SNYDER,

Defendant-Appellant.
_____/

PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 148981

Plaintiff-Appellee, Court of Appeals No. 319642

v

PAUL J. BETTS,

Defendant-Appellant.
_____/

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AMICUS CURIAE **BRIEF OF THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN**

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STATEMENT OF INTEREST

Since its founding in 1976, Criminal Defense Attorneys of Michigan ("**CDAM**") has been the statewide association of criminal defense lawyers in Michigan, representing the interests of the criminal defense bar in a wide array of matters. CDAM has more than 400 members.

As reflected in its bylaws, CDAM exists in part to "promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy," "provide superior training for persons engaged in criminal defense," "educate the bench, bar and public of the need for quality and integrity in defense services and representation," and "guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws."

This appeal implicates those guaranteed rights. The Ex Post Facto Clauses of the United States and Michigan Constitutions bar the retroactive application of a law that increases the punishment for a crime. *People v Earl*, 495 Mich 33, 37; 845 NW2d 721 (2014) (citing *Calder v Bull*, 3 US 386, 390 (1798)); US Const, art I, § 10, cl 1; Const 1963, art I, § 10. The Michigan Sex Offender Registry Act ("**SORA**"), which started out as a private law enforcement database, has been transformed through nineteen amendments into a public system of monitoring and control. The Court is now faced with the question of whether the current version of SORA constitutes punishment, making it unconstitutional to retroactively impose SORA's requirements upon offenders convicted prior to that transformation. CDAM advocates for a position consistent with the holding of the Sixth Circuit in *Does #1-5 v Snyder*: SORA is in effect punitive, making its retroactive application violative of the Ex Post Facto Clauses of the United States and Michigan Constitutions. 834 F3d 696 (CA 6, 2016), reh den (Sept 15, 2016), cert den *Snyder v John Does #1-5*, 138 S Ct 55 (2017).

STATEMENT OF QUESTIONS PRESENTED

1. Whether the current version of SORA, MCL 28.721 *et seq.*, with ban on sexual offenders living, working, and loitering within 1,000 feet of schools and tiered system of mandatory in-person reporting unconstitutionally increases the punishment after the offense in violation of the Ex Post Facto Clauses of the Michigan and United States Constitutions?

   Trial court answered: No

   Court of Appeals' majority answered: No

   Plaintiff-Appellee answers: No

   Defendants-Appellants answer: Yes

   Amicus Curiae answers: Yes

2. Whether SORA should be deemed wholly unconstitutional as applied to registrants convicted prior to its latest enactment in 2011 when SORA's unconstitutional provisions cannot be severed without rendering SORA completely inoperable?

   Trial court answered: N/A

   Court of Appeals' majority answered: N/A

   Plaintiff-Appellee answers: No

   Defendants-Appellants answer: Yes

   Amicus Curiae answers: Yes

INTRODUCTION

Imagine that the State, in the name of public safety, resolved that citizens who are more likely than the average citizen to commit a future crime of aggression or predation should be relegated to live, work, and loiter only in locations specifically zoned for their use to isolate them from vulnerable populations. They must also report to a specific administrative office once per month for questioning, to enhance monitoring and surveillance. For the sake of expediency, the State dispensed with individualized assessments and chose instead to create a class of "dangerous" persons based on social-science statistical research and facts of public record. Citizens satisfying at least 3 of 5 indicia (such as a record of being abused as a child) were found 15% more likely than the average citizen to commit a crime of aggression or predation in the future. While a criminal history of aggressive or predatory behavior would be one factor, it would not be a prerequisite. Under this hypothetical scheme, many in this class have never been convicted of a crime, but are nevertheless partially "regulated" out of society.

If Michigan's SORA is not punishment, then it is the precursor to this Orwellian vision. The zoning out of registrants from residential, commercial, and public places near schools is no different in kind from the zoning out of "dangerous" persons above. It is only different in degree. SORA identifies the class of "dangerous" persons to be banished and monitored using facts of public record that it deems indicative of "dangerousness." Except, SORA only uses one indicium—prior conviction for a criminal sexual act. The notion is that prior sex offenders—as a class—are statistically more likely to abuse school children. Prior conviction is conclusive proof of membership in that class. Thus, SORA shares all of the key elements of the scheme above: (1) a significant restraint on personal liberty, (2) justified by a broad classification and grossly overgeneralized statistics, (3) imposed through a rule of universal application.

That SORA includes only those with a prior conviction is of no significance if SORA's purpose is not punishment; it just happens to be the evidence chosen to support a finding of dangerousness. Relying on that single indicium of dangerousness is, if anything, less rational than the hypothetical "dangerous person" zoning system above, which does not deem evidence of conviction sufficient. If this Court upholds SORA as constitutional on the mere basis that it rationally serves a legitimate regulatory purpose, then it will have laid the foundation for the hypothetical scheme above.

This Court should reject the idea that SORA can be so justified. Our constitutional concept of ordered liberty cannot tolerate using broad classifications and tenuous (if not irrational) justifications to deprive a person of the freedom to live, work, and be in public places of their choosing, or the right to be free from warrantless seizure. Doing so requires a rule narrowly tailored to significantly advance a compelling governmental interest, along with an adversarial process providing sufficient procedural safeguards to ensure that only those who truly endanger society are deprived of these fundamental liberties. Due process requires as much.

Because SORA cannot be constitutionally enforced as mere civil regulation, this leaves punishment as the only possible justification. Due process will support that rationale because the excessiveness of punishment is measured by a different standard under the Eighth Amendment. On the other hand, "[t]he Ex Post Facto Clauses of the United States and Michigan Constitutions bar the retroactive application of a law if the law . . . increases the punishment for a crime." *Earl*, 495 Mich at 37. Thus, the only constitutionally sound solution is to hold that SORA's restraints on liberty are unconstitutional when applied retroactively.

This Court did not ask the parties to address the issue of severability, but that issue must also be addressed. Because SORA's school safety zones and tiered scheme of in-person reporting requirements enacted through its 2006 and 2011 amendments cannot be severed without rendering SORA inoperable, this Court should deem the entire statute unconstitutional as applied to those convicted prior to its latest amendment in 2011. However, given that this issue may not have been fully briefed by the parties, CDAM suggests that this Court either grant leave to appeal on this issue or invite supplemental briefing to address it.

STATEMENT OF FACTS

CDAM relies on the fact statements in the briefs of Messrs. Snyder and Betts. For the sake of context, however, CDAM provides the following short summary of the various amendments to SORA after Messrs. Snyder and Betts were convicted.

SORA originally took effect on October 1, 1995, and required sex offenders to register but made registry information confidential, except for law enforcement purposes. *People v Dipiazza*, 286 Mich App 137, 142; 778 NW2d 264 (2009). However, since SORA's original enactment, it has been amended nineteen times.[1] Four amendments alone demonstrate the conversion of this statute into a complex, punitive system of monitoring and control imposing affirmative obligations, disabilities, and restraints upon registrants, touching nearly every aspect of their lives. *Does #1-5*, 834 F3d at 696; MCL 28.723, *et seq.*

To start, in 1999, SORA was amended to make its registry available to the public online. MCL 28.728(2), as amended by 1999 PA 85. In 2004, it was amended again to require each

[1] 1995 PA 10; 1996 PA 494; 1999 PA 85; 2002 PA 542; 2004 PA 237; 2004 PA 238; 2004 PA 240; 2005 PA 121; 2005 PA 123; 2005 PA 127; 2005 PA 132; 2005 PA 301; 2005 PA 322; 2006 PA 46; 2006 PA 402; 2011 PA 17; 2011 PA 18; 2013 PA 2; 2013 PA 149.

registrant's photograph to be published on the public internet registry. MCL 28.728(3)(c), as added by 2004 PA 238. In 2006, the Legislature again amended SORA putting school safety zones into effect, which bar registrants from loitering, working, or living within 1,000 feet of a school. MCL 28.733–28.736. Most recently, in 2011, the Legislature completely rewrote SORA, retroactively imposing a tier-based classification system with corresponding and extensive in-person reporting requirements. 2011 PA 17 and 18; MCL 28.725; MCL 28.722.

ARGUMENT

To determine if the purpose and effects of a civil statute are so punitive as to negate the Legislature's nonpunitive intent, federal courts consider the factors laid out in *Kennedy v Mendoza-Martinez*:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. [372 US 144, 168–169 (1963).]

Because the Sixth Circuit, Messrs. Snyder and Betts, and their supporting *amici*, have already said much about the facts pertinent to these factors to SORA, CDAM will instead focus on only two factors that deserve further explication: "rational connection" and "excessiveness." Properly analyzed, these factors demonstrate that SORA has only one legitimate justification for using such a broad rule of general application to impose severe restraints on personal liberty, and that is punishment. That justification only permits SORA to be applied prospectively under the Ex Post Facto Clauses of the Michigan and United States Constitutions.

Having reached that conclusion, the next question becomes how to salvage as much of the statute as possible without rewriting it. See MCL 8.5. Because SORA is inoperable without these requirements, given their integral relationship to the rest of the statute, this Court's only solution is to bar the application of SORA in its entirety to those convicted prior to its 2011 amendment and let the Legislature rewrite the statute if it desires to do so.

I. SORA's school safety zones and tiered in-person reporting requirements constitute punishment.

The central issue in this appeal is whether SORA is "so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Kansas v Hendricks*, 521 US 346, 361 (1997) (quoting *United States v Ward*, 448 US 242, 248–249 (1980)). Assuming this is the proper analysis for both the United States and Michigan Constitutions, *Kennedy* offers a useful set of factors to consider in making this determination. 372 US at 168–169. However, the federal case law applying these factors has often taken a wooden approach that does a disservice to the constitutional issues at stake. It is important to look more closely at the purpose behind each factor and appreciate that a factor's relative significance can change from case to case.

While the bulk of the *Kennedy* test goes toward showing the magnitude of SORA's punitive purposes and effects, the last two factors ask a slightly different though related question: is there a nonpunitive regulatory purpose that would legitimately support it? When the Court appreciates the purpose of these two factors and how they relate to this case, it should conclude the answer is no.

First of all, classifying nearly all sex offenders as a threat to school children and in need of in-person reporting is irrational. But even if the Court discerned a rational connection to the

purpose of preventing recidivism, that connection is of little significance here because this purpose could be ascribed to just about any penal statute, making it of no real significance in the final analysis of whether SORA is punitive.

Furthermore, if a rationally assignable purpose does exist, then SORA is excessive in relation to that purported regulatory purpose. The school safety zones and in-person reporting requirements so deprive a person of fundamental liberties that it cannot stand as a regulatory statute without (1) narrow tailoring and (2) strict procedural safeguards. SORA offers neither, only a broad overgeneralization and an irrebuttable presumption of dangerousness. Given the grave deprivations of liberty, SORA's scheme would violate due process as a regulatory scheme. The only way such deprivations can be constitutionally imposed without further individualized assessment and a civil adversarial proceeding to determine dangerousness is if these deprivations are punishment for the underlying criminal offense. Given that SORA's tiered system of school safety zones and in-person reporting requirements can only be legitimately justified as punishment, this system violates the Ex Post Facto Clauses of the Michigan and United States Constitutions when applied retroactively.

A. The *Kennedy* test is a flexible, non-binding, non-exhaustive analytical tool for determining whether a statute imposes punishment and should not be applied in a wooden fashion.

We deal here with two distinct constitutional authorities—one state and one federal—with the central issue for this case under both constitutions being the question of what constitutes "punishment." To date, this Court has not distinguished the two constitutional provisions as requiring differing interpretations and has previously relied upon the factors identified by the United States Supreme Court for determining whether a statute constitutes "punishment," rather than devising its own test. *Earl*, 495 Mich at 43–49. CDAM maintains that the federal test—first announced in *Kennedy*, 372 US at 168–169—is at the very least underdeveloped. Federal

cases have largely applied the *Kennedy* factors in a superficial manner involving little to no discussion of the factors' underlying purpose and significance. The discussion below primarily aims to develop a better understanding of the varying significance and interplay of certain factors and pushes back on potential misperceptions about the test.

When it comes to interpreting Michigan's Ex Post Facto Clause in the Constitution of 1963, Article I, § 10, the Court is in no way bound by the *Kennedy* test or federal interpretations of the federal Ex Post Facto Clause, even though it has relied on that analysis in *Earl*. The only reason this Court did so is that no one has yet argued for a different interpretation of Michigan's Ex Post Facto Clause from the one employed by the federal courts. *Earl*, 495 Mich at 37 n 1. While the Court cannot apply in this appeal an analysis that is less constitutionally restrictive than what the federal case law would allow, given that the federal Ex Post Facto Clause also applies, the Court can analyze the punitive nature of SORA in a manner that is more restrictive than what is reflected in the federal jurisprudence.

To be sure, Michigan's Ex Post Facto Clause is nearly identical to the language contained in United States Constitution, Article I, § 10, making reliance on the established case law expedient. But that means nothing when it comes to carrying out this Court's supreme judicial role of interpreting Michigan's Constitution. Notably, state supreme courts have at times parted ways with federal precedent when it comes to identical provisions in their state constitutions, even leading the United States Supreme Court to ultimately change its view of the U.S. Constitution. See, e.g., *Lawrence v Texas*, 539 US 558, 576 (2003) (observing that "[t]he courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment . . . .").

That said, the *Kennedy* test still provides a helpful framework for analysis. When analyzing whether a statue is punishment for purposes of the Ex Post Facto Clause, federal courts apply a two-step inquiry. *Smith v Doe*, 538 US 84, 92 (2003). First, a court must determine whether the Legislature intended the statute as a criminal punishment or a civil remedy. *Id.* The text and structure of a statute may either expressly or implicitly indicate a legislative preference for one label or the other. *Earl*, 495 Mich at 38. If the text or structure indicates the statute is penal—i.e., serves to reprimand the wrongdoer or deter others—then the analysis is over because retroactive application of the law violates the Ex Post Facto Clause. *Smith*, 538 US at 92.

On the other hand, if the Legislature categorizes the statute as civil, that does not necessarily make it so. *Hendricks*, 521 US at 361 (explaining that "a civil label is not always dispositive"). Even if the Legislature's stated intent was to enact a regulatory scheme that is civil and nonpunitive,[2] form must not prevail over substance. A court must still ascertain whether "the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Id*. Stated differently, "even if the text of the statute indicates the Legislature's intent to impose a civil remedy, [courts] must determine whether the statute nevertheless functions as a criminal punishment in application." *Earl*, 495 Mich at 38.

As shown below, the significance of any given factor in the *Kennedy* analysis block quoted above will vary from case to case. The Court should not presume that a factor having more significance to analyzing one statute will have the same significance in analyzing another statute, even if the statutes are similar. The Court should not treat the *Kennedy* factors as the end-all-be-all in evaluating whether a statute constitutes punishment. The United States

[2] "[A] statute is intended as a civil remedy if it imposes a disability to further a legitimate governmental purpose." *Earl*, 495 Mich at 39 (citing *Trop v Dulles*, 356 US 86, 96 (1958)).

Supreme Court itself has said these are merely "useful guideposts" and "neither exhaustive nor dispositive." *Smith*, 538 US at 97.

B. The lack of a rational connection to preventing recidivism is "most significant," but if such a connection exists, it says little about the punitive effects or purpose of the statute.

Among the seven factors enumerated in *Kennedy*, the one most misunderstood is whether the statute "has a rational connection to a nonpunitive purpose." *Smith*, 538 US at 97. The apparent purpose for SORA's tiered system of school safety zones and in-person reporting requirements is to prevent recidivism and thereby protect the public from future crime. As Messrs. Snyder's and Betts's briefs have shown, and as the Sixth Circuit has held, the SORA statute is not rationally connected to its professed nonpunitive purpose. (See, e.g., Snyder's Suppl Br 29–35); *Does #1-5*, 834 F3d 969. It is simply not rational to deem every sexual act that has been criminalized as evidence that the offender is a threat to school children or at risk of deceiving law enforcement as to his or her whereabouts and personal appearance (so as to warrant in-person reporting). Needless to say, a finding that a rational connection is lacking would make this factor most significant in the analysis because it would leave only punishment as a legitimate justification for the statute.

The converse, however, is not true. If the Court departs from the Sixth Circuit's analysis and finds a rational connection, that connection would have little significance because the purpose of preventing recidivism could be assigned to any undisputedly penal statute imposing supervision and restraints on liberty. Without question, a statute can have both punitive and nonpunitive purposes—they are not mutually exclusive. Even statutes that no one would dispute are punitive serve a nonpunitive purpose of protecting the public from harm.[3]

[3] Because it is never surprising to find an assignable nonpunitive purpose, courts often spend little time considering this factor in their analysis and quickly move on to other factors. See, e.g.,

This Court should not ascribe special significance to this factor merely because the United States Supreme Court deemed it "most significant" in analyzing Alaska's Sex Offender Registration Act, *Smith*, 538 US at 108. It is simply not the case that this factor automatically carries more weight than others in every case. An examination of some of the United States Supreme Court's earlier decisions demonstrates why this is so.

In *Department of Revenue of Montana v Kurth Ranch*, 511 US 767 (1994), the Supreme Court considered whether a "tax" imposed on marijuana was invalid under the Double Jeopardy Clause. In finding the tax was punishment, the court saw as most significant the unique nature of the tax: it was conditioned on the commission of a crime and imposed only after the taxpayer had been arrested and was no longer in ownership or possession of the marijuana. *United States v Ursery*, 518 US 267, 282 (1996). The rational connection to an assignable purpose played a lesser role in the analysis.

In another example, *United States v Halper*, 490 US 435 (1989), the court examined whether a civil penalty for Medicare fraud violated the Double Jeopardy Clause. Despite earlier case law establishing that a civil penalty is not punishment just because it exceeds actual damages, the Court found most significant the fact that "the fine was more than 220 times greater than the Government's damages." *Ursery*, 518 US at 280. It agreed with the district court that such liability was "sufficiently disproportionate that the sanction constitutes a second punishment in violation of double jeopardy." *Halper*, 490 US at 452. Here, excessiveness was more significant than the existence of an assignable nonpunitive purpose.

State v Pollard, 908 NE2d 1145, 1152 (Ind, 2009); *State v Letalien*, 985 A2d 4, 22 (Me, 2009); *Starkey v Oklahoma Dep't of Corrs*, 305 P3d 1004, 1028 (Okla, 2013); *Doe v State*, 189 P3d 999, 1015–1016 (Alas, 2008).

The United States Supreme Court first referred to the "rational connection to a nonpunitive purpose" as "most significant" in *Ursery*, 518 US at 290, when it was determining whether *in rem* civil forfeiture proceedings were punishment for purposes of the Double Jeopardy Clause.[4] After observing that "*in rem* civil forfeiture has not historically been regarded as punishment" and that "there is no requirement of scienter in order to establish that the property is subject to forfeiture," *id*. at 291, the Court found it "most significant" that the civil forfeiture provisions at issue served the important nonpunitive goals of "encourag[ing] property owners to take care in managing their property and ensur[ing] that they will not permit that property to be used for illegal purposes," *id*. at 290. The rational connection to these particular nonpunitive goals was significant not just because some rational connection existed, but because the goals the statutes were rationally connected to differed so greatly from the sort of goals achieved through penal statutes: Instead of controlling the criminal behavior itself, the civil purpose was aimed at encouraging responsible behavior in potentially innocent property owners.

In evaluating Alaska's Sex Offender Registration Act, the Supreme Court in *Smith*, 538 US at 102, again deemed the rational connection to a nonpunitive purpose "a '[m]ost significant' factor in [its] determination that the statute's effects are not punitive," but it was careful to note that the purpose was "public safety, which is advanced by alerting the public to the risk of sex offenders in their community." As in *Ursery*, this nonpunitive goal aimed at directing the behavior of others; the purpose was not to deter or restrain the offenders themselves, as they

[4] The Court distanced itself from the *Halper* analysis, explaining that, while the government's damages can be quantified and compared to the size of the penalty, "it is virtually impossible to quantify, even approximately, the nonpunitive purposes served by a particular civil forfeiture." *Ursery*, 518 US at 284.

remained "free to move where they wish and to live and work as other citizens, with no supervision." *Id.* at 101.

Contrast (1) the regulatory purpose in *Ursery* of disabling property and deterring negligent property ownership, and (2) the regulatory purpose in *Smith* of collecting and disseminating information to the public, with (3) SORA's supposed regulatory purpose of preventing recidivism by disabling and controlling the sex offender. Even if the connection between establishing safety zones and in-person reporting and preventing recidivism could be considered "rational"—a notion that has been debunked—the purpose of protecting the public from future crime by restraining the movements and freedoms of the criminal offender fits squarely within the objectives of traditional punishment.

As every law student quickly learns, the "dominant approaches to justification [for punishment] are retributive and utilitarian," with the latter encompassing not only deterrence but also "[i]ncapacitation and other forms of risk management." Joshua Dressler, *Cases and Materials of Criminal Law* (3d ed), ch 2, pp 32, 36.

> Imprisonment [for instance] temporarily puts convicted criminals out of general circulation, and the death penalty does so permanently. These punishments physically prevent persons of dangerous disposition from acting upon their destructive tendencies. *Less drastic forms of risk management include probationary or parole supervision, and accompanying requirements . . . and prohibitions (. . . association with certain persons, contact with the victim, and so on).* [*Id*. at 36 (emphasis added).]

Incarceration, and the terms of probation or parole, while obviously punitive, also readily serve the purpose of managing the risk that the offender will recidivate. In *Smith*, 538 US at 102, the Court observed that arguing a law deterring future crimes is punitive "because deterrence is one purpose of punishment . . . . proves too much," since any number of governmental programs might deter crime without imposing punishment. But the argument goes both ways. Arguing

that a law preventing recidivism shows the statute is nonpunitive also proves far too much, since any number of undeniably punitive statutes accomplish that same purpose. Consequently, assigning to SORA the purpose of preventing recidivism provides no indication one way or the other as to whether the statute's purpose is punitive or nonpunitive.

Calling SORA's objective "public safety" does nothing to change this. A number of punishments for crime against persons can be assigned a regulatory purpose of public safety because of the nature of harm caused by the crime and the deterrent effect of punishment. Cf. *id*. ("Any number of governmental programs might deter crime without imposing punishment."). The mere presence of a public safety purpose tells us practically nothing about whether SORA's requirements are punitive in nature. The court must look at the specific, concrete regulatory objective, which in this case, is to restrain the liberty of prior offenders to protect the public from future harm they may cause. This purpose is too indistinguishable from the traditional purposes of punishments such as incarceration, probation, or parole as to have any real significance in the final analysis of whether SORA is punishment.

C. The statute's effect is excessive: its deprivation of fundamental liberties without individualized assessment is constitutionally impermissible, except as punishment for the prior conviction.

When a statute has a rational connection to a nonpunitive purpose, the next question then becomes whether the statute's effect is excessive in relation to its assigned nonpunitive purpose. *Kennedy*, 372 US at 168–169; see also *United States v Juvenile Male*, 590 F3d 924, 941–942 (CA 9, 2010), cert granted, judgment vacated on other grounds 564 US 932 (2011) (citing *Kennedy*, 372 US at 169).[5] If this Court concludes that SORA is rationally connected to its

[5] *United States v Juvenile Male* does a noteworthy job of outlining how the "rational connection to a nonpunitive purpose" factor and the "excessiveness" factor of the *Kennedy* test work together. 590 F3d at 938–939. The court there held that retroactive imposition of Montana's juvenile registration and reporting requirement was punitive and, therefore, violated the Ex Post

purported nonpunitive purpose (contrary to the Sixth Circuit), this Court should find that it nevertheless goes beyond the constitutionally permissible bounds of a mere civil regulation and is therefore excessive in relation to its nonpunitive purpose. In particular, SORA is excessive as a regulatory law because it exceeds the level of affirmative disability and restraint that due process would allow without the narrow tailoring of an individualized assessment and strict procedural safeguards of an adversarial proceeding on the issue of dangerousness. The only way to save SORA from this broader unconstitutionality is to deem it punitive, in which case it may be applied prospectively, but cannot be applied retroactively.

1. The Hendricks / Smith *dichotomy shows that individualized assessments and adjudicatory proceedings are required when due process would not be satisfied by a rule of universal application.*

To illustrate the constitutional problem, it helps to juxtapose the United States Supreme Court's analysis of two distinct sex-offender statutes, each imposing a magnitude of restraint on the polar opposite end of the spectrum from the other.

Smith dealt with a sex offender registration act that imposed no direct restraints on the activities of convicted sex offenders. 538 US at 100. The United States Supreme Court reversed the Ninth Circuit's holding that applying the registration requirements to all convicted sex offenders without regard to future dangerousness made Alaska's SORA excessive in relation to its regulatory purpose. *Id.* at 103. The Court explained that "[t]he Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified

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Facto Clause of the United States Constitution. *Id.* at 941–942. After finding that the act had the nonpunitive, regulatory aim of "improving public safety," the court emphasized that the statute is still "likely to be punitive if it appears excessive in relation to the alternative [nonpunitive] purpose assigned." *Id.* at 939.

crimes should entail particular regulatory consequences." *Id*. at 104. It concluded that "the legislature has power in cases of this kind to make a rule of universal application." *Id*.

Kansas v Hendricks, 521 US at 357, on the other hand, dealt with a statute authorizing the involuntary and potentially indefinite confinement of sexually violent predators. After serving 10 years in prison for indecent conduct with two 13-year-old boys, Hendricks was slated to be released to a halfway house when the state petitioned for his civil commitment as a sexually violent predator. *Id*. at 353–354. After a civil trial—where the state had to carry its burden beyond a reasonable doubt—the jury found Hendricks to be a sexually violent predator, and he was committed. *Id*. at 354. The statute permitted Hendricks thereafter to obtain repeated review of the necessity for this confinement under the Act through three different avenues:

> First, the committing court was obligated to conduct an annual review to determine whether continued detention was warranted. Second, the Secretary was permitted, at any time, to decide that the confined individual's condition had so changed that release was appropriate, and could then authorize the person to petition for release. Finally, even without the Secretary's permission, the confined person could at any time file a release petition. [*Id*. at 353 (internal citations omitted).]

The United States Supreme Court rejected Hendricks' Ex Post Facto Clause and Double Jeopardy Clause challenges based in part on the fact that the state had "limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; . . . and permitted release upon a showing that the individual is no longer dangerous or mentally impaired." *Id*. at 368–369. In the course of its analysis, the Court emphasized "under the appropriate circumstances *and when accompanied by proper procedures*, incapacitation may be a legitimate end of the civil law." *Id*. at 365–366 (emphasis added).

In later distinguishing *Hendricks* from *Smith*, the Supreme Court observed that "[t]he magnitude of the restraint made individual assessment appropriate" in *Hendricks*, whereas

Alaska's act "imposes the more minor condition of registration." *Smith*, 538 US at 104. The court concluded that, "[i]n the context of the regulatory scheme the State can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions without violating the prohibitions of the Ex Post Facto Clause." *Id*.

Two observations should be made in light of the discussion above. First, the Supreme Court could leave the assessment in the hands of the public in *Smith* only because the truly adverse regulatory consequences for sex offenders depended entirely on the private response of other individuals to the information Alaska's act disseminated. Second, the Supreme Court in both cases recognized the need for procedural safeguards, such as an individualized assessment, when the statute imposes the sort of restraints on liberty seen in *Hendricks*. Hendricks had already been convicted of a sexual offense, but he was nevertheless provided an individualized assessment and adversarial proceeding with strict burdens imposed on the government before he could be civilly committed under Kansas's Sexually Violent Predator Act. The civil commitment did not merely rest on the criminal proceeding undertaken to determine culpability for a prior criminal offense.

The reason for requiring individualized assessment and procedural safeguards is not spelled out in *Smith* or *Hendricks*, but it undoubtedly goes to the question of what process is due. The United States Supreme Court has held:

> [T]he Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California,* 342 U.S. 165, 172 [] (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325–326 [] (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be

> implemented in a fair manner. *Mathews v. Eldridge,* 424 U.S. 319, 335 [] (1976). [*United States v Salerno*, 481 US 739, 746 (1987).]

Determining whether the process is fair calls for consideration of:

> three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews*, 424 US at 335.]

And in any event, the Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v Glucksberg*, 521 US 702, 720–721 (1997).

The deprivation of liberty is never greater, and the stakes are never higher, than when the consequence is confinement. As *Smith* recognized, this made the narrow tailoring of an individualized assessment employed by the Kansas Legislature in *Hendricks* "appropriate." 538 US at 104. In contrast, the "minor conditions of registration" imposed by Alaska's legislature in *Smith* imposed no restraint, such that due process could be satisfied by a "rule of universal application." *Id*. As explained below, the restraints imposed by Michigan's SORA are not as extreme as *Hendricks* but nevertheless are so substantial that they cut to the core liberties protected under the Due Process Clause of the Fourteenth Amendment. Consequently, a general rule of universal application will not suffice.

2. SORA's disabilities and restraints cannot be imposed as mere regulation, because due process requires individualized

assessment and procedural safeguards prior to such deprivations of liberty.

With SORA we deal with a scheme imposing affirmative disabilities and restraints less severe than the confinement in *Hendricks*, but far more serious than the mere remote reporting required in *Smith*. Though the in-person reporting requirements and school safety zones do not completely deprive the convicted sex offender of all liberty, they do deprive the offender of fundamental liberty interests protected by the Fourteenth Amendment.

"Liberty of the individual, under both the Fifth and Fourteenth Amendment Due Process Clauses, embraces the people's constitutional right to be not only in their own dwellings but also everywhere in public places long recognized as dedicated to use by the citizenry." William J. Rich, 1 Modern Constitutional Law § 14:27 (3d ed). SORA deprives sex offenders of such liberty by establishing school safety zones that bar registrants from living, working, or loitering within 1000 feet of a school, MCL 28.734–28.735, effectively limiting registrants' housing, work, and travel opportunities throughout large portions of the state, especially urban areas. See *Does #1-5*, 834 F3d at 702–703 (showing a map of Grand Rapids, Michigan that reveals the expansive portions of the city that registrants may not occupy). SORA's definition of "loitering," MCL 28.733(b), even prevents a registrant from participating in basic parenting activities, like picking their child up from school, and from family events, such as attending a youthful family member's extracurricular activities or sporting events to support and encourage them. SORA essentially "consigns [registrants] to years, if not a lifetime, of existence on the margins" of society. *Does #1*-5, 834 F3d at 705.

Such restrictions also "impact where an offender's children attend school, access to public transportation for employment purposes, access to drug and alcohol rehabilitation programs, and even access to medical care and residential nursing home facilities for the aging offender."

Commonwealth v Baker, 295 SW3d 437, 445 (Ky, 2009). A SORA registrant would struggle to even establish a permanent home, as there would be no guarantee that a school would not open within 1,000 feet of any location a registrant decided to settle into; a registrant would always face a constant fear of eviction. See *id*. at 445 (striking down a statute imposing a significant limitation on where the registrant may live). The school safety zones will not only effect registrants' ability to find a permanent home, but will also prevent registrants from securing steady employment, as a school could open next to their job at any time, requiring them to quit.

SORA's extensive in-person reporting requirements, 2011 PA 17 and 18; MCL 28.725, also profoundly infringe upon the right to be free from unreasonable search and seizure. *Mapp v Ohio*, 367 US 643, 655 (1961) (enforcing the Fourth Amendment of the United States Constitution against the states by incorporation through the Fourteenth Amendment). "A seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when, 'taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *Kaupp v Texas*, 538 US 626, 629 (2003) (quoting *Florida v Bostick*, 501 US 429, 437 (1991)). Under the current version of SORA, registrants must regularly report, in person, to the state police to verify their residence and other information based upon their tier classification, under penalty of imprisonment. MCL 28.725(10); MCL 28.725a(3); MCL 28.729. Rather than making the police encounter the registrant and bring him in for questioning, SORA forces the registrant to encounter the police and submit to questioning. All the same, a registrant would by no means feel at liberty to go about his or her business and ignore the requirement to report in person to the state police, given the criminal penalties of not complying.

This imposition here is far more severe than a mere traffic stop or even being called in once or twice for questioning. SORA requires registrants to report in person whenever they change their address, change or discontinue employment, enroll in or discontinue higher education, change their name, temporarily stay somewhere other than their registered address for more than seven days, change their email address, purchase a vehicle, or regularly operate any vehicle. MCL 28.725(1)(a)–(h). And the registrant must report within three business days—without any exception. MCL 28.725(1)(a); MCL 28.722(g). Such reporting "requires time-consuming and cumbersome in-person reporting" that "compels [registrants] to interrupt [their daily] lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information." *Does #1*-5, 834 F3d at 705.

Of course, a requirement to report in person is completely unnecessary to accomplishing the aim of obtaining such information. And the Sixth Circuit and other courts have noted that such requirements are for that reason excessive. *Does #1*-5, 834 F3d 696; *Commonwealth v Muniz*, 164 A3d 1189, 1210–1211, 1218 (Pa, 2017), cert den sub nom *Pennsylvania v Muniz*, 138 S Ct 925 (2018); *Letalien*, 985 A2d at 18. But even if there were some good reason to require reporting in person to accomplish SORA's aims, the requirement nevertheless seriously infringes upon the right to be free from warrantless seizure.

Given the fundamental liberties at stake, the Fourteenth Amendment first of all calls for narrow tailoring, which is ordinarily accomplished through an individualized assessment. See, e.g., *Hendricks*, 521 US at 365–366; *MacDonald v City of Chicago*, 243 F3d 1021, 1034 (CA 7, 2001) ("The regulation is also narrowly tailored to promote these interests, first by requiring an individualized assessment of the proposed march vis-a-vis these concerns."). But SORA's school safety zones and in-person reporting requirements are imposed upon all registrants,

without regard to the severity of their prior crime and without any apparent connection between the crime and their risk of re-offending. MCL 28.734–28.735; MCL 28.725; MCL 28.722. While SORA classifies offenders into tiers according to their offense of conviction, which determine both the length of registration and frequency of in-person reporting required, this classification occurs without any individualized risk assessment. MCL 28.722; MCL 28.725(10); MCL 28.725a(3).

Several courts have found the imposition of such severe restraints upon registrants without any individualized assessment to be so excessive in relation to its nonpunitive purpose as to constitute punishment. See *Does #1*-5, 834 F3d at 705–706; see also *Pollard*, 908 NE2d at 1152–1154 (holding that because the statute "[r]estrict[ed] the residence of offenders based on conduct that may have [had] nothing to do with crimes against children and [did not] consider[ ] whether a particular offender is a danger to the general public," the "statute exceed[ed] its nonpunitive purpose" and violated the Ex Post Facto Clause when applied retroactively.); *Baker*, 295 SW3d at 446–447 (explaining that the statute was excessive because it did not make "any type of individualized assessment as to whether a particular offender [wa]s a threat to public safety," but instead, "prohibit[ed] all registrants—regardless of whether the registrant's victim was an adult, teenager, or child, and regardless of whether the crime was violent, nonviolent or statutory—from living within 1,000 feet of a school, playground, or daycare facilities."). Even assuming some rational basis for concluding that sex offenders as a general rule pose a greater risk of committing sex offenses than the general population, imposing such severe restraints on that overgeneralized basis is offensive to our basic concept of ordered liberty. Substantive and procedural due process do not allow it. *Glucksberg*, 521 US at 720–721; *Mathews*, 424 US at 334–335.

"It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v United States*, 116 US 616, 635 (1886), overruled on other grounds *Warden v Hayden*, 387 US 294 (1967). To hold SORA's restrictions can be imposed on Messrs. Snyder and Betts would set a dangerous precedent. Allowing SORA's restraints to be imposed on some basis other than punishment for the underlying sex offense would necessarily mean such regulation can be imposed on even law-abiding citizens through a rule of general application if it is merely rational.

For instance, some studies have shown that children who are victims of sexual abuse are at greater risk of committing a sexual offense as adults. US General Accounting Office, *Cycle of Sexual Abuse* 6 (Sept, 1996) (noting that the research overall is inconclusive but that "[a] few of the studies found that sex offenders of children were more likely to have been sexually abused as children than were members of control groups composed of noninstitutionalized nonoffenders.").[6] The government could rationally rely on such a study to conclude that those who are sexually abused as children pose a greater risk of abusing children themselves. Absent the due process protections delineated above, the government could then deprive this entire subclass of citizens who have committed no crime of their fundamental liberty interests on a seemingly rational yet overgeneralized and uncompelling basis that such people pose a greater danger to society.

SORA's severe restraints on individual liberty cannot be justified as mere civil regulation in this case, when the individualized assessment and procedural safeguards ordinarily required of such regulation are utterly lacking. Cf. *Hendricks*, 521 US at 365–366, 368–369. Because a regulatory purpose is not constitutionally sound justification, the only other way SORA can be

[6] Available at https://www.gao.gov/assets/230/223155.pdf.

constitutionally enforced is as punishment. Assuming that is a permissible justification for imposing SORA's disabilities and restraints on those convicted after its enactment, it is not permissible to impose such punishment on Messrs. Snyder and Betts under the Ex Post Facto Clauses of the Michigan the United States Constitutions.

II. Because severing SORA's punitive provisions would leave SORA inoperable, SORA must be declared unconstitutional as a whole when retroactively applied.

Because SORA's school safety zones and in-person reporting requirements violate the Ex Post Facto Clause, this Court must determine whether those unconstitutional provisions can be severed from the rest of the statute. If possible, courts dealing with unconstitutional portions of a statute should try "to limit the solution to the problem," by severing the problematic, unconstitutional portions of the law, and leaving the rest of the law intact. *Ayotte v Planned Parenthood of N New England*, 546 US 320, 328–329 (2006). Therefore, this Court's first step in attempting to resolve SORA's unconstitutionality is to determine whether the unconstitutional provisions are severable from SORA. In doing so, this Court must look to Michigan law, as severability of a state statute is a matter of state law. *Leavitt v Jane L*, 518 US 137, 139 (1996).

Michigan law mandates that, when possible, a court should interpret a statute to sustain its constitutionality, even when certain provisions have been found to be unconstitutional. MCL 8.5; *Pletz v Sec'y of State*, 125 Mich App 335, 375; 336 NW2d 789 (1983). However, Michigan law clarifies that this should only be done if "the valid portion of the statute [is] independent of the invalid sections, forming a complete act within itself." *Id*. Therefore, when an act's purpose can be accomplished without the unconstitutional portion, the act should be upheld. *Republic Airlines Inc v Dep't of Treasury*, 169 Mich App 674, 685; 427 NW2d 182 (1988). On the other

hand, if the "unconstitutional portions are so entangled with the others that they cannot be removed without adversely affecting the operation of the act," then a court must find the entire act unconstitutional. *Blank v Dep't of Corrs*, 462 Mich 103, 123; 611 NW2d 530 (2000).

Sometimes, when the Legislature passes a statute, it includes a severability clause. This severability clause then "provides a rule of construction, which may sometimes aid in determining legislative intent." *Dorchy v Kansas*, 264 US 286, 290 (1924). Thus, a severability clause "has the effect of reversing the presumption, which would otherwise be indulged, of an intent that, unless the act operates as an entirety, it shall be wholly ineffective." *Railroad Retirement Board v Alton R Co*, 295 US 330, 362 (1935). While SORA itself does not contain a severability clause, the Michigan Legislature has enacted a general severability provision, MCL 8.5. MCL 8.5 states:

> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions of applications of the act which can be given effect without the invalid portion or application, *provided such remaining portions are not determined by the court to be inoperable*, and to this end acts are declared severable. [MCL 8.5 (emphasis added).]

Construction of Michigan's statutes must follow this rule "unless such construction would be inconsistent with the manifest intent of the legislature." MCL 8.5.

Under MCL 8.5, this Court must determine whether the SORA statute can function on its own if the school safety zones, the extensive immediate in-person reporting requirements, and the arbitrary tier classification provisions are ignored when applied to registrants whose offenses predate the enactment of these provisions. If this Court finds that SORA is still operable without these provisions, then these unconstitutional provisions should be severed from the act for purposes of applying the act retroactively. However, if this Court finds that SORA is inoperable without these unconstitutional provisions, then the Court must find the act unconstitutional as a

whole when applied retroactively. In this case, while the school safety zones can effectively be severed from SORA, the in-person reporting requirements and tier classification provisions cannot be excised without leaving the act completely inoperable. This Court should declare SORA wholly unconstitutional when applied retroactively.

A. SORA's unconstitutional provisions cannot be severed without making the statute inoperable.

The school safety zone restrictions are severable from the SORA statute. These school safety zones were codified in 2006 as MCL 28.733–28.736 and MCL 28.730(3). Because these restrictions are separately codified, and therefore self-contained, it is relatively easy to sever the school safety zones from SORA. As a result, the SORA sections containing the school safety zone restrictions would be inapplicable to registrants who committed an offense predating the enactment of those sections.

However, SORA's in-person reporting requirements and tier classifications cannot be excised while leaving a functioning statute. SORA was amended in 2011 to create tiering classification and corresponding in-person requirements. The provisions added at this time also added and rewrote key definitional terms, which are used throughout the statute as a whole and trigger SORA's numerous obligations.[7] Together, the tiering classification provisions and the in-person reporting requirements affect nearly half of the current law. See **Exhibit A** (showing a highlighted version of the statutory changes made to SORA in 2011).

[7] For example, Mich Public Act 17, § 3 (2011), codified as MCL 28.723, specifies who must register (namely those convicted of "listed offenses"). Section (2)(k) of the act, codified as MCL 28.722(k), defines "listed offense" to mean "a tier I, tier II, or tier III offense." Likewise, Section 5(10)-(12), codified as MCL 28.725(10)–(12), keys the length of registration to one's tier classification and Section 5a(3), codified as MCL 28.725a(3), keys the frequency of registration to a registrant's tier classification.

Because these provisions are so deeply embedded in SORA, it is impossible to excise them without leaving the entirety of SORA inoperable. For example, the in-person reporting requirements laid out in MCL 28.725a establish that a registrant's reporting requirements correspond with his/her tier classification. MCL 28.725a requires Tier I registrants to report once a year, Tier II registrants to report twice a year, and Tier III registrants to report quarterly. If the tiering classification language is excised from the statute, then SORA does not specify how often a registrant must report. Likewise, a registrant's registration period is also based upon the registrant's tier classification. MCL 28.725(10)–(12). As a result, if the Court were to excise the tier classification provisions in an attempt to interpret the statute to sustain its constitutional portions, then the tiering language would be eliminated and the statute would not inform registrants of the time period for which they will be subject to SORA's requirements.

In effect, the tier classification language and corresponding reporting requirement provisions "are not like a collection of bricks, some of which may be taken away without disturbing the [provisions as they existed before], but rather are like the interwoven threads constituting the warp and woof of a fabric, one set of which cannot be removed without fatal consequences to the whole." *Carter v Carter Coal Co*, 298 US 238, 315–316 (1936). If all of the provisions corresponding to the tiered system of in-person reporting are excised from the statute, what is left is an incomprehensible blend of procedural provisions referencing excised sections of the statute. This is not a functioning, operable statute.

Furthermore, when unconstitutional provisions are deeply embedded in the fabric of a statute, courts often find the provisions are unable to be severed. For example, in *In re Apportionment of State Legislature–1982*, this Court, considering the state apportionment formula, held that once the weighted land area/population portion of the apportionment formula was

declared illegal, "all the apportionment rules fell because they [were] inextricably related," as this was not a case of a "single line" being held violative. 413 Mich 96, 138–139; 321 NW2d 565 (1982); see also *Associated Builders & Contractors v Perry*, 869 F Supp 1239, 1254 (ED Mich, 1994), rev'd on other grounds 115 F3d 386 (CA 6, 1997) (holding that part of Michigan's Prevailing Wage Act was preempted by federal law, the law's impermissible sections were so interwoven with the permissible provisions that they were not severable, what was left of the statute after severance of the preempted provisions would not comport with the Legislature's intent, and the statute was therefore unenforceable in its entirety).

Without the tiering classification and in-person reporting provisions, SORA's remaining provisions are not "otherwise complete in [themselves] and [are not] capable of being carried out without referenc[e] to the unconstitutional [sections]." Any attempt to sever the unconstitutional provisions leaves the statute inoperable within the meaning of MCL 8.5. *Blank*, 462 Mich at 123 (quoting *Maki v E Tawas*, 385 Mich 151, 159; 188 NW2d 593 (1971) (quotations omitted)). Additionally, because SORA, absent its unconstitutional provisions, is inoperable under MCL 8.5, the statute "cannot be judicially enforced because doing so *requires* the Court to impose its own prerogative on an act of the Legislature." *Stone v Williamson*, 482 Mich 144, 161; 753 NW2d 106 (2008) (emphasis in original). The tiering classifications and in-person reporting provisions added in 2011 effectively constitute a complete rewrite of SORA. Consequently, it is impossible to have a clear indication of what the Legislature would do with the law, absent the provisions that cannot be retroactively enforced constitutionally, or whether the Legislature would have voted to pass the law without the unconstitutional provisions. This Court cannot redraft SORA without presuming to know what the Legislature would want done. As a result, SORA cannot be enforced against offenders retroactively.

B. Revival of an earlier version of SORA is inappropriate.

Attempting to solve this problem by reviving an earlier version of SORA is inappropriate. Revival of the earlier versions of SORA would make it impossible for registrants and law enforcement alike to know what a registrant's obligations are. Revival also contravenes the Legislature's intent and inappropriately requires this Court to make legislative judgments.

1. Revival of earlier versions of SORA would make it impossible for registrants to know what their obligations are.

Reviving earlier versions of SORA will cause a state of confusion where neither registrants nor law enforcement would have any conclusive idea as to a particular registrant's obligations. For starters, it is unclear which version(s) of the statute may be revived and to whom the revived statute(s) would apply.[8] Additionally, superseded, earlier versions of SORA are not publicly available for registrants to review and hybrid versions of SORA are not even in existence. Without a reliable source of law to look at, a registrant will not know what his/her obligations are. To go one step further, without the textual authority of the law, even law enforcement, prosecutors, defense attorneys, and judges will be unsure as to what a particular registrant's obligations are. SORA registrants need to know what law to follow and law enforcement needs to know which law to enforce. Reviving earlier versions of SORA would cause confusion as to what acts or omissions would constitute a crime and would leave law enforcement unsure about what, if any, SORA obligations they should lawfully enforce.

[8] Would an earlier version of SORA revive only for pre-2011 registrants or for all registrants? If the earlier version of SORA only applies to pre-2011 registrants, then there would be two versions of the statute in effect simultaneously. Also, if the current version of SORA applies to some registrants and the revived version applies to others, should all the pre-2011 registrants be covered by the same revived 2005 statute? Would it make sense to have the 2005 version of SORA apply to pre-2006 registrants, the 2010 version to pre-2011 registrants, and the 2017 version to everyone else making three versions of SORA simultaneously in effect? The possibilities are endlessly unclear.

2. Reviving earlier versions of SORA contravenes legislative intent and inappropriately requires this Court to make legislative judgments.

Reviving earlier versions of SORA contravenes legislative policy. Michigan's Legislature has expressly adopted an anti-revival approach under MCL 8.4, stating that: "[w]henever a statute, or any part thereof shall be repealed by a subsequent statute, such statute, or any part thereof, so repealed, shall not be revived by the repeal of such subsequent repealing statute." MCL 8.4.

The in-person reporting requirements and corresponding tier classifications did not constitute a mere reconfiguration of SORA, but instead were so extensive and far-reaching that without these provisions, SORA is irrelevant and unworkable. In essence, in amending SORA to add these provisions, the Legislature completely rewrote the law and effectively repealed much of the earlier version of SORA in the process. Under MCL 8.4, the judicial repeal of these unconstitutional provisions should not result in a revival of the previous law.

Revival also contravenes legislative intent. There is no evidence that the Legislature today would want any of the earlier versions of SORA to be enforced as written. Since SORA was enacted in 1995, it has been amended nineteen times, changing immensely as detailed above. Wholesale revival of an earlier version of SORA that the Legislature decided did not accomplish its objectives undermines legislative intent. Reviving some provisions from earlier SORA laws and keeping some of SORA's current provisions in an attempt to create a hybrid law is also inappropriate, as picking and choosing which provisions of which versions of SORA should be used for which purposes is a legislative function.

The United States Supreme Court reminds courts to be "mindful that [courts'] constitutional mandate and institutional competences are limited, [and] [courts] should restrain [themselves] from 'rewriting state law to conform it to constitutional requirements' even [when]

striv[ing] to salvage it." *Ayotte*, 546 US at 329 (quoting *Virginia v Am Booksellers Ass'n, Inc*, 484 US 383, 397 (1988)). This is because "making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a 'far more serious invasion of the legislative domain' than [courts] ought to undertake." *Id*. at 330 (quoting *United States v Treasury Emps Union*, 513 US 454, 479, n 26 (1995)).

This Court should give the Legislature the ability, time, and space it needs to rework the statute to conform to the federal and state constitutions, instead of presuming what statute the Legislature would have written had it known the school safety zones, in-person reporting, and tier classification provisions were unconstitutional as violative of the Ex Post Facto Clause. This Court should not revive any earlier version of SORA.

CONCLUSION AND REQUESTED RELIEF

The current version of SORA with its school safety zones and tiered scheme of extensive in-person reporting requirements constitutes punishment and is therefore unconstitutional if retroactively imposed. It is irrational to treat every person convicted of any criminal sexual act to be a threat to school children and in need of enhanced surveillance through in-person reporting. In any event, SORA is excessive in relation to its supposed regulatory purpose because it exceeds the permissible constitutional bounds of civil regulation. Constitutional due process, whether substantive or procedural, does not permit the government to impose these sorts of restraints through civil regulation without a narrow tailoring and procedural safeguards to ensure that only those who are truly a danger would be deprived of the fundamental personal liberties of choosing where to live, work, and be in public places. Therefore, retroactive application of SORA in its current form is unconstitutional as it violates the Ex Post Facto Clauses of both the United States and Michigan Constitutions.

Since SORA is inoperable when all of its unconstitutional provisions are removed, SORA as a whole cannot be enforced against registrants whose offenses predate the unconstitutional provisions. Additionally, revival of earlier SORA statutes is equally inappropriate. Therefore, registrants convicted of offenses predating these provisions cannot be subjected to SORA as a whole. As *amicus curiae*, CDAM encourages the Court to reverse the decision of the Court of Appeals and hold that SORA cannot be applied to Messrs. Snyder or Betts.

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