STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Hoekstra, P.J., and Meter and M. J. Kelly, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ALLEN SNYDER,

Defendant-Appellant.
_____/

Supreme Court No. 153696

Court of Appeals No. 325449

Gratiot Circuit Court
No. 14-007061-FH

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF JURISDICTION

This Court has jurisdiction to consider Defendant-Appellant David Allen Snyder's application for leave to appeal—and to review—the decision of the Court of Appeals. MCR 7.303(B)(1); MCL 600.215(3).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The Ex Post Facto Clauses of the United States and Michigan constitutions permit retroactive application of non-punitive civil regulatory laws. Michigan's Sex Offenders Registration Act (SORA) retroactively classifies offenders into tiers based on crime of conviction, requires Snyder to register for 25 years, requires Snyder to report in person twice annually and within three business days of certain changes to registry information, and restricts his activities within school zones. Does SORA impose "punishment" in violation of the Ex Post Facto Clause?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: No.

2. A plea is knowing and voluntary if the defendant is aware of direct consequences of his plea; due process does not require knowledge of collateral consequences. This Court, like many others, has defined a direct consequence as one that affects the "range of the defendant's punishment," i.e., is punitive. Is compliance with SORA a collateral consequence of Snyder's plea that does not render his plea unknowing or involuntary?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

INTRODUCTION

Since the United States Supreme Court upheld Alaska's sex-offender registry in 2003 in *Smith v Doe*, 538 US 84 (2003), both the States and the Federal Government have revised their sex-offender-registry laws to address the very real risk that those who have committed criminal sexual conduct in the past will offend again. That risk remains " 'frightening and high,' " *id*. at 103; a 2014 Department of Justice report, for example, observed that over a 20-year period following release, a full 27% of sex-offenders offend again.

To address that risk, Michigan took an additional step in 2006 to reduce recidivism: it established safety zones that bar sex offenders from residing, working, or loitering in close proximity (within 1,000 feet) of a school. That same year, Congress enacted the Sex Offender Registration and Notification Act (SORNA) to set minimum standards for both the federal and state registries. The federal standards require registration for 15 years, 25 years, or life, depending on the offense of conviction; classify offenders based on their offense; and require in-person reporting (both periodically and when triggered by specific events, such as when a registrant moves). States that fail to comply with these federal standards may lose 10% of law-enforcement funds they would otherwise receive. Michigan implemented these standards in 2011.

In this case, Defendant-Appellant David Allen Snyder pled no contest to fourth-degree criminal sexual conduct in August 1995—over one year after Michigan's initial SORA had been enacted, but before it went into effect. He argues that amendments to SORA since 1995 "have transformed what was once a

regulatory law into a punitive one" that cannot be applied retroactively. Snyder Supp Br, p 2. But while he posits that SORA was, at one point, a non-punitive regulatory law (for which constitutional principles allow retroactive application), he urges this Court to strike down Michigan's sex-offender registration scheme in its entirety and remove him from the registry.

Snyder is wrong. SORA's requirements do not amount to punishment, and they may thus be applied retroactively consistent with ex post facto and due process principles.

But while Snyder is mistaken and the Court of Appeals correctly rejected his arguments, this Court should nevertheless grant Snyder's application, for two reasons. First, this Court should clarify under Michigan law that SORA does not constitute "punishment," in contrast to the Sixth Circuit's decision in *Does #1–5 v Snyder*, 834 F3d 696 (CA 6, 2016). Second, this Court should provide guidance on what portions or iterations of SORA remain constitutional for retroactive application in the event that some portion of the SORA is deemed—by this Court or another—punitive. The People anticipate that the latter question will arise in the federal district court class action in *Does #1–6 v Snyder, et al.* (ED Mich No. 2:16-cv-13137), and the issue is better addressed in this Court, as this Court is the final arbiter of Michigan law.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

In August 1995, Snyder commits fourth-degree criminal sexual conduct.

In August 1995, David Allen Snyder pleaded no contest to fourth-degree criminal sexual conduct after he engaged in sexual contact with his cousin, a 15-year-old girl, while he was intoxicated on alcohol and marijuana. App 33a, 46a. Snyder does not dispute his guilt for this crime. See Snyder Supp Br, p 3.

Michigan enacts SORA in 1994, which goes into effect in October 1995.

Approximately one year before Snyder's plea, Michigan first enacted its Sex Offenders Registration Act (SORA) in 1994. 1994 PA 295. That same year, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which "conditions certain federal law enforcement funding on the States' adoption of sex offender registration laws and sets minimum standards for state programs." *Smith*, 538 US at 89–90.

Because Snyder was incarcerated for a listed offense when Michigan's SORA became effective in October 1995, he was required to register as a sex offender. See MCL 28.723(1)(b); 1994 PA 295 (then MCL 28.724). As Snyder indicates, this initial version of SORA was a confidential, non-public, law enforcement database. See 1994 PA 295 (then MCL 28.730). It required Snyder to notify law enforcement, within 10 days, of any address change, among other changes. *Id.* (then MCL 28.725). It also required him to register for 25 years. *Id.*

Michigan makes the registry public and adds student safety zones.

In the years since it was first enacted, SORA has undergone a series of amendments.[1] In 1996, Michigan amended SORA to require law-enforcement agencies to make offender information available to the public. 1996 PA 494. This followed a national wave of "Megan's Laws," named after Megan Kanka, a 7-year-old New Jersey girl "who was sexually assaulted and murdered in 1994 by a neighbor who, unknown to the victim's family, had prior convictions for sex offenses against children." *Smith*, 538 US at 89. Certain information on Michigan's registry is now available to the public, on the internet. MCL 28.728(2).

Like other States, Michigan has refined its registry law multiple times since its initial adoption. For example, Michigan amended SORA in 2006 to create "student safety zones," which generally prohibit offenders from residing, working, or loitering within 1,000 feet from school property. MCL 28.733–35. These zones impose a physical buffer zone between children and a group of offenders that have high rates of sexual recidivism.

Congress enacts SORNA and conditions federal funding for States on substantial compliance with minimum standards.

In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA) to strengthen the nationwide network of sex-offender registration and notification programs. 42 USC 20901 *et seq*. In addition to updating the federal registry law, SORNA established minimum standards for state registries.

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[1] See, e.g., 1994 PA 295; 1996 PA 494; 1999 PA 85; 2002 PA 542; 2004 PA 240; 2005 PA 121; 2005 PA 127; 2005 PA 132; 2006 PA 46; 2011 PA 17; 2011 PA 18.

To avoid a reduction in federal funding, States must "substantially implement" SORNA's requirements. 42 USC 20927(a) & (d). To assist the States in their implementation efforts, the United States Attorney General issued guidelines that describe the minimum standards a State must meet to achieve substantial compliance. See National Guidelines for Sex Offender Registration and Notification 10 (July 2008) (Guidelines), http://www.smart.gov/guidelines.htm. SORNA and the Guidelines "set[ ] a floor, not a ceiling," for state registry programs. Guidelines 6.

Of relevance, a state's registry program must include the following components for the State to be in minimum compliance:

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 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. Guidelines 21–22.

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 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 20914; Guidelines 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 20920; Guidelines 33–34.

Community notification. SORNA also requires community notification and targeted disclosures. Within three business days of an offender registering or updating his 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 20923; Guidelines 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 20913(c); Guidelines 50. Offenders must also inform the jurisdiction if the offender intends to commence residence, employment, or school attendance in another jurisdiction. *Id*. States must also 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 and the manner of reporting is left to the states' discretion. *Id.* at 52, 54. States must also require offenders to report international travel 21 days in advance. Supplemental Guidelines for Registration and Notification 1631, 1637 (Jan. 2011) (Supplemental Guidelines), http://www.smart.gov/guidelines.htm.

Periodic in-person verification. States must also require in-person verification of registry information at periodic intervals based on the offender's tier level. 42 USC 20918; Guidelines 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.* at 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 20915; Guidelines 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 7–8, 45–47; see also Supplemental Guidelines 1639.

Michigan amends its registry law to comply with federal standards.

To comply with SORNA's minimum standards, Michigan again amended its registry law in 2011. These amendments: (1) classify offenders into three tiers according to their underlying offenses, MCL 28.722(r)–(w); (2) require periodic in-

person reporting (in Snyder's case, two times per year, MCL 28.725a(3)(b)), as well as in-person reporting within three business days of certain changes, including changes in residence, employment, educational enrollment, vehicle use or ownership, name, and e-mail address or other designations used in Internet postings, MCL 28.725(1), 28.722(g), & 28.725a(3)(c); (3) require publication on the Internet of the offender's name and aliases, date of birth, residential, business, and school addresses, license plate and vehicle description, listed offenses of conviction, physical description, photograph, registration status, and tier classification, MCL 28.728(2); and (4) require tier-II offenders like Snyder to register for 25 years, MCL 28.725(10)–(12) & 725a(3).

An offender who fails to comply with SORA's requirements is subject to criminal penalties. MCL 28.729.

Snyder fails to report his employment.

In 2014, Snyder failed to report two changes in his employment. See App 203a. On March 27 of that year, he applied to work for Chippewa Cab in Alma, Michigan, as a cab driver. App 89a. He was subsequently hired on March 31, 2014, and he began driving on April 1, 2014. App 94a–95a, 98a–99a. Snyder drove for Chippewa Cab on April 1, 2, and 3, until law enforcement received an anonymous tip that he was working there and informed Chippewa that Snyder was a registered sex offender. App 104a–105a. On April 3, 2014, Chippewa Cab terminated Snyder's employment. App 105a.

As of April 17, 2014—17 days after he was hired—Snyder still had not reported his employment at Chippewa Cab to law enforcement, nor had he reported the termination of that employment. App 125a, 128a, 131a. A warrant was issued for his arrest, App 130a, and he was convicted in November 2014 of failure to register—specifically, for failing to report in person within three business days that he had "change[d] his . . . place of employment." MCL 28.725(1)(b); see also MCL 28.729 (penalties for failure to register); MCL 28.722(g) (3-day requirement); App 164a. Given his other criminal history, Snyder was sentenced as a fourth habitual offender to 2 to 15 years in prison. App 217a.

This Court holds Snyder's application in abeyance pending its decision in *People v Temelkoski*.

Snyder appealed his conviction, arguing, among other things, that requiring him to comply with SORA violated ex post facto and due process principles. App 10a. The Court of Appeals rejected his argument, citing *People v Temelkoski*, 307 Mich App 241 (2014), rev'd 501 Mich 960 (2018), and explained that the Court of Appeals had "squarely rejected the notion that the requirements of SORA amount to punishment." App 12a.

Snyder then sought leave to appeal in this Court, which held his appeal in abeyance pending this Court's resolution of *People v Temelkoski*. In January 2018, this Court reversed the Court of Appeals' decision in *Temelkoski*, but it did so on the narrow ground that applying SORA to Mr. Temelkoski— whom it found had been induced to plead guilty by benefits provided under the Holmes Youthful Trainee Act (HTYA), MCL 762.11 *et seq.*—violated due process. *People v Temelkoski*, 501 Mich

960 (2018). This Court did not decide whether SORA's requirements constitute punishment, for purposes of the Ex Post Facto Clause or otherwise.

This Court has now ordered supplemental briefing on the questions whether SORA's requirements amount to punishment and whether convicting Snyder for failure to register violates the Ex Post Facto Clause.

STANDARD OF REVIEW

This Court reviews constitutional questions and questions of statutory construction de novo. *Fluor Enterprises, Inc v Revenue Div, Dep't of Treasury*, 477 Mich 170, 174 (2007).

SUMMARY OF ARGUMENT

Snyder's conviction for failing to report his employment does not violate ex post facto or due process principles.

First, the requirement that Snyder violated—the duty to report his employment within three business days—is not alone so punitive in purpose or effect that it constitutes punishment. He has not been punished for declining to comply with an unconstitutional requirement. And SORA's requirements, even viewed cumulatively, do not constitute punishment. Thus, they may be applied retroactively without offending ex post facto principles.

Second, the plea here did not violate due process as SORA registration was only a collateral consequence of his plea. Thus, the plea was knowing and voluntary because Snyder was aware of the direct consequences.

Finally, should this Court conclude that portions of the current version of SORA are punitive, it must sever those portions and leave the remainder intact. Alternatively, should the Court conclude that the punitive aspects cannot be severed—e.g., the 2011 amendment—it must strike only that amendment, thereby reviving the prior version of the law for retroactive application.

ARGUMENT

I. Convicting Snyder for failing to report his employment does not violate ex post facto principles, nor do the SORA requirements do so generally.

This Court has asked whether Snyder's conviction for failure to register under SORA is an ex post facto punishment. It was not. This is true when examining Snyder's failure to register, which was the basis of his conviction, or when examining the SORA requirements as a whole.

A. The SORA requirement to register employment does not constitute punishment.

Given the posture of Snyder's case, he cannot be seen as having been punished for failing to comply with an unconstitutional requirement. Snyder was convicted for starting a new job and failing to report it to law enforcement within three business days, as he was required to do under SORA. App 164a. He is not a civil plaintiff who challenged SORA's requirements wholesale, seeking a declaration that the requirements are cumulatively punitive and that he need not comply.

The underlying SORA requirement that Snyder violated—i.e., the requirement to report changes in employment in person within three business days—is not itself punitive. Snyder appears to acknowledge as much. See Snyder

Supp Br, p 13 ("The immediate in person reporting requirements alone may not violate the Ex Post Facto Clause."). Snyder does not argue that the Legislature's intent in enacting SORA was punitive. See Snyder Supp Br, p 13 n 57. And rightly so. See Section I.B. Moreover, having to report changes in employment within three business days is not alone so punitive in effect that it constitutes punishment under Step Two of the *Kennedy v Mendoza-Martinez* test. See Section I.B; *People v Patton*, __ Mich App __, 2018 WL 3672214, at *8 (2018) (No. 341105) (requirement to report telephone numbers and email addresses not an ex post facto violation).

For this reason alone, this Court should hold that Snyder's conviction poses no ex post facto problem.

B. SORA's requirements do not cumulatively constitute punishment.

Even taking all of SORA's requirements into account, complying with SORA does not constitute punishment. For that reason, requiring Snyder to comply with SORA does not violate either the federal or Michigan Ex Post Facto Clauses, which this Court has treated as co-extensive. *People v Earl*, 495 Mich 33, 37 n 1 (2014).

The vast majority of courts addressing various iterations of federal and state SORA laws—including laws that resemble Michigan's—have held that those laws are not punitive. Indeed, not only has the U.S. Supreme Court held that a state sex-offender-registry law was not punitive, *Smith v Doe*, 538 US 84, 92, 96–97 (2003), all 11 regional federal circuit courts[2] and at least 14 state supreme courts

[2] *United States v Parks*, 698 F3d 1, 5–6 (CA 1, 2012) (federal SORNA); *Doe v Cuomo*, 755 F3d 105, 112 (CA 2, 2014) (New York); *Doe v Pataki*, 120 F3d 1263,

have reached the same conclusion about SORA laws.[3] And the Michigan Court of Appeals has upheld Michigan's SORA law on five separate occasions. *People v Temelkoski*, 307 Mich App 241, 260–270 (2014); *People v Tucker*, 312 Mich App 645, 681 (2015); *People v Golba*, 273 Mich App 603, 620 (2007); *People v Pennington*, 240 Mich App 188, 196 (2000); *In re Ayres*, 239 Mich App 8, 19 (1999).

In contrast, a minority of state supreme courts have held—many based on state constitutions—that state SORAs are punitive and have limited their application.[4]

1267, 1285 (2 CA, 1997) (New York); *EB v Verniero*, 119 F3d 1077, 1105 (3d Cir. 1997) (New Jersey); *United States v Under Seal*, 709 F3d 257, 265 (CA 4, 2013) (federal SORNA); *United States v Young*, 585 F3d 199, 201, 204–05 (CA 5, 2009) (federal SORNA); *Doe v Bredesen*, 507 F3d 998 (CA 6, 2007) (Tennessee); *United States v Leach*, 639 F3d 769, 773 (CA 7, 2011) (federal SORNA); *Weems v Little Rock Police Dep't*, 453 F3d 1010 (CA 8, 2006) (Arkansas); *Doe v Miller*, 405 F3d 700, 719 (CA 8, 2005) (Iowa); *ACLU of Nevada v Masto*, 670 F3d 1046, 1050, 1056–1057 (CA 9, 2012) (Nevada); *Hatton v Bonner*, 356 F3d 955, 964 (CA 9, 2003) (California); *Shaw v Patton*, 823 F3d 556, 571–572 (CA 10, 2016) (Oklahoma); *United States v Hinckley*, 550 F3d 926, 929, 937 (CA 10, 2008) (federal SORNA), abrogated on other grounds by *Reynolds v United States*, 132 S Ct 975 (2012); *United States v WBH*, 664 F3d 848, 852, 855, 857–858 (CA 11, 2011) (federal SORNA).

[3] E.g., *State v Boche*, 885 NW2d 523 (Neb, 2016); *People v Mosley*, 344 P3d 788, 799 (Cal, 2015); *State v Trotter*, 330 P3d 1267, 1276 (Utah, 2014); *Kammerer v State*, 322 P3d 827, 834–836 (Wyo, 2014); *People v Gravino*, 928 NE2d 1048, 1054–1055 (NY 2010); *Ward v State*, 315 SW3d 461 (Tenn, 2010); *Anderson v State*, 182 SW3d 914, 918 (Tex Crim App 2006); *State v Seering*, 701 NW2d 655, 668 (Iowa, 2005); *RW v Sanders*, 168 SW3d 65, 70 (Mo, 2005); *Foo v State*, 102 P3d 346, 357 (Hawai'i 2004); *State v Moore*, 86 P3d 635, 641–643 (NM, 2004); *State v Partlow*, 840 So2d 1040, 1043 (Fla, 2003); *Kaiser v State*, 641 NW2d 900, 905–907 (Minn, 2002), superseded by statute as stated in *State v Jones*, 729 NW2d 1 (Minn, 2007); *Nollette v State*, 46 P3d 87, 90 (Nev, 2002); *State v Bollig*, 605 NW2d 199, 206 (Wis, 2000).

[4] E.g., *Commonwealth v Muniz*, 164 A3d 1189, 1213 (Pa, 2017); *In re Taylor*, 343 P3d 867, 869 (Cal, 2015); *Doe v State*, 111 A3d 1077, 1100 (NH, 2015); *Doe v Dep't of Pub Safety & Corr Servs*, 62 A3d 123, 124 (Md, 2013); *Starkey v Oklahoma Dep't of Corr*, 305 P3d 1004, 1030 (Okla, 2013); *State v Williams*, 952 NE2d 1108, 1112–1113 (Ohio, 2011); *Wallace v State*, 905 NE2d 371, 384 (Ind, 2009); *State v Letalien*,

While Snyder correctly notes that the Sixth Circuit recently held Michigan's SORA requirements punitive, *Does #1–5 v Snyder*, 834 F3d 696 (CA 6, 2016), that decision is an outlier and was wrongly decided. It also is not binding on this Court. It is a well-established principle that the state courts are not bound to follow the decisions of the lower federal courts in reviewing the constitutionality of state laws. See *Abela v General Motors Corp*, 469 Mich 603, 607 (2004).[5]

As the following analysis will show, Michigan's SORA requirements are not punitive in either purpose or effect, and applying them retroactively to Snyder was constitutional.

1. The Ex Post Facto Clause permits retroactive application of non-punitive civil regulatory laws.

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. *Earl*, 495 Mich at 37 & n 1. Determining whether a law constitutes punishment is a two-step inquiry. *Id.* at 38.

The Court "must begin by determining whether the Legislature intended the statute as a criminal punishment or a civil remedy." *Id.* If the Legislature intended to impose criminal punishment, "retroactive application of the law violates the Ex

985 A2d 4, 26 (Me, 2009); *Commonwealth v Baker*, 295 SW3d 437, 447 (Ky, 2009); *Doe v State*, 189 P3d 999, 1017 (Alaska, 2008).

[5] Nonetheless, this decision is controlling for determinations of what are clearly established constitutional principles under 42 USC 1983. For this reason, in *People v Temelkoski* (No. 150643, R. 146) the State submitted a letter to this Court in that case indicating that it waived the argument that it may retroactively apply SORA's 2006 and 2011 amendments.

Post Facto Clause and the analysis is over." *Id.* If, on the other hand, the Legislature intended to enact a civil remedy, the 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.*

2. The Legislature intended SORA to be a civil remedy, not a punishment.

Snyder expressly does not argue that the Legislature's intent in enacting SORA was punitive. See Snyder Supp Br, p 13 n 57. And correctly so. As the legislative declarations accompanying SORA demonstrate, the Legislature intended the registry and requirements to be a non-punitive civil remedy:

> 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. [MCL 28.721a.]

Indeed, even the few courts that have held SORA laws to be punitive generally have not done so on this ground.

Accordingly, the People will focus on the second step of the analysis: whether SORA is punitive in purpose or effect.

3. SORA is a civil regulatory program that rationally advances public safety; it is not punitive in purpose or effect.

Michigan's SORA is a civil regulatory program that protects public safety from future harm by monitoring and alerting the public to the presence of offenders that, as a group, have been shown to pose a potential danger. See MCL 28.721a. And that is the same purpose that the U.S. Supreme Court recognized in upholding a SORA registration statute as non-punitive, *Smith v Doe*, 538 US 84, 93 (2003), and in upholding as non-punitive civil commitment for sexually violent predators, *Kansas v Hendricks*, 521 US 346, 361 (1997). Michigan's SORA law is not punitive in either purpose or effect.

In analyzing whether a regulatory scheme has the effect of being punitive, this Court considers whether the 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. *Earl*, 495 Mich at 43–44; *Smith*, 538 US at 97 (citing factors in *Kennedy v Mendoza-Martinez*, 372 US 144, 168–169 (1963)). These factors are "neither exhaustive nor dispositive," but are "useful guideposts." *Smith*, 538 US at 97; *Earl*, 495 Mich at 43–44.

Snyder bears a heavy burden of proving that SORA is punitive. Because the Court ordinarily defers 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." *Id.* at 44 (emphasis added). The party objecting to the statutory scheme bears the burden of showing this "clearest proof."

Id. Moreover, the general rules of constitutional construction apply, as well as the fact that "[s]tatutes are presumed constitutional." *Phillips v Mirac, Inc*, 470 Mich 415, 422 (2004). This Court will exercise the power to declare a law unconstitutional only "with extreme caution" and "never" exercises it "where serious doubt exists with regard to the conflict." *Id.* "Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt . . . that a court will refuse to sustain its validity." *Id.* (quotations omitted).

Applying the *Mendoza-Martinez* factors to Michigan's SORA shows that the law is not punishment.

a. SORA has not historically been regarded as punishment.

As a relatively new regulatory scheme, SORA laws are " 'of fairly recent origin,' " which suggests they have not historically been regarded as punishment. *Smith*, 538 US at 98. Registration in general has not traditionally been viewed as punitive. See*, e.g.*, *RW v Sanders*, 168 SW3d 65, 69 (Mo, 2005), citing *Lambert v California*, 355 US 225, 229 (1957); *State v Ward*, 869 P2d 1062, 1072 (Wash, 1994) (same). Instead, "[r]egistration is a traditional governmental method of making available relevant and necessary information to law enforcement agencies." *Ward*, 869 P2d at 1072.

Nor, as several courts have held, are requirements like those found in Michigan's SORA analogous to more traditional methods of punishment.

Not shaming

While offenders listed on sex-offender registries may feel shame, SORA laws do not resemble the traditional punishment of shaming. "Like Hester Prynne with her scarlet 'A,' " the colonial chastisement of shaming "required criminals to stand in public or bear brands displaying their crimes for 'face-to-face' public shaming[.]" *United States v WBH*, 664 F3d 848, 855 (CA 11, 2011), citing *Smith*, 538 US at 98. The U.S. Supreme Court has correctly distinguished sex-offender registration from traditional shaming.

As the Court explained in *Smith*, "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Smith*, 538 US at 98–99. The Court acknowledged that publicity from SORA "may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism." *Id.* But it held that, "[i]n contrast to the colonial shaming punishments," Alaska's SORA did not "make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme." *Id.* The same is true here.

Publication on the Internet does not alter the analysis, even though "the humiliation" to the offender "increas[es] in proportion to the extent of the publicity." *Id.* at 99. Indeed, " 'there is overwhelming federal authority holding that Internet posting of registrant information is not analogous to historical forms of punishment.' " *State v Petersen-Beard*, 377 P3d 1127, 1133 & 1134 (Kan, 2016) (citing cases). The *Smith* Court focused on the key factor that "the purpose and the

principal effect of notification are to inform the public for its own safety, not to humiliate the offender." 538 US at 99.

SORA is also unlike shaming because it does not affirmatively publicize, like a public service announcement, who is on the registry and does not seek the public's ridicule; rather, it merely makes offender information available for the public to search, sign up for notifications, or share a registrant's profile with individual contacts. *Smith*, 538 US at 99; *State v Trotter*, 330 P3d 1267, 1276 (Utah, 2014). Further, Michigan's registry allows the public to search by area and by non-compliant status, not just by name, which is consistent with its purpose of promoting public safety, as opposed to shaming particular individuals. It does not allow users to post comments for public view on a registrant's profile. Contra *Doe v Dep't of Pub Safety & Corr Servs*, 62 A3d 123, 145 (Md, 2013). In fact, recognition of the civil purpose of protecting public safety has led a number of courts to uphold even sex-offender registries that (unlike Michigan's law) affirmatively publicize the identity of offenders. The federal SORNA, for example, requires officials to distribute notice of an offender's status to "each school and public housing agency" in the area where the offender resides, yet "federal circuits addressing whether SORNA's publication requirements are punitive have followed *Smith* and held they are not . . . ." *Petersen-Beard*, 377 P3d at 1134, citing 42 USC 16921(b)(2), now 42 USC 20923(b)(2); see also *ACLU v Masto*, 670 F3d 1046, 1051, 1055–56 (CA 9, 2012) (requiring active notification to youth and religious organizations); *Moore v*

Avoyelles Corr Ctr, 253 F3d 870, 872 (CA 5, 2001) (Louisiana SORA) (requiring sex offenders on probation to notify neighbors of residence and sex-offender status).

Indeed, if publication alone rendered SORA punitive, then having a public trial in any criminal case would be punitive, rather than part of our commitment to transparency in the criminal process. See *Smith*, 538 US at 99 ("[O]ur criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused."). That is why a number of courts have held that it is not punitive to publish truthful information about juvenile sex offenders. E.g., *WBH*, 664 F3d at 855; *United States v Under Seal*, 709 F3d 257, 265 (CA 4, 2013); *People ex rel Birkett v Konetski*, 909 NE2d 783, 799 (Ill, 2009). Cf. *United States v Juvenile Male*, 670 F3d 999, 1011 (CA 9, 2012) (rejecting argument that SORNA violates due process by discarding juveniles' "right to lifetime confidentiality"); *Does v Munoz*, 507 F3d 961, 965–966 (CA 6, 2007) (holding that juvenile sex offenders' interest in private records was not a fundamental right); *Doe v Mich Dep't of State Police*, 490 F3d 491, 501 (CA 6, 2007) (same). But see, e.g., *Commonwealth v Muniz*, 164 A3d 1189, 1213 (Pa, 2017) (holding SORNA's publication provisions comparable to shaming).

Notably, *Smith* did not hold that publishing previously non-public information is punitive. To the contrary, the Court noted that "*most*"—though, by implication, not all—of the information made public by Alaska's SORA law was already public, *Smith*, 538 US at 98–99, and its analysis did not hinge on whether

the information was otherwise public, see *id*. Publishing truthful information about Snyder to further a legitimate governmental objective is not punishment. *Id*.

The registry's publication of "tier" levels based on the offense, with no individualized determination of dangerousness, similarly is not punitive. Tier levels are tied to the seriousness of the offense committed, again confirming that SORA is keyed to public safety. The Supreme Court has squarely held 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," noting that it has on multiple occasions upheld laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment. *Smith*, 538 US at 103–104. Indeed, the Court upheld Alaska's classification based on offense severity, explaining that the classifications were "reasonably related to the danger of recidivism" and that the lack of individualized determinations did not render SORA punitive. *Id*. at 102. Several courts to address this issue have reached the same conclusion. E.g., *Shaw v Patton*, 823 F3d 556, 571 (CA 10, 2016) (Oklahoma law); *Masto*, 670 F3d at 1056–1057 (Nevada law); *WBH*, 664 F3d at 852, 855, 857–858 (federal SORNA); *Doe v Miller*, 405 F3d 700, 704, 719–722 (CA 8, 2005) (Iowa law); *Moore v Avoyelles Corr Ctr*, 253 F3d 870, 872–873 (CA 5, 2001) (Louisiana law). The Supreme Court has also squarely held that due process does not require individualized determinations of dangerousness before an offender is included in a sex-offender registry. *Connecticut Dep't of Public Safety v Doe*, 538 US 1, 6 (2003). But see *Does #1–5*, 834 F3d at 702–703, 705 (likening tier

classification system to shaming); *State v Letalien*, 985 A2d 4, 26 (Me, 2009) ("uncertain" whether lack of individualized determination renders SORA excessive).

Not banishment or exile

SORA similarly does not resemble the traditional punishment of banishment or exile, which represents "the complete expulsion of an offender from a socio-political community" and prohibits one "from even being present in the jurisdiction." *Shaw*, 823 F3d at 566. "Exile" is defined as "[e]xpulsion from a country, esp[ecially] from the country of one's origin or longtime residence." *Black's Law Dictionary* (8th ed, 2004). "Banishment" is defined as "[t]he action of authoritatively expelling from the country; a state of exile; expatriation," or "[t]he action of peremptorily sending away; a state of enforced absence; dismissal." *1 Oxford English Dictionary* (2d ed, 1989); see also *Black's Law Dictionary* (8th ed, 2004) (defining banishment as exile).

In particular, Michigan's student safety zones—which prohibit offenders from residing, working, or loitering within 1,000 feet of school property—do not resemble exile or banishment. Indeed, 20 other States prohibit sex offenders from residing near schools.[6] The zones are "confined to specified geographic areas relevant to the

[6] See Ala Code 15-20A-11 (2000 ft.); Ark Code Ann 5-14-128 (2,000 ft. for two tiers of offenders); Cal Penal Code 3003.5(b) (2,000 ft.); Fla Stat Ann 775.215(2)(a) (1,000 ft.); Ga Code Ann 42-1-15(b) (1,000 ft.); Idaho Code Ann 18-8329 (500 ft.); 730 Ill Comp Stat Ann 150/8 (500 ft. for certain offenders); Iowa Code Ann 692A.114 (2,000 ft.); Ky Rev Stat Ann 17.545(1) (1,000 ft.); La Stat Ann 14:91.2(A)(2) (1,000 ft.); Miss Code Ann 45-33-25(4)(a) (3,000 ft.); Mo Ann Stat 566.147 (1,000 ft.); NC Gen Stat Ann 14-208.16 (1,000 ft.); Ohio Rev Code Ann 2950.034(A) (1,000 ft.); 57 Okla Stat Ann 590 (2,000 ft.); SC Code Ann 23-3-535(B) (1,000 ft.); SD Codified Laws 22-24B-23 (500 ft.); Tenn Code Ann 40-39-211(a)(1) (1,000 ft.); Va Code Ann 18.2-370.3(A) (500 ft. for certain offenders); Wyo Stat Ann 6-2-320(a)(iv) (1,000 ft.).

regulatory purpose they serve," *People v Mosley*, 344 P3d 788, 802 (Cal, 2015), which is to create a buffer between large groups of children and a group of offenders with high rates of recidivism. An offender subject to the zones is not "excluded from the state or any part thereof." *Id.* While an offender "may have a sense of being banished to another area of the city," "true banishment goes beyond the mere restriction of one's freedom to go or remain where others have the right to be: it often works a destruction on one's social, cultural, and political existence." *State v Seering*, 701 NW2d 655, 667–668 (Iowa, 2005). That is why numerous courts have upheld as non-punitive student safety zones similar to Michigan's—or even twice as large. E.g., *Shaw*, 823 F3d at 571 (Oklahoma residency restriction of 2,000 feet from school, playground, park, or child care center); *Miller*, 405 F3d at 719 (Iowa 2,000-ft residency restriction); *Seering*, 701 NW2d at 667–668 (Iowa 2000-ft residency restriction from school or daycare center); see also *Mosley*, 344 P3d at 790, 802 (holding non-punitive, in Sixth Amendment case, prohibition on residing within 2,000 feet of school or "where children regularly gather"). But see *In re Taylor*, 343 P3d 867, 869 (Cal, 2015) (holding punitive, in as-applied challenge, blanket enforcement of residency restrictions against sex offender parolees in San Diego given scarcity of housing in that county); *Baker*, 295 SW3d 437, 440, 444–445 (Ky, 2009) (holding SORA law punitive based in part on school safety zones).

Not probation or parole

SORA also is not akin to probation or parole. Indeed, the Supreme Court rejected this analogy in *Smith*. 538 US at 101. "Probationers are subject to

searches of their persons and property simply on reasonable suspicion" of a violation and are subject to random drug tests. *Petersen-Beard*, 377 P3d at 1137. They may also be required to "avoid injurious or vicious habits and persons or places of disreputable or harmful character"; permit state agents to visit their homes; remain in the State unless given permission to leave; "work faithfully at suitable employment"; accept the first offer of "honorable employment"; obtain written consent before changing jobs; perform community service; and go on house arrest. *Id.*; accord *Shaw*, 823 F3d at 565. But see *Muniz*, 164 A3d at 1213 (Pa) (likening federal SORNA to probation).

The same is not true of SORA offenders, who must report information for a database but are not under supervision. See MCL 28.725(1), 28.722(g), & 28.725a(3)(c). No specific officer was assigned to supervise Snyder, nor did SORA subject him to the stringent requirements listed above. See *Shaw*, 823 F3d at 565.

b. SORA imposes only minor affirmative disabilities or restraints.

Nor does SORA impose a substantial disability or restraint akin to punishment. The relevant inquiry when determining whether a law imposes an affirmative disability or restraint is "how the effects of the act are felt by those subject to it." *Earl*, 495 Mich at 44 (quoting *Smith*, 538 US at 99–100). "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* That is the case here.

SORA imposes only minor restraints that further its regulatory purpose, and it leaves offenders with substantial freedom. As the outset, SORA compliance does

not resemble the "infamous punishment" of imprisonment—"the paradigmatic affirmative disability or restraint." *Earl*, 495 Mich at 44–45 (citing *Smith*, 538 US at 100).

While Snyder challenges SORA's in-person reporting requirements, these are regulatory requirements that further a non-punitive purpose, including reporting requirements that are frequent. While reporting in person is "doubtless more inconvenient than doing so by telephone, mail or web entry," it "serves the remedial purpose of establishing that the individual is in the vicinity," "confirms identity by fingerprints," and "records the individual's current appearance." *United States v Parks*, 698 F3d 1, 6 (CA 1, 2012). The federal SORNA imposes similar requirements, which means that this issue affects the state's ability to comply with SORNA and to receive law-enforcement funding. 42 USC 20913(c) (requiring in-person re-porting within "3 business days after each change of name, residence, employment, or student status") & 20918 (requiring in-person reporting every 6 months for tier II offenders like Snyder). Further, the inconvenience of in-person reporting is minor "compared to the disadvantages of [registration in general] in its consequences for renting housing, obtaining work and the like—consequences that were part of the package that *Smith* itself upheld." *Id.*

And while the *Smith* Court noted that Alaska's statute did not require in-person reporting, the Court's decision did not depend on that fact, as evidenced by the multitude of courts that have upheld in-person reporting in *Smith*'s wake. *Litmon v Harris*, 768 F3d 1237, 1243 (CA 9, 2014) ("[T]here is no reason to believe

that the addition of such a requirement would have changed the outcome."); see also *Shaw*, 823 F3d at 571–572 (CA 8) (Oklahoma SORA) (upholding weekly in-person reporting); *Doe v Cuomo*, 755 F3d 105, 112 (CA 2, 2014) (New York SORA) (triennial in-person reporting for level-one offenders); *Parks*, 698 F3d at 5–6 (CA 1) (federal SORNA) (quarterly in-person reporting); *Masto*, 670 F3d at 1050, 1056–1057 (CA 9) (Nevada SORA) (quarterly in-person reporting); *WBH*, 664 F3d at 852, 855, 857–58 (CA 11) (federal SORNA) (quarterly in-person reporting and within 3 days of changing name, residence, employment, or student status); *Hatton v Bonner*, 356 F3d 955, 964 (CA 9, 2003) (California SORA) (in-person reporting for all offenders); *Doe v Pataki*, 120 F3d 1263, 1267, 1285 (CA 2, 1997) (New York SORA) (quarterly in-person reporting for offenders deemed sexually violent predators); see also *United States v Leach*, 639 F3d 769, 773 (CA 7, 2011) (federal SORNA) (upholding requirements, which included reporting within 3 days of change in residence or employment, as "regulatory" under *Smith*, though not focusing specifically on this aspect of SORNA); *Kammerer v State*, 322 P3d 827, 834–836 (Wyo, 2014) (quarterly in-person reporting and within 3 days of change in residence, vehicle, or employment status); cf. *Under Seal*, 709 F3d at 265 (federal SORNA) (upholding, against Eighth Amendment challenge, in-person reporting as non-punitive); *Nollette v State*, 46 P3d 87, 90 (Nev, 2002) (upholding as non-punitive, in considering voluntariness of guilty plea, in-person reporting requirement in any community in which the offender is present for more than 48 hours). But see *Does #1–5*, 834 F3d at 705 (highlighting Michigan's "time-consuming and cumbersome in-

person reporting" requirements); *Muniz*, 164 A3d at 1213 (Pa) (finding in-person reporting requirement an "important" distinction from *Smith*); *Letalien*, 985 A2d at 12, 18, 24–25 (holding Maine's SORA punitive based in part on extent and frequency of reporting requirements, i.e., quarterly in-person reporting and within 5 days of receipt of verification request).

SORA's student safety zones—which exist in some form in 20 other States[7]—are also civil and regulatory in nature, rather than a punitive restraint. They are intended to protect public safety by placing a physical buffer zone between offenders and the state's children, to decrease temptation and opportunities to reoffend. These restrictions, while they do impose some disability, are limited. *Mosley*, 344 P3d at 802; see also *Seering*, 701 NW2d at 668. For this reason, several courts have rejected arguments that similar student safety zones impose a punitive disability or restraint. E.g., *Shaw*, 823 F3d at 570–571 (CA 10) (Oklahoma residency restriction of 2,000 feet from school, playground, park, or child care center); *Weems v Little Rock Police Dep't*, 453 F3d 1010, 1013–1014, 1017 (CA 8, 2006) (Arkansas residency restriction of 2,000 feet from school or daycare facilities for "high-risk" offenders); *Miller*, 405 F3d at 719–723 (CA 8) (Iowa residency restriction of 2,000 feet from school or child care facility); *Seering*, 701 NW2d at 667–668 (Iowa residency restriction of 2,000 feet from school or day-care center); cf. *Mosley*, 344 P3d at 790, 799, 802 (holding non-punitive, in Sixth Amendment facial challenge, California residence restriction of 2,000 feet of school or "park where children regularly

[7] See supra note 6.

gather"). But see *Does #1–5*, 834 F3d at 697, 701–03, 705 (CA 6) (likening student safety zones to banishment); *Baker*, 295 SW3d at 440, 444–445 (Ky) (holding SORA punitive in part based on school safety zones); *In re Taylor*, 343 P3d 867, 869 (Cal, 2015) (holding punitive, in as-applied challenge, blanket enforcement of residency restrictions against sex offender parolees in San Diego given scarcity of housing in that county). The student safety zones are not punitive.

Further, while Snyder objects to SORA's definition of "loitering" in defining what behavior is prohibited in school zones, see Snyder Supp Br, p 9–10, 16, he has not brought a vagueness challenge. Any concern regarding the scope of prohibited loitering does not require striking the entire statute, or even the school safety zones, as the loitering prohibition could be severed and struck separately. See, e.g., *People v Lockridge*, 498 Mich 358, 391 (2015) (severing only those portions of sentencing guidelines that made guidelines mandatory).

Notably, in upholding Alaska's SORA law, the Supreme Court found compelling that SORA's obligations are "less harsh than the sanctions of occupational debarment," which the Court has previously held non-punitive. *Smith*, 538 US at 99 (citing *Hudson v United States*, 522 US 93, 118 (1997) (indefinitely barring participation in the banking industry); *De Veau v Braisted*, 363 US 144 (1960) (forbidding work as union official); and *Hawker v New York*, 170 US 189 (1898) (revocation of medical license)). That contrast remains compelling.

c. SORA only incidentally promotes the traditional aims of punishment.

The next factor asks whether the law promotes the traditional goals of punishment—namely, deterrence and retribution. *Smith*, 538 US at 102. Because SORA's deterrence and retributive effects are minimal and incidental to the goal of protecting the public from potentially dangerous offenders, see *Earl*, 495 Mich at 45–47, this factor does not lean toward a determination that SORA is punishment.

Courts have accorded this factor less emphasis in the intent-effects analysis, given *Smith*'s admonition that "[a]ny number of governmental programs might deter crime without imposing punishment." *Id*. Think, for example, of metal detectors used to guard court entrances. As this Court and others have held, the presence of *some* punitive or deterrent effects does not render a regulatory regime punishment. *Earl*, 495 Mich at 45; accord *Shaw*, 823 F3d at 571 (listing cases); *Seering*, 701 NW2d at 668; *Nollette*, 46 P3d at 90; *State v Burr*, 598 NW2d 147, 154 (ND, 1999); *Ward*, 869 P2d at 1073. After all, "to hold that any governmental regulation that has indirect punitive effects constitutes a punishment would undermine the government's ability to engage in effective regulation." *Earl*, 495 Mich at 45 (citing *Smith*, 538 US at 102).

d. SORA rationally advances a non-punitive purpose.

A statute's rational connection to a non-punitive purpose is the "most significant factor" in the determining whether the statute's effects are punitive. *Smith*, 538 US at 102. And here, as in *Smith*, Michigan's SORA rationally furthers

the "legitimate and non-punitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *Id.*

The Legislature enacted SORA pursuant to its police power "to better assist law enforcement [ ] 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. The Legislature 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.* SORA's registration requirements "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.*

Smith recognized that these non-punitive purposes are important. *Smith*, 528 US at 102–103; see also *Earl*, 495 Mich at 42 (power to protect health and safety of citizens is a civil remedy, and not punitive). The Court cited "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class," describing it as "frightening and high," citing statistics from the United States Department of Justice. *Smith*, 538 US at 103.

Further, SORA's requirements rationally advance those purposes. Registration assists authorities in keeping track of offenders, alerts the public to their presence, and helps parents make informed decisions regarding child care and victimization prevention. *Smith*, 538 US at 103; *Trotter*, 330 P3d at 1276; *Kaiser v*

State, 641 NW2d 900, 906 (Minn, 2002), superseded by statute as stated in *State v Jones*, 729 NW2d 1 (Minn, 2007). In-person reporting establishes that the offender is where he says he is, confirms identity by fingerprints, and records current appearance. *Parks*, 698 F3d at 6. Student safety zones create a buffer between children and a group of offenders with high rates of recidivism and are designed to reduce offenders' temptations and opportunities to re-offend. *Shaw*, 823 F3d at 574.

While Snyder debates the effectiveness of these measures and the rate of recidivism among various sub-groups of sexual offenders, citing studies, he presented no studies or experts in the lower courts and the record contains no factual findings on the risk of sex-offender recidivism. See App 24a–28a (motion); App 49a (trial transcript); App 213a (sentencing transcript); App 10a (Court of Appeals opinion). Accord *Masto*, 670 F3d at 1057 (similarly noting lack of trial court findings in rejecting attempt to distinguish *Smith* on basis of recidivism studies).

Moreover, even the studies on which Snyder relies confirm that it is rational to consider past sex offenders as potential future re-offenders. For example, one of those studies reports that "the observed sexual recidivism rate for all cases was 11.9% (n = 7,740), 2.9% for the low risk cases (n = 890), 8.5% for the moderate cases (n = 4,858), and 24.2% for the high risk cases (n = 1,992)." App 315a, Hanson et al., *High Risk Sex Offenders May Not Be High Risk Forever*, 29 J of Interpersonal Violence 15 (2014). A rational legislature might think that an 11.9% chance of a new offense in a span of just five years is a public safety risk worth addressing.

The U.S. Department of Justice's Office of Justice Programs has also cited, in an March 2017 report, a large study of sex-offender recidivism showing that, while sex offenders had a lower *overall* rearrest rate (that is, rearrest rate for sexual *or* other crimes) than non-sex offenders within three years of release, their *sex crime* rearrest rate was *four times higher* than the rate of non-sex offenders. *Sex Offender Management and Assessment Initiative* (Oct 2014), p 111 (citing Langan, Schmitt, and Durose (2003)), available at http://www.smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf. And the same report cited a large 2004 study by Harris and Hanson finding an even higher recidivism rate than the 11.9% just discussed: it found that the 5-year sexual recidivism rate for all sex offenders was 14%, and that the 10-year and 15-year sexual recidivism rates for sex offenders were 20% and 24%, respectively. *Id*. p 112. "Using the same data set, Hanson, Morton, and Harris (2003) reported that the 20-year sexual recidivism rate for the sample was 27 percent." *Id*. Again, a rational legislator could think that a more than one-in-four chance that the offender will commit another crime—odds higher than Russian roulette—is a public-safety issue.

Multiple studies also define recidivism in terms of new sexual offenses detected by authorities, which excludes consideration of undetected sexual offenses that nevertheless pose a public danger. See, e.g., Hanson, *High Risk*, at 6 (defining "offence-free" as "no new sexual offences were detected during th[e] time period"); Ira & Tara Elmann, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Const'l Commentary 495, 501 (2015) (App 262a)

(citing study defining recidivism to include only sex offenses that return an offender to prison). Indeed, the Hanson study cites this as a limitation of the study. Hanson, supra, p 12 (it is "well known" that "officially recorded charges or convictions" have "low sensitivity" in that "many offences are undetected"). As the Office of Justice Programs explained in its March 2017 report, supra p 107, "recidivism remains a difficult concept to measure, especially in the context of sex offenders. The surreptitious nature of sex crimes, the fact that few sexual offenses are reported to authorities, and variation in the ways researchers calculate recidivism rates all contribute to the problem."

It is also possible that SORA registration is having its desired effect and is decreasing offenders' opportunities to re-offend. The Hanson study, indeed, cites this as another of the study's limitations. Hanson, supra, p 11 ("it is possible that certain forms of conditional release are sufficiently confining as to meaningfully limit opportunities" for re-offense). Concluding that SORA does not rationally advance its purpose, then, would be like "throwing away your umbrella in a rainstorm because you are not getting wet." *Shelby Cty, Ala v Holder*, 570 US 529, 590 (2013) (Ginsburg, J., dissenting).

The lack of agreement over how to interpret evolving data illustrates an important point: Setting public-safety policy is a task entrusted to the Legislature, not to the courts, and the Legislature has the institutional competence to study relevant statistics, to draw conclusions from those statistics, and to enact policy accordingly. The Supreme Court of Pennsylvania put it well:

> We recognize there are studies which find the majority of sexual offenders will not re-offend, and that sex offender registration laws are ineffective in preventing re-offense; we also recognize there are studies that reach contrary conclusions. In this context, we find persuasive [amicus's] argument that policy regarding such complex societal issues, especially when there are studies with contrary conclusions, is ordinarily a matter for the General Assembly. . . . Although there are contrary scientific studies, we note there is by no means a consensus, and as such, we defer to the General Assembly's findings on this issue. We are also cognizant that the General Assembly legislated in response to a federal mandate based on the expressed purpose of protection from sex offenders. [*Muniz*, 164 A3d at 1217.]

This is not a case where the Legislature has turned a blind eye to conclusive, agreed-upon data, rendering a policy irrational. Cf. *Smith*, 538 US at 87 (courts have a role in striking laws based on "sham or mere pretext").

It is also rational to classify offenders based on the severity of their offense of conviction, rather than conducting individualized risk determinations. Indeed, the Supreme Court has squarely held 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." *Smith*, 538 US at 103. The test is "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith*, 538 US at 105. A regulatory regime is not punitive "simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 US at 102–103; accord *Mosley*, 344 P3d at 803–804 (fact that residency restrictions apply to offenders who are not child abusers not determinative). That is why at least five federal circuits have upheld classification of offenders based on offense in the absence of an individualized determination of dangerousness. E.g., *Shaw*, 823 F3d at 571–72 (CA 10); *Masto*, 670 F3d at 1057

(CA 9); *WBH*, 664 F3d at 859 (CA 11); *Miller*, 405 F.3d at 721 (CA 8); *Moore*, 253 F3d at 872–873 (CA 5). But see *Does #1–5*, 834 F3d at 702–03, 705 (CA 6); *Baker*, 295 SW3d at 444–446 (Ky); *Letalien*, 985 A2d at 15, 23–24 (Me) (left "uncertain" whether lack of individualized risk determination renders SORA excessive). Moreover, to receive federal funding, Michigan must ensure that an offender who would qualify for a particular offense-based "tier" under the federal SORNA is subject to the minimum SORNA requirements for that tier. See Guidelines 21–22.

Snyder has not shown that SORA's non-punitive purpose is a "sham or mere pretext." *Id.* As cited above, numerous decisions have upheld varying degrees of SORA requirements, both before and after *Smith*, including recently, despite the studies that Snyder belatedly marshals on his side. The Legislature's decision to monitor this population and decrease their proximity to schoolchildren in light of current data was, at the least, rational.

e. SORA is not excessive in relation to its regulatory purpose.

Nor is SORA excessive in relation to its regulatory purpose. While SORA requirements may burden offenders, those requirements help achieve the Legislature's important purpose of protecting the public. See *Earl*, 495 Mich at 47–48 (fact that law may burden defendant not determinative). The burdens of SORA are not excessive in light of this benefit.

The duration of registration—be it 15 years, 25 years, or for life, also required by SORNA for federal funding, see 34 USC 20915—also is not excessive. As illustrated by the data cited in the Office of Justice Program's March 2017 report,

"the [sexual] recidivism rates of sex offenders increase as followup periods become longer," increasing in one study "from 14 percent after 5 years . . . to 24 percent after 15 years[.]" *Sex Offender Management and Assessment Initiative* (Mar 2017), p 114; see also *Smith*, 538 US at 104 ("most reoffenses do not occur within the first several years after release," but may occur "as late as 20 years following release"). In accordance with these statistics, multiple courts have upheld SORA laws that require even lifetime registration by holding that they are non-punitive. E.g., *Smith*, 538 US at 90, 102 (length reasonably related to danger of recidivism); *Parks*, 698 F3d at 5–6 (CA 1); *WBH*, 664 F3d at 852, 859–860 (CA 11); *RW*, 168 SW3d 65, 67, 70 (Mo); *State v Worm*, 680 NW2d 151, 162 (Neb, 2004); cf. *Boche*, 885 NW2d at 531–532 (Neb) (lifetime registration not punishment under Eighth Amendment); *Petersen-Beard*, 377 P3d at 1129 (Kan) (same). But see *Does #1–5*, 834 F3d at 703, 705 (CA 6); *Letalien*, 985 A2d at 18, 22–26 (Me).

Finally, Michigan's SORA registry appropriately protects the interests of offenders by warning users, on the registry itself, that any harassment of offenders or attempts at vigilantism can result in civil or criminal penalties.[8] See *EB v Verniero*, 119 F3d 1077, 1104 (CA 3, 1997) (New Jersey's warning appropriately managed risk to offenders).

The excessiveness inquiry "is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to

[8] Michigan Public Sex Offender Registry, available at http://www.communitynotification.com/cap_main.php?office=55242/.

remedy." *Smith*, 538 US at 105. Indeed, "*Hendricks*, and the long line of cases on which it relies, counsels that *bona fide* remedial legislation may inflict very substantial individual hardship without implicating the Ex Post Facto [Clause.]" *EB*, 119 F3d at 1103–1104. Consistent with the holdings of several courts, as cited above, Michigan's SORA requirements do not constitute punishment and may be applied retroactively consistently with the Ex Post Facto Clause.

4. The Sixth Circuit's analysis in *Does* is not persuasive.

As discussed above, the Sixth Circuit in *Does #1–5 v Snyder* held that the 2006 and 2011 amendments to Michigan's SORA impose punishment and that retroactive application of those amendments violates the Ex Post Facto Clause. 834 F3d 696 (CA 6, 2016). But that decision is not persuasive.

First, the Sixth Circuit did not cite or discuss *any* of the case law from *all* other circuits and at least 14 state supreme courts holding that similar SORA laws are *not* punitive. Compare *Does #1–5*, 834 F3d 696 with notes 2 and 3, supra.

Second, the Sixth Circuit erred on nearly every factor of the *Mendoza-Martinez* test. It held that Michigan's 2006 and 2011 SORA amendments resemble banishment and shaming—without discussing the historical definition of shaming, and even as the court acknowledged that SORA's student safety zones "do[ ] not prohibit the registrant from setting foot in the school zones" and would not constitute "banishment" as that punishment is described in Blackstone's *Commentaries*. *Does #1–5*, 834 F3d at 701. The court also held that SORA

resembles probation and parole, while conceding that "the level of individual supervision is less than is typical of parole or probation[.]" *Id*. at 703.

The court also concluded that SORA does not rationally advance its non-punitive purpose, citing a 2003 study suggesting that sex offenders are less likely to recidivate than other sorts of criminals, and citing other evidence in the record suggesting that offense-based public registration has, at best, no impact on recidivism. *Id*. at 704. But the court did not distinguish between sexual recidivism and other-offense recidivism, nor did it appear to take into account contrary studies and literature on sex-offender recidivism and the efficacy of SORA programs. See, e.g., *Sex Offender Management and Assessment Initiative* (Mar 2017), available at http://www.smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf, discussed supra; *Muniz*, 164 A3d at 1217 (discussing lack of consensus in scientific studies regarding recidivism rates and efficacy of SORA programs). The decision does not persuade.

C. Any SORA component deemed punitive must be severed while leaving the rest of the statutory scheme intact.

Because Michigan's SORA requirements are not punitive, this Court should follow the numerous decisions from other jurisdictions upholding similar requirements against ex post facto challenge.

But, importantly, should this Court find any component of SORA punitive, Snyder remains obligated to register under SORA. Michigan Compiled Laws 8.5 requires this Court to sever any portion of SORA that it may find punitive and to leave the remainder of SORA intact. Cf. *People v Lockridge*, 498 Mich 358, 391 (2015) (severing only those portions of sentencing guidelines that made guidelines

mandatory). In short, this severance rule refutes Snyder's efforts to characterize Michigan's law as a "super registry" law that must be considered in the aggregate, as MCL 8.5 requires this Court to examine each of SORA's "portions" individually. This is especially so, given that—as the decade preceding SORA's most recent amendments shows—the basic registration requirements can still be given effect. E.g., *Smith v Doe*, 538 US 84 (2003); see also *Eastwood Park Amusement Co v Stark*, 325 Mich 60, 73 (1949) (stating general severability rule even in absence of severability clause).

United States Supreme Court precedent on severability bears this out. For one thing, the Court has evaluated individual components of a statutory scheme for punitiveness, rather than restricting itself to evaluation only of the cumulative effect of the regime. In *Hudson v United States*, for example, this Court evaluated separately the punitiveness of two individual components of a regulatory regime: (1) money penalties and (2) debarment. 522 US 93, 103–105 (1997) (finding "little evidence . . . that *either* OCC money penalties *or* debarment sanctions" were punitive (emphasis added)). The Court has also instructed, on remand following a ruling that a law is ex post facto, that "only the ex post facto portion of the new law is void as to petitioner, and therefore any severable provisions which are not ex post facto may still be applied to him." *Weaver v Graham*, 450 US 24, 36 n 22 (1981).

Accordingly, a court may determine that some aspects of a SORA regime are punitive but others are not; and if so, it should sever retroactive application of only the punitive components. Accord *Kammerer*, 322 P3d at 837 (Wyo) ("If we held that

[the travel provisions] were invalid, we would uphold those portions of the Act which could be given effect without the invalid provision."); *Coppolino v Noonan*, 102 A3d 1254, 1269, 1279 (Pa Commw Ct, 2014) (holding only one SORA provision punitive and severing it), aff'd, 125 A3d 1196 (Pa, 2015).

At a minimum, even if this Court determined that severing SORA's 2011 amendments, or portions thereof, would be unworkable, that would not eliminate the requirement to register altogether, as Snyder argues. See Snyder Supp Br, p 27. Rather, striking the 2006 and/or 2011 amendments would have the effect of reviving the pre-2006 or pre-2011 version of SORA. E.g., *Chicago, I & LR Co v Hackett*, 228 US 559, 566 (1913) ("That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity *nor operate to supersede any existing valid law*." (emphasis added)); *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135, 144 (1977) ("It is a general rule of statutory interpretation that an unconstitutional statute is void ab initio" and is " 'as inoperative as if it had never been passed.' "); *We People Nevada ex rel Angle v Miller*, 192 P3d 1166, 1176 (Nev, 2008) ("[W]hen a statute is declared unconstitutional, it has no effect and the prior governing statute is revived."); accord 82 C.J.S. Statutes § 111. Thus, supposing the Court determined that SORA's 2006 and 2011 amendments are punitive, the version of SORA enacted before 2006—i.e., that enacted by 2004 PA 240—would become applicable to all registrants whose offenses occurred before 2006, including Snyder.

It is important for this Court to offer guidance on this question. While the People anticipate that this question will arise in the federal district court class action in *Does #1–6 v Snyder, et al.* (ED Mich No. 2:16-cv-13137), this issue would be better addressed in this Court, as this Court is the final arbiter of Michigan law. See *Exxon Corp v Wisconsin Dep't of Revenue*, 447 US 207, 226 n 9 (1980).

An overwhelming majority of jurisdictions have correctly upheld retroactive application of basic SORA registration as non-punitive, see supra notes 2 and 3, including our Court of Appeals. There is no reason to depart from that consensus.

II. Applying SORA to Snyder also does not violate due process.

Requiring Snyder to comply with SORA also does not violate due process. Contra Snyder Supp Br, pp 29–31. As an initial point, while SORA had not yet become effective at the time Snyder pleaded no contest to fourth-degree criminal sexual conduct in August 1995, see 1994 PA 295 (becoming effective in October 1995), SORA *had* been enacted at the time of Snyder's plea. Snyder Supp Br, p 29 n 89; accord *id.* p 30 n 92.

Regardless, SORA is a non-punitive collateral consequence of which due process did not require Snyder's knowledge to render his plea knowing and voluntary. His due process claim fails.

A. A plea is knowing and voluntary if the defendant is aware of *direct* consequences of his plea; due process does not require knowledge of *collateral* consequences.

To be constitutionally valid, due process requires that a plea be voluntary and knowing. *People v Cole*, 491 Mich 325, 332–333 (2012). Courts throughout the

country, including this Court, have held that a plea is knowing and voluntary when the defendant is aware of the *direct* consequences of the plea. *Id.* (citing *Brady v United States*, 397 US 742, 755 (1970)). A defendant need not be aware of a plea's *collateral* consequences for the plea to be knowing and voluntary. *Id.* at 333–334.

The prevailing distinction between direct and collateral consequences "turns on whether the result represents a definite, immediate and largely automatic effect on *the range of the defendant's punishment*." *Id.* at 334 (emphasis added). In general, a consequence is "direct" if it is "imposed by the sentencing court as part of the authorized punishment, and included in the court's judgment." *Stanbridge v Scott*, 791 F3d 715, 719 (CA 7, 2015). "Direct" consequences "are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of post-release supervision, a fine." *People v Harnett*, 945 NE2d 439, 442 (NY, 2011).

In contrast, consequences other than those imposed directly by the court as part of the punishment are generally considered "collateral." See, e.g., *Stanbridge*, 791 F3d at 719 (consequence is collateral if not included in court's judgment, regardless of whether it is imposed automatically upon conviction); *People v Gravino*, 928 NE2d 1048, 1054 (NY, 2010) (non-penal consequences that result from fact of conviction generally considered to be collateral). "[E]ffects of a conviction commonly viewed as collateral include civil commitment, civil forfeiture, *sex offender registration*, disqualification from public benefits, and disfranchisement." *Chaidez v United States*, 133 S Ct 1103, 1108 n 5 (2013) (emphasis added); see also

Foo, 102 P3d at 357 (listing "loss of the right to vote or travel abroad, loss of civil service employment, loss of a driver's license, loss of the right to possess firearms or an undesirable discharge from the Armed Services").

This Court, like many others, has defined the direct versus collateral distinction in terms of whether the consequence is punitive, citing the prevailing consensus that the distinction turns on whether the consequence is an effect on the "range of the defendant's punishment." *Cole*, 491 Mich at 334 (applying *Smith*'s ex post facto framework to determine whether statute "imposes punishment or is nonpunitive"); cf. *Earl*, 495 Mich at 39 n 2 (treating analysis to determine whether law imposes punishment for purposes of due process the same as that for ex post facto analysis). Important to this Court's analysis in *Cole* was that the mandatory lifetime electronic monitoring at issue in that case is "*part of the sentence itself*." 491 Mich at 335 (emphasis in original).

Several other courts have taken the same approach and analyzed whether the consequence is punitive. See, e.g., *State v LeMere*, 879 NW2d 580, 591–595 (Wis, 2016); *Trotter*, 330 P3d at 1276 (registration unrelated to range of defendant's punishments and beyond control of trial court); *Commonwealth v Pridham*, 394 SW3d 867, 881–882 (Ky, 2012); *Harnett*, 945 NE2d at 441–442; *Gravino*, 928 NE2d at 1054–1055 (SORA requirements "not part of the punishment imposed by the judge" and are "nonpenal consequences that result from the fact of conviction"); *Ward v State*, 315 SW3d 461 (Tenn, 2010) ("nonpunitive and . . . therefore a collateral consequence"); *Anderson v State*, 182 SW3d 914, 918 (Tex Crim App

2006); *Foo*, 102 P3d at 358; *State v Moore*, 86 P3d 635, 641–643 (NM, 2004); *State v Partlow*, 840 So2d 1040, 1043 (Fla, 2003); *Nollette*, 46 P3d at 89–91; *Johnson v State*, 922 P2d 1384, 1387 (Wyo, 1996); *Ward*, 869 P2d at 1068 (Wash).

Notably, the U.S. Supreme Court's decision in *Padilla v Kentucky*, 559 US 356 (2010), "did not eschew" the distinction between direct and collateral consequences. *Chaidez*, 133 S Ct at 1112 ("We did not think, as Chaidez argues, that *Strickland* barred resort to that distinction. Far from it[.]"). In *Padilla*, the Court held that counsel engaged in deficient performance by failing to advise the defendant that his guilty plea made him subject to automatic deportation, *Padilla*, 559 US at 369, despite the prevailing view at the time that deportation was a collateral, not a direct, consequence of a conviction. Relying on the "unique nature of deportation," *id.* at 357, 365, the Court explained that deportation is "*uniquely* difficult to classify as either a direct or a collateral consequence" and that "the collateral versus direct distinction is thus ill suited to evaluating a *Strickland* claim concerning *the specific risk of deportation*." *Id.* at 366 (emphasis added).

Among the factors the *Padilla* Court considered were that "the penalty of deportation" amounted to "banishment or exile," *id.* at 366, 373, and that deportation imposed harsh effects only on a uniquely vulnerable class, *id.* at 370–371. As the Wisconsin Supreme Court explained in *LeMere*, "not all people convicted of certain crimes face deportation . . . ; only noncitizens face deportation's penal effects." *LeMere*, 879 NW2d at 593. Indeed, the *Padilla* Court "used the word 'noncitizen' 17 times and appeared to view noncitizens—'a class of clients least able

to represent themselves'—as a particularly vulnerable class." *Id*. (citing *Padilla*, 559 US at 370–371). The *Padilla* Court likewise described deportation as a "penalty" at least five times. *Id*. at 592–593 (giving examples).

As the Court has since clarified, *Padilla* is limited to the "unique" "penalty of deportation." See *Chaidez*, 133 S Ct at 1110–1112; see also *LeMere*, 879 NW2d at 592 (noting that *Padilla* used "unique" multiple times). Indeed, the Court subsequently listed "sex offender registration" as an "effect[ ] of a conviction commonly viewed as collateral," *Chaidez*, 133 S Ct at 1108 n 5, thereby reaffirming the viability of the direct versus collateral distinction generally.

What is more, *Padilla* concerned the Sixth Amendment right to effective assistance of counsel, not what due process requires a court to inform a defendant about the consequences of his plea. The Supreme Court has made clear that an attorney's obligations under the Sixth Amendment to advise a client of consequences of a guilty plea are broader than a judge's obligations under the Fifth and Fourteenth Amendments to ensure that a plea is voluntary. *United States v Youngs*, 687 F3d 56, 62 (CA 2, 2012), citing *Libretti v United States*, 516 US 29, 50–51 (1995). Thus, even if the *Padilla* Court had demonstrated a categorical unwillingness to apply the direct versus collateral distinction in the Sixth Amendment context—which it did not—that would not demonstrate an intent to jettison the distinction in the due-process context. *Youngs*, 687 F3d at 62; see also *United States v Delgado-Ramos*, 635 F3d 1237, 1240–1241 (CA 9, 2011); *United States v Nicholson*, 676 F3d 376, 381 n 3 (CA 4, 2012).

Finally, the Supreme Court has held that *Padilla* does not apply retroactively to cases in which the conviction became final before *Padilla*. *Chaidez*, 133 S Ct at 1105; accord *People v Gomez*, 295 Mich App 411, 418 (2012). That includes Snyder's case.

This Court's decision in *Cole*, defining the direct versus collateral distinction in terms of whether the consequence affects "the range of the defendant's punishment," post-dates *Padilla*, as do decisions from other courts concluding that non-punitive consequences of a plea are collateral. See, e.g., *LeMere*, 879 NW2d at 591–595; *Trotter*, 330 P3d at 1273–1276 (automatic nature of registration requirement not determinative; registration collateral because not related to punishment and "beyond the control of the trial court"); cf. *People v Peque*, 3 NE3d 617, 638 n 11 (NY, 2013) (explaining why *Gravino* analysis survives *Padilla*). Thus, whether a consequence of a plea affects the defendant's "punishment" remains the correct analysis, and it is the analysis that this Court should apply here.

B. SORA registration is a collateral consequence of Snyder's plea that lacks due-process implications.

Because, as discussed in Section I, SORA is not punishment, nor is it part of the sentence imposed by a court, it is a collateral consequence of Snyder's plea that does not render his plea unknowing or involuntary. *Cole*, 491 Mich at 334; see also *Stanbridge*, 791 F3d at 719.

A majority of courts have held, both before and after *Padilla*, that SORA registration and compliance is a collateral consequence of a guilty plea about which a defendant need not be informed. These courts are correct. See, e.g., *Virsnieks v*

Smith, 521 F3d 707, 715–716 (CA 7, 2008); *Trotter*, 330 P3d at 1276; *State v Flowers*, 249 P3d 367, 372 (Idaho, 2011); *Gravino*, 928 NE2d at 1049; *Ward*, 315 SW3d at 472; *Magyar v State*, 18 So3d 807, 811–12 (Miss, 2009); *Anderson*, 182 SW3d at 918; *Foo*, 102 P3d at 358; *Moore*, 86 P3d at 641–643; *Partlow*, 840 So2d at 1043; *Kaiser*, 641 NW2d at 905–907; *State v Schneider*, 640 NW2d 8 (Neb, 2002); *Nollette*, 46 P3d at 89–91; *Davenport v State*, 620 NW2d 164, 166 (ND, 2000); *State v Bollig*, 605 NW2d 199, 206 (Wis, 2000); *State v Timperley*, 599 NW2d 866, 869 (SD, 1999); *Johnson*, 922 P2d at 1387; *Ward*, 869 P2d at 1068, 1076; *State v Young*, 542 P2d 20, 22 (Ariz, 1975); see also *Chaidez*, 133 S Ct at 1108 n 5 (sex-offender registration is "commonly viewed as collateral").

In contrast to the majority view, some courts, including the Michigan Court of Appeals, *People v Fonville*, 291 Mich App 363 (2011), have held that a defendant must be informed about SORA consequences before entering a guilty plea.[9] In *Fonville*, while the Court of Appeals correctly held that SORA registration is not "punishment" under the Eighth Amendment, 291 Mich App at 381, it nevertheless held that counsel's failure to inform Fonville of SORA before he pleaded guilty was constitutionally deficient performance and that Fonville was prejudiced. *Id*. at 395.

[9] See *State v Pentland*, 994 A2d 147 (Conn, 2010) (trial court failed to comply with statute requiring advisement of registry, but proper remedy is to seek withdrawal of plea, not removal from registry); *People v McClellan*, 862 P2d 739, 745 (Cal, 1993) (holding SORA a direct consequence, but court's failure to inform defendant was harmless); *Taylor v State*, 698 SE2d 384, 388 (Ga Ct App, 2010) (*attorney's* failure to advise client of SORA constituted deficient performance under Sixth Amendment; remanding for decision on prejudice).

In so holding, the court analogized SORA to the unique penalty of deportation that *Padilla* addressed. *Id*. at 389–393.

Fonville is both incorrectly decided and distinguishable. First, it is inconsistent with *Padilla*'s holding that deportation is "unique." *Padilla*, 559 US at 357, 365–366; *Chaidez*, 133 S Ct at 1110; see also *LeMere*, 879 NW2d at 593.

Second, the court erred in concluding that SORA resembles the uniquely severe penalty of deportation. Notably, "the automatic nature of the registration requirement cannot alone render the consequence identical to deportation"; otherwise, "other civil deprivations such as losing one's right to vote or carry a weapon would suffice to remove the consequence from the direct versus collateral dichotomy[.]" *Trotter*, 330 P3d at 1273. Instead, the severity of the consequence must be considered. *Id*.

Unlike SORA, the Supreme Court held that deportation is "the equivalent of banishment or exile." *Padilla*, 559 US at 373. Non-citizens confronted with deportation "face possible exile from this country and separation from their families." *Id*. at 370. They are "deprive[d] . . . of the right to stay and live and work in this great land." *Trotter*, 330 P3d at 1273. Deportation "creates a permanent physical separation from the United States and, to a lesser extent, from people who live here." *LeMere*, 879 NW2d at 594. If the deported person wishes to maintain relationships with friends and family who live in the United States, "deportation's permanent physical separation could create a more onerous burden than time served in an American prison." *Id*. "The person's friends and family likely would

need to spend hundreds, if not thousands, of dollars on international travel expenses for a single physical reunion." *Id*. While SORA is a serious consequence—as are multiple other automatic consequences deemed to be collateral, including disenfranchisement and the loss of public benefits, public employment, a driver's license, or the right to possess firearms—it is "not akin to the restrictions and consequences faced," *uniquely*, "by deportees." *Trotter*, 330 P3d at 1274.

Moreover, *Fonville* pre-dated this Court's decision in *Cole*, which continued—post-*Padilla*—to define the direct versus collateral distinction in terms of whether the consequence affects "the range of the defendant's *punishment*." *Cole*, 491 Mich at 334 (emphasis added).

Even if *Fonville* were correctly decided, its analysis still would not govern Snyder's claim. Snyder appears to argue that applying SORA to him violates due process because such application rendered his plea unknowing and involuntary. Snyder has not asserted a claim of ineffective assistance of counsel. In contrast, *Fonville* concerned the Sixth Amendment right to effective assistance of counsel, which—as discussed above—is broader than a court's responsibility under the Fifth and Fourteenth Amendments to ensure that a plea is voluntary. *Youngs*, 687 F3d at 62 (citing *Libretti*, 516 US at 50–51). *Fonville*—or indeed any ineffective-assistance case—does not govern Snyder's due-process argument.

Finally, this Court's decision in *Temelkoski* also does not govern Snyder's due process claim. Contra Snyder Supp Br, p 30. This Court decided *Temelkoski* on the narrow ground that applying SORA to Temelkoski retroactively violated due

process because, at the time of his plea, the Holmes Youthful Trainee Act (HYTA) provided that he would not have a conviction on his record and that he would suffer no civil disability or loss of right or privilege following his release from HYTA status. *People v Temelkoski*, 501 Mich 960 (2018). This Court held that HYTA's benefits induced Temelkoski's plea, such that depriving him of those benefits violated his constitutional right to due process. *Id*. at 594. Relevant to Snyder's case, this Court confirmed that "the Legislature may retroactively attach civil consequences to a conviction[.]" *Id*.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, the People respectfully request that this Court grant Snyder's application for leave.

Respectfully submitted,

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