STATE OF MICHIGAN

IN THE

SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
HOEKSTRA, P.J. and METER and M.J. KELLY, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court
No. 153696

-vs-

DAVID ALLEN SNYDER,

Defendant-Appellant.

Court of Appeals No. 325449
Gratiot County CC No. 2014-007061-FH

BRIEF OF THE OAKLAND COUNTY PROSECUTOR'S OFFICE

AS *AMICUS CURIAE* IN SUPPORT OF THE STATE OF MICHIGAN

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COUNTERSTATEMENT OF JURISDICTION

Amicus Curiae adopts Plaintiff-Appellee's statement of jurisdiction. On May 25, 2018, this Court issued the following order:

> The appellant shall file a supplemental brief within 42 days of the date of the order appointing counsel, or of the ruling that the defendant is not entitled to appointed counsel, addressing: (1) whether the requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, amount to "punishment," see *People v Earl*, 495 Mich 33 (2014), see also *Does # 1-5 v Snyder*, 834 F3d 696, 703-706 (CA 6, 2016), cert den sub nom *Snyder v John Does # 1-5*, 138 S Ct 55 (Oct 2, 2017); and (2) whether the defendant's conviction pursuant to MCL 28.729 for failure to register under SORA is an ex post facto punishment, where the registry has been made public, and other requirements enacted, only after the defendant committed the listed offense that required him to register, US Const, art I, § 10; Const 1963, art 1, § 10. [*People v Snyder,* 501 Mich 1078 (2018)].

CONSTITUTIONAL AND PERTINENT STATUTORY PROVISIONS INVOLVED

Article I, section 9, clause 3 of the United States Constitution provides, "No Bill of Attainder or ex post facto Law shall be passed." US Const, art I, §9, cl 3. Article I, section 10, clause 1 of the United States Constitution provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . ." US Const, art I, §10, cl 1.

Article I, section 10 of the 1963 Michigan Constitution provides: "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." Const 1963, art 1, §10.

MCL 28.729 states in pertinent part:

> (1) Except as provided in subsections (2), (3), and (4), an individual required to be registered under this act who willfully violates this act is guilty of a felony punishable as follows:
>
> > (a) If the individual has no prior convictions for a violation of this act, by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.[1]

[1] Though defendant had a prior conviction for failure to register (216a), defendant was charged as a first SORA offender, presumably because he was a fourth habitual offender due to prior felony convictions.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

[I.] IS THERE ANY EX POST FACTO CLAUSE VIOLATION WHEN, AFTER THE SEX OFFENDER REGISTRATION ACT WAS PASSED, DEFENDANT VIOLATED ITS REQUIREMENTS? [Issue II in the MOAA Order]

The sentencing judge:	was not asked to answer the question.
The Court of Appeals:	upheld defendant's registration.
Defendant-Appellant:	answers the question, "Yes."
Plaintiff-Appellee:	states that there is No Ex Post Facto Clause violation
Amicus-OCPO:	answers the question, "No."

[II.] WHEN THE LEGISLATURE CLEARLY ANNOUNCED THAT THE SORA WAS NOT INTENDED TO CONSTITUTE PUNISHMENT AND DEFENDANT HAS FAILED TO ESTABLISH BY THE CLEAREST PROOF THAT THE STATUTE HAS A PUNITIVE EFFECT, DID PLAIN ERROR OCCUR WHEN DEFENDANT WAS REQUIRED TO REGISTER? [Issue I in the MOAA order]

The sentencing judge:	was not asked to answer the question.
The Court of Appeals:	upheld defendant's registration.
Defendant-Appellant:	answers the question, "Yes."
Plaintiff-Appellee:	answers the question, "No."
Amicus-OCPO	answers the question, "No."

COUNTERSTATEMENT OF FACTS

Amicus Curiae rely on the statement of facts as set forth by the Plaintiff-Appellee. The key facts, however, are that in August 1995, Snyder pleaded no contest to CSC IV contrary to MCL 750.520e(1)(a) committed in May of 1995. In return for his plea, a count of CSC II was dismissed. 30a. Defendant was at least five years older than the victim and the victim was defendant's 15-year-old cousin. 33a-34a[2], 46a. While incarcerated in October of 1995 (the court having exceeded the guidelines and sentenced defendant to 16 to 24 months incarceration (47a)), Michigan's sex offender registry was passed into law. 1994 PA 295. Because defendant was incarcerated at the time the SORA became effective, he had to register as a sex offender for 25 years after release from incarceration. 1994 PA 295; MCL 28.723(1)(b); MCL 28.725. In 1999, he was required under the SORA to keep his employment updated in the registry. 1999 PA 85; MCL 28.725(1)(b). In 2011, he was designated a Tier II offender but the length of his registration period had remained unchanged since 1995. 2011 PA 17; MCL 28.722(u)(*x*); MCL 28.725(11); 183a, 221a.

There is no indication that defendant ever appealed his conviction for CSC-IV claiming that his plea was involuntary or that he was subject to punishment which violated the Ex Post Facto Clause.

In 2008, defendant was convicted of failure to comply with the sex offender registration act and was incarcerated. 216a-217a.

In March 2014, Snyder again violated the Act. He did not report his employment for a cab service. *People v Snyder,* unpublished per curiam opinion of the Court of Appeals issued February 18, 2016 (Docket No. 325449), p 1, 5; 10a, 14a. He was then again charged and

[2]When Amicus refers to appellant's appendices, they are referred to by "a."

convicted of failing to register as required by the SORA. MCL 28.729. *Id.* At sentencing, the judge found that defendant believed that he just did not have to comply with the law. 217a.

On appeal from his failure to register conviction, Snyder asserted that the provisions of the SORA constituted an impermissible ex post facto law. The Court of Appeals, relying on *People v Temelkoski,* 307 Mich App 241; 859 NW2d 743 (2014), rejected this argument finding that the SORA was not "'so punitive either in purpose or effect that it negates the Legislature's intent to deem it civil.'" *Snyder,* unpub op at 4 citing *Temelkoski,* 307 Mich App at 270; 13a. The Court found that the purpose of the SORA was "to provide information 'to the public so that they might modify their behavior in appropriate and lawful ways to protect themselves and prevent crime' with a registry of 'persons residing in their communities who have engaged in sexually predatory conduct and who, by virtue of relatively high recidivism rates among such offenders are recognized to be resistant to reformation and deemed to pose potential danger of repeat misconduct.'" *Snyder,* unpub op at 2-3 quoting *People v Pennington,* 240 Mich App 188, 195; 610 NW2d 608 (2000); 11a-12a.

Defendant filed an application to this Court, which held the case in abeyance for *People v Temelkoski,* (Docket No. 150643). *People v Snyder,* ___Mich ___; 901 NW2d 605 (2017). After *Temelkoski* was decided, this Court granted a mini-oral argument. *People v Snyder,* 501 Mich 1078 (2018).

SUMMARY OF THE ARGUMENTS

[1.] Whether defendant's conviction pursuant to MCL 28.729 for failure to register under the SORA is an ex post facto punishment? [Issue #2 in the MOAA Order]

Defendant's conviction contrary to MCL 28.729 violated neither the federal nor state constitutions' Ex Post Facto Clause. Defendant is not required to register due to his current conviction, but had to register previously due to his CSC-IV conviction, which defendant is not appealing. MCL 28.729 is not being applied retroactively, but prospectively. The SORA was passed before defendant violated its provisions. There is no Ex Post Facto Clause violation when defendant committed the crime *after* the law requiring registration was enacted.[3]

[2.] Whether the requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, amount to punishment? [Issue #1 in the MOAA Order]

The Legislature has clearly pronounced that the SORA was not intended to constitute punishment. In *Smith v Doe,* 538 US 84, 103; 123 S Ct 1140; 155 L Ed 2d 164 (2003), the United States Supreme Court found that creating a law that alerts the public to the risk of sex offenders in their community is legitimate and nonpunitive in nature. The overwhelming majority of courts addressing various provisions of federal and state SORA laws have likewise held that the registries and notification provisions are *not* punitive. Michigan applies the same test as the United States Supreme Court, and the result in this case should be no different. All factors of the ex post facto test dictate that the registry and notification provisions are civil regulatory statutes. Defendant has failed to establish by the clearest proof that the registry has a punitive effect.

[3] Therefore, Amicus believes that the second question should be addressed before the first. If a SORA violation is not retrospective at all, then there cannot be a violation of the Ex Post Facto Clause.

3. Whether defendant's plea to his CSC-IV conviction was knowing and voluntary? [Additional Issue Raised by Defendant]

This Court did not grant consideration on the additional issue that defendant has raised, whether defendant's plea was not knowing and voluntary in his CSC-IV case. Moreover, defendant has not appealed his CSC-IV conviction, but instead his conviction for failure to register which occurred after a jury trial. Therefore, defendant's claim is not properly before this Court. This case is not the proper vehicle to answer that question, and it should not be addressed.

INTRODUCTION

This case does not involve a crime for which registration is required but instead a violation of the SORA. There is no ex post facto problem which arises at all. Though defendant was required to register for a CSC-IV conviction in 1995, he did not commit the crime which resulted in the conviction that he is appealing until 15 years *after* the SORA requirement that he violated was passed. There is no Ex Post Facto Clause violation when defendant committed the crime *after* the law was passed.

Nonetheless, registration is not punishment at all. In *Smith v Doe,* 538 US 84, 103; 123 S Ct 1140; 155 L Ed 2d 164 (2003), the United States Supreme Court found that creating a law that alerts the public to the risk of sex offenders in their community is legitimate and nonpunitive in nature. Neither the purpose nor the effect was unconstitutional. Michigan applies the same test as the United States Supreme Court and the result in this case should be no different. All factors of the ex post facto test dictate that the registry and notification provisions are civil regulatory statutes.

Our Legislature determined that a person convicted of an offense listed in the sex offender registry, "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 Legislature consequently enacted the registry "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. This Court also noted that our Legislature has determined that those on the registry "pose a potential serious danger" to the public and particularly children. *People v Dowdy*, 489 Mich 373, 380; 802 NW2d 239 (2011). This Court stated that in order to effectuate this task the Legislature enacted a comprehensive registry. *Id.*

The United States Supreme Court, when upholding Alaska's sex offender registry against claims similar to those posed in this case, found that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'" *Smith v Doe,* 538 US at 103 quoting *McKune* v *Lile*, 536 US 24, 34; 153 L Ed 2d 47; 122 S Ct 2017 (2002).

Over the years, Michigan has made changes to its registry both to address this risk of recidivism as well as to comply with the federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act enacted in 1994 and the Adam Walsh Child Protection and Safety Act (AWA) which included the Sex Offender Registration and Notification Act (SORNA) enacted in 2006. 34 USC §20901 *et seq.* Senate Legislative Analysis, SB 566-571 (February 8, 2000); Senate Legislative Analysis SB 1275 (July 29, 2002); House Legislative Analysis, SB 188 & 189 (March 22, 2011). 1c-29c[4]; 237a. These federal acts were also designed to protect the public from violent sexual offenders and sex offenders with minor victims and to make more uniform what had remained a patchwork of federal and 40 individual state registration systems. *Reynolds v United States,* 565 US 432, 435; 132 S Ct 975; 181 L Ed 2d 935 (2012). SORNA also requires retroactive registration of sex offenders. 34 USC §20912(b); 28 CFR 72.3; also https://www.smart.gov/sorna.htm#AGGuidelines. To avoid a reduction in federal funding, states had to "substantially implement" SORNA's requirements.[5] 34 USC §20927.

Due to the 2011 changes in Michigan's SORA, some offenses and offenders were removed from the registry, but some offenses were subject to more stringent registration requirements. Consistent with SORNA's requirements, Michigan classified offenders into three

[4] Amicus has used "c" to denote pages in amicus' appendix.

[5] In 1999, for instance, Michigan received 16 million dollars in federal Byrne Grants which would have been subject to reduction by 10% if the State did not act in accordance with the federal acts. Senate Legislative Analysis, SB 566-571 (February 8, 2000); House Legislative Analysis, SB 188 & 189 (March 22, 2011) 18c-21c, 29c; 237a.

tiers based on their offenses of conviction, required in-person reporting, mandated 25-year registration for Tier II offenders (including sexual contact crimes involving victims under the age of 18), and published certain information regarding offenders on the Internet. Compare: National Guidelines for Sex Offender Registration and Notification https://www.smart.gov/pdfs/final_sornaguidelines.pdf; MCL 28.722; MCL 28.725(10)-(12); MCL 28.725a(3); MCL 28.728(2).[6] In this case, the registry reveals that defendant's registration obligation will cease in 2028. 221a.

It is these recent amendments which defendant primarily attacks on appeal. However, defendant's 25-year registration period has remained unchanged since 1995. And, the overwhelming majority of courts addressing various provisions of federal and state registry and notification laws have held that those laws are *not* punitive. All federal circuit courts,[7] but the Sixth,[8] and at least 39 of our sister states' courts[9] have reached the same conclusion about sex

[6] The ACLU indicated a position of neutrality on the bills. House Legislative Analysis, SB 188, 189, 206 (March 22, 2011). 247a.

[7] *United States v Parks,* 698 F3d 1, 5-6 (CA 1, 2012); *Doe v Cuomo,* 755 F3d 105, 112 (CA 2, 2014); *E.B. v Verniero,* 119 F3d 1077, 1105 (CA 3, 1997); *United States v Under Seal,* 709 F3d 257, 264-266 (CA 4, 2013); *United States v Johnson,* 632 F3d 912, 917-918 (CA 5, 2011); *United States v Young,* 585 F3d 199 (CA 5, 2009); *Mueller v Raemisch,* 740 F3d 1128, 1130, 1133-1135 (CA 7, 2014); *United States v Leach,* 639 F3d 769, 773 (CA 7, 2011); *Weems v Little Rock Police Dep't,* 453 F3d 1010, 1017 (CA 8, 2006); *Doe v Miller,* 405 F3d 700, 718-722 (CA 8, 2005); *Litmon v Harris,* 768 F3d 1237, 1243 (CA 9, 2014); *ACLU v Masto,* 670 F3d 1046, 1051-1065 (CA 9, 2012); *Shaw v Patton,* 823 F3d 556, 561-577 (CA 10, 2016); *United States v White,* 782 F3d 1118, 1127-1128 (CA 10, 2015); *United States v W.B.H.* 664 F3d 848, 853-861 (CA 11, 2011); *Anderson v Holder,* 396 US App DC 281; 647 F3d 1165, 1168-1173 (2011).

[8] The Sixth Circuit which found in *Doe v Snyder,* 834 F3d 696 (CA 6, 2016) that certain aspects of Michigan's SORA gave it a punitive effect, also issued *Doe v Bredesen,* 507 F3d 998 (CA 6, 2007) which had previously upheld lifetime monitoring for sex offenders as non-punitive and *United States v Felts,* 674 F3d 599, 605-606 (CA 6, 2012) (and *United States v Shannon,* 511 Fed Appx 487, 492 (CA 5, 2013)) which rejected an ex post facto challenge to SORNA. Defendant also cites an earlier Ninth Circuit case which had since been vacated by the United States Supreme Court. See also *ACLU v Masto,* 670 F3d at 1053 (upholding Nevada's SORA against ex post facto claims).

offender registries. The courts which have found their Acts punitive, overwhelmingly relied on their own State constitution.[10] In addition to the lower court in this case, Michigan appellate

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[9] *State v Biddle,* 187 So 3d 1122, 1125-1126, 1128 (Ala, 2015); *State v Noble,* 171 Ariz 171, 175-178; 829 P2d 1217 (1992); *State v Henry,* 224 Ariz 164, 172; 228 P 3d 900 (2010); *Sullivan v State,* 2012 Ark 74, p 30-31; 386 SW3d 507 (2012); *Kellar v Fayetteville Police Dep't,* 339 Ark 274, 287; 5 SW3d 402 (1999); *Johnson v Dep't of Justice,* 60 Cal 4th 871, 888 n 10; 341 P3d 1075 (2015); *People v J.O.,* 2015 COA 119, p 22-30; 383 P3d 69, 74-75 (2015); *State v Waterman,* 264 Conn 484, 492-498; 825 A2d 63 (2003); *State v Kelly,* 256 Conn 23, 92-94; 770 A2d 908 (2001); *Hassett v State,* 12 A3d 1154 (Del, 2011); *Helman v State,* 784 A2d 1058, 1078 (Del, 2001); *State v Parlow,* 840 So 2d 1040, 1043 (Fla, 2003); *Rainer v State,* 286 Ga 675, 675-677; 690 SE2d 827 (2010); *State v Guidry,* 105 Haw 222, 236; 96 P3d 242 (2004); *State v Forbes,* 152 Idaho 849, 852; 275 P3d 864 (2012); *People v Fredericks,* 2014 IL App 122122, ¶54-61; 383 Ill Dec 293, 306-308; 14 NE3d 576 (2014); *State v Seering,* 701 NW2d 655, 667-669 (Iowa, 2005); *State v Peterson-Beard,* 304 Kan 192, 198-209; 377 P3d 1127 (2016); *Commonwealth v Thompson,* 548 SW3d 881, 889 (Ky, 2018); *Buck v Commonwealth,* 308 SW3d 661, 668 (Ky, 2010); *State v Cook,* 2016-1518 (La 05/03/17); 226 So3d 387, 391-392 (May 3, 2017); *State ex rel Olivieri v State,* La 2000-0172; 779 So 2d 735, 748 (February 21, 2001); *Kaiser v State,* 641 NW2d 900, 907 (Minn, 2002); *State v LaFountain,* 901 NW2d 441, 448 (Minn App, 2017); *Jackson v State,* 224 So 3d 1254, 1257-1258, ¶14 (Miss App, 2017); *Garrison v State,* 950 So 2d 990, 993, ¶4 (Miss, 2006); *Doe v Phillips,* 194 SW3d 833, 841-842 (Mo, 2006); *State v Mount,* 317 Mont 481, 491-497; 2003 MT 275; 78 P3d 829 (2003); *State v Boche,* 294 Neb 912, 921-923; 885 NW2d 523 (2016); *State v Eighth Judicial Dist Court,* 29 Nev 492; 306 P3d 369 (2013); *Doe v Poritz,* 142 NJ 1, 40-77; 662 A2d 367 (1995); *ACLU v City of Albuquerque,* 2006-NMCA-078, 48; 139 NM 761, 777; 137 P3d 1215 (2006)(evaluating a registry created by city ordinance); *Devine v Annucci,* 56 NYS3d 149, 152;___NE2d___ (2017); *In re Bethea,* 806 SE2d 677, 681-682 (NC App, 2017); *State v Burr,* 1999 ND 143, ¶ 35; 598 NW2d 147, 154-159 (1999); *State v Macnab,* 334 Or 469, 480-483; 51 P3d 1249 (2002); *State v Gibson,* ___A3d___ (RI, 2018); *In the Interest of Justin B.,* 419 SC 575, 583-584; 799 SE2d 675 (2017); *Meinders v Weber,* 2000 SD 2 ¶15-37; 604 NW2d 248, 257-262 (2000); *Ward v State,* 315 SW3d 461, 467-473 (Tenn, 2010); *Rodriguez v State,* 93 SW3d 60, 70-79 (Tex Crim App, 2002); *State v Trotter,* 2014 UT 17, ¶30; 330 P3d 1267, 1276 (2014); (Amicus could not find any Vermont case which addressed the issue.); *Baugh v Commonwealth,* 68 Va App 437, 447-451; 809 SE2d 247 (2018); *State v Ward,* 869 P2d 1062, 1068-1074 (Wash, 1994); *State v Enquist,* 256 P3d 1277, 1281 (Wash App, 2011); *Haislop v Edgell,* 215 W Va 88, 94-95; 593 SE2d 839 (2003); *State v Bollig,* 2000 WI 6, ¶27; 232 Wis 2d 561, 205-206; 605 NW2d 199 (2000); *Kammerer v State,* 2014 WY 50 ¶22; 22 P3d 827, 836-837 (2014); *Vaughn v State,* 2017 WY 29, ¶54; 391 P3d 1086, 1099 (2017).

[10] In fact, all States but two which have found aspects of their own sex offender registries punitive, have unilaterally found so on the basis of their own State's Constitution. *Doe v State,* 189 P3d 999, 1007-1019 (Alas, 2008); *Gonzalez v State,* 980 NE2d 312, 315-321 (Ind, 2013)(finding punishment under the State constitution as applied to that defendant); *Moe v Sex Offender Registry Bd.,* 467 Mass 598, 616; 6 NE3d 530 (2014); *Doe v State,* 167 NH 382, 396-

(FOOTNOTE CONT'D NEXT PAGE)

courts have found that Michigan's SORA did not impose punishment in nine separate published cases.[11]

Defendant has failed to establish by the clearest proof that the Legislature had a punitive intent in passing the registry or that the registry has a punitive effect.

ARGUMENT

[I.] THERE IS NO EX POST FACTO CLAUSE VIOLATION WHEN, AFTER THE SEX OFFENDER REGISTRATION ACT WAS PASSED, DEFENDANT VIOLATED ITS REQUIREMENTS. [Issue II in the MOAA Order]

Standard of Review and Issue Preservation:

Issues of constitutional law are subject to review de novo. *Dep't of Health & Human Servs v Rasmer,* 501 Mich 18, 30; 903 NW2d 800 (2017). However, though defendant raised other constitutional issues, defendant has failed to demonstrate that he raised an ex post facto

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(FOOTNOTE CONT'D FROM PREVIOUS PAGE)
411; 111 A2d 1077 (2015)(unconstitutional under the State constitution as applied to that defendant); *State v Williams,* 129 Ohio St 3d 344, 347-349; 952 NE2d 1108 (2011); *Starkey v Okla. Dep't of Corr,* 2013 OK 43, ¶22-28; 305 P3d 1004, 1020-1030 (2013). But see *Commonwealth v Muniz,* 640 Pa 699, 749; 164 A3d 1189 (2017) and *State v Letalien,* 2009 ME 130, ¶63-64; 985 A2d 4, 26 (2009)(finding punitive under the federal constitution). Maryland has come to differing results depending on the facts of the case. Compare *Doe v Dep't of Pub Safety & Corr Servs,* 430 Md 535, 551-559; 62 A3d 123 (2013), with *Long v Dep't of Pub Safety & Corr Servs,* 230 Md App 1, 23-24; 146 A3d 546 (2016). Defendant cites *Commonwealth v Baker,* 295 SW3d 437, 447 (Ky, 2009), which found residency restrictions amounted to punishment; however, the Court later found the registration provisions passed consistent with SORNA did not amount to punishment. *Buck v Commonwealth,* 308 SW3d 661, 668 (Ky, 2010).

[11] *People v Patton,* ___Mich App___;___NW2d___ (2018)(Docket No. 341105); slip op at 11; *People v Tucker,* 312 Mich App 645,; 879 NW2d 906 (2015); *People v Bosca,* 310 Mich App 1, 72-73; 871 NW2d 307 (2015); *People v Costner,* 309 Mich App 220, 233; 870 NW2d 582 (2015); *People v Temelkoski,* 307 Mich App 241, 270-271; 859 NW2d 743 (2014), rev'd in part on other grounds, 501 Mich 960 (2018); *People v Fonville,* 291 Mich App 363, 381; 804 NW2d 878 (2011); *People v Golba,* 273 Mich App 603, 620; 729 NW2d 916 (2007); *People v Pennington,* 240 Mich App 188, 197; 610 NW2d 608 (2000); *In re Ayres,* 239 Mich App 8, 21; 608 NW2d 132 (1999).

claim in the lower court. 16a-29a, 210a-219a. To demonstrate plain error "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) . . . the plain error affected substantial rights . . . [, and 4)] once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *People v Randolph,* 502 Mich 1, 10; 917 NW2d 249 (2018) quoting *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Discussion:

Defendant's conviction contrary to MCL 28.729 violated neither the federal nor state constitutions' Ex Post Facto Clause. Defendant was originally required to be on the sex offender registry due to a prior CSC-IV conviction which he committed before the SORA was passed. There is no indication that defendant ever appealed this conviction. However, he did not violate the requirements of the SORA until 19 years after the Act was passed, 15 years after the SORA requirement he violated was passed, and after he had already been incarcerated for violating the Act—placing him well on notice of its requirements. MCL 28.729 was not applied retroactively, but prospectively. There is no ex post facto violation when defendant committed the crime *after* the law requiring registration was enacted.[12]

Ex post facto laws are prohibited by both the United States Constitution, US Const, art I, §9, cl 3 ("No Bill of Attainder or ex post facto Law shall be passed.") and US Const, art I, § 10 ("no state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . .") and the Michigan Constitution, Const 1963, art 1, § 10 ("no

[12] See *infra* for the reasons that sex offender registration also does not constitute punishment.

bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted"). Michigan has not interpreted its constitutional provision more expansively than its federal counterpart[13] and the language contained in our state constitution is virtually identical to that used in the federal constitution.[14] *In re Certified Question,* 447 Mich 765, 776-777; 527 NW2d 468 (1994). Defendant does not argue that Michigan construes its constitutional provision any differently (Defense Brief at 6, n 25).

An ex post facto law is a term of art which possessed an established meaning at the time of the framing of the United States Constitution:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. ***Every law that aggravates a crime, or makes it greater than it was, when committed***. 3d. ***Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed***. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. (emphasis added) [*Calder v Bull*, 3 US 386, 390; 1 L Ed 648 (1798)[15]]

This Court has adopted Justice Chase's definition of ex post facto laws he expressed in *Calder v Bull,* 3 US 386, 390; 1 L Ed 648; 3 Dall 386 (1798). See *People v Stevenson,* 416 Mich 383, 396; 331 NW2d 143 (1982), citing *In re Hoffman,* 382 Mich 66, 71 n 1; 168 NW2d 229 (1969). The Ex Post Facto Clause is designed to ensure fair notice that conduct is criminal and to secure

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[13] See also *Lohrstorfer v Lohrstorfer,* 140 Mich 551, 560; 104 NW 142 (1905); *People v Potts,* 436 Mich 295, 300; 461 NW2d 647 (1990); *People v Russo,* 439 Mich 584, 592-593; 487 NW2d 698 (1991); *People v Earl,* 495 Mich 33, 37; 845 NW2d 721 (2014).

[14] Except for an improvement in phraseology, this provision remained unchanged since 1835 and mirrors restrictions passed on state government in the federal constitution. Susan Fino, *The Michigan Constitution* (Oxford University Press, 2011), Part II, pp 44. There was no substantive discussion in the debates of the 1850, 1907-1908 or 1963 constitutional conventions regarding the Ex Post Facto Clause. See Constitutional Convention 1850, p 67, 118; Address to the People, Constitutional Convention 1908, p 1416; Address to the People, 2 Official Record, Constitutional Convention 1961, p 3364.

[15] In accord *Peugh v United States,* 569 US 530, 538; 133 S Ct 2072; 186 L Ed 2d 84 (2013); *Carmell v Texas,* 529 US 513, 520-521; 120 S Ct 1620; 146 L Ed 2d 577 (2000); *Collins v Youngblood,* 497 US 37, 41-42; 110 S Ct 2715; 111 L Ed 2d 30 (1990).

substantial personal rights against arbitrary and oppressive legislation. *Weaver* v *Graham,* 450 US 24, 28-29; 101 S Ct 960; 67 L Ed 2d 17 (1981); *Dobbert v Florida,* 432 US 282, 293; 97 S Ct 2290; 53 L Ed 2d 344 (1977); *People v Russo*, 439 Mich 584, 592; 487 NW2d 698 (1992).

To violate the Ex Post Facto Clause, "[t]he critical question is whether the law changes the legal consequences of acts ***completed*** before its effective date." *Carmell v Texas,* 529 US 513, 520; 120 S Ct 1620; 146 L Ed 2d 577 (2000) (citation omitted).[16] Justice Thomas may have said it most succinctly, "Under this view, courts must compare the punishment affixed to the crime at the time of the offense, with the punishment affixed at the time of the sentence. If the latter is harsher than the former, the court must apply the punishment in effect at the time of the offense." *Peugh,* 569 US at 561 (THOMAS, J., dissenting).

Defendant was originally placed on the registry due to a CSC-IV conviction. In August 1995, Snyder pleaded no contest to having committed CSC-IV contrary to MCL 750.520e(1)(a) for acts which occurred in May of 1995. Defendant was then incarcerated. 33a-34a, 46a. While incarcerated in the Department of Corrections in October 1995, the SORA was passed. 1994 PA 295 stated (and continues to state):

> (1) Subject to subsection (2), the following individuals who are domiciled or temporarily reside in this state or who work with or without compensation or are students in this state are required to be registered under this act:
>
> ***
>
> (b) An individual convicted of a listed offense on or before October 1, 1995 if on October 1, 1995 he or she is . . . committed to the jurisdiction of the department of corrections . . .

MCL 28.723. In 1999, Snyder was obligated to keep his employment updated on the registry, a requirement that also currently exists. 1999 PA 85; MCL 28.725(1)(b).

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[16] See also *Weaver* v *Graham,* 450 US 24, 28; 101 S Ct 960; 67 L Ed. 2d 17 (1981); *Dobbert v Florida,* 432 US 282, 299; 97 S Ct 2290; 53 L Ed 2d 344 (1977); *Hopt v Utah,* 110 US 574, 589; 4 S Ct 202; 28 L Ed 262 (1884); *Fletcher v Peck,* 10 US 87, 138; 3 L Ed 162 (1810); *People v Doyle,* 451 Mich 93; 545 NW2d 627 (1996); *Potts,* 436 Mich at 301.

Defendant violated this requirement in 2014. Defendant was then convicted of MCL 28.729 states the following in pertinent part:

> (1) Except as provided in subsections (2), (3), and (4), an individual required to be registered under this act who willfully violates this act is guilty of a felony punishable as follows:
>
> > (a) If the individual has no prior convictions for a violation of this act, by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

Defendant had been convicted of this same offense in 2008. 216a-217a.

Because the requirement that defendant violated was in effect ***fifteen years before*** defendant committed the current felony, he had ample notice of his obligations and this statute was applied prospectively. He did not commit the crime until *after* the law had been passed. See *In re Miller,* 110 Mich 676, 677; 68 NW 990 (1896)(indicating, "The penalty he is now serving is imposed for the offense committed by the prisoner after the act of 1893 took effect. Under such circumstances, the act cannot be regarded as *ex post facto*. . . He is presumed to have known its provisions when he committed the offense for which he is now serving time.").

Defendant argues that the SORA is an ex post facto law because the statute imposes retroactive legal consequences for conduct committed before its enactment. Defendant's argument must fail. The punishment affixed to the crime at the time defendant committed the SORA violation was exactly the same as the punishment affixed at the time of his sentence. Defendant did not complete his offense until after the SORA requirements were passed into law.

The SORA violation statute is akin to a recidivist statute in which the consequences flow from the last felony committed, not the earlier one. Both this Court and the United States Supreme Court have repeatedly found that "'Recidivist statutes . . . do not change the penalty imposed for the earlier conviction.'" *People v Reichenbach*, 459 Mich 109, 124-125; 587 NW2d

1 (1998), quoting *Nichols v United States*, 511 US 738, 747; 114 S Ct 1921; 128 L Ed 2d 745 (1994). As stated by the United States Supreme Court:

> When a defendant is given a higher sentence under a recidivism statute . . . 100% of the punishment is for the offense of conviction. None is for the prior convictions of the defendant's "status as a recidivist." The sentence "is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one." [*United States v Rodriguez,* 553 US 377, 386; 128 S Ct 1783; 170 L Ed 2d 719 (2008)(citations omitted)[17]]

Even though a requirement of defendant's conviction was that he had to have previously been required to register, his offense was not committed until *after* the Act was passed.

The federal courts have rejected similar issues dealing with SORNA. In *United States v Leach,* 639 F3d 769 (CA 7, 2010), for instance, defendant was convicted of a sex offense in 1990 and was obligated to register in Indiana in 1994 for this offense. In 2006, Congress passed SORNA which established criminal penalties for offenders who failed to register as a sex offender *after* traveling in interstate commerce. 18 USC §2250(a). In 2008, defendant moved from Indiana to South Carolina, failed to register and was subsequently charged federally. Defendant claimed on appeal that his charges violated the Ex Post Facto Clause of the United States and Indiana Constitutions. The Court rejected his claims finding that "SORNA merely creates new, prospective legal obligations based on the person's prior history." *Id.* at 773. The Court stated that the law did not penalize past conduct because "[a] sex offender violates the

[17] See also *Gryger v Burke,* 334 US 728, 732; 68 S Ct 1256; 92 L Ed 1683 (1948); *Graham v West Virginia,* 224 US 616, 623; 32 S Ct 583; 56 L Ed 917 (1912); *Ex parte Brazel,* 293 Mich 632, 637-638; 292 NW 664 (1940); *People v Palm,* 245 Mich 396, 402-403; 223 NW 67 (1929)(upholding enhancement as habitual offenders even though prior convictions occurred before the act was passed); *People v Miller,* 357 Mich 400, 410; 98 NW2d 524 (1959); *People v Perkins*, 280 Mich App 244, 251-252; 760 NW2d 669 (2008); *People v Callon*, 256 Mich App 312, 318; 662 NW2d 502 (2003)(upholding conviction as recidivist drunk driver though the prior convictions occurred before the statute was passed); *People v Tice,* 220 Mich App 47, 50-51; 558 NW2d 245 (1996)(rejecting defendant's argument that his felon-in-possession of a firearm conviction was invalid because the felon-in-possession of a firearm statute was passed after he committed the crime which led to his original conviction).

statute when, at any time *after* SORNA was enacted, he travels in interstate commerce and then failed to register. Because the law targets only the conduct undertaken by convicted sex offenders after its enactment, it does not violate the Ex Post Facto Clause." *Id.* (citations omitted) In accord *United States v Fuller,* 627 F3d 499, 508 (CA 2, 2010), vacated on other grounds 565 US 1189; 132 S Ct 1534; 182 L Ed 2d 152 (2012); *United States v Shenandoah,* 595 F3d 151, 158-159 (CA 3, 2010), abrogated in part on other grounds by *Reynolds v United States,* 565 US 432; 132 S Ct 975; 181 L Ed 2d 935 (2012); *United States v Gould,* 568 F3d 459, 466 (CA 4, 2009); *United States v Young,* 585 F3d 199, 205 (CA 5, 2009); *United States v Voice,* 622 F3d 870, 879 (CA 8, 2010); *United States v Ambert,* 561 F3d 1202, 1207-1208 (CA 11, 2009).

Likewise, in *United States v Hardeman,* 704 F3d 1266 (CA 9, 2013), defendant was charged with a commission of a federal offense involving a minor while under a legal duty to register as a sex offender. 18 USC §2260A. Hardeman was required to register in California due to 1980 and 1986 state sex crimes he committed before California's version of SORA was passed. *Id.* at 1267. The federal statute that defendant violated, 18 USC §2260A, was passed in 2006. Defendant was indicted on his federal offense in 2010. *Id.* at 1267. Though defendant claimed his prosecution violated the Ex Post Facto Clause, the Court found that the prosecution was not for his past sex crimes. The Court saw "no material difference between §2260A and ordinary recidivism states-statutes that provide enhanced penalties for previously convicted persons. The Supreme Court has long held that recidivism statutes do not violate the Ex Post Facto Clause because the enhanced penalty punishes only the latest crime and is not retrospective additional punishment for the original crimes." *Id.* at 1268. The Court held that this was true even if the duty to register arose retroactively. *Id.* at 1269. See also *United States v Morgan,* 255 F Supp 3d 221, 229 (D DC, 2017)(indicating, "There is a consensus among circuits that

prosecution under § 2250(a) for failure to register, when registration was required because of a pre-SORNA conviction, does not violate the Ex Post Facto Clause.").

The Seventh Circuit also rejected a similar challenge to a recapture provision similar to the statute passed in Michigan. The plaintiff in *Johnson v Madigan,* 880 F3d 371 (CA 7, 2018) sued state officials who enforced an Illinois version of SORA. Johnson had been convicted in 1983 of a sex offense, had to register for a period of time, but eventually came off the registry. However, Illinois later passed its version of the recapture provision requiring registration of sex offenders if they committed new crimes after 2011. Defendant committed a theft offense after 2011 and was required to register for life as a sexual predator. In his suit, he claimed that the statute violated the Ex Post Facto Clause. The Seventh Circuit, however, found that the statute was not retroactive. The Court concluded, "A statute is retroactive for purposes of the *ex post facto* clause if it redefines or changes the penalty for a crime committed before the law went into effect. The 2012 version of Illinois' Sex Offender Registration Act didn't redefine or change the penalty for crimes committed in 1983. It didn't apply to Mr. Johnson when it took effect. Mr. Johnson only fell within its ambit when he committed, and was convicted of, a felony in 2013 . . . Mr. Johnson is right that his 2013 theft conviction wouldn't have triggered sexual predator status but for the 1983 rape conviction. But . . . it was Mr. Johnson's post-Act felony that caused today's problems; his prior criminal record simply increased the consequences of the 2013 conviction—'a stiffened penalty for the latest crime.' *Gryger v Burke*, 334 US [728,] 732[; 68 S Ct 1256; 92 L Ed 1683 (1948)]." *Id.* at 376.

Other states have also rejected Ex Post Facto Clause claims raised by defendants charged with failure to register offenses for similar reasons. In *State ex rel Olivieri v State,* La 2000-0172; 779 So 2d 735, 748 (February 21, 2001), the Court found that failure to register charges posed no

Ex Post Facto Clause problem, "It is hornbook law that no ex post facto problem occurs when the legislature creates a new offense that includes a prior conviction as an element of the offense, as long as the other relevant conduct took place after the law was passed."(citation omitted). The South Dakota Supreme Court agreed noting, "We emphasize that the crime of failure to register under the Act constitutes a separate offense. The fact that a prior conviction for sexual misconduct is an element of the 'failure to register' offense is of no consequence. It is hornbook law that no *ex post facto* problem occurs when the legislature creates a new offense that includes a prior conviction as an element of the offense, as long as he other relevant conduct that took place after the law was passed." *Meinders v Weber,* 2000 SD 2 ¶24; 604 NW2d 248, 258 (2000) (citation omitted) See also *State v Kelly,* 256 Conn 23, 93-94; 770 A2d 908 (2001)(indicating, "although the statute deemed the failure to register a crime, that portion of the statute was fully prospective.")(citation omitted); Accord *Buck v Commonwealth,* 308 SW3d 661, 667 (Ky, 2010)

In this case as well, defendant is solely appealing his SORA violation conviction as violating the Ex Post Facto Clause. His appeal is not from his CSC-IV conviction and he committed his failure to register offense after the SORA was passed. Defendant's conviction contrary to MCL 28.729 violated neither the federal nor state constitutions' Ex Post Facto Clause. There is no Ex Post Facto Clause violation when defendant committed the crime *after* the law requiring registration was enacted.

ARGUMENT

[II.] THE LEGISLATURE CLEARLY ANNOUNCED THAT THE SORA WAS NOT INTENDED TO CONSTITUTE PUNISHMENT, AND DEFENDANT HAS FAILED TO ESTABLISH BY THE CLEAREST PROOF THAT THE STATUTE HAS A PUNITIVE EFFECT. [Issue I in the MOAA order]

Standard of Review and Issue Preservation

Issues of constitutional law are subject to review de novo. *Rasmer,* 501 Mich at 30. When

evaluating the constitutionality of a statute, this Court presumes statutes are constitutional and "exercise[s] the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict." *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004). This Court indulges "[e]very reasonable presumption" in favor of a statute's validity. *Id*. at 423. The fact that defendant asserts a statute may appear undesirable, unfair, unjust, or inhumane does not of itself render a statute unconstitutional and empower a court to override the Legislature. *Doe v Dep't of Social Servs,* 439 Mich 650, 681; 487 NW2d 166 (1992)(citation omitted). The Legislature, not the courts, should address arguments that a statute is unwise or results in bad policy. *People v Kirby,* 440 Mich 485, 493-494; 487 NW2d 404 (1992). This Court will construe a statute as constitutional unless its unconstitutionality is "clearly apparent." *People v Skinner,* 502 Mich 89, 99, 100; 917 NW2d 292 (2018).

As stated *supra,* defendant did not raise this precise claim below and thus his claim is unpreserved. 16a-29a; 210a-219a. Defendant must demonstrate plain error. *Randolph,* 502 Mich at 10.

Discussion:

The Legislature has clearly announced that the SORA was not intended to constitute punishment and defendant has failed to establish ***by the clearest proof*** that the statute has a punitive effect. In *Smith v Doe,* 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003), the United States Supreme Court found that creating a law that alerts the public to the risk of sex offenders in their community is legitimate and nonpunitive in nature. Neither the purpose nor the effect was unconstitutional. Michigan applies the same test as the United States Supreme Court and the result in this case should be no different. All factors of the Ex Post Facto test dictate that

the registry and notification provisions are civil regulatory statutes.

Defendant attacks two separate Articles of Michigan's Sex Offender Registration Act. The first challenge is to certain registration and notification provisions in Article II, MCL 28.723-MCL 28.730, concerning 25-year registration, penalties for violating the provisions, creation of the public registry, categorization of offenses into tiers, in-person reporting, and fees for maintenance of the registry. The second challenge is to the school safety zones located in Article III, MCL 28.733-MCL 28.736. Defendant has not asserted that he has been affected by the school safety zones, just that he might be affected in the future. Amicus will address the challenge to the registration and notification provisions and leave the school zone restrictions to the arguments of the able Appellee.[18]

Before determining whether a punishment violates the Ex Post Facto Clause, a threshold question is whether the government action constitutes punishment. *People v Earl,* 495 Mich 33, 38; 845 NW2d 721 (2014). Usually, punishment is a "deliberate act intended to chastise or deter." (citation omitted) *Wilson v Seiter*, 501 US 294, 300; 115 L Ed 2d 271; 111 S Ct 2321 (1991). "[W]hether a sanction constitutes punishment is not determined from the defendant's perspective." *Dep't of Revenue v Ranch,* 511 US 767, 777 n 14; 128 L Ed 2d 767; 114 S Ct 1937

[18] Any constitutional problems with the 2006 residency restrictions would also be severable, especially when these amendments were not passed at the same time as the 2011 amendments. 2005 PA 121; MCL 8.5; MCL 28.728(8). In fact, if the Sixth Circuit had been consistent in its decisions, in *Doe v Snyder,* 834 F3d 696 (CA 6, 2016) it would solely have struck down the 2006 amendments to the SORA which were *not* based on SORNA, but upheld the 2011 amendments which were based on SORNA. Compare *Doe v Snyder,* 834 F3d 696 (CA 6, 2016)(finding both the 2006 and 2011 amendments unconstitutional as applied to those plaintiffs) with *United States v Felts,* 674 F3d 599, 605-606 (CA 6, 2012) (and *United States v Shannon,* 511 Fed Appx 487, 492 (CA 6, 2013))(rejecting ex post facto challenges to SORNA).

And again, defendant's period of registration has been 25 years since 1995. Therefore regardless of defendant's challenge to the 2006 and 2011 amendments, defendant will still have to register.

(1994).

To determine whether the SORA is a form of punishment involves a two-part inquiry:

> The court must begin by determining whether the Legislature intended the statute as a criminal punishment or a civil remedy. . . . If the Legislature's intention was to impose a criminal punishment . . . the analysis is over. [] However, if the Legislature intended to enact a civil remedy, the court must also ascertain whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil. . . . [*Earl*, 495 Mich at 38 (quotation marks and citations omitted).]

A. The Legislature intended the SORA to be a remedial regulatory scheme.

Whether a statutory scheme is civil or criminal is a question of statutory construction. *Smith v Doe,* 538 US at 92. The purpose of the sex offender registry is expressly set out in MCL 28.721a:

> 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 the 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.

See also *People v Dowdy*, 489 Mich 373, 380; 802 NW2d 239 (2011). These are legitimate nonpunitive purposes. *Smith v Doe,* 538 US at 93 (determining that the goal of the Alaska Legislature in enacting its registry—protecting the public from sex offenders—was a legitimate nonpunitive governmental objective.) Accordingly, the Michigan Legislature made it clear that the purpose of the SORA is not to impose punishment on sex offenders. Also, Michigan's SORA is not contained in either the penal code or code of criminal procedure but instead within the Chapter which governs the Michigan State Police which is charged with enforcement of both

criminal and civil regulatory laws. See *Smith,* 538 US at 96 (ASORA administered by the Alaska Department of Public Safety, "an agency charged with enforcement of both criminal *and* civil regulatory laws.") Defendant agrees that the Legislature did not intend the SORA to constitute punishment. (Defense Brief, p. 13, n 57).

B. The purpose and effects of the SORA are not so punitive as to negate the civil intent.

Since the purpose of the SORA is not to impose punishment, this Court must determine "whether the statutory scheme is so punitive [] in . . . effect as to negate the State's intention to deem it civil." The seven factors considered in *Kentucky v Mendoza-Martinez,* 372 US 144, 168-69; 83 S Ct 554; 9 L Ed 2d 644 (1963), used to assist in determining whether a statute has a punitive effect are:

> [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. [*Earl*, 495 Mich at 44, citing *Mendoza-Martinez*, 372 US at 168-169.]

The *Mendoza-Martinez* factors are "neither exhaustive nor dispositive," but are "useful guideposts." *Smith*, 538 US at 97. Because the Court will "ordinarily defer to the legislature's stated intent . . . ***only the clearest proof*** will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id*. at 92 (internal citations and quotation marks omitted) (emphasis added). This Court in *Earl,* 495 Mich at 43-44, applied the *Mendoza-Martinez* factors to determine whether a statutory scheme was so punitive as to negate the intent of a civil remedy.

The Supreme Court in *Smith v Doe*, 538 US at 97, stated that five of the factors were

relevant to its analysis "whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose."

The United States Supreme Court found Alaska's sex offender registry did not amount to punishment. The Alaska statute shared many similarities with Michigan's statute. The Alaska statute evaluated by *Smith v Doe* required the sex offender to provide his or her name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver's license number, information about vehicles to which he or she had access, and post-conviction treatment history. *Smith,* 538 US at 90. The offender had to permit authorities to photograph and fingerprint him or her. *Id.* If the sex offender were convicted of an aggravated sex offense or two or more sex offenses, he or she had to register quarterly for life. *Id.* The offender had to notify his or her local police department if the offender moved. Also, a sex offender who knowingly failed to comply with the Act was subject to criminal prosecution. *Id.* Alaska maintained a central registry of offenders and made public on the Internet, the sex offender's name, aliases, photograph, physical description, address, description of vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence and a statement whether the sex offender was in compliance with the requirements. *Smith,* 538 US at 91. *Smith* dealt with two sex offenders who were released from incarceration in 1990 and had completed rehabilitative programs but yet were required to register. *Id.*

The Supreme Court found after examining all the factors, that Doe could not show, "much less by the clearest proof that the effects of the law negate Alaska's intention to establish

a civil regulatory scheme. The Act is nonpunitive, and its retroactive application does not violate the Ex Post Facto Clause." *Smith,* 538 US at 105-106.

Though defendant claims that a 25 year registration period[19] converts Michigan's statute into one which is punitive, the Alaska statute at issue in *Smith,* required life-time registration for aggravated sex offenders and the Court found that this did not convert the statute into one with punitive effect. *Young,* 585 F3d at 205 (indicating, "Young claims that SORNA lengthens the duration of registration, and, [] that SORNA reduces the time frame for the sex offender to update his registry. Both of these claims are factually false: certain Alaskan offenders must register for life; and under ASORA a sex offender has only one business day to register after 'becoming physically present' in Alaska.") Defendant's 25-year registration requirement has also remained constant since 1995.

Defendant also asserts that criminal penalties within the Act convert Michigan's SORA to a punitive statute. However, the Alaska statute analyzed by the United States Supreme Court in *Smith,* also contained criminal penalties, including prosecution for a felony, for noncompliance (Alaska Stat §11.56.835) and this did not convert the statute into one with a punitive effect. (Moreover, future prosecution does not implicate the Ex Post Facto Clause. See Argument I, *supra*).

Defendant also argues that because the registry is public, it results in punishment. However, the registry considered by *Smith* was public and *Smith* expressly rejected the argument that "wide dissemination" of such information was excessive, finding a similar public notification system "reasonable in light of the nonpunitive objective." *Smith*, 538 US at 103-105.

[19] Defendant is a Tier II offender and has to register for 25 years. MCL 28.722(u)(*x*); MCL 28.725(11); 183a, 221a. The length of defendant's registration in 1995 was also 25 years. 1994 PA 295.

Accord *United States v Parks,* 698 F3d 1, 6 (CA 1, 2012); see also *ACLU v Mastro,* 670 F3d 1046, 1056 (CA 9, 2012)(indicating, "Active dissemination of an individual's sex offender status does not alter the Court's core reasoning that 'stigma . . . results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.' *Smith*, 538 US at 98."); *Anderson v Holder,* 396 US App DC 281; 647 F3d 1165, 1173 (2011)("The effectiveness of registration depends on making vulnerable people aware of the presence of sex offenders in their communities. Empowering the police to engage in active notification where they think appropriate is not excessive in view of this legitimate regulatory goal."); *United States v Hinckley,* 550 F3d 926, 937-938 (CA 10, 2008)(indicating, "Furthermore, SORNA, just as the *Smith* scheme, merely provides for the 'dissemination of accurate information about a criminal record, most of which is already public.' While the public display of this information could result in shame for Mr. Hinckley, this is not 'an integral part of the objective of the regulatory scheme.' *Id.* at 99. SORNA aims to 'inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.'")(citations omitted). Accord *Shaw v Patton,* 823 F3d 556, 563 n 11 (CA 10, 2016).

Defendant does not claim that *Smith* was wrongly decided and Michigan construes the definition of punishment for ex post facto purposes similarly to the United States Supreme Court. Defendant primarily argues that features in Michigan's SORA not present in *Smith*—which are required if a state conforms to SORNA—convert Michigan's Act into punishment, namely categorization of offenses into tiers, in-person reporting of information necessary to identify the appearance and location of the offender, and the fees charged. However, evaluation of all factors

of the *Mendoza-Martinez* test weigh in favor of the conclusion that the registry is nonpunitive in effect.

1. Affirmative disability or restraint

The relevant inquiry when determining whether a law imposes an affirmative disability or restraint is "how the effects of the [a]ct are felt by those subject to it." *Smith*, 538 US at 99-100. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id*. at 100. In *Smith,* the Court noted that the Act—which included quarterly reporting—imposed no physical restraint and therefore did not resemble the punishment of imprisonment "the paradigmatic affirmative disability or restraint" and was "less harsh than the sanctions of occupational debarment" which the Court had held to be nonpunitive. *Id.* See also *Hudson v United States,* 522 US 93, 104; 118 S Ct 488; 139 L Ed 2d 450 (1997)(concluding that a bar to working in the banking industry was not an affirmative disability); *Flemming v Nestor,* 363 US 603, 617; 80 S Ct 1367; 4 L Ed 2d 1435 (1960)(finding that a termination of Social Security benefits was not an affirmative disability); *De Veau v Braisted,* 363 US 144, 160; 4 L Ed 2d 1109; 80 S Ct 1146 (1960)(Opinion by FRANKFURTER, J.)(laws prohibiting convicted felons from serving as officers or agents of a union not punishment); *Hawker v New York,* 170 US 189, 196, 200; 42 L Ed 1002; 18 S Ct 573 (1898) (laws prohibiting the practice of medicine by convicted felons not punishment).

a. In-person reporting requirements

Offenders in Michigan must report in person twice a year for Tier II offenses. MCL 28.725a(3)(b). Offenders are also required to report in person when they change their names, residences, or places of employment, or discontinue employment; enroll as a student with institutions of higher education or discontinue such enrollment; temporarily reside at any place

other than their residence for more than seven days; establish an e-mail or instant message address or "any other designations used in internet communications or postings;" purchase or "begin[] to regularly operate" a vehicle, or discontinue such ownership or operation.[20] MCL 28.725(1)(a)-(h).

In-person appearance serves a remedial purpose; it establishes that the sex offender is in fact in the vicinity and not in some other jurisdiction, confirms his or her identity, and verifies that his photograph matches the offender's current appearance. MCL 28.725a(5). This Court found that "[t]his absolute reporting obligation arises from the offender's status as a sex offender and the potential danger the offender poses to the people of Michigan." *Dowdy,* 489 Mich at 389.

Moreover, it is minimally intrusive, consistent with any regulatory scheme. It merely requires a visit to a police station two times a year or when the offender makes changes in his or her life which would affect the ability of law enforcement or the public to locate him or her.

The *Smith* Court found that—though in that case there was no indication that the updates to the registry had to be made in person—the updates did not constitute an affirmative disability. The Court rejected Does' argument that the periodic updates were similar to probation or supervised release noting that "[a]lthough registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so." *Smith,* 538 US at 101.

Several federal circuits have found that requiring in-person appearances by the registrant to update personal information and to provide notification of changes in residence, vehicle, and employment status, which is required by SORNA, does not impose an affirmative disability. In *Parks*, 698 F3d at 6, the First Circuit noted the regulatory justifications for requiring in-person

[20] This information is required by SORNA. 34 USC §20914(a)(c); SORNA §114, https://smart.gov/pdfs/final_sornaguidelines.pdf (accessed November 15, 2018)

appearances by the registrant:

> To appear in person to update a registration is doubtless more inconvenient than doing so by telephone, mail or web entry; but it serves the remedial purpose of establishing that the individual is in the vicinity and not in some other jurisdiction where he may not have registered, confirms identity by fingerprints and records the individual's current appearance.

Accord *United States v Under Seal*, 709 F3d 257, 265 (CA 4, 2013). See also *United States v W.B.H.*, 664 F3d 848, 857 (CA 11, 2011)("Appearing in person may be more inconvenient, but requiring it is not punitive" and stating that in-person registry is important to help law enforcement track offenders and ensure that the information provided was accurate); *Shaw v Patton,* 823 F3d 556, 568 (CA 10, 2016)(rejecting claim that the requirement that individuals report in person weekly or quarterly depending on whether the offender is transient, amounted to an affirmative disability); *ACLU v Masto,* 670 F3d at 1056-1057 (CA 9, 2012)(upholding 90 day life-time verification for offenders stating that "[t]he requirement that sex offenders present themselves for fingerprinting is not akin to imprisonment, and the burden remains less onerous than occupational debarment."); *State v Petersen-Beard,* 304 Kan 192, 204-205; 377 P3d 1127 (2016)(rejecting claim that quarterly in-person registration for *all* sex offenders was an affirmative disability). Accord *State v Eighth Judicial District Court,* 29 Nev 492, 513; 306 P3d 369 (2013); *Doe v Cuomo,* 755 F3d 105, 112 (CA 2, 2014); *Kammerer v State,* 2014 WY 50 *P22; 22 P3d 827, 836-837 (2014).

The Sixth Circuit in *Doe v Snyder,* 834 F3d 696 (CA 6, 2016) disagreed with the weight of other authority and found that lifetime, in-person registration amounted to an affirmative disability. When *Doe* found that the requirements posed an affirmative disability, it referenced the fact that registrants faced imprisonment if they failed to comply with the restrictions. However, the Alaska Act—which the United States Supreme Court found in *Smith* was not

punitive—contained felony penalties for failure to comply. (And again, the threat of future prosecution does not offend the Ex Post Facto Clause.) *Doe* also found that there was "no nexus between the regulatory purpose and the job at issue." *Id.* at 703. However, as correctly determined by a number of courts, in-person registration verifies that the offender is in fact in the jurisdiction. The more information which is provided by the offender, the better informed are the public and law enforcement regarding the whereabouts of the offender. Not all information supplied by the offender is provided to the public, solely to law enforcement. MCL 28.728. These provisions clearly effectuate the purpose of the registry "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. Also, Snyder is *not* required to register for life and is *not* required to register quarterly.

This factor weighs in favor of the determination that the registry is nonpunitive.

b. Categorization into Tiers

Michigan's SORA (consistent with SORNA[21]), categorizes offenses into tiers based on the severity of the offense. MCL 28.722(r)-(w). The mere fact that the crimes are categorized into tiers, however, doesn't amount to any affirmative disability or restraint upon defendant. The Alaska statute examined by the United States Supreme Court also established different periods of registration depending on the type of crime and included lifetime registration for aggravated sex offenses, yet the Supreme Court did not find that those provisions converted the Act into one that is punitive. *Smith,* 538 US at 90.

This factor weighs in favor of the determination that the registry is nonpunitive.

[21] 34 USC §20914(a)(c); SORNA §111(2)-(4), https://smart.gov/pdfs/final_sornaguidelines.pdf (accessed November 15, 2018).

c. Fees

Under the SORA, offenders who are not incarcerated are required to pay $50.00 upon initial registration and $50.00 annually, except that the total amount of payment over the entire registration period cannot exceed $550.00. MCL 28.725a(6). Of the money collected, $30.00 is forwarded to the Michigan State Police, which is required to deposit the money in the sex offenders' registration fund. $20.00 is retained by the court, local law enforcement agency, sheriff's department, or department post. MCL 28.725b(1). "Money credited to the fund shall only be used by the department for training concerning, and the maintenance and automation of, the law enforcement database, public internet website, information required under section 8, or notification and offender registration duties under section 4a." MCL 28.725b(2). "If an individual required to pay a registration fee under this act is indigent, the registration fee shall be waived for a period of 90 days" (MCL 28.725b(3)) and the Department of Corrections does not collect a fee for housed inmates. MCL 28.725c.

In *People v Earl,* this Court found that the $130.00 Crime Victim's Rights Assessment did not amount to punishment. *Earl,* 495 Mich at 35. This Court also determined that the assessment did not amount to an affirmative disability or restraint. This Court held, "the assessment—a maximum of $130—is 'certainly nothing approaching the 'infamous punishment' of imprisonment.'" *Id.* at 44 (citation omitted). This Court held that, though the assessment might have some punitive effects on defendants, "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." *Id.* at 45. As in *Earl,* a $50 yearly fee—which can be waived for 90 days upon demonstration of indigence and which is also not paid by incarcerated individual—does not constitute an affirmative disability.

This factor weighs in favor of the determination that the registry is nonpunitive.

2. Historical form of punishment

a. In-person reporting requirements

The United States Supreme Court, noting that sex offender registration was of recent origin, concluded it did not resemble a traditional means of punishment. The United States Supreme Court found that past punishments such as whipping, pillory and branding "inflicted physical pain and staged a direct confrontation between the offender and the public." *Smith,* 538 US at 98. The Court also noted that public shaming, humiliation, and banishment, "involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community." *Id. Smith* found that "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Id.* Instead, *Smith* noted that the criminal justice system *requires* that its processes be public. *Id.* at 99. Accord *United States v W.B.H.,* 664 F3d at 856 (indicating "Sex offenders are not forced to stand in pillories in the middle of town to face a barrage of bad-mouthing from the town's browbeaters and blowhards."); *Kellar v Fayetteville Police Dep't,* 339 Ark 274, 284-285; 5 SW3d 402 (1999)(This type of consequence, contrary to dissemination of truthful information, "required the physical participation of the offender and typically required direct confrontation between the offender and members of the public.")(citation omitted).

Registration is also frequently part of civil regulation, such as car licensing, social security applications, registering for selective service (*Parks,* 698 F3d at 6), the census, and voting. The registry merely organizes the offender's information into a database for use. *Collie v State,* 710 So2d 1000, 1010 (Fla App, 1998). It also is similar to public notification of "wanted"

posters, the FBI's most wanted list, the publication of "deadbeat" dads' photographs (*State ex rel Olivieri,* 779 So 2d at 748) and dissemination of "rap sheet" information to regulatory agencies, bar associations, prospective employers and interested members of the public (*Keller v Fayetteville Police Dep't,* 339 Ark 274, 284-285; 5 SW3d 402 (1999)) —all of which are utilized for public protection and safety, not punishment. *State ex rel Olivieri,* 770 So 2d at 748.

Defendant argues that the registry is akin to probation and parole, historical types of punishment. However, *Smith* rejected the argument that registration was similar to probation or parole because offenders did not have to ask for permission to engage in certain activities, they merely had to report that they did them. The Count noted that, unlike violations of probation or parole, for any violation of ASORA offenders must be exposed to future charges, with due process for those charges, before they face any loss of liberty. *Id.* at 102. See *Shaw v Patton,* 823 F3d at 564 (indicating, "Probation historically operated as a deferred sentence for an underlying offense, but any violation of Mr. Shaw's reporting requirements would entail a criminal prosecution distinct from his underlying offense" and that contrary to registration, probation historically concerned a probationer's supervision as opposed to disclosure of personal information); Accord *United States v W.B.H.,* 664 F3d at 857.

Also, unlike probation or supervised released, registration is not imposed "either in lieu of incarceration or fines—our society's preferred modes of punishment . . ." *Doe v Pataki,* 120 F3d 1263, 1283-1284 (CA 2, 1997). While probation or parole may have "reporting" in common in the abstract, this is only one aspect of many conditions attached to these punishments. For example, probationers in Michigan are subject to search of their persons and property simply on reasonable suspicion of a probation violation or criminal activity (*People v Hellenthal,* 186 Mich App 484, 486; 465 NW2d 329 (1990)) and are subject to random drugs tests and potentially in-

or out-patient drug or mental health treatment or counseling. MCL 771.3(2)(g),(h),(i); *People v Roth,* 154 Mich App 257, 259; 397 NW2d 196 (1986). They may also be required to avoid leaving the state without permission (MCL 771.3(1)(b)), engage in community service (MCL 771.3(2)(e)), go on house arrest (MCL 771.3(2)(k), serve time in jail (MCL 771.3(2)(a), stay away from other felons (*People v Miller,* 182 Mich App 711, 714; 452 NW2d 890 (1990)), and complete high school or an equivalency degree. MCL 771.3(2)(q). Individuals on parole can be placed on a specialized alternative incarceration unit (MCL 791.234a), must provide a DNA sample (MCL 791.233d(1)), may be housed in a community corrections center or residential home (MCL 791.236(11)), may be subject to electronic monitoring (MCL 791.236(15)(18)), may be required to stay away from certain people (MCL 791.236(16)), and must consent to searches upon demand by an officer or parole officer. MCL 791.236(19).

These provisions distinguish parole and probation from a registration system. See *Shaw v Patton,* 823 F3d at 564 (indicating that "Historically, probation included multiple conditions beyond regular reporting."); *Petersen-Beard,* 304 Kan at 204 (finding that provisions such as in Michigan's probation statute distinguished registration from probation and parole); *Kammerer v State*, 322 P3d at 836 (finding that Wyoming SORA's reporting requirements were not "akin to supervised probation or parole . . . While the reporting provisions of WSORA[22] require registrants to interact periodically with law enforcement agencies, those requirements do not subject registrants to monitoring similar to that imposed under supervised probation or parole."); *State v Eighth Judicial District Court,* 129 Nev at 513 (indicating that registration which

[22] Wyoming's SORA required the offender to report his address in person to the county sheriff every three months, report any change in residence, vehicle, or employment status within three days, and report an intention to leave the country at least twenty-one days prior to travel. The Act also delivered notice of the offender's registration to residential neighbors within 750 feet of the offender's residence. *Kammerer,* 322 P2d at 830-831, 835, 836.

included in-person registration every three months could not be "considered a historical form of punishment.").

Also, "unlike parole, probation, or the length of imprisonment, the requirement to register as a sex offender is beyond the control of the trial court. . . instead it is a legal obligation, predetermined by the legislature, placed on those convicted of particular crimes and is an automatic operation of statute . . . intended to act not as a criminal punishment but as a prophylactic civil remedy." *State v Trotter,* 2014 UT 17, ¶P30; 330 P3d 1267, 1276 (2014).

Similarly, here, the reporting provisions pursuant to MCL 28.725, which require provision of truthful information by the offender, do not amount to monitoring akin to supervised probation or parole. Defendant has no constitutional right to keep truthful information—much of which is *required* to be public—secret.

When the *Doe* Court found that the registration requirements were consistent with probation or parole, it adopted the arguments rejected by *Smith* and many other Courts. *Doe,* 834 F3d at 703. Rather than adopt the minority view, this Court should follow the guidance of the United States Supreme Court and the majority of other circuits.

This factor weighs in favor of the determination that the registry is nonpunitive.

b. Categorization into Tiers

The mere fact that offenses are now separated into tiers does not cause the Act to resemble any historical form of punishment. "To the contrary, specification and comprehensiveness are hallmarks of *civil* regulation." *Young,* 585 F3d at 205 (rejecting defendant's claim that SORNA's creation of classes of offenders created a punitive effect).

When *Doe v Snyder* found to the contrary, the Court first of all applied a definition of punishment suggested by law professors, as opposed to that applied by the United States

Supreme Court. *Doe,* 834 F3d at 701. Moreover, when *Doe* found that the SORA's registration requirements resembled traditional shaming punishments because the SORA contained no classification based on present dangerousness (*Id.* at 702-703), this argument was rejected by the United States Supreme Court. *Smith,* 538 US at 98. As the Ninth Circuit stated, "Plaintiffs' argument that AB 579 is overbroad because it will force many non-dangerous offenders to register is squarely foreclosed by *Smith*. 'The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause.'" *ACLU v Masto,* 670 F3d at 1057 (citation omitted).

Also, when *Doe* determined that the SORA resembled a historical version of punishment, it mentioned that some of the plaintiffs were charged with offenses which did not have a sexual component or offenders who had received treatment under HYTA. That is not true in this case. Defendant was convicted of a sex crime and did not receive treatment under HYTA. Defendant has failed to support his argument that this factor—which did not apply in the circumstances of his case—could dictate that *he* was subject to punishment. Moreover, presently sex offenders cannot receive treatment under HYTA unless there are aggravating factors present in their offenses. MCL 762.11. Also, in 2004, the Legislature amended the SORA to allow certain individuals who received treatment under HYTA to petition for removal from the registry. MCL 28.722(b)(*ii*); MCL 28.728c. But again, dissemination of truthful information cannot be considered punishment. See *United States v W.B.H.,* 664 F 3d at 856 (rejecting a similar argument based on *Smith,* "Under *Doe* disseminating that truthful information would not be considered punishment, and it would be permitted. Any embarrassment or scorn resulting from dissemination of the truthful information about W.B.H.'s youthful offender conviction is a

collateral consequence of a legitimate regulation."); *United States v Under Seal,* 709 F3d at 265 (indicating, "Appellant attempts to distinguish *Smith*, arguing that records involving criminal offenses committed by juveniles are not made public, such that disseminating information about them must be punitive. . . . the Supreme Court has held that '[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.' *Smith*, 538 US at 98.")

This factor weighs in favor of the determination that the registry is nonpunitive.

c. Fee

The $50 yearly fee also does not cause the Act to resemble any historical form of punishment. First of all, the fee has nothing to do with the SORA violation conviction. In fact, since defendant was incarcerated on the SORA violation, he wouldn't have to pay the fee while incarcerated. This Court in *Earl* found that the CVRA assessment did not amount to punishment noting that the assessment was a relatively new concept and did not "share the characteristics of punitive fines because it imposes a flat fee irrespective of the underlying criminal conduct." *Earl,* 495 Mich at 45. Sex offender registrations are also of a relatively recent origin (*Smith,* 438 US at 97) and the fee charged under the Act is also a flat fee for every offender which indicates that it does not resemble a punitive fine.

This factor weighs in favor of the determination that the registry is nonpunitive.

3.-4. Scienter and criminal behavior

Smith did not find that whether registration was triggered upon a finding of scienter and whether the behavior was already a crime were helpful in evaluating the sex offender registry. *Smith,* 538 US at 97, 105. Instead the Court said, "[t]he regulatory scheme applies only to past conduct, which was, and is, a crime. This is a necessary beginning point, for recidivism is the

statutory concern. The obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation." *Id.* at 105. Michigan's SORA is no different and defendant does not argue these factors have any relevancy. Also, in-person reporting, and the separation of crimes into tiers is not dependent on the scienter of the defendant. *Helman v State,* 784 A2d 1058, 1078 (Del, 2001)(indicating, "The only predicate requirement is that an offender be convicted or adjudicated delinquent of an offense requiring Tier III notification. Therefore a finding of *scienter* is not required to bring the notification provisions into play."); *Rodriguez v State,* 93 SW3d 60, 73 (Tex Crim App, 2002)(indicating, "Although a culpable mental state may be required with respect to some of the underlying offenses . . . the statute does not require a culpable mental state with respect to the registration and notification provisions. . . ."). Though certain *violations* of the SORA may require mens rea, registration itself is dependent on a totally separate crime. See *State v Kelly,* 256 Conn 23, 93-94; 770 A2d 908 (2001)(indicating, "although the statute deemed the failure to register a crime, that portion of the statute was fully prospective.").

This Court in *Earl* also agreed that these factors were generally unhelpful in ex post facto analysis. This Court found that "regardless whether the underlying conduct constitutes a strict liability felony (requiring no criminal intent) or a crime requiring the most depraved criminal intent (such as premeditated murder) the assessment treats the conduct exactly the same by imposing a flat fee." *Earl,* 495 Mich at 48. The same is true for the fee assessed under the SORA; the fee is the same for every sex offender, and the amount solely depends on the length of time on the registry. Also, this fee was not imposed for the years before the SORA was passed, only after defendant was released from incarceration.

5. Traditional aims of punishment

The United States Supreme Court rejected Does' claim that the fact that the reporting requirement appeared to be measured by the extent of wrongdoing rather than the risk posed, rendered the Act punitive. The Court found that instead "[t]he broad categories, however, and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism and this is consistent with the regulatory objective." *Smith,* 538 US at 102.

a. In-person reporting requirements

When considering this factor, there is no meaningful distinction between this case and *Smith.* The fact that offenders must register in person, doesn't convert the nature of the Act from one that is regulatory in nature as opposed to one that furthers the traditional aim of punishment. As stated *supra,* "it serves the remedial purpose of establishing that the individual is in the vicinity and not in some other jurisdiction where he may not have registered, confirms identity . . . and records the individual's current appearance." *Parks,* 698 F3d at 6. The overriding purpose of the SORA is to facilitate the location of sex offenders by law enforcement as well as to "prospectively safeguard members of the community by informing them that a convicted sex offender is living among them." *Helman,* 784 A2d at 1078. See also MCL 28.721a. This is a purpose unrelated to punishing sex offenders for past offenses.

Also though "[i]t is possible that the fact of registration will deter some registered offenders from re-offending, but it is equally likely that the deterrence would come from their conviction and incarceration." *Kellar v Fayetteville Police Dep't,* 339 Ark at 285. The South Carolina Supreme Court, when evaluating the constitutionality of a statute which required life-time registration for certain offenses, even for juveniles, as well as registration every 90 days, found that the "[t]he purpose of the sex offender registry has nothing to do with retribution, and

any deterrent effect of registration derives from the availability of information, not from punishment. Instead, the purpose of the registry and the electronic monitoring component is to protect the public and aid law enforcement." *In the Interest of Justin B,* 419 SC 575, 580, 583-584; 799 SE2d 675 (2017). In accord *Ray v State,* 133 Idaho 96, 100; 982 P2d 931 (1999); *State v Burr,* 1999 ND 143, ¶18; 598 NW2d 147, 154 (1999). This Court also stated that "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.

Though defendant asserts that urging citizens to contact law enforcement when registrants are violating the provisions of the SORA promotes vigilantism and therefore demonstrate a retributive purpose, the exact opposite is the case. These tipsters are, instead of taking the law into their own hands, contacting law enforcement which would conduct an investigation into whether the registrants are violating the law. The SORA itself also imposes criminal penalties for those who reveal information in derogation of the Act and exposes the wrongful divulger to a civil suit with treble damages. MCL 28.730(4)(5). Also the public sex offender website established by the Michigan State Police specifically warns individuals using the site to use the information for an appropriate purpose. See Michigan Public Sex Offender Registry <http://www.communitynotification.com/cap_main.php?office=55242/> (accessed November 20, 2018)(indicating, "Extreme care should be exercised in using any information obtained from this web site. Information on this site must not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address. Any such action could result in civil or criminal penalties.") These provisions indicate "the law is intended to disseminate information for public safety and not to punish registrants." *ACLU v Masto,* 670 F3d at 1056.

This factor weighs in favor of the determination that the registry is nonpunitive.

b. Categorization into Tiers

Again, when considering this factor, there is no meaningful distinction between this case and *Smith.* Alaska categorized offenses into different categories for registration purposes and SORNA, as well as Michigan's SORA, fine-tuned these categories. *Smith* rejected the same argument that defendant is making, that because there was no individualized determination of dangerousness, the Act is punitive. *Smith* stated, "The Court of Appeals was incorrect to conclude that the Act's registration obligations were retributive because 'the length of the reporting requirement appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed.' 259 F.3d at 990. The Act, it is true, differentiates between individuals convicted of aggravated or multiple offenses and those convicted of a single nonaggravated offense. Alaska Stat. § 12.63.020(a)(1) (2000). The broad categories, however, and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Smith,* 538 US at 102. *Smith* found that Alaska could "mak[e] reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith,* 538 US at 103.

Due to the 2011 changes in Michigan's SORA, some offenses and offenders were removed from the registry, but some offenses were subject to more stringent registration requirements. This did not convert the Act into one that furthered the traditional aims of punishment. See *Kammerer,* 322 P3d at 838 (rejecting argument that, because offenses were classified by crimes as opposed to the likelihood of reoffending, that this demonstrated a retributive effect indicating that this argument is no different from that rejected by the United States Supreme Court in *Smith*); Accord *Shaw v Patton,* 823 F3d at 571. As argued *supra*,

"specification and comprehensiveness are hallmarks of civil regulation." *Young,* 585 F3d at 205.

Doe v Snyder, gave this factor little weight. *Doe,* 834 F3d at 704. However, again, there is no meaningful distinction between this case and *Smith* and the United States Supreme Court squarely found that "[t]he Court of Appeals was incorrect to conclude that the Act's registration obligations were retributive. . . ." *Smith,* 538 US at 102.

This factor weighs in favor of the determination that the registry is nonpunitive.

c. Fees

This Court found that the CVRA assessment did not promote the traditional aims of punishment. The fee did not depend on the underlying factual nature of the crimes committed or number of convictions. This Court also found that the difference in assessment between misdemeanors and felonies was consistent with the regulatory objective and the small fee was unlikely to have a significant deterrent effect. *Earl,* 495 Mich at 46. In this case as well, the fee charged by the Act does not consider the underlying factual nature of the crimes committed or number of convictions. Rather than being punitive, the fact that the fees are charged yearly clearly demonstrates that the fees are commensurate with the remedial purposes of the Act, funding "training concerning, and the maintenance and automation of, the law enforcement database, public internet website, information required under section 8, or notification and offender registration duties under section 4a." MCL 28.725b(2). See also *Mueller v Raemisch,* 740 F3d 1128, 1135 (CA 7, 2013)(indicating, "The fee is intended to compensate the state for the expense of maintaining the sex offender registry. The offenders are responsible for the expense, so there is nothing 'punitive' about making them pay for it, any more than it is 'punitive' to charge a fee for a passport.")

This factor weighs in favor of the determination that the registry is nonpunitive.

6.-7. Rational connection to non-punitive purpose, and excessive with respect to non-punitive purpose

a. In-person reporting requirements

Sex offender registration bears a rational connection to the goal of public safety by providing for identification of individuals convicted of sex offenses, and by making that information available to law enforcement agencies and the general public. *Smith*, 538 US at 102-103. As argued *supra,* in-person registration effectuates this goal, and is not excessive with respect to this objective, because it ensures that the information, particularly concerning the most serious offenders, is accurate and up-to-date. It also, by providing extensive information regarding the offender, keeps the public aware of his or her address and law enforcement cognizant of where the offender is living and working. *State v Biddle,* 187 So 3d 1122, 1126 (Ala, 2015)(noting that Alabama's SORA had a "rational connection to the legitimate, non-punitive purpose of public safety, which is advanced by enabling law enforcement officials to maintain closer contact with sex offenders and alerting the public to the risk posed by a sex offender in their community").

This factor weighs in favor of the determination that the registry is nonpunitive.

b. Categorization into Tiers

The Legislature has categorized offenses into tiers, with those which are the most dangerous requiring longer registration terms. This three-tier system reasonably serves to keep the public safe. See *Nollette v State,* 118 Nev 341, 347; 46 P3d 87 (2002)(indicating that "the three-level classification system, ensure[s] that community disclosure occurs to prevent public harm where the risk of re-offense is high, not to punish past conduct"). Defendant argues that sex offender registration statutes do not reduce recidivism (Defense Brief, pp. 23-24). However, the efficacy of the statute is a matter for the Legislature. Even if the SORA is not perfect in

achieving its aims, "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 US at 103. It is "'most significant'" that while registration may have some punitive aspects, it serves "'important nonpunitive goals.'" *Earl,* 495 Mich at 46, quoting *United States v Ursery,* 518 US 267, 290; 116 S Ct 2135; 135 L Ed 2d 549 (1996). Defendant's arguments do not "suggest that the Act's nonpunitive purpose is a 'sham or mere pretext.'" *Smith,* 538 US at 84 (citation omitted).

The Ninth Circuit, when noting that Nevada had expanded the class subject to regulation, found that "the linking of conviction status to registration is a reasonable nonpunitive regulatory scheme under *Smith.*" *ACLU v Masto,* 670 F3d at 1057. The Court rejected plaintiff's argument which critiqued the recidivism studies referenced in *Smith,* finding, "a recalibrated assessment of recidivism risk would not refute the legitimate public safety interest in monitoring sex-offender presence in the community." *Id.*

As stated by the Eleventh Circuit, grouping the offenses as SORNA did into tiers was not materially different from the Alaska scheme at issue in *Smith.* "Both statutory regimes group the offenders in categories instead of making individual determinations of dangerousness. Because *Doe* held that the regulatory scheme of the Alaska statute is not excessive in relation to its non-punitive purpose, it necessarily follows that SORNA's is not either." *United States v W.B.H.,* 664 F3d at 859-860. As noted by the Kansas Supreme Court when also rejecting defendant's argument, "the proposition that offender registration schemes are rationally related to the nonpunitive purpose of public safety finds overwhelming approval in the federal caselaw." *Petersen-Beard,* 304 Kan at 208. The Kansas Supreme Court found that the fact that the amendments to its SORA required more information from offenders, required posting on the internet and increased the penalty for noncompliance and required life-time registration for

certain crimes, is not excessive "given KORA's public safety purpose. . ." *Id.* at 202, 208 See also *Meinders v Weber,* 604 NW2d at 259, 260 (upholding lifetime registration for all specified offenses indicating "we are not free as judges to overrule legislative values. We pass only on the permissible scope of legislative regulation, not its wisdom . . . The view that judges function to fine tune legislative excess has long been discarded. Only when statutes are plainly and unmistakably unconstitutional may we declare them void.")

Also, as stated by *Smith,* the Legislature could reasonably conclude that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'" *Smith,* 538 US at 103, quoting *McKune v Lile,* 536 US 24, 34; 122 S Ct 2017; 153 L Ed 2d 47 (2002). The United States Supreme Court cited studies conducted by the United States Department of Justice's Bureau of Justice Statistics concerning sex offenders and recidivism of prisoners finding that "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.* *Smith* found that the duration of the reporting requirements was not excessive noting "[e]mpirical research on child molesters, for instance, has shown that, 'contrary to conventional wisdom, most reoffenses do not occur within the first several years after release,' but may occur 'as late as 20 years following release.' R. Prentky, R. Knight, and A. Lee, U.S. Dep't. of Justice, National Institute of Justice, Child Sexual Molestation: Research Issues 14 (1997)." *Smith,* 538 US at 104. See also *United States v Kebodeaux,* 570 US 387, 395-396; 133 S Ct 2496; 186 L Ed 2d 540 (2013)(indicating, even when noting conflicting studies, "There is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals. See Dep't. of Justice, Bureau of Justice Statistics, P. Langan, E. Schmitt, & M. Durose, *Recidivism of Sex Offenders* Released in 1994, p 1 (Nov. 2003)(reporting that compared to non-sex offenders released sex offenders were four

times more likely to be rearrested for a sex crime. . .)"); *Conn Dep't of Pub Safety v Doe,* 538 US 1, 4; 123 S Ct 1160; 155 L Ed 2d 98 (2003)(indicating, "'Sex offenders are a serious threat in this Nation . . . when convicted sex offenders reenter society, they are much more likely than any other type of offender to be arrested for a new rape or sex assault.'")(citation omitted).

Smith's conclusion was confirmed by recent statistical studies which emphasize that "sexual recidivism rates range from 5 percent after 3 years to 24 percent after 15 years." Dep't. of Justice, Office of Justice Reform, R. Przybylski (*Sex Offender Management Assessment and Planning Initiative* March 2017), https://smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf p. 107) (accessed November 26, 2018); 31c.[23] A recent report from the Bureau of Justice Statistics—the source relied on by the United States Supreme Court in *Smith* (which included statistics from Michigan) indicated that "five in 6 (83%) of state prisoners released in 2005 across 30 states were arrested at least once during the 9 years following their release." Dep't. of Justice, Bureau of Justice Statistics, M Alper, M. Durose & J. Markman *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014),* p 1, 15, 18 (May, 2018), https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf (accessed November 27, 2018); 56c. And a Justice Department report from 2017 found that, not only did "researchers widely agree that observed recidivism rates are ***underestimates*** of the true re-offense rates of sex offenders," but noted studies that concluded that sexual recidivism rates increased over the years. The report noted one study which determined that sexual recidivism rates for offenders studied over 20 years was 27%. *Sex Offender Management Assessment and Planning Initiative,* p. 107-109, 112; 31c-33c, 36c. Another United States Department of Justice Report found that only 40.4% of rapes or sexual assaults of victims over the age of 12 were reported. Dep't. of Justice, Bureau of

[23] The entire assessment is available on the website. Amicus has attached the chapter concerning adult sex offender recidivism.

Statistics, R. Morgan, J. Truman, *Criminal Victimization-2017* p 6, 7. https://www.bjs.gov/content/pub/pdf/cv17.pdf (accessed January 23, 2019). 86c. Other studies have found that 70% of *child* sexual assaults are not reported to the police and 86% of sex crimes against adolescents go unreported to the police or any other authority. *Belleau v Wall,* 811 F3d 929, 933 (CA 7, 2016), citing David Finkelhor, Heather Hammer, & Andrea J. Sedlak, "Sexually Assaulted Children: National Estimates & Characteristics," *Juvenile Justice Bulletin* 8 (August 2008); U.S. Dep't. of Justice, Office of Justice Programs, "Youth Victimization: Prevalence and Implications" 6 (April 2003); and Candace Kruttschnitt, William D. Kalsbeek & Carol C. House (eds.), National Research Council, *Estimating the Incidence of Rape and Sexual Assault* 36-38 (2014). Another Justice Department report cited studies which revealed a sexual recidivism rate at 39% for rapists over the course of 25 years and a 52% recidivism rate for child molesters over the course of a 25-year follow-up period. *Sex Offender Management Assessment and Planning Initiative*, p 117, 120; 41c, 44c.

As stated recently by the Seventh Circuit, after noting that these numbers didn't take account of the very high rate of underreporting of sex offenses, "If only 20 percent of child molestations result in an arrest, the 3 percent recidivism figure implies that as many as 15 percent of child molesters released from prison molest again. That's a high rate when one considers the heavy punishment they face if caught recidivating, and thus is further evidence of the compulsive nature of their criminal activity."[24] *Belleau v Wall,* 811 F3d at 934. The Eleventh Circuit, when reviewing similar statistics and also noting the under-reporting of sexual crimes,

[24] As cogently stated by the Seventh Circuit, "Readers of this opinion who are parents of young children should ask themselves whether they should worry that there are people in their community who have 'only' a 16 percent or an 8 percent probability of molesting young children—bearing in mind the lifelong psychological scars that such molestation frequently inflicts." *Belleau v Wall,* 811 F 3d at 933-934.

indicate that the threat of sexual recidivism is "appalling." *United States v Irey,* 612 F3d 1160, 1214-1215 (CA 11, 2010). Accord *United States v Pabon,* 819 F3d 26, 31 (CA 1, 2016); see also *State v Eighth Judicial District Court,* 129 Nev at 517-518 (upholding registration—even for juvenile offenders—noting studies regarding recidivism rates of sex offenders at 13%).

And, if the risk of recidivism is frightening and high, it is reasonable for the State to determine that providing extensive information regarding the offender, keeps the public aware of his or her address and law enforcement aware of where the offender is living and working which is reasonably geared to ensure public safety. Snyder, who was a fourth felony offender, had sex with his cousin who was a minor and violated the sex offender registry on two occasions. 33a-34a, 46a, 216a-217a. From the court's comments, defendant also does not believe he has to comply with the registry. 217a. He will likely violate its provisions in the future.

Doe v Snyder found that certain recidivism studies cast doubt on the United States Supreme Court's findings in *Smith. Doe,* 834 F3d at 707. However, as stated *supra,* recent studies by the bodies relied upon by the United States Supreme Court in *Smith,* confirm the findings that recidivism of sex offenders is "frightening and high." Also, the *Doe* Court never even mentioned a fact acknowledged by the majority of researchers, that there is a huge percentage of underreporting of sex crimes. 33c. However, again, it is defendant who must show by the clearest proof that the Act is punitive and conflicting studies do not demonstrate "the clearest proof." Moreover, there was no fact-finding done in the lower court regarding the conflict between the studies (particularly because defendant's claim was unpreserved), but more importantly, this would be a job for the Legislature. Whether the effect of the SORA is excessive is "not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are

reasonable in light of the nonpunitive objective." *Smith*, 538 US at 105. Even though there may be conflicting evidence concerning recidivism, the Legislature has the power to weigh the evidence and to reach a rational conclusion, for example, that safety needs justify the registration requirements. *Doe v Dep't of Social Servs,* 439 Mich at 681; *Kirby,* 440 Mich at 493-495. Cf *Kebodeaux,* 570 US at 396. ***In fact, defendant acknowledges that the Legislature has rejected many of the arguments he is now making*** (Defense Brief at 8, 9, 11, 20). Defendant has failed to show by the clearest proof that the Legislature's means were not reasonable.

This factor weighs in favor of the determination that the registry is nonpunitive.

c. Fees

This Court in *Earl* found that any punitive effects of the CVRA assessment were incidental to the goal of funding crime victim's services, a purpose which was rationally connected to the assessment itself. *Earl,* 495 Mich at 46-47. This Court also found that placement of the assessment on the convicted offenders was a rational policy decision. *Id.* at 47. This Court also deemed the assessment as not excessive with respect to its purpose. This Court also found that, though the assessment might pose a hardship, it was set at a rate that the Crime Victims Services Commission determined was necessary to adequately fund the crime victim's services programs. *Id.*

The fee assessed by the SORA is tailored to the goal of keeping the registry functioning, training those who maintain it, and educating those who are subject to it. Also, the fee is waived for 90 days upon demonstration of indigence, the fee is capped at a certain amount, and the fee is not assessed upon those who are incarcerated. These facts also reveal that the fee is not meant to be punishment but solely is used for the Act's regulatory purpose. See also *Petersen-Beard,* 304 Kan at 205, 208-209 (rejecting defendant's assertion that the fact that registrants could

potentially pay $240 in fees annually demonstrated the punitive effect of the Act); *McGuire v Strange,* 83 F Supp 3d 1231, 1256-1257 (MD Ala, 2015)(rejecting plaintiff's assertion that the fact that registrants could potentially pay $240 in fees annually demonstrated the punitive effect of the Act, stating "[b]ecause ASORCNA's fees are used to offset the costs of the regulatory scheme, they do not resemble the traditional punishment of fines.").

This factor weighs in favor of the determination that the registry is nonpunitive.

C. Response to *Doe v Snyder*

The decision in *Doe v Snyder* does not bind this Court. *Abela v GMC,* 469 Mich 603, 606; 677 NW2d 325 (2004)(indicating, "Although state courts are bound by the decisions of the United States Supreme Court construing federal law, *Chesapeake & O R Co v Martin*, 283 US 209, 220-221; 51 S Ct 453; 75 L Ed 983 (1931), there is no similar obligation with respect to decisions of the lower federal courts."). See generally *Younger v Harris,* 401 US 37, 43-45; 91 S Ct 746; 27 L Ed 2d 669 (1971). And, the opinion only applied to the plaintiffs in that lawsuit. *Doe v Snyder,* 834 F3d at 706. The federal court did *not* enjoin the state officers from administering the act.[25] Compare *Fullmer v Mich Dep's of State Police,* 207 F Supp 2d 650, 662 (ED Mich, 2002), rev'd 360 F3d 579 (CA 6, 2004). The opinion in *Snyder* also heavily relied on the residency restrictions. *Snyder,* 834 F3d at 701-702. As stated *supra,* if the Sixth Circuit had been consistent in its decisions, it would solely have struck down the 2006 amendments to SORA which were not based on SORNA, but upheld the 2011 amendments which were based on SORNA. See *United States v Felts,* 674 F3d 599, 605-606 (CA 6, 2012) (and *United States v Shannon,* 511 Fed Appx 487, 492 (CA 5, 2013))(rejecting ex post facto challenges to SORNA).

Moreover, if Michigan's SORA had accurately been evaluated in light of the United

[25] However, *Doe v Snyder* has been used in support of civil suits against state actors.

States Supreme Court's opinion in *Smith v Doe,* the federal court should have found that Michigan's registry did not amount to punishment. When *Doe* said that "many states" have found their Acts punitive, *Doe* did not acknowledge that ***all other federal circuits have found that the sex offender registries under consideration did not amount to punishment*** and that the states that have found their registries punitive—which are in the clear minority—overwhelmingly did so based on their own states' constitution. See also *State v Kenney,* 417 P3d 989, 994, 997 (Idaho App, 2018)(specifically rejecting *Doe v Snyder*); *Does v Wasden,* unpublished opinion of the United States District Court for the District of Idaho issued May 17, 2018 (Case No. 1:16-cv-00429-DCN) p 17-22[26] (rejecting *Doe v Snyder's* analysis when Idaho's registration provisions were challenged as ex post facto); 116c-118c; *United States v Morgan,* 255 F Supp 3d at 231 n 2 (rejecting *Doe v Snyder's* analysis when SORNA's registration provisions challenged as punishment); *Devine v Annucci,* 56 NYS3d 149, 152;___NE2d___ (2017)(rejecting *Doe v Snyder's* analysis to a challenge to New York's SORA which the Court found was very similar to Michigan's SORA).

For these reasons *Doe v Snyder* is an aberration and a minority approach that should not be followed. Given 1) the commonalities between Michigan's SORA and the Act reviewed in *Smith v Doe* and 2) the coextensive nature of our state's and the federal ex post facto jurisprudence, this Court should follow the United States Supreme Court's guidance in *Smith*—an approach that is consistent with that of the vast majority of federal circuits and sister states.

Conclusion

Our Legislature determined that a person convicted of an offense listed in the sex offender registry, "poses a potential serious menace and danger to the health, safety, morals, and

[26] Amicus has cited and attached this unpublished case because *Doe v Snyder* is of relatively recent vintage and fairly few federal cases have discussed its reasoning.

welfare of the people, and particularly the children, of this state." The Legislature consequently enacted the registry "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. The result of this case should be no different from *Smith v Doe.* All *Mendoza-Martinez* factors weigh in favor of the determination that the registry has a nonpunitive effect. Defendant has failed to show ***by the clearest proof*** that Michigan's sex offender registry is so punitive in purpose or effect as to negate the Legislature's intent to deem that the statute is a civil regulatory statute meant to protect the public.

RELIEF

WHEREFORE, Amicus respectfully requests that this Honorable Court find that, not only is defendant's SORA violation conviction not retrospective at all, but that the notification and registration provisions in Michigan's SORA do *not* amount to punishment.

Respectfully submitted,

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