STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Kirsten Frank Kelly, P.J., Cynthia Diane Stephens and Michael J. Riordan, J.J.

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. 148981
Plaintiff-Appellee,	Court of Appeals No. 319642
v	Muskegon County Circuit Court No. 12-062665-FH
PAUL J. BETTS,	
Defendant-Appellant. _____/	

BRIEF OF AMICUS CURIAE
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STATEMENT OF JURISDICTION

Attorney General Dana Nessel agrees with the parties that this Court has jurisdiction over this appeal.

STATEMENT OF QUESTIONS PRESENTED

1. Are the requirements of Michigan's Sex Offenders Registration Act (SORA), taken as a whole, punishment, and is it an ex post facto violation of both the federal and Michigan constitutions to apply the 2006 and 2011 amendments to registrants whose offenses predate those amendments?

Appellant's answer:	Yes.
Appellee's answer:	No.
Trial court's answer:	No.
Court of Appeals' answer:	No.
Amicus Curiae's answer:	Yes.

2. Are unconstitutional portions of the SORA severable?

Appellant's answer:	Some are but most are not.
Appellee's answer:	Yes.
Trial court's answer:	Did not answer.
Court of Appeals' answer:	Did not answer.
Amicus Curiae's answer:	Some are but most are not.

INTEREST OF AMICUS CURIAE

The Attorney General is the constitutionally established officer who serves as the chief law enforcement officer for the State. The Attorney General is charged with defending not only state laws but also the state constitution. The Legislature has also authorized the Attorney General to participate in any action in any state court when, in her own judgment, she deems it necessary to participate to protect any right or interest of the State or the People of the State. MCL 14.28.

The Attorney General's primary interest in this case is in protecting our communities from the impact of the recidivism that is more likely to occur due to the punitive nature of Michigan's Sex Offenders Registration Act (SORA), MCL 28.721 et seq. SORA's onerous restrictions are not supported by evolving research and best practices related to recidivism, rehabilitation, and community safety.

INTRODUCTION

There are dangerous sexual predators, to be sure, and the public needs to be protected from them. But the current SORA it is not the way to achieve that goal because it places people on the registry without an individualized assessment of their risk to public safety. Indeed, it provides little differentiation between a violent rapist or reoffender and an individual who has committed a single, non-aggravated offense. And it provides no way for most registrants to lessen their registration period based on their circumstances and rehabilitation. Taken as a whole, SORA's onerous requirements are punishment and their retroactive application violates both federal and state Ex Post Facto Clauses.

For years, federal and state courts have held that sex offender registration and notification requirements were not punishments and therefore did not constitute an ex post facto violation. Their conclusions relied heavily on the US Supreme Court's 2003 decision in *Smith v Doe*, 538 US 84 (2003), and its conclusion that Alaska's Sex "first generation" Offender Registration Act was nonpunitive. But the tide is changing. Federal and state courts have steadily been rethinking the issue, in large part because of the significant additional burdens that have been added to these statutes since *Smith*. State Supreme Courts in Alaska, California, Indiana, Kentucky, Maine, Maryland, Ohio, Oklahoma, and Pennsylvania have concluded that their registries constitute punishment and their retroactive application an ex post facto violation—either by distinguishing *Smith* or by relying on their state Ex Post Facto Clause. In 2015 the Sixth Circuit reviewed SORA, determining that SORA was "something altogether different from and more

troubling than Alaska's first-generation registry law" and holding that its 2006 and 2011 amendments were punishment and that their retroactive application violated the federal Ex Post Facto Clause. *Does #1–5 v Snyder*, 834 F3d 696, 703, 705 (CA 6, 2016), reh den (September 15, 2016), cert den *Snyder v John Does #1–5*, 138 S Ct 55 (2017). The Sixth Circuit cautioned that *Smith* was not "a blank check to states to do whatever they please in this arena." *Id*. at 705.

Smith's rationale is outdated with respect to modern registration schemes such as Michigan's SORA. SORA has become a bloated statute[1] whose effectiveness as a law enforcement and public safety tool has decreased as the size of the registry has swollen, and whose punitive requirements (notably its geographic restrictions and burdensome in-person reporting requirements) are out of touch with a more balanced and evidence-based understanding of recidivism.

The unconstitutional 2006 amendment that added the geographic exclusion zones could be severed. But the unconstitutional 2011 amendments are fairly embedded in the Act. Their severance would leave the act inoperable, and any attempts by this Court to repair the resulting ambiguities would be an incursion into the sphere of the Legislature, in violation of the separation-of-powers doctrine. Nor is revival of an earlier version of SORA a viable option, because the Legislature disfavors revival.

[1] Michigan's registry is the fourth largest state registry in the country, with some 42,998 registrants. https://api.missingkids.org/en_US/documents/Sex_Offenders_Map.pdf (last visited 1/29/2020).

STATEMENT OF FACTS AND PROCEEDINGS

This case arises out of Paul Betts's 1993 guilty plea to criminal sexual conduct in the second degree and the retroactive application of SORA to him. Certainly the issue of whether SORA is punishment affects Betts and other registrants. But it also affects many other citizens whom the Attorney General has an obligation to protect. It affects offenders' families and employers. And it affects community members, who are lulled into a false sense of security, believing that the registry is keeping them safe from the most dangerous sexual predators when research shows that indiscriminate registration is ineffective or even counterproductive to preventing recidivism.

ARGUMENT

I. SORA's burdensome requirements, which are divorced from individualized risk assessment, amount to punishment when taken in the aggregate, and it is an ex post facto violation of both the federal and Michigan constitutions to apply the 2006 and 2011 amendments to registrants whose offenses predate those amendments.

In its order granting leave, this Court asked whether, taken as a whole, SORA is punishment; if so, when it became punitive; and whether retroactive application of that punishment violates the Ex Post Facto Clauses of the Michigan and United States Constitutions. Const 1963, art I, § 10, US Const, art I, § 10, cl 1. (Appellant's Appendix at 100a–101a.) SORA's requirements in the aggregate are punishment, and the 2006 amendment—and later the extensive 2011 amendments—were definable moments where SORA became punitive. Accordingly, application of SORA to registrants whose offenses predate the 2011 amendments violates the Ex Post Facto Clauses of the Michigan and United States Constitutions. The parties in this case have briefed in detail the progression of amendments to SORA, and this brief does not repeat that progression.

A. SORA's requirements, as a whole, amount to punishment.

1. Courts look at intent and purpose.

Even where sex offender registry laws are aimed at protecting the community, a critical inquiry is whether, notwithstanding the deference afforded legislative enactments, *Lambert v California*, 355 US 225, 228 (1957), a registration and notification scheme is "so punitive either in purpose or effect as to negate [the

State's] intention to deem it civil," *Kansas v Hendricks*, 521 US 346, 361 (1997) (internal quotations omitted). See also *People v Earl*, 495 Mich 33, 43 (2014).

In determining if the effects of a statute are punitive, courts generally consider the non-exhaustive guideposts set forth in *Kennedy v Mendoza-Martinez*, 372 US 144, 168–169 (1963)—referred to as the "intent-effects" test. These guideposts include whether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment; whether it comes into play only on a finding of *scienter*; whether its operation will promote the traditional aims of punishment—retribution and deterrence; whether the behavior to which it applies is already a crime; whether an alternative purpose to which it may rationally be connected is assignable for it; and whether it appears excessive in relation to the alternative purpose assigned. *Id.*

2. The Sixth Circuit has struck down SORA as punitive, and other States' registries have suffered a similar fate.

Applying the intent-effects framework but focusing on the effects, the Sixth Circuit held that Michigan's scheme "require[es] much more from registrants than did the statute in *Smith*" and is punitive in nature. *Does #1–5*, 834 F3d at 703. The Sixth Circuit pointed out that, unlike Michigan's SORA, there was no evidence in *Smith,* 538 US at 100–101, that registrants were restricted in where they wished to live or work, and there was no in-person reporting. *Does #1–5*, 834 F3d at 703.

The U.S. Solicitor General's office, when giving its views on the then-pending petition for certiorari in the *Does #1–5* case, similarly concluded that Michigan's

sex-offender-registration scheme had "a variety of features that go beyond the baseline requirements set forth in federal law" and that it "differs from those of most other States." *Snyder v John Does, #1–5 et al* (*Does I*), No 16-768, Brief of United States as Amicus Curie, 2017 WL 2929534 at 9 (July 7, 2017). And like the Sixth Circuit, the U.S. Solicitor General opined that the Sixth Circuit's opinion did not conflict with *Smith*'s holding. *Id*. at 17.

A number of state supreme courts have applied the intents-effects test and, based on the effects portion of that test, concluded that their registries constitute punishment and their retroactive application violates the Ex Post Facto Clause. See *State v Williams*, 952 NE2d 1108, 1112–14 (Ohio, 2011); *In re C.P.*, 967 NE2d 729, 733–750 (Ohio, 2012); *Wallace v State*, 905 NE2d 371, 384 (Ind, 2009); *Doe v State*, 111 A3d 1077, 1100–1102 (NH, 2015); *In re Taylor*, 343 P3d 867, 869 (Cal, 2015); *Commonwealth v Baker,* 295 SW3d 437, 447 (Ky, 2009); *State v Pollard*, 908 NE2d 1145, 1147–1148 (Ind, 2009); *Starkey v Oklahoma Dep't of Corr*, 305 P3d 1004, 1029–1030 (Okla, 2013); *Commonwealth v Muniz*, 164 A3d 1189, 1213 (Pa, 2017), cert den *Pennsylvania v Muniz*, 138 S Ct 925 (2018); *Doe v Dep't of Public Safety & Corr Servs*, 62 A3d 123, 124, 143 (Md, 2013); *State v Letalien*, 985 A2d 4, 26 (ME, 2009); *Doe v State*, 189 P3d 999, 1017 (Alaska, 2008). See also *State v Petersen-Beard*, 377 P3d 1127, 1145–49 (Kan, 2016) (Johnson, J., dissenting) (concluding that Kansas' sex offender registry is punitive); *Riley v NJ State Parole Bd*, 32 A3d 190, 244 (NJ Super Ct App Div, 2011) (holding that the affirmative disabilities and restraints imposed by New Jersey's sex offender monitoring act

were sufficient, by themselves, to hold that their retroactive application violated the Ex Post Facto Clause, with other factors providing additional support); *Commonwealth v Cory*, 911 NE2d 187, 197 (Mass, 2009) (concluding that Massachusetts' sex offender monitoring statute is punitive in effect and its application to the defendant "impermissible under ex post facto provisions of the United States and Massachusetts Constitutions"); *State v Strickland*, 2009-Ohio-5242, No 2008-L-034, 2009 WL 3255305, at 9 (Oct. 9, 2009) (holding that Ohio's sex offender classification system is "clearly punitive in nature"); *United States v Juvenile Male*, 590 F3d 924, 932 (CA 9, 2009), vacated as moot, 131 S Ct 2860 (2011) (concluding that SORNA's juvenile registration and reporting requirements were different both in nature and degree than Alaska's statute for adult offenders).

This Court should consider the aggregate effects of Michigan's SORA, as the Court did in *Smith*, 538 US at 92, 94, 96–97, 99, 104–105, as the Sixth Circuit did in *Does #1–5 v Snyder*, 834 F3d at 706, and as the United States Solicitor General did when it filed its amicus in *Does I,* WL 2929534 at 11 n 2.

3. SORA's detrimental and nonproductive effects negate the Legislature's intention to deem it civil.

Examining its effects in the aggregate, SORA is punishment. Offenders are placed on the registry without an individualized assessment of their risk to the public and, generally speaking, without a way to lessen their registration period based on their circumstances and rehabilitation. Once on the registry, the registrant is subject to extensive burdens, many of which are counterproductive to

the Legislature's goal of public safety. See MCL 28.721a. And for any registrant already coping with a developmental disability from birth—for example, autism or an intellectual disability—SORA becomes a second disability. See generally Dubin & Horowitz, *Caught in the Web of the Criminal Justice System: Autism, Developmental Disabilities, and Sex Offenses*, (Jessica Kingsley Publishers, 2017.)[2] For all registrants, SORA's geographic restrictions and in-person reporting requirements, coupled with the public aspect of the registry, make it difficult for registrants to engage in community and family life or counseling, and are antithetical to evolving research and best practices related to recidivism, rehabilitation, and community safety.

a. SORA's geographic exclusion zones are overly burdensome and unconstitutionally vague, and their safety benefits are questionable.

Michigan's SORA places significant restrictions on residency, work, and travel. In upholding Alaska's sex offender registry, *Smith* specifically noted that the record contained no evidence that the State's scheme led to "substantial

[2] A recent study suggests that a significant percentage of registrants might be on the autism spectrum. A team of psychologists conducted a study of thirty-seven male juveniles who had been charged with some type of sexual offense and found that twenty-two of the thirty-seven defendants (60%) were diagnosed as being on the autism spectrum. Sutton, et al., *Identifying Individuals With Autism in a State Facility for Adolescents Adjudicated as Sexual Offenders: A Pilot Study*, Focus on Autism and Other Developmental Disabilities 28:3, Nov 2012, at 1–9, available at https://journals.sagepub.com/doi/full/10.1177/1088357612462060 (last visited 1/29/2020).

occupational or housing disadvantages." 538 US at 100.[3] In contrast, when the Sixth Circuit concluded that Michigan's registration scheme is punishment, it explained, "Most significant is its regulation of where registrants may live, work, and loiter." *Does #1–5*, 834 F3d at 703. Indeed, SORA's 1,000-foot exclusion zone often banishes registrants by pushing them out of communities for purposes of living, working, and even moving around—potentially causing homelessness, transiency, or unemployment.

Registrants are not free to live where they wish or where they can afford to live. Nor are registrants free to live near to their children's school. (As an example of this, the Sixth Circuit in its *Does #1–5* opinion reprinted a map of exclusion zones in the Grand Rapids area that vividly shows the extent to which SORA criminalizes living in vast areas, severely limiting registrants' housing and employment options. *Does #1–5*, 834 F3d at 702.) They are also not free to take their desired job or work in a location convenient to home.[4] Thus, registration can limit employment opportunities or make travel to a job prohibitive. And in today's mobile and global economy, many jobs require on-the-job travel. In many lines of work—manufacturing, construction, sales, handyman services, and delivery are some examples—the registrant's main place of work might be outside of the exclusion

[3] Justice Stevens argued in his dissent that sex offender registration statutes severely deprived registrants of their liberty, imposing restraints on only one particular class. *Smith*, 538 US at 113 (Stevens, J., dissenting).

[4] There is an exception for individuals who were working within a student safety zone on January 1, 2006, and for situations where a school is relocated or is initially established 1,000 feet or less from the individual's place of employment. MCL 28.734(3)(a), (b).

zone but the job might nevertheless require the registrant to travel within or through an exclusion zone.[5] Yet, because registrants are barred from "loitering" within 1,000 feet of a school, they must err on the side of nonattendance, even if refusing to perform necessary travel costs them advancement or the job itself. Likewise, the exclusion zones may prevent a registrant who wants to open a business from maneuvering for business meetings or sales calls.

Even those with employment in a fixed area can be penalized or fired when an employer discovers they are on the registry. The 2011 amendments require posting of employer addresses on the Internet, which is a major disincentive to employers, who understandably do not want their business locations listed on the sex offender registry. Sometimes the employer finds out about an employee's placement on the registry because law enforcement shows up at the registrant's place of employment to check for SORA compliance. This is what happened to David Snyder in the other SORA case pending before this Court. See *People v Snyder*, Supreme Court No. 153696, Defendant-Appellant's Supp Br, filed 10/23/2018.

Problematically, despite their best efforts, registrants may be unaware or unsure of their presence within exclusion zones. The inability to discern what falls within an exclusion zone leaves well-meaning registrants vulnerable to penalties for

[5] There is an exception for an individual who "only intermittently or sporadically enters a student safety zone for the purpose of work." MCL 28.734(c). But registrants must determine whether their work is intermittent or sporadic, and must err on the side of caution.

noncompliance, including fines and imprisonment. MCL 28.734(2)(a), (b); see also *Doe v Snyder*, 101 F Supp 3d 672, 684 (ED MI, 2015) (holding that the exclusion zones were unconstitutionally vague after concluding that SORA "does not provide sufficiently definite guidelines for registrants and law enforcement to determine where to measure the 1,000 feet distance used to determine exclusion zones" and thus that registrants would be unable to reasonably determine the boundaries of the exclusion zones, resulting in "over-policing.") And because exclusion zones are typically measured "as the crow flies," not as people actually travel between two points, a registrant whose 1,000-foot exclusion zone includes a highway or body of water may be required to travel a far greater distance in order to comply. This effectively extends the zone and may place additional burdens on travel to work or a child's school. Thus, Michigan's large exclusion zone freezes out registrants from many communities and jobs and subjects them to stiff penalties even for inadvertent noncompliance.

Restrictions on living and "loitering," which often force registrants to live far from central areas and leave them confused about where they can and cannot go, can also prevent registrants from getting the best possible counseling. Counseling individuals with sex offense convictions is recognized as a specialized area of counseling, and research supports group therapy whenever possible. See Michael Hubbard, *Sex offender therapy: A battle on multiple fronts*, Counseling Today (A publication of the American Counseling Association), at p 2, March 31, 2014. But exclusion zones may prevent them from access to appropriate counseling or the

group counseling that would reduce recidivism (see pp 33–35 below) and help them be productive members of society.

The Kentucky Supreme Court noted similar "significant collateral consequences" with its registry, such as "where an offender's children attend school, access to public transportation for employment purposes, access to employment opportunities, access to drug and alcohol rehabilitation programs and even access to medical care and residential nursing home facilities for the aging offender." *Baker*, 295 SW3d at 445. Similarly, the Pennsylvania Supreme Court agreed that its state registry imposed extraordinary secondary disabilities in finding and keeping housing, employment, and schooling. *Muniz*, 164 A3d at 1210.

It is not just registrants themselves who are affected by these burdens. Their spouses, children, and extended families are affected as well. Limitations on where one can live and work place additional logistical burdens on the entire family, not the least of which are that some families may be forced to live far from the children's schools, or in some cases even live apart if the family home is in an exclusion zone.

Also, SORA's vague definition of "loiter" ("to remain for a period of time and under circumstances that a reasonable person would determine is for the primary purpose of observing or contacting minors," MCL 28.733(b)) might mean that a school-age child loses the ability to have a parent show up at parent-teacher conferences, attend his football game or choir concert, or accompany her to a school graduation. A registrant's hesitancy to attend these events is not unfounded. A

2006 Attorney General letter opinion opined that it "would be prohibited by the Act for registered offenders to attend a school play or sporting event" as these activities fall within the definition of "loiter," and that the Act "makes no accommodation for school events that may involve a child of the offender. . .." Letter Opinion of the Attorney General to Representative Jacob W. Hoogendyk, Jr. & Isabella County Prosecuting Attorney Larry J. Burdick, dated July 14, 2006; see also *Doe*, 101 F Supp 3d at 685 (holding that SORA's definition of "loiter" was unconstitutional because it is sufficiently vague as to prevent ordinary people using common sense from being able to determine whether they must refrain from certain conduct, and that "it remains ambiguous whether a registrant may attend a school movie night where he intends only to watch the screen, or a parent-teacher conference where students may be present"). Even a registrant who rents or purchases a home outside of the school safety zone may be reluctant to attend family gatherings, visit an elderly parent in a nursing or medical facility, or attend therapy sessions located within the zone. These are all limitations that burden family ties and affect the stability of family structures.

These burdens appear to outweigh any conceivable public safety benefit. Research also casts doubt on countervailing public safety benefits, and, troublingly, suggests that these burdens might jeopardize the safety of the community by encouraging recidivism.

A 2013 study of Michigan and Missouri sex offenders showed that "the effect of residency restrictions on sex offender residences and behavior is small," while

such restrictions "may further complicate the reentry process." Huebner, et al, *An Evaluation of Sex Offender Registry Restrictions in Michigan and Missouri*, Nat'l Institute of Corrections (2013), p 72, available at https://nicic.gov/evaluation-sex-offender-registry-restrictions-michigan-and-missouri (last visited 1/23/2020). The study recommended that if residency restrictions are applied, risk assessment instruments should be utilized and duration should be considered. *Id*. at 73.

Studies from States show similar results. A study released from Minnesota prisons, the Minnesota Department of Corrections concluded that residency bans would not have prevented re-offenses against children. *Vasquez v Foxx*, USSC No 18-386, Brief of Eighteen Scholars as *Amicus Curiae* in Support of Petitioners, pp 7–11, citing Minnesota Dep't of Corrections, Residential, Proximity & Sex Offense Recidivism in Minnesota (April 2007), available at https://mn.gov/doc/data-publications/research/publications /?id=1089-272960 (last visited 1/23/2020). That study found *not one case* in which a residency ban would have prevented contact with a juvenile victim, noting, among other things, that the victims and perpetrators were often biologically related or made contact with the victim through another adult; that in a number of cases the offender first contacted the victim too far from the victim's residence for a ban to matter; and that none of the remaining cases involved a school, park, daycare, or other place where children congregated. *Vasquez*, Brief of 18 Scholars at 9–11, discussing citing Minnesota Report at 23–24. Likewise, a similar study by Colorado's Sex Offender Management Board found " 'no research indicating that residence restrictions are correlated with reduced

recidivism or increased community safety," and concluded that "limiting where a sex offender sleeps at night . . . seems ineffective.' " *Id*. at 11, citing Colorado Sex Offender Mgmt Bd, White Paper on the Use of Residence Restrictions As a Sex Offender Management Strategy 4–5 (2009), available at https://www.scribd.com/document/340731677/Colorado-Sex-Offender-Management-Board-2009-Study (last visited 1/23/2020). Both the Minnesota and Colorado studies noted that residency requirements can be counterproductive because barriers to stable housing undermine efforts to reintegrate offenders into the community, making recidivism more likely. *Vasquez*, Brief of Eighteen Scholars at 12.

Likewise, an analysis of crime rates in Washington D.C. suggested that " 'knowing where a sex offender lives does not reveal much about where sex crimes, or other crimes will take place.' " Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 NYU Rev L & Soc Change 727, 751 (2013), citing Amanda Y. Agan, *Sex Offender Registries*: *Fear Without Function?*, 54 J L & Econ 207, 234 (2011). Other studies have similarly shown that there is "no relationship between sex offending and residential proximity to locations where children congregate." *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 751 (citing studies). Accord Alex Duncan, *Calling a Spade a Spade: Understanding Sex Offender Registration as Punishment and Implications Post-Starkey*, 67 Okla L Rev 323, 351 (Winter 2015), citing Cassie Dallas, Comment*, Not in My Backyard: The Implications of Sex Offender Residency Ordinances in Texas and Beyond*, 41 Tex Tech L Rev 1235, 1268–1270 (2009) &

Karen J. Terry & Alissa R. Ackerman, *A Brief History of Major Sex Offender Laws, in Sex Offender Laws: Failed Policies, New Directions* 64 (Richard Wright ed, 2009) (citing various studies concluding that residency restrictions may be counterproductive).

In short, SORA's geographic exclusion zones are an affirmative disability and restraint; are contrary to the desired goals of rehabilitation, stability, and re-integration into community life; and are excessive in relation to their purported benefits. Their addition in 2006 created an easily definable moment when SORA became punishment.

b. SORA's in-person reporting requirements are excessive in relation to any non-punitive purpose.

SORA imposes burdensome in-person reporting requirements. Some are immediate, and others, applicable to Tier III registrants, are quarterly. Such frequent in-person reporting—which mirrors what a person must do on probation or parole—is punishment.

For example, registrants must appear in person within three business days when they change address or employment, enroll or disenroll in higher education, change their name, reside at an address other than their registered address for more than seven days (in other words, travel for more than a week), change their email address, or purchase or begin or cease regular operation of a vehicle. MCL 28.725(1)(a)–(g). Failure to immediately report in person for the many—often minor—life changes could result in police investigation, possible felony conviction,

and imprisonment. Juveniles who are 14 or older are subject to the same penalties as adults for failing to follow the in-person reporting requirements—despite their emotional and developmental immaturity. See *Belloti v Baird*, 443 US 622, 635 (1979) (noting children's "vulnerability" and their needs for concern and sympathy).

These in-person reporting requirement are burdensome in many ways. Because registrants must report travel in person in advance, they may not be able to accompany a child or relative to an out-of-town event or medical appointment. And if they travel out of town and rent a car, they have to then return home to report that vehicle. The vehicle registration requirement causes further confusion if registrants have to occasionally drive a company vehicle or temporarily use a family member's car as an emergency vehicle. And restrictions on travel and in-person notification requirements can burden or inhibit more extensive travel, which is often necessary in today's global economy. Also, in-person requirements are difficult for registrants confined to nursing homes—an increasingly pressing concern as SORA's many lifetime registrants age.

SORA's requirement that registrants must report within three days whenever they establish electronic email or instant message addresses may prevent registrants from performing simple, routine tasks such as making online purchases, submitting tax payments, or signing up for work- or school-related advisory, support, or chat groups. It is no wonder the Oklahoma Supreme Court likened its similar in-person reporting requirements to the post-incarceration supervision of parolees. *Starkey*, 305 P3d at 1022–1023. And it is not surprising that the Sixth

Circuit in *Does #1–5* held that SORA resembles the punishment of parole/probation—because registrants, like parolees, must report in person rather than by phone or mail; are subject to numerous restrictions on where they can live and work; and can be punished by imprisonment for failing to comply, "not unlike a revocation of parole." 834 F3d at 703. Accord *Smith*, 538 US at 111 (Stevens J., dissenting).

In a similar vein, Maine's Supreme Court held that the provisions of its registry, "which require lifetime registrants, under threat of prosecution, to physically appear at their local law enforcement agencies within five days of receiving a notice by mail, place substantial restrictions on the movements of lifetime registrants and may work an 'impractical impediment that amounts to an affirmative disability.' " *Letalien*, 985 A2d at 18 (internal quotation omitted).

Likewise, the Supreme Court of Indiana characterized Indiana's registry requirements that registrants "register, re-register, and update one's information" as "significant affirmative obligations." *Wallace v State*, 905 NE2d 371, 370 (Ind, 2009). And the Supreme Court of New Hampshire held that its State's frequent reporting "exceed simply burdening or disadvantaging" the registrant. *Doe v State*, 167 NH 382, 405 (2015).

In short, Michigan's requirement that registrants report in-person on a vast array of information is an affirmative disability and restraint and is excessive in relation to the expressed purpose of public health and safety. Its addition in 2011 underscored the punitive nature of SORA.

c. The impact of the Internet has not been tempered by individual risk assessment or reasonable time periods.

Whether the public aspect of SORA is punitive depends to some extent on who it is applied to. It is certainly less punitive when applied to a dangerous predator and reoffender (whose neighbors, employers, and associations might well want to know in order to protect themselves or their children) than to an individual who has committed a relatively minor offense and has not reoffended in the ensuing decade. This dichotomy highlights SORA's troubling lack of individualized risk assessment, pubic stigmatization of registrants into "tiers" that do not correspond to actual risk, and the long registration durations without any re-assessment of risk.

Too, the fact that the Internet has "evolved"[6] and become *increasingly* dominant in our society, and that SORA's relationship with the Internet has also "evolved," make it more difficult to pinpoint when the public nature of SORA became punishment than when specific punitive burdens such as the geographic exclusion zones or reporting requirements were added. Did public registration, absent any determination of risk, become punitive in 2006 when SORA was amended to allow subscribing members of the public to receive electronic notification when a person registers or moves into a particular zip code (Mich Pub Act 46 (2006))? Does it date back to 1996 when an amendment made the registry available to the public, giving the public access to considerable information about

[6] Evolution is "a *gradual* process in which something changes into a different and usually more complex or better form." New Heritage Dictionary (1982) (emphasis added).

the registrant, including address, vehicle description and license plate number, physical descriptions, sex offenses for which convicted, and current photograph? See 1996 PA 494. Or does it date back only to 1999 when extensive information about the registrant was made available on the Internet? See MCL 28.728(2).[7] The World Wide Web was available to the general public at that point, having become publicly available in 1991.[8] But Twitter did not exist until 2006, three years after *Smith* was decided. See *Petersen-Beard*, 377 P3d at 1144–45 (Johnson, J., dissenting). And although smartphone technology was unveiled at tradeshows in the early 90's, making it possible for mobile phones to facilitate wider Internet functionality, the iPhone was not unveiled until 2007.[9]

Notwithstanding the difficulty in pinpointing the exact year and scope of any punitive nature of public access, the impact of Internet dominance on an assessment of SORA's burdens cannot be underestimated. The public aspect of SORA, divorced as it is from individualized risk assessment or reasonable duration requirements, is an important factor in concluding that SORA requirements in the aggregate are punitive.

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[7] The registrants' photographs were not required on the Internet until 2004.

[8] Martin Bryant, "20 years ago today, the World Wide Web opened to the public," Insider, Aug 6, 2011, available at https://thenextweb.com/insider/2011/08/06/20-years-ago-today-the-world-wide-web-opened-to-the-public/ (last visited 1/23/2020).

[9] Charles Arthur, the history of smartphones: timeline, Jan 24, 2012, available at https://www.theguardian.com/technology/2012/jan/24/smartphones-timeline (last visited 1/23/2020).

When the U.S. Supreme Court concluded in *Smith* in 2003 that Alaska's registry was not punishment, it also concluded that the registry was not akin to face-to-face public shaming. 538 U.S. at 98, 101. The Court's reasoning was premised on its understanding of the Internet as it then existed. Public registration, the *Smith* majority said, is "more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality." *Id*. at 99.

Whether the Justices understood the impact the Internet revolution was already having in 2003 is unclear. A dissenting justice of the Kansas Supreme Court queried whether a court more technologically savvy than the *Smith* Court might have viewed Internet notification differently and noted that younger justices might be more attuned to the digital age. *Petersen-Beard*, 377 P3d at 1144 (Johnson, J., dissenting). Justice Ginsburg's dissent in *Smith*, 538 U.S. at 115–116 (Ginsburg, J., dissenting),where she noted that public labels such as registered sex offender "call[ ] to mind shaming punishments once used to mark an offender as someone to be shunned," could have been either a recognition of the Internet's significance in 2003 or prescience about the future explosion of the Internet. See also *id*. at 109 (Souter, J., concurring) (noting that Alaska's widespread dissemination of offenders' names, photographs, addresses, and criminal history serves to "humiliate and ostracize the convicts") and *id*. at 112 (Stevens, J., dissenting in No 01-729 and concurring in judgment in No 01-1231) (noting that widespread public access to "personal and constantly updated information has a

severe stigmatizing effect.") (citing examples of threats, assaults, loss of housing, and loss of jobs).

What *is* clear is that the landscape has changed dramatically in the past 15 years. Computers are a much more integral part of daily life than they were in 2003. And smartphones are commonplace. See *Petersen-Beard*, 377 P3d at 1144–45 (Johnson, J., dissenting) (explaining that data that can be accessed by a smartphone "includes push notifications of sex offender registries and indiscriminate sharing of social media" and that "ubiquitous tweeting and other social media have changed the landscape of information sharing.") Through this evolving technology, the Internet now reaches into every nook and cranny of American life, shaping human behavior. It is the defining way in which people learn about one another—meaning that if the first thing someone sees when googling a name is a registry page, that will define how the person is seen.

Packingham v North Carolina, is instructive in demonstrating how far the High Court has evolved in its understanding of the role of the Internet. 137 S Ct 1730 (2017). There, the Court

- characterized social networking sites such as Facebook, LinkedIn, and Twitter as "commonplace," *id.* at 1736;
- acknowledged that the Internet is, for many, "the principle source[ ] for knowing current events, checking ads for employment, speaking and *listening in the modern public square*, and otherwise exploring the vast realms of human thought and knowledge," *id.* at 1737, emphasis added;
- noted that "[s]even in ten American adults use at least one Internet social networking service." *Id.* at 1735;

- described the Cyber Age as "a revolution of historic proportions," the dimensions of which "we cannot appreciate yet," noting that it has "vast potential to alter how we think, express ourselves, and define who we want to be." *Id.* at 1736;

- stated that a person with an Internet connection can "become a town crier with a voice that resonates farther than it could from any soapbox," *id.* at 1737 (citing *Reno v ACLU*, 521 US 844, 870 (1997)); and

- relevant to the applicability of *Smith*, described "[t]he forces and directions of the Internet" as "so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow." *Packingham*, 137 S Ct at 1737. In *Riley v California,* a majority of the U.S. Supreme Court noted that ordinary citizens with smartphones can easily access vast amounts of data and that "a cell phone [can be] used to access data located elsewhere, at the tap of a screen." 134 S Ct 2473, 2491 (2014).

This dramatic growth in the Internet and the dissemination of its information has several consequences for a registrant. First, the registry's reach is now widespread in the registrant's community. See *Detroit Free Press v United States Dep't of Justice*, 829 F3d 478, 482 (CA 6, 2016) (noting that "modern technology only heightens the consequences of disclosure" of criminal record information and that "in today's society the computer can accumulate and store information that would otherwise have surely been forgotten") (internal citation omitted). And the widespread message is that all registrants are dangerous and should be shunned ("not in our town"). Second, registrants are no longer simply shamed in the public square of one's own community; they are now shamed in the eyes of their county, their state, their nation—and in our global economy, the world.

In the midst of these rapid developments, the context of Michigan's SORA is hardly neutral and strictly factual. The inaccurate message is that *all* registrants are dangerous—because they have been singled out from other types of offenders.

Indeed, the registry "does more than merely disseminate information." *Doe*, 111 A3d at 1097. As the New Hampshire Supreme Court observed, "If the registry were truly just about making criminal records more easily available to the public, then all such records would be available. Instead, only certain offenders are listed on the website." *Id*. And as Justice Souter stated in his concurrence in *Smith*, "Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm." 538 US at 109 (Souter, J., concurring).

The message that all registrants are dangerous and somehow have immutable character defects and compulsions, has been fueled by SORA's tiered system, a part of the 2011 amendments. While the tiers might have been a step in the right direction in terms of safety had they actually classified registrants based on risk to the community, they are devoid of individualized risk assessment, corresponding only to the type of conviction. Registrants are thus subject to humiliation and ostracization without assessment of their rehabilitation or risk to the community. In her dissent in *Smith*, Justice Ginsburg cited the lack of individualized risk assessment as a reason why Alaska's scheme was excessive in relation to its nonpunitive purpose. 538 US at 116–117 (Ginsburg, J., dissenting). She noted that registration was based on past crimes, not present risk, that the duration of reporting was "keyed not to any determination of a particular offender's

risk of reoffending,[10] but to whether the offense of conviction qualified as aggravated," and that the act made "no provision whatever for the possibility of rehabilitation." *Id*.

Notably, many states classify sex offenders on the basis of an individualized risk assessment. Under New York's scheme, for example, the level of assessed risk affects both the type of information that can be publicly released and the duration of registration. See NY Correct Law §§ 168-169-W (2019); [NY] Div of Crim Just Services, "Risk Level & Designation Determination," https://www.criminaljustice.ny.gov/nsor/risk_levels.htm (last visited 1/23/2020) (explaining that "risk level governs the amount and type of information which can be released as community notification and also impacts duration of registration"). Oregon assigned more serious collateral consequences to offenders who pose the greatest risk to the public. O.R.S. §§ 163A.105 & 163A.100. In Georgia, a "Sex Offender Registration Review Board" uses research-based assessments to assign "points" that are used to compute a score indicating a high, moderate, or low risk of re-offending; sexual attacks against strangers and a history of multiple offenses are among the factors

[10] Scholars note that there are reasonably accurate ways to estimate an individual's re-offense risk, such as the Static-99R, a 10-item actuarial scale that assesses the sexual re-offense risk of adult males that is used widely worldwide. *Vasquez*, Brief of Eighteen Scholars at 18. Recent meta-analyses show that the Static-99 is among the best supported actuarial instruments for predicting sexual recidivism. Huebner, *An Evaluation of Sex Offender Registry Restrictions in Michigan and Missouri* at 73 (citation omitted). The Michigan Department of Corrections uses Static-99R. MDOC Policy Directive 04.01.105, p 5, available at https://www.michigan.gov/documents/corrections/04_01_105_Final_10-1-19__667508_7.pdf (last visited 01/28/2020).

considered indicative of high risk. GA Code Ann § 42-1-12 et seq. (2019); Sexual Offender Registration Rev Board [Ga], *Sexual Offender Registration Review Board Standing Procedure,* https://www.sorrb.org/board-information/standing-procedures. (last visited 1/23/2020).

The upshot is that Michigan's registry is not similar to accessing public records, as the Supreme Court characterized it in *Smith*. 538 US at 99. Due to the evolution of the Internet, shaming is now an inevitable consequence of registration. See *Doe*, 111 A3d at 1097 (noting that Internet access "makes the information readily and instantly available, which is not often the case for other public information and records"). And the already wide audience potentially becomes even wider due to SORA's "tell a friend" feature, which allows an individual, with a mere click of a button, to inform colleagues, neighbors, and family members of a person's status on the registry. This expansive audience has ready access to a wide variety information—including a current photograph, the registrant's home and work address, vehicle description and license plate number, and physical descriptions (including scars and tattoos)—that would not otherwise be available even in a background check. See *Muniz*, 164 A3d at 1215–1216 (noting that the information in the Commonwealth of Pennsylvania's registry went "beyond otherwise publicly accessible conviction data" by including photograph, physical description, vehicle license plate number, and description of vehicles).

Other courts have echoed the sentiment that registries are akin to shaming. The Sixth Circuit concluded that Michigan's SORA "resemble[s] traditional

shaming punishments," "brand[ing] registrants as moral lepers solely on the basis of a prior conviction." *Does #1–5*, 834 F3d at 702, 705. The New Hampshire Supreme Court likewise stated, "[I]n many ways the internet is our town square"; "[p]lacing offenders' pictures and information online serves to notify the community, but also holds them out for others to shame and shun." *Doe*, 111 A3d at 1097. A Pennsylvania Supreme Court Justice noted that "[y]esterday's face-to-face shaming punishment can now be accomplished online, and an individual's presence in cyberspace is omnipresent." *Commonwealth v Perez*, 97 A3d 747, 765–66 (Pa, 2014) (Donahue, J., concurring).

Similarly, Maryland's Court of Appeals recognized that "[b]eing labeled as a sexual offender within the community can be highly stigmatizing and can carry the potential for social ostracism." *Young v State*, 806 A2d 233, 249 (Md, 2002). Accord *Dep't of Pub Safety & Corr Serv*, 62 A3d at 140 (holding that dissemination of personal information via the internet is "tantamount to the historical punishment of shaming."); *Doe*, 189 P3d at 1012 (footnotes omitted); *Wallace*, 905 NE2d at 380. See also *Petersen-Beard*, 377 P3d at 1145 (Johnson J., dissenting) (stating that "despite the spin the majority would put on it, today's dissemination of sex offender registry information does resemble traditional forms of punishment."); *Millard v Rankin*, 265 F Supp 3d 1211, 1226 (D Colo, 2017) (stating that "Justice Kennedy's words [in *Smith*] ring hollow that the state's website does not provide the public with means to shame the offender," and noting that the Justices "did not foresee the development of private, commercial websites exploiting the information made

available to them," "the opportunities for 'investigative journalism,' " or "the ubiquitous influence of social media").

The negative effect of shaming is not limited to the registrants themselves. The families of registrants also "face a known, real, and serious threat of retaliation, violence, ostracism, shaming, and other unfair and irrational treatment from the public"—regardless of whether the offender or the offender's family is actually a threat to public safety. *Millard*, 265 F Supp 3d at 1222–1223.

Shaming also jeopardizes registrants' support systems. When they are released back into society, they often need to enter or re-enter the work force or rent an apartment or a home, only to face a reluctant employer or landlord. And they can be subject to ostracization and bullying.

This lack of peer and community support is particularly detrimental for juveniles. "Otherwise supportive networks, such as schools, neighborhoods, and workplaces that 'can and often help a juvenile's rehabilitation and socialization' are instead transformed into 'hostile environments' that further ostracize the juvenile offender and enhance the likelihood of recidivism." Shannon C. Parker, *Branded for Life: The Unconstitutionality of Mandatory and Lifetime Juvenile Sex Offender Registration and Notification*, 21 VA J Soc Pol'y & L 167, 192 (2014), citing Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, 27 Dev Mental Health L 34, 51 (2008).

Juveniles face even greater challenges than lack of socialization. Their " 'developmental stage makes them highly susceptible to peer influence and

judgment.' " *Branded for Life,* 21 VA J Soc Pol'y & L at 191, quoting Elizabeth S. Scott & Lawrence Steinberg, *Blaming Youth*, 81 Tex L Rev 799, 813–14 (2003). Too, difficulties with employment are often enhanced for juveniles, who often have not yet developed job skills and have no experience to fall back on. And renting an apartment might be doubly difficult if a landlord discovers the juvenile's registration status. (Children of registrants can face these same challenges.)

Some juveniles must bear this ostracization for life—even if they do not pose a danger to the health and safety of Michigan citizens. Because their particular offenses and the ages allegedly involved placed them in Tier III—with no individualized risk assessment—they will forever be hampered from fully participating in their community.

It is estimated that, on average, between 10% and 20% of a state's sex offender registry are children who have committed sex offenses. Catherine L. Carpenter, *A Sign of Hope: Shifting Attitudes on Sex Offense Registration Laws*, 47 Sw L Rev 1, 13 (2017). These juveniles can end up on the registry for acts they do not truly understand, misguided pranks, sexual exploration, or ill-considered decisions such as sexting (which is epidemic among teens now). They will be subject to the registry's life-changing burdens even though they do not necessarily pose a danger to the public. True, juveniles under the age of 14 years old at the time of the offense are no longer required to register. And Michigan does have a "Romeo & Juliet" exception, allowing some youthful registrants to be exempt from registration

if they were involved in a consensual sexual act with another minor.[11] But juveniles age 14 and older will end up as lifetime registrants if they are Tier III offenders, with no way to shorten the term, regardless of their circumstances or rehabilitation.

For both juveniles and adults, rehabilitation can be hampered by the shaming aspect of the public registry. Registrants often carry so much shame that fear of being judged can either keep them from engaging in treatment or create a setback. *Sex offender therapy: A battle on multiple fronts*, Counseling Today (A publication of the American Counseling Association), March 31, 2014. Particularly with respect to juveniles, this is contrary to the primary goal of the juvenile justice system, which is rehabilitation rather than deterrence or retribution *McKeier v Pennsylvania*, 403 US 528, 544–545 n 5 (1971); *In re Gault*, 387 US 1, 15–16 (1967).

In addition to the shaming aspects of registry on the Internet, the registry also allows the public to submit an anonymous tip on the registry website. This encourages the public to act as vigilantes and opens up the possibility for classmates, work colleagues, and community members to be vindictive and retaliatory.[12] An anonymous tip can lead to the Michigan State Police arriving

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[11] The Romeo and Juliet exception applies if the victim was 13–15 years old and the offending minor not more than four years older than the minor, or if the victim was 16 or 17 and the minor was not under the custodial authority of the offender at the time of the conduct. A court must determine that the exception applies.

[12] The fact that the registry warns users that there are penalties for harassment of offenders, http://www.communitynotification.com/cap_main.php?office=55242 (last visited 1/28/2020) is likely to do little to prevent harassment through false tips, especially since the tips are anonymous.

unannounced at the registrant's home, place of employment, or school—even when a registrant is fully compliant with all SORA requirements. A registrant may be hard-pressed to refute a tip, and the mere investigation of the tip could cause humiliation and the loss of employment or housing.

An altogether different aspect of Internet developments is the extent to which registrants are hampered by their own restrictions on computer and Internet use. The Internet is now used routinely for education and employment-related activities, yet many Internet functions require usernames and passwords, all of which registrants must communicate to local law enforcement immediately and in person. Albeit in a slightly different context, the Michigan Court of Appeals in *People v Wilson* recognized that restrictions on computer use "pose a significant barrier to a defendant's transition back into society." No 330799, 2017 WL 3197681 (July 27, 2017).

Given the ubiquity of the Internet in modern life, the public aspect of the registry is now, more than ever, an affirmative disability. For some on the registry, it is excessive in relation to the Legislature's stated purpose of safety. As the registry's size has swelled without any commensurate focus on a registrant's level of risk to the community, it has become a far *less* effective tool in keeping the community safe. It is increasingly more difficult for law enforcement officers to know which offenders to focus their efforts on, and likewise more difficult for the public to discern which individuals present a danger. See *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 749, 753 (internal citations and quotations omitted)

(opining that registries are "at best only minimally effective to the public and law enforcement" and explaining why more nuanced risk assessments of offenders is needed to "put precious public safety resources where they are needed the most"—"monitoring the highest-risk offenders.")

d. SORA's burdens are out of touch with reasoned views about recidivism, rehabilitation, and community safety.

Modern social science research has shown that SORA's extensive burdens are excessive in relation to SORA's purported public safety goals. There are two salient points: 1) research refutes common assumptions about recidivism rates that supposedly justify SORA's extreme burdens; and 2) regardless of what one believes about recidivism rates, registries are not good tools to protect the public.

On the first point, recent empirical studies, the Sixth Circuit said, cast "significant doubt" on *Smith*'s pronouncement that recidivism is "frightening and high." *Id.* at 704. The Sixth Circuit cited a study suggesting that sex offenders are less likely to recidivate than other sorts of criminals. *Id.*, citing Lawrence A. Greenfield, *Recidivism of Sex Offenders Released from Prison in 1994* (2003).

Significantly, Michigan has never analyzed recidivism among its registrants. See *Does #1–5*, 834 F3d at 704. Perhaps it has just assumed, based on *Smith*, that the recidivism rate for all sex offenders is "frightening and high." *Smith*, 538 US at 103. But *Smith* relied on a "study" that was not a study at all but merely an "informal review by a therapist that was cited in a pop psychology journal." *A Sign of Hope*, 47 Sw L Rev at 17, citing Ira Mark Ellman & Tara Ellman, "*Frightening*

and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics, 30 Const Comment 495 (2015) (uncovering the origin of the Court's reliance on the term "frightening and high" as it relates to recidivism of those who commit sex offenses, and why that phrase is inaccurate). According to the Ellmans, the study was devoid of any scientific foundation. *Id.* Regardless, its impact has lingered, so much so that one scholar says it is "difficult to rebut, even with statistical evidence to the contrary." *A Sign of Hope*, 47 Sw L Rev at 18. Indeed, that phrase has been repeated by over one hundred courts, even though it was not based on any real research. See *Vasquez*, Brief of Eighteen Scholars at 4 n 7 (citing Ellman, *Frightening and High* at 497), available at https://www.supremecourt.gov/DocketPDF/18/18-386/67891/20181024143847779_18-386%20Amici%20Brief%20Scholars.pdf (last visited 1/23/2020).

Bureau of Justice statistics for the same time period do not support the conclusion that sex offenders recidivate more than non-sex offenders. Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country,* 58 Buff L Rev 1, 57–58 (2010). In a large follow-up study of convicted sex offenders following discharge from prison, the BJS shows that sex offenders were *less likely* than other offenders to be arrested for another offense. *Id.*, citing Bureau of Justice Statistics, Recidivism of Sex Offenders Released from Prison in 1994, November 16, 2003, available at https://www.bjs.gov/content/pub/pdf/rsorp94.pdf (last visited 1/23/2020). And although sex offenders were four times more likely than non-sex offenders to be arrested for a sex crime, even that

percentage was relatively low—only 5.3% of sex offenders. *Id.* Of the almost 9,700 sex offenders released in 1994, nearly 4,300 were identified as child molesters—but only about 3.3% of those were rearrested for another sex crime against a child within three years. *Id.* Significantly, although 70% of all men in prison for a sex crime were men whose victim was a child, in almost all of the child-victim cases the child was *the prisoner's child or a relative*. *Id.* Thus, although the registry's focus is on possible dangerousness of strangers, that scenario is rare. And according to the Bureau of Justice, "[r]ecidivism studies typically find that the older the prisoner when released[,], the lower the rate of recidivism," *id.*, counseling against lifetime registration.

More recent, peer-reviewed studies likewise cast doubt on *Smith*'s conclusion regarding recidivism. For example, a 2012 longitudinal study by social scientist Karl Hanson indicates that only 5 to 15% of adult sex offenders, and only 1 to 5% of juveniles, will recidivate. *A Sign of Hope*, 47 SW L Rev at 18, discussing Declaration of R. Karl Hanson in *Doe v Harris*, No 3:12-cv-05713-THE, 2013 WL 144048 (ND Ca, Nov 7, 2012), available at https://www.eff.org/document/declaration-r-karl-hanson (last visited 1/23/2020). Hanson says that re-offense rates for sex offenders substantially reduce over time, and that once an offender has reached 16.5 years without reoffending, incidents of re-offense "are no more likely than with any other offender." *Id.* Scholar Catherine Carpenter says that the risk of a juvenile offender reoffending "drops off dramatically as the child sex offender

enters adulthood." Catherine L. Carpenter, *Throwaway Children: The Tragic Consequences of a False Narrative*, 45 Sw L Rev 461, 493 (2016).

There is also skepticism among experts about whether registries (and especially geographic restrictions) reduce crime; some evidence suggests they might actually *increase* crime. Catherine Carpenter describes a cycle where, "[w]ithout secure prospects for employment, housing, or education, both adult and child registrants often spiral down…." *A Sign of Hope,* 47 Sw L Rev at 6. Those concerns, added to the barriers a registrant faces in being able to be fully involved in family life and community, are detrimental to society's goal of rehabilitating offenders. Also, the more burdensome the registry, the more likely it is that sex offenders fail to comply—a serious problem if the whereabouts of truly dangerous sexual predators are unknown to law enforcement.

Counselors, too, recognize that society is often responsible for erecting barriers that stand in the way of a sex offender's recovery. See Michael Hubbard, *Sex offender therapy*: *A battle on multiple fronts*, Counseling Today (A publication of the American Counseling Association), Society's perception (March 31, 2014), available at https://ct.counseling.org/2014/03/sex-offender-therapy-a-battle-on-multiple-fronts/ (last visited 1/23/2020). Echoing the views of scholars, counselors say that "punitive barriers such as limited jobs, housing restrictions, and sex offender registration raise significant risk factors for recidivism," often negating the efforts of sex offender therapists and sex offenders who truly desire to be productive members of society. *Id*.

While the effectiveness of treatment for sex offenders has been the subject of much debate, some studies show that recidivism rates are much lower for treated sex offenders. Roger Przybylski, *Effectiveness of Treatment for Adult Sexual* Offenders, SOMAPI (Sex Offender Management Assessment and Planning Initiative (2015), U.S. Dept of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, available at https://smart.gov/SOMAPI/sec1/ch7_treatment.html (last visited 1/23/2020). In one of the largest meta-analyses of studies of the effectiveness of sex offender treatment, researchers concluded that cognitive-behavioral treatments and behavior therapy had significant effects, noting that treatment effects were "greater for sex offenders who completed treatment" and that the odds of recidivating doubled for sex offenders who dropped out of treatment. *Id.*, "Findings from Synthesis Research" (discussing research of Lösel and Schmucker).

Barriers to recovery affect not only registrants but also the community. One counselor theorized that by buying into the common myths that most sex offenders are predators, that they will reoffend, and that treatment for sex offenders does not work, society "may be contributing to future victimization." *Sex offender therapy*, Counseling Today, "Society's perception." Restricting employment, housing and access to family—which are important stabilizers for sex offenders—might actually make communities less safe. See *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 765.

Residency restrictions can prevent offenders from accessing treatment, without which "offenders are more likely to commit new crimes." *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 751–752, citing Ron Wilson, *Geographic Research Suggests Sex Offender Residency Laws May Not Work*, 2 Geography & Pub Safety 11 (2009). Conversely, factors such as meaningful employment "can provide a stabilizing influence by involving offenders in pro-social activities and assisting them in structuring their time, improving their self esteem, and meeting their financial obligations.' " *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 760, citing Center for Sex Offender Mgmt, *US Dept of Justice, Time to Work: Managing the Employment of Sex Offenders Under Community Supervision* 1 (2002).

Stabilizing forces are particularly important for juvenile sex offenders. See Amy E. Halbrook, *Juvenile Pariahs*, Hastings L J 1, 4 (December 2013) (opining that society is less safe when juvenile registrants "are effectively prohibited from any chance at successfully progressing from youth to young adult to productive member of adult society."). Considerations such as decreased culpability and increased capacity for change have led the U.S. Supreme Court to distinguish juveniles from adults in other contexts. See *Roper v Simmons*, 543 US 551, 578 (2005) (juvenile death penalty); *Graham v Florida*, 560 US 48, 78–79 (2010) (juvenile life without parole); *Miller v Alabama*, 567 US 460, 489 (2012) (mandatory life imprisonment without the possibility of parole). A plethora of research—now well-accepted—instructs that adolescents are not as mentally or emotionally

developed as adults, that they have increased levels of dopamine in their prefrontal cortex (which increases the likelihood of engaging in risky or "novelty-seeking" behavior), that the white matter in their brains is not fully developed, and that they are vulnerable to risky behavior. *Juvenile Pariahs*, 65 Hastings L J at 9 (citing various research). Juveniles are also not "fully developed in the psychosocial realm." *Id*.

With respect to sex crimes, research shows that juvenile sex offenders present low recidivism risk. *Id*. at 13. They "generally engage in less serious sexual offenses than adults" and "have fewer victims than adult sex offenders." *Id*. at 11 (citing research). As a group, "juveniles who are adjudicated delinquent have low rates of sexual re-offense and an even lower likelihood of sexually offending as adults, especially if they receive appropriate treatment." *Id*. (citing research). In longitudinal studies by Franklin Zimring and his colleagues, they found minimal correlation between committing a sex offense as a juvenile and committing a sex offense as an adult. *Juvenile Pariahs*, 65 Hastings L J at 13–14, citing Franklin E. Zimring et al, *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood*?, 6 Criminology & Pub Pol'y 507, 511 (2007) & Franklin E. Zimring et al, *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort Study,* 26 Just Q 58, 59–62 (2009).

This idea of low recidivism for juvenile offenders is not isolated to the theoretical or research realm. There is a consensus among experienced

practitioners who work with juvenile sexual abuse intervention that juvenile sex offenders have a low rate of recidivism—between 2 and 14%—and are unlikely to become adult sex offenders. *Branded for Life*, 21 Va J Soc Pol'y & L at 188, citing Britney M. Bowater, *Comment, Adam Walsh Child Protection and Safety Act of 2006: Is There a Better Way to Tailor the Sentences of Juvenile Sex Offenders*?, 57 Cath U L Rev 817, 840–41 (2008) (discussing studies).

Research also suggests that juvenile sex offenders respond particularly well to treatment. See Franklin E. Zimring, *An American Travesty: Legal Responses to Adolescent Sexual Offending* 27, 62 (2004) (noting that a study of 1,025 juveniles who had completed some sort of treatment showed that "[t]he recidivism rates of treated juveniles were 56% of the recidivism rates of similarly treated adult offenders.") Given this research, lifetime registration for juveniles is excessively burdensome.

For both juveniles and adults, policies that emphasize and encourage reintegration and rehabilitation are the best hope for avoiding recidivism and keeping communities safer. And community safety is, after all, the rationale for Michigan's SORA. MCL 28.721a.

The second and perhaps even more important conclusion from the research is that registries do not promote, and may even undermine, public safety. In determining that Michigan's SORA is punishment and violates the Ex Post Facto Clause, the Sixth Circuit found evidence supporting the view that "offense-based public registration has, at best, no impact on recidivism," while finding nothing in

the record to "suggest[] that the residential restrictions have any beneficial effect on recidivism rates." *Does* #1–5, 834 F3d at 705.

While registries may give the community a sense of security, that sense is false. See *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 749 (citing numerous studies opining that registries make offenders more likely to recidivate). Research shows that they do not actually protect the public. A study commissioned by the Texas Senate Committee on Criminal Justice in 2010 concluded that "[b]ased on the research [and] the testimony provided during the hearing, it is clear registries do not provide the public safety, definitely not the way it is now." Carpenter, *The Evolution of Unconstitutionality in Sex Offender Registration Laws,* Hastings LJ 1071, 1073 quoting S Comm on Crim Justice, Interim Report to 82nd Leg, S Rep No 81, at 4 (Tex 2010), available at https://senate.texas.gov/cmtes/85 /c590/c590. InterimReport2016.pdf (last visited 1/23/2020).

Similarly, two studies in the University of Chicago Journal of Law & Economics revealed that sex offender registries may have little effect on, or may even increase, sex offenses. *Id*. at 750. The first study analyzed data from the National Incident-Based Reporting System, finding that while reporting may deter those not already on the registries (i.e. deterred by the threat of registration), the ex post imposition of those sanctions actually increases recidivism among those already registered. *Id*., citing J.J. Prescott & Johah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior*?, 54 J L & Econ 161, 181 (2011). The second study looked at three separate data sets, none of which

suggested that sex offender registries deter sex crimes. *Id*. at 750, citing Amanda Y. Agan, *Sex Offender Registries: Fear Without Function*?, 54 J L & Econ 207 (2011). One of the data sets was used to compare national crime statistics with the state of registry implementation in 48 states; researchers found no significant decrease in the rate of rape or the arrest rate for sexual abuse following registration or notification mandates. *Id*. at 219–225.

A study that looked at sex offenders in New York over a 21-year period concluded that approximately 96% were committed by first-time offenders who would not have been registered. Jeffrey C. Sandler, et al, *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 Psychol Pub Pol'y & L 284, 296 Table 1 (2008). During this extensive time period, about 4% were recidivisms. *Id*. Although a broad study at the Medical University of South Carolina performed on South Carolina's sex offender registry law had somewhat different results—showing that registries had *some* deterrent effect, at least on first-time offenders—it nevertheless concluded that registries have *no effect on recidivism*. *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 751, citing Letourneau, Levenson, Bandyopadhyay, Sinha & Armstrong, *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence Against Women* 4, 19 (2010), available at https://www.ncjrs.gov/pdffiles1/nij/grants/231989.pdf (last visited 1/23/2020).

Even a study concluding that community notification deters first-time sex offenses, conceded that such notification increases recidivism by registered offenders because "sex offenders become more likely to commit crimes when their information is made public because the associated psychological, social, or financial costs make crime-free life relatively less attractive." J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J L & Econ 161, 165 (2011). And again, data shows that about 90% of sex crimes are committed by persons known to the victims—often family members (about 30%) but also known and trusted individuals such as family friends, babysitters, and neighbors (about 60%). *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 757, citing *Child Sexual Abuse: What Parents Should Know,* American Psychological Association, available at https://abolitionistmom.org /wp-content/uploads/2014/05/Child-sexual-abuse-What-parents-should-know.pdf (last visited 1/23/2020.) These considerations lessen the likelihood that registries are keeping our communities safe from sexual predators.

Finally, there can be unintended consequences to offender registries. Registries may create incentives for judges and prosecutors to alter charges and for victims to underreport. *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 749. For example, a study of South Carolina's registry law found that, after implementation of the state registry law, defendants were more likely to have charges reduced from sex to non-sex crimes over time. *Id*. at 750, citing Letourneau, et al, *Evaluating the Effectiveness of Sex Offender Registration and*

Notification Policies at 4. The same study found that an increased number of defendants were allowed to plead to non-sex-offense charges. *Id.*

Inadequately supported and narrow views of recidivism, along with the possibility that registration might discourage rehabilitation and encourage future crimes, show that SORA's burdens are an affirmative disability or restraint, promote retribution not rehabilitation, are not rationally connected to the Legislature's asserted nonpunitive purpose, and potentially endanger the safety of the community.

In sum, SORA, taken as a whole, amounts to punishment. SORA's burdensome requirements and its devastating consequences for noncompliance are untethered to the purpose of protecting the health and safety of the public. The 2006 and 2011 amendments to Michigan's SORA are definable points at which SORA became punishment for all on the registry.

B. Retroactive application of SORA's punitive amendments to registrants whose offenses predate those amendments violates the Ex Post Facto Clauses of the Michigan and United States constitutions.

The Ex Post Facto Clause of the United States and Michigan constitutions bars legislatures from retroactively inflicting greater punishment than that allowed at the time a crime was committed. US Const, art I, § 10, cl 1; Const 1963, art I, § 10; *People v Earl*, 495 Mich 33, 37 (2014). In *Earl*, this Court noted that Michigan Court of Appeals decisions have treated Michigan's Ex Post Facto Clause as co-extensive with its federal counterpart. *Id.* at 37–38.

Writing for the Court in *Landgraf v USI Film Products*, Justice Stevens explained that legislatures have "unmatched powers" to "sweep away settled expectations suddenly and without individualized consideration." 511 US 244, 266 (1994). In the federalist papers, Alexander Hamilton characterized ex post facto laws as "the favorite and most formidable instruments of tyranny." The Federalist No 84, p 512. And the Sixth Circuit, in analyzing Michigan's sex offender registry, noted, "As the founders rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under the guise of civil regulation to punish people without prior notice." *Does #1–5*, 834 F3d at 706.

The Ex Post Facto Clause seeks to prevent (1) lack of fair notice and interference with settled expectations; and (2) vindictive legislation. *Landgraf,* 511 US at 266–267. Mr. Betts is a perfect example of the problems associated with retroactive application of a statute that inflicts punishment without prior notice. He pleaded to CSC 2 in 1993, two years before a sex offender registry even existed, and was sentenced to prison and paroled in 1999. Mr. Betts has said that he would not have taken that plea had he known he was going to have to register. (10/15/2018 Aff'd of Betts in Muskegon County Circuit Court, filed in this case.) Yet SORA has been retroactively imposed on him.

If this Court determines that Michigan's SORA is punishment, it is a short step to seeing that its retroactive application does not give fair notice. Many current registrants committed their offenses when the registry was just a confidential law enforcement database, and many more before the sweeping

changes that were introduced in 2006 and 2011. They certainly did not expect to be subjected to a burdensome and public scheme of reporting and monitoring, or to being subject to imprisonment if they work, live, or spend time with their children within geographic exclusion zones that bar them from many parts of their towns or cities. Many pleaded guilty—some to crimes they did not believe they committed—without being able to weigh registration (often lifetime registration) into the equation.

As to whether Michigan's registry is vindictive, Justice Kennedy, in a discussion particularly poignant to sex offender registries, noted in *Landgraf* that legislative bodies are responsive to political pressures and therefore "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." 511 US at 266. Similarly, Justice Souter noted in his concurrence in *Smith* that "when a legislature uses prior convictions to impose burdens that outpace the law's stated aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones." 538 US at 109 (Souter, J., concurring).

Even if that was not the intent in Michigan, legislation that is not intended to be vindictive can become so based on its harsh effects. "[T]he fact that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the Ex Post Facto Clause." *Does #1–5*, 834 F3d at 705–706. SORA allows for and even encourages vindictive responses such as the firing of a registrant, a landlord's refusal to rent an

apartment or house, the shunning of an offender's spouse or extended family, the bullying of a sex offender's children at school, or the use of Michigan's anonymous tip vehicle to harass and retaliate against registrants and their families. See *Wallace*, 905 NE2d at 380 (noting that the practical effect of the dissemination of sex offender information is that it "often subjects offenders to 'vigilante justice' which may include lost employment opportunities, housing discrimination, threats, and violence") (internal citations omitted).

In short, it is an ex post facto violation of both the federal and Michigan constitutions to apply the 2006 and 2011 amendments to registrants whose offenses predate those amendments.

II. Some SORA provisions may be severed, but severance of 2011 amendments would leave the Act inoperable, and any attempts by this Court to "rescue" what remains would violate the separation-of-powers doctrine.

This court has asked whether unconstitutional amendments can be severed from SORA and whether a prior version of SORA can be revived. (Appellant's Appendix at 100a–101a.) MCL 8.5 allows for and encourages severability where "the remaining portions or applications of the act [ ] can be given effect without the invalid portion or application[.]" But no portion of an act can be severed if it is so entangled with the valid portions of the statute that it cannot be cleanly excised and would instead leave the statute inoperable. *Blank v Dep't of Corrections*, 462 Mich 103, 122–123 (2000).

Under these standards, some of SORA's provisions may be severed; others may not be because the statute would be left inoperable and it is beyond this Court's authority to remedy that situation. Revival is disfavored and is not a viable solution.

A. The public nature of the registry and the geographic exclusion zones could be severed, but the 2011 amendments could not.

Whether the provisions requiring an Internet registry are severable depends on how one answers the question of whether public registration is punishment. As discussed above, that question is a nuanced one. Public registration based on risk assessments would not necessarily be punishment. But indiscriminate, life-long internet-based registration regardless of any demonstration of risk is punitive. The statutory provision requiring an Internet registry, MCL 28.730, is self-contained, and SORA contains an express provision regarding the severability of any unconstitutional public registry provision. MCL 28.728(8). That provision could be severed, giving the Legislature the choice between allowing the registry to revert to a law enforcement tool with no public access, or adopting risk-assessment-based, time-limited registration that would include public registration.

Likewise, if this Court holds that only the 2006 geographic exclusion zones are punishment, the Court can sever the exclusion zones. There is no problem in identifying the registrants who have been punished by the geographic exclusion zones—those provisions apply, with very limited exceptions, to all registrants.

By contrast, the unconstitutional 2011 amendments cannot be cleanly excised. They are deeply embedded in SORA and cannot be severed without leaving the Act inoperable. They were not discrete additions. Instead, they changed the Act's essential nature by, among other things, creating a retroactive tier-based system (with tiers determining the frequency and length of reporting requirements), imposing immediate in-person reporting requirements, and adding key definitions that, when removed, would leave lingering questions about the scope and nature of the requirements. Those ambiguities pose uncertainty and risk both on registrants who must comply with the Act and on law enforcement authorities who must implement the Act. And they subject the Act to vagueness and due-process challenges.

Moreover, there may be parts of the 2011 amendments that the Legislature could retain without their cumulative impact being punitive. It is within the province of the Legislature, not this Court, to decide how it will make SORA non-punitive. It may want shorter registration. It may want non-public registration, or public registration only for certain offenders whose risk has been individually assessed. It also may choose to decrease the frequency of certain reporting requirements or replace certain in-person reporting with more feasible on-line or mail reporting. These are quintessentially legislative decisions. In the event this Court holds that SORA, taken as a whole, is unconstitutional, it can delay the effect of its decision for 90 days, thus giving the Legislature time to craft a new statute that complies with the Court's decision and reasoning.

B. This Court's remedial efforts would violate the separation-of-powers doctrine.

Any attempt by this Court to add language to clarify the ambiguities would constitute a rewrite of the Act, in violation of the separation-of-powers doctrine. The touchstone of any inquiry into severability is "legislative intentions." See *People v Steanhouse*, 500 Mich 453, 482 (2017) (Larson, J., concurring); *id.* at 492 (Markman, J., dissenting); see also *Ayotte v Planned Parenthood of Northern New England*, 546 US 320, 329 (2006) (explaining that the rewriting of state law is "quintessentially legislative work").

This Court has made clear that when a statute is at issue, "the law is established by the Legislature" and this Court "is compelled to follow it as written." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 202 (2008). "This Court cannot write into [ ] statutes provisions that the legislature has not seen fit to enact." *Paselli v Utley*, 286 Mich 638, 643 (1938) (internal citations omitted), or "rewrite the plain statutory language," *DiBenedetto v West Shore Hosp*, 461 Mich 394, 405 (2000). That would be tantamount to the Court "substitut[ing its] own policy decisions for those already made by the Legislature." *Id.* And such a substitution would be an incursion into the Legislature's sphere, in violation of the Separation of Powers Clause. Const 1963, art 3, § 2 ("The powers of government are divided into three branches: legislative, executive and judicial," and "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.")

Even recognizing that there is sometimes overlap of responsibilities and powers among the branches of government, *Judicial Attorneys Ass'n v State*, 459 Mich 291, 296 (1998) (internal citation omitted), revising legislative language to clarify unanswered questions that remain after severance goes too far. As a former Justice of this Court explained when discussing severability, "a court is only approximating the will of the Legislature," and to the extent the Legislature has erred, it "can tell us its actual will" and remedy in a way it "considers best, as it is better equipped than this Court to weigh the policy options." *Steanhouse*, 500 Mich at 482–483 (Larsen, J., concurring).

C. Revival is not an appropriate remedy.

The Legislature has made clear that it disfavors revival: "Whenever a statute, or any part thereof shall be repealed by a subsequent statute, such statute, or any part thereof, so repealed, shall not be revived by the repeal of such subsequent repealing statute." MCL 8.4. Even recognizing that legislative response to a judicial decision differs from the Legislature's voluntary act of amending a statute, it is not at all clear that the Legislature would choose to adopt an earlier version of SORA wholesale, or that it would choose to adopt a particular prior version over another. Nor is it clear whether or how the federal Sex Offender Registration and Notification Act (SORNA) would affect any remedial measures.[13]

[13] As the Attorney General briefed more extensively at the application stage, the Legislature could decide not to implement SORNA, forgoing the relatively nominal Judicial Access Grant funds associated with SORNA compliance. See *People v Betts* app for lv, Br of amicus AG, pp 47–48.

Considerable time has passed since the earlier versions of SORA, and there is a growing sense that punitive measures do not halt, and may even contribute to, recidivism in this area.

Additionally, revival of a prior statute in toto could have unintended effects. For example, it could revive earlier punitive aspects of the registry—such as registration of children under the age of 14—that the Legislature decided it no longer wanted. And if a prior statute is revived only in part, then this Court is making legislative choices about which parts of the statute to bring back.

Significantly too, the Legislature has had some four years since the federal district court struck down various SORA provisions, including the geographic exclusion zones and numerous reporting requirements, as unconstitutional ex post facto violations. *Does #1–5 v Snyder*, 101 F Supp 3d 672 (ED MI, 2015) & *Does #1–5 v Snyder*, 101 F Supp 3d 722 (2015). And it has had over three years since the Sixth Circuit affirmed the district court. *Does #1–5*, 834 F3d at 696. Yet the Legislature has not responded by re-enacting an earlier version of SORA.

An additional concern is that revival would potentially create different registries for different individuals based on the years they committed their offenses. This would be an unworkable solution both for the Michigan State Police as it enforces the statute, and for registrants as they attempt to figure out which version of the statute applies to them.

CONCLUSION AND RELIEF REQUESTED

Michigan's Sex Offender Registry Act, taken as a whole, imposes burdens that are so punitive in their effect that they negate the State's public safety justifications. Accordingly, Amicus Curiae Attorney General Dana Nessel asks this Court to hold that SORA is punishment and its retroactive application violates the Ex Post Facto Clauses of the Michigan and United States constitutions. The unconstitutional 2011 amendments cannot be severed without leaving an Act that is inoperable without remedial efforts that are quintessentially legislative. Protecting the children and families of Michigan from sexual offending is critical, but it is the Legislature's task to determine how best to do so within constitutional constraints.

Respectfully submitted,

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