STATE OF MICHIGAN
IN THE SUPREME COURT

ANTHONY HART,

Plaintiff-Appellant,

v

STATE OF MICHIGAN, acting through the Michigan Department of State Police,

Defendant-Appellee.

Supreme Court No. 159539

Court of Appeals No. 338171

Court of Claims No. 16-212-MM

BRIEF ON APPEAL OF APPELLEE STATE OF MICHIGAN

ORAL ARGUMENT REQUESTED

Joseph T. Froehlich (P71887)
Assistant Attorney General
Attorney for Defendant-Appellee
State of Michigan
State Operations Division
P.O. Box 30736
Lansing, MI 48909
(517) 335-7573

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STATEMENT OF JURISDICTION

On February 7, 2019, the Court of Appeals reversed the April 12, 2017 order of the Michigan Court of Claims denying Defendant-Appellee State of Michigan's motion for summary disposition under MCR 2.116(C)(8). Plaintiff-Appellant Anthony Hart now appeals the Court of Appeals' unpublished February 7, 2019 opinion, as well as the March 22, 2019 order denying Hart's motion for reconsideration. The Court of Appeals properly determined that Hart failed to plead facts establishing a Michigan constitutional tort claim against Defendant-Appellee State of Michigan.

COUNTER-STATEMENT OF QUESTION PRESENTED

On September 25, 2019, this Court directed the parties to address the following question:

> Whether the Court of Appeals erred when it concluded that the plaintiff had failed to allege sufficient facts to state a constitutional-tort claim under the principles outlined in *Canton v Harris*, 489 US 378 (1989), and *Bd of Co Cmmr's of Bryan Co, Ok v Brown*, 520 US 397, 409 (1997).

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

INTRODUCTION

The U.S. Supreme Court has established an onerous standard for pleading a constitutional tort claim arising out of an alleged failure to train or supervise employees. Anthony Hart alleges that the failure to properly train and supervise state employees resulted in Hart being arrested and prosecuted for failure to register as a sex offender. The Court of Appeals analyzed whether Hart's complaint alleged sufficient facts in support of his claim, and properly applied U.S. Supreme Court precedent in concluding that he did not.

Hart has not alleged and cannot establish a pattern of similar violations by the State. Further, Hart has not alleged and cannot establish direct and obvious causal link between the State's alleged failure to train and supervise and the alleged violation of Hart's constitutional rights. Thus, here the Court of Appeals appropriately held that Hart failed to plead a Michigan constitutional tort claim.[1]

Hart claims the Court of Appeals decision contained several errors. But one of those errors involves a new legal theory that he abandoned by failing to raise it below. The others regard arguments considered and rejected by the Court of Appeals in a well-reasoned decision. The court below properly evaluated Hart's complaint, and applied precedent of this Court and the U.S. Supreme Court to hold that Hart failed to plead facts establishing a constitutional violation.

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[1] There is some question about this Court's authority to create a tort claim for money damages under the Michigan Constitution separate from an enactment of the Legislature. See the Michigan Unemployment Insurance Agent's application for leave filed January 16, 2020 in *Bauserman v. UIA* (Case No. 156389), but this Court need not reach that issue here.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Anthony Hart was convicted of fourth-degree criminal sexual conduct in 2001. (App p 5a, ¶14.) As a result, Hart was required to register as a sex offender. (App p 5a, ¶15.) At the time of his conviction, Hart was 16 years old, and was adjudicated as a juvenile. (App p 5a, ¶14.) Ten years after Hart's conviction, in 2011, the Michigan Sex Offender Registry Act was amended. The 2011 amendments provided, among other things, that certain offenders adjudicated as juveniles (including Hart) were no longer required to be registered. (App p 5a, ¶16.) But Hart was never "flagged" as a juvenile in the sex offender registry database. (App p 6a–7a, ¶24–25.) As a result, Hart was inadvertently not removed from the registry with other similar juvenile offenders following the 2011 amendments to the Sex Offender Registry Act (SORA). At the time, no one was aware of the mistake.

On July 5, 2013, Hart registered an incorrect address with the Sex Offender Registry (SOR). (App p 7a–8a, ¶29–30.) He was arrested by Hillsdale Police and charged with a violation of the SORA. (App p 8a, ¶31–36.) Hart entered a plea agreement of nolo contendere and was found guilty of one count of failure to register as a sex offender. (App p 8a, ¶37.) On January 23, 2014, Hart failed to verify his address with SOR and was later arrested and charged with failure to register. (App p 9a, ¶40.) On February 18, 2014, Hart entered a plea of guilty to the charge of failure to register and was sentenced to prison with the Michigan Department of Corrections. (App p 10a, ¶48.)

On August 14, 2015, the Michigan Department of Corrections determined that Hart was not required to register with SOR and notified MSP. (App p 11a,

¶53.) Within 10 days, the Hillsdale Circuit Court entered an order vacating Hart's 2013 and 2014 guilty pleas and convictions. (App p 11a, ¶54.) Hart was released from prison on August 26, 2015. (App p 11a, ¶55.) Hart's earlier 2013 conviction was vacated on November 17, 2015. (App p 11a, ¶56.)

Following his release from custody, Hart filed a five-count complaint seeking money damages from the State of Michigan, each of which was premised upon alleged violations of Article 1, §§ 11 and 17 of the Michigan Constitution. Hart alleged, in conclusory fashion, that the "customs, policies and/or practices" of the State resulted in violation of Hart's constitutional rights, i.e., his arrest and prosecution for failure to register as a sex offender. Under a fair reading of his complaint, he alleged that the state failed to train, supervise, and/or discipline state employees. (App p 16a–17a, ¶ 80 e–g).

The State of Michigan moved for summary disposition on December 5, 2016. On April 12, 2017, Court of Claims Judge Cynthia Diane Stephens issued a written opinion denying the State's motion, holding that Hart's claims fell within the "narrow remedy" for constitutional torts described in *Smith v Dep't of Public Health*, 428 Mich 540 (1987).

In a decision dated February 7, 2019, the Court of Appeals reversed the decision of the Court of Claims. *Hart v State of Michigan*, unpublished per curiam opinion of the Michigan Court of Appeals, Docket No. 338171 (decided February 7, 2019) (App p 132a–140a). The Court of Appeals held that Hart had failed to plead sufficient facts to state a claim for a constitutional violation. (App p 136a, at 5.)

The court reviewed Hart's complaint and concluded that Hart's allegations of injury based upon "customs, policies and/or practices" of the State of Michigan were rooted only in allegations that the State has failed to properly "train, supervise, and/or discipline defendant's employees." (App p 136a, at 6.) The court further held that there was lack of direct causation between the alleged failure to train and the alleged constitutional violation, and that as a result, Hart had failed to allege facts sufficient to establish a constitutional tort claim. (App p 139a–140a, at 8–9.)

On March 22, 2019, the Court of Appeals denied Hart's motion for reconsideration. On May 3, 2019, Hart timely filed his application for leave to appeal in this Court.

On September 25, 2019, this Court granted Hart's application for leave to appeal, and directed the parties to address:

> whether the Court of Appeals erred when it concluded that the plaintiff had failed to allege sufficient facts to state a constitutional-tort claim under the principles outlined in *Canton v Harris*, 489 US 378 (1989), and *Bd of Co Cmmr's of Bryan Co, Ok v Brown*, 520 US 397, 409 (1997).

STANDARD OF REVIEW

The decision to grant or deny a motion for summary disposition is reviewed de novo. *Maiden v Rozwood,* 461 Mich 109, 118–119 (1999). The appellate court reviews the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294 (1998).

ARGUMENT

I. The Court of Appeals properly determined that Hart failed to establish a constitutional tort claim.

In asking the parties to address the issue, the Court's question is predicated on the existence of a tort claim based on the Michigan constitution, and the State of Michigan does not challenge that point here, see n 1 above, because this Court should reject Hart's application on narrow grounds. The two U.S. Supreme Court cases identified by this Court create a very high threshold of proof, and the Court of Appeals correctly rejected the claim as pled here. That court correctly understood Hart's challenge to raise a claim that based on an alleged failure to supervise or train its employees to apply the SORA properly. But there was no such policy or custom. The lower court rightly dismissed the claim because there was no direct link between the State's actions and any injury. And finally, the listing as a sex offender on the registry is not a constitutional injury in and of itself in any event.

A. *Canton v Harris* and *Bd of Co Cmmr's of Bryan Co, Ok v Brown* establish an onerous standard to establish government liability under the circumstances presented by this case.

Canton v Harris, 489 US 378 (1989) and *Bd of Co Cmmr's of Bryan Co, Ok v Brown*, 520 US 397 (1997) establish limited circumstances where an allegation of failure to train or supervise employees can give rise to liability. Both cases recognize that in *Monell v New York City Dept of Social Services*, 436 US 658 (1978), the United States Supreme Court established narrow circumstances where a government can be found liable for a violation – but only where the government itself causes the constitutional violation at issue.

Respondeat superior or vicarious liability will not attach. *Id.*, at 694–695. Instead, "[i]t is only when the 'execution of the government's policy or custom ... inflicts the injury' that the municipality may be held liable….." *Canton*, 489 US at 385, quoting *Springfield v Kibbe*, 480 US 257 (1987) (O'Connor, J., dissenting), which in turn was quoting *Monell,* 436 US at 694.

In limited circumstances, a government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of constitutional tort liability. But there must be a direct causal link between a municipal policy or custom and the alleged constitutional deprivation. *Canton*, 489 US at 388. *Canton* holds that inadequate police training may serve as a basis for liability "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Canton,* 489 US at 388.

This standard goes beyond simple negligence. "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bryan Co*, 520 US at 410. Thus, when policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. *Id.* at 407. The government's "'policy of inaction' " in light of notice that its program will cause constitutional violations "is the functional equivalent of a

decision by the city itself to violate the Constitution." *Canton*, 489 US at 395 (O'Connor, J., concurring in part and dissenting in part).

"Only then 'can such a shortcoming be properly thought of as a [state] 'policy or custom' that is actionable…." *Connick v Thompson*, 563 US 51, 60 (2011), quoting *Canton*, 489 US at 389. To properly be considered a "policy or custom," the failure to train must reflect a deliberate or conscious choice by the government. *Canton*, 489 US at 389. A less stringent standard of fault for a failure-to-train claim "would result in de facto respondeat superior liability on municipalities ...." *Id.* at 392

Further, a failure to train must be closely related to the ultimate injury – an onerous standard for a plaintiff who seeks to plead a constitutional violation against the State based upon a policy or custom. *Canton*, 489 US at 391. Alleging that an otherwise sound program has occasionally been negligently administered is insufficient. *Id.* "Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training…." *Id.* The only avenue to establish liability is for a plaintiff to prove that "that the deficiency in training actually caused" the constitutional deprivation. *Id.*

As explained by the U.S. Supreme Court in *Canton*:

> To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident. See *Oklahoma City v. Tuttle,* 471 U.S., at 823, 105 S.Ct. at 2436 (opinion of REHNQUIST, J.).

> Thus, permitting cases against cities for their "failure to train" employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities—a result we rejected in *Monell,* 436 U.S., at 693–694, 98 S.Ct., at 2037. It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. [*Canton*, 489 US at 391–392 (paragraph break added).]

In *Bryan Co*, the U.S. Supreme Court again cautioned that a government may not be held liable simply because it employs a tortfeasor. 520 US at 403. "Where a plaintiff claims that the government has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Id.* at 405, citing *Canton*, 489 US at 391–392. The Court recognized that "the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the 'moving force' behind the plaintiff's injury." *Bryan Co*, 520 US at 407–408, citing *Canton*, 489 US at 390–391.

But where a claim of governmental liability rests on a single action rather than a pattern of conduct, "the danger that [the government] will be held liable without fault is high." *Bryan Co*, 520 US at 408. Nevertheless, the Court in *Bryan Co* recognized the possibility of a "narrow range of circumstances" where a constitutional violation may be a "highly predictable consequence" of a failure to train or supervise reflective of deliberate indifference. *Id.* at 409. *Canton* described such circumstances to be where the need for training or supervision is so obvious

that constitutional violations flowing from the failure to train or supervise are a "moral certainty." *Canton,* 489 US at 390 n 10.

In sum, a government's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. *Connick*, 563 US at 61, citing *Oklahoma City v Tuttle,* 471 US 808, 822 (plurality opinion) ("[A] 'policy' of 'inadequate training' " is "far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell* "). Where a plaintiff claims a constitutional injury occurring as the result of a failure to train or supervise police employees, a plaintiff faces an uphill battle in establishing governmental liability.

Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. *Monell*, 436 US at 691. It is not enough to simply identify conduct attributable to the government. Rather, a plaintiff must identify deliberate action by the government itself that is the moving force behind the alleged injury. *Canton*, 489 US at 385; *Bryan Co.* 520 US at 403. Courts must be careful not to impose liability on the government solely for the tortious acts of employees. *Id.* Negligent administration of a program will not suffice. *Bryan Co*, 520 US at 407–408, citing *Canton*, 489 US at 390–391. That is basically the gravamen of Hart's complaint here, nothing more than the negligent administration of the registry.

In nearly all cases, a plaintiff must demonstrate a pattern of constitutional violations to establish a policy or custom. *Bryan Co.* at 407–409. Policymakers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger [governmental] liability." *Id.* at 407. "Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Connick*, 563 US at 64.

In the absence of a pattern of constitutional violations, the Court in *Bryan Co* left open the rare possibility that a plaintiff could demonstrate deliberate indifference where there is a direct and obvious causal link between the failure to train and the deprivation of constitutional rights such that constitutional violations were a "highly predictable consequence." *Connick*, 563 US at 64; *Bryan Co*, 520 US at 409; *Canton*, 489 US at 390 n 10. Such a direct and obvious causal link are only possible "in a narrow range of circumstances." *Bryan Co*, 520 US at 409. Strict standards of fault and causation will apply. *Canton*, 489 US at 391-392. In other words, in rare cases, the unconstitutional consequences of failing to train could be so patently obvious that a constitutional violation is a "moral certainty." Hart cannot meet this onerous standard.

B. The Court of Appeals properly construed Hart's constitutional tort claims as being premised on the alleged failure to train or supervise employees.

Of the seven allegations in the complaint that Hart claims amount to customs, practices, and policies of the State, four specifically mention the State's alleged failure to train. (App pp 16a–17a, ¶ 80 a–d.) Although the next three do not specifically mention a failure to train or supervise, the allegations are fairly read as describing the result of the alleged failure to properly supervise and train employees who improperly maintained and operated registry. (App pp 16a–17a, ¶ 80 e–g.)

Here, Hart insists that the Court of Appeals did not consider his allegations that the State failed to properly institute proper procedures to ensure the accuracy of the sex offender registry, and that the State actively propagated and published a flawed registry as a result. But the Court did consider these allegations and concluded that the allegations were tantamount to allegations of failure to train and supervise. *Hart*, slip opinion at 6 (App p 137a.)

Indeed, the analysis of the Court of Appeals recognizes that an institutional defendant such as the State of Michigan can only maintain the sex offender registry through the actions of State agents and employees. As a result, the Court of Appeals properly concluded that Hart's allegations could only be construed as allegations that the State failed to train or supervise its employees and agents such that the registry was improperly maintained. Thus, to the extent that court rested its analysis on its finding that Hart only alleged a failure to train, supervise or discipline employees, there was no error.

Further, with respect to the allegations of failure to train, there is another basis for the denial of Hart's claim under *Canton* and *Bryan Co* that was not articulated by the Court of Appeals. *Canton* states that to properly be considered a "policy or custom," the failure to train must reflect a deliberate or conscious choice by the government. *Canton*, 489 US at 389. But Hart does not allege any facts reflecting a deliberate or conscious choice by the government. Instead, Hart makes only conclusory allegations that the State failed to train employees regarding maintenance of the Registry, and no facts whatsoever to support the conclusion that the State made a deliberate or conscious choice regarding the alleged failures to train and supervise. If anything, the allegations of Hart's complaint indicate a one-time negligent administration by State employees in their maintenance of the registry. Such allegations cannot form the basis of a constitutional tort.

C. The Court of Appeals properly applied binding precedent to determine that there was no direct link between the State's actions and the alleged constitutional violation.

The Court of Appeals faithfully applied *Canton* and *Bryan Co* to Hart's claims, holding that because Hart only alleged a failure to train, supervise or discipline employees, Hart was required to show the State acted with deliberate indifference to his constitutional rights. (App p 137a–139a, at 6–8.) Because Hart did not allege a pattern of similar constitutional violations, he was required to plead and establish that there was "a high degree of predictability" that he would be arrested and prosecuted for his failure to register as a sex offender as a result of the State's failure to properly train and supervise employees regarding maintenance of

the state sex offender registry. (App p 138a–139a, at 7–8.) In other words, Hart was required to plead facts demonstrating that it was so "patently obvious" that the state policies were so constitutionally deficient that the State knew "to a moral certainty" that Hart's rights would be violated. *Id.* Without this "direct and obvious causal link between the failure to train" and the deprivation of his rights, Hart cannot maintain a constitutional tort claim. *Id.*

In analyzing whether Hart had adequately pleaded facts in support of a finding of deliberate indifference, the court found that "the alleged failure to train MSP employees in this SORA context does not carry the [] obvious or clear dangers of a constitutional violation" as required by *Canton* and *Bryan Co.* (App p 137a–140a, at 6–9.) Therefore, the court below concluded that it is not "a moral certainty" or patently obvious that people on the SOR will fail to keep the SOR updated and be arrested as a result. (App p 139a, at 8.) Thus, "because of this lack of a 'high degree of predictability' and a lack of direct causation of a constitutional violation," the court held that Hart had failed to allege facts sufficient to establish a constitutional tort claim. (App p 139a–140a, at 8–9.)

In fact, the Court of Appeals noted that, for a constitutional violation to result, "the person also would have to be unaware of the change in the law and fail to take any step to be removed from the SOR." (App p 139a, at 8 n 6). In other words, the Court found that, because a person erroneously listed on the registry could have become aware of the 2011 change in law and taken steps to be removed from the list, there was not a "direct causation" between the State's alleged failure

to train and any constitutional violation resulting from being listed on the registry. *Id.*, citing *Bryan Co* 520 US at 409 and *Connick v Thompson*, 563 US 51, 60 (2011).

This was a proper determination by the Court of Appeals based on United States Supreme Court precedent, and Hart has offered no persuasive argument to the contrary. Even if the State was "morally certain" to have a "highly flawed" registry rooted in the failure to train and supervise employees, there would still be no "moral certainty" that Hart would be arrested and prosecuted as a result of the "highly flawed" registry. This is precisely what the Court of Appeals considered—whether there was a link between the State's failure to train and Hart's ultimate arrest and prosecution—and it determined that there was no direct and obvious causal link. Without this necessary causal link, there can be no deliberate indifference, and therefore no constitutional violation.

To prove deliberate indifference, Hart must show that the State was on notice that, absent additional specified training, it was "highly predictable" that Hart would be arrest and prosecuted. In fact, Hart had to show that it was so predictable that failing to train State employees regarding maintenance of the sex offender registry amounted to conscious disregard for Hart's constitutional rights. See *Bryan Co* at 409; *Canton*, at 389. Hart cannot and did not do so.

Indeed, there were several events between the alleged policy leading to Hart's improper placement on the registry and his injury. First, Hart engaged in conduct in violation of SORA. Then, the local prosecutor made the decision to charge Hart

with a crime for his violation. After that, apparently on the advice of counsel, Hart pleaded guilty to the violations.

The facts alleged do not demonstrate that it was a moral certainty that Hart's improper placement on the registry would later result in his arrest and prosecution. The arrest and prosecution could only happen upon the happening of several other circumstances. It is entirely conceivable that Hart could have continued to be improperly listed on the registry for years without an arrest or prosecution, had he continued to meet his registration obligations. It also conceivable that could have failed to meet his registration obligations, yet never been charged with a crime in the discretion of the local prosecutor. It is also imaginable that Hart could have failed to meet his registration obligations, been charged with a crime, but then contested the charges with the assistance of counsel and discovered that it was legally impossible for him to have committed the crime. Hart's injury and the alleged failure to train are simply too attenuated to give rise to the State's liability under the standards of *Canton* and *Bryan Co*. Thus, Hart's new arguments in this Court add nothing to the analysis and would not result in a different disposition.[2]

[2] And, regardless, Hart is not entitled to relief on his constitutional tort claims because he has an alternative remedy—a § 1983 action. In fact, Hart has taken advantage of that alternative remedy and filed a suit against the individual employees and officers involved, *Hart v County of Hillsdale, et al*, Eastern District of Michigan Case No 16-10253, which currently is pending.

D. Being listed on the sex offender registry is not a constitutional injury in and of itself.

The Court of Appeals properly determined that Hart could not establish a constitutional tort claim because there was no direct causal link between the State's action and the alleged constitutional violation—being illegally arrested and prosecuted. (App p 137a–140a, at 6–9.) Indeed, the *only* constitutional violations alleged in Hart's complaint involved the arrest and prosecution that resulted from the State's alleged failure to train and supervise employees.

In the preliminary statement in his complaint, the only facts that Hart indicated amounted to a constitutional violation was the State's actions that resulted in the *false arrest and malicious prosecution* of Hart. (App p 3a, ¶3) (emphasis added). Then, when arguing to the Court of Appeals that inadequate training could amount to a constitutional tort claim, Hart pointed to the substance of his claims: "Defendant had actual notice that said law enforcement officials were likely to *engage in arrests and initiate prosecutions* for alleged SORA violations." (App p 117a,) (emphasis added). But there is no direct and causal link between the alleged policy of the State and Hart's arrest or prosecution.

Hart now claims that the Court of Appeals should have considered a different alleged constitutional violation from his arrest and prosecution—Hart's incorrect status as a listed sex offender. But Hart's constitutional tort claim was not premised on that alleged constitutional violation, until now. Nowhere else—not in his complaint, his briefing before the Court of Claims, or his brief to the Court of Appeals—did Hart mention an alleged constitutional violation for being listed on

the registry. Hart has not explained why the Court of Appeals should have considered this alternative basis for relief in its analysis. Nor can he. The Court of Appeals cannot have considered an argument that was not properly preserved and presented. In short, Hart has abandoned the issue. See *Steward v Panek*, 251 Mich App 546, 558 (2002) (holding that plaintiffs abandoned an issue by failing to brief it on appeal).

And to the extent that Hart further argues that the Michigan Attorney General's amicus briefs in two recent Michigan Supreme Court cases support a finding that Hart had a liberty interest in not being incorrectly listed on the registry, the argument is misplaced. An amicus brief in wholly unrelated cases—on wholly unrelated issues—has no application here whatsoever. First, the position taken in the amicus briefs in those other cases does not bind the State in this case. Second, whether being listed on the registry is punishment such that there is a liberty interest at issue was not a matter addressed in either of the amicus briefs Hart relies on. Put simply, an amicus brief on an unaddressed and unrelated issue in a different criminal case does not amount to a basis for relief in this matter.

Hart is also incorrect on the merits of his claim that placement on the registry alone is a constitutional violation. *Does #1-5 v Snyder*, 834 F3d 696 (CA 6, 2016), cert denied, 138 S Ct 55 (2017), does not compel the conclusion that being listed on the sex offender registry is a constitutional violation in and of itself. Instead, the Sixth Circuit explained that SORA was punitive because of the *aggregate effect* of certain challenged aspects of the law.

Specifically, the Sixth Circuit stated that the cumulative effect of three statutory features amounted to punishment: the student safety zones where an offender is not permitted to live, work or loiter; the public classification of a offenders into tiers without an individualized assessment; and the requirements on offenders to appear in person to report even minor changes to certain information. *Does #1-5*, 834 F3d at 705. It was the aggregate effect of these specific provisions that compelled the Sixth Circuit's determination that the current SORA has "much in common with banishment and public shaming," "and has a number of similarities to parole/probation." *Id.* at 701, 703.

Nowhere in *Does #1-5* is there support for the position that Hart takes here. Nothing about the holding in *Does #1-5* even suggests that a deprivation of liberty occurs when an offender is improperly listed on the Registry. The issue of what liberty interest may or may not exist in connection with sex offender registration was simply not an issue litigated in that case.[3]

Perhaps most importantly, despite the Sixth Circuit's conclusion in *Does #1-5*, whether SORA constitutes punishment remains an open question in Michigan's state courts. Indeed, this Court is considering that very question, among others, in *People v Snyder*, Michigan Supreme Court No. 153696. Moreover, the Michigan Court of Appeals has determined that SORA is not punishment and that certain

[3] Furthermore, Michigan's federal courts have repeatedly rejected claims of due process violation based upon placement on the SOR. See *Doe v Kelley,* 961 F Supp 1105 (WD Mich, 1997); *Lanni v Engler,* 994 F Supp 849 (ED Mich, 1998); *Akella v Michigan Dept of State Police,* 67 F Supp 2d 716 (ED Mich, 1999); *Fullmer v MSP,* 360 F3d 579 (CA 6, 2004); *Doe XIV v MSP,* 490 F3d 491 (CA 6, 2007).

provisions of SORA do not violate the Ex Post Facto Clause. In *People v Tucker*, 312 Mich App 645 (2015), after holding that the recidivist provision of SORA, MCL 28.723 (1)(e), is not an ex post facto law, the court considered whether the statute constitutes cruel and unusual punishment. In doing so, it found that there was no constitutional violation because SORA does not constitute punishment at all. *Tucker*, 312 Mich App at 683 ("[T]he student safety zones and in-person reporting requirements of SORA do not constitute punishment.")

The binding precedent that SORA does not constitute punishment is not undermined by *Does #1-5*. "Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." *Abela v Gen Motors Corp*, 469 Mich 603, 606 (2004) (internal citation omitted). As a result, under Michigan law, there is no basis for Hart's position that improper placement on the SOR constitutes a punishment or a deprivation of a constitutional liberty interest.

CONCLUSION AND RELIEF REQUESTED

Hart alleges that the failure to properly train and supervise state employees resulted in Hart's constitutional rights being violated. But Hart has not alleged and cannot establish a pattern of similar violations by the State. Further, Hart has not alleged and cannot establish that the State knew to a moral certainty that Hart's constitutional rights would be violated as a result of the allegedly deficient policy. Because there is no direct and obvious causal link between the State's alleged failure to train or supervise employees and the alleged violation of Hart's

constitutional rights, the Court of Appeals properly determined that Hart failed to plead a Michigan constitutional tort claim.

Respectfully submitted,

/s/ Joseph T. Froehlich
Joseph T. Froehlich (P71887)
Assistant Attorney General
Attorney for Defendant-Appellee
State of Michigan
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573

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