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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/
Cross-Appellant,

Supreme Court No. 164685
Court of Appeals No. 327355
Wayne Cir. Ct. No. 14-010811-FC

v

CORA LADANE LYMON,

Defendant-Appellant/
Cross-Appellee.
_________________________________/

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN

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STATEMENT OF QUESTIONS PRESENTED

I. What legal standard applies to determine what constitutes punishment under Const 1963, art 1, § 16 (Michigan's Cruel or Unusual Punishment Clause)?

Court of Appeals' answer:	Assumes the test is the same as for ex post facto claims.
Prosecutor's answer:	Assumes the test is the same as for ex post facto claims.
Lymon's answer:	Suggests that the test may differ from that for ex post facto claims.
ACLU's answer:	This question of first impression, which has implications far beyond the SORA context, should either be reserved or decided on further briefing. In any event the clearest proof requirement should not apply.

II. Is Michigan's Sex Offenders Registration Act, MCL 28.721 et seq., as amended by 2020 PA 295 (SORA 2021), punishment under Const 1963, art 1, §16, or punishment under US Const, Am VIII?

Court of Appeals' answer:	Yes
Prosecutor's answer:	No.
Lymon's answer:	Yes.
ACLU's answer:	Yes.

III. Is the punishment imposed by SORA 2021 cruel or unusual in violation of Const 1963, art 1, §16 or cruel and unusual under US Const, Am VIII, when imposed for a non-sexual crime?

Court of Appeals' answer:	Yes
Prosecutor's answer:	No.
Lymon's answer:	Yes.
ACLU's answer:	Yes.

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INTRODUCTION

After a decade of litigation, the Legislature revised Michigan's Sex Offenders Registration Act (SORA) at the end of 2020.[1] Courts had unanimously agreed that the prior version of SORA unconstitutionally imposed retroactive punishment. Two years ago, this Court so held in *People v Betts*, 507 Mich 527 (2021). The Sixth Circuit had reached the same conclusion in 2016 in *Does #1-5 v Snyder* (*Does I*), 834 F3d 696 (CA 6, 2016), cert den, 583 US 814 (2017). When Michigan ignored that ruling and continued enforcing the unconstitutional law, registrants brought a class action. The federal district court again held that SORA is punishment. *Does #1-6 v Snyder*, 449 F Supp 3d 719 (ED Mich, 2020) (*Does II*) (Cleland, J.).

The latest iteration of SORA makes minimal changes to the Act's structure and requirements. The law remains conviction-based. It retains the same tier system, the same lifetime/lengthy registration periods, and almost the same reporting requirements and online registry, all without any individualized assessment. In almost all cases, there is no path off the registry regardless of individual circumstances, rehabilitation, or decades of law-abiding behavior. SORA 2021 continues to require people who were never convicted of sex offenses to register—a provision the Sixth Circuit flagged as punitive. *Does I*, 834 F3d at 703. One person subject to that renewed provision is Cora Lymon.

Mr. Lymon contested the requirement that non-sex offenders register as sex offenders. The Court of Appeals concluded that SORA 2021, like its predecessor, is punishment because the law's minor amendments do not significantly alter the analysis this Court laid out in *Betts*. *People v Lymon*, 993 NW2d 24 (2022), 37-44. The Court of Appeals further held that imposing sex

[1] This brief was not authored in whole or part by counsel for a party, nor did such counsel or a party make a monetary contribution intended to fund the brief's preparation or submission.

offender registration on Mr. Lymon is cruel or unusual punishment. *Id.*, p 22. This Court should affirm.

INTEREST OF AMICUS

The American Civil Liberties Union of Michigan (ACLU) is the Michigan affiliate of a nationwide, nonpartisan organization of over 1.5 million members dedicated to protecting core constitutional liberties. The ACLU or its attorneys have been involved in numerous SORA cases, including representing the plaintiffs in *Does I* and the class of all Michigan registrants in *Does II*, as well as filing an amicus brief in *Betts*. ACLU counsel currently represent a class of all Michigan registrants in *Does A-H v Whitmer*, No. 22-cv-10209 (ED Mich) (Goldsmith, J.) (*Does III*), which includes a "non-sex-offense subclass" comprised of non-sex-offenders subject to SORA. *Id.*, R 35, ¶¶2, 6.

BACKGROUND

I. The Legislative and Litigation History

A. SORA's Successive Amendments Make It Ever More Punitive

When Michigan first passed a registration law in 1994, registry information was available solely to law enforcement, and registrants needed to update only address changes, which didn't have to be done in person. 1994 PA 295, §5(1). Since that time, the legislature has repeatedly amended the statute, imposing new burdens, and covering more people and more conduct.

In 1999, registry information was made available on the internet. 1999 PA 85. In 2004, registrants' photos were posted on the website. 2004 PA 237. Amendments in 2006 retroactively barred registrants from working, residing, or loitering within 1,000 feet of schools. 2005 PA 121; 2005 PA 127. Penalties were also increased. 2005 PA 132. Another amendment gave subscribing members of the public electronic notification when people moved to a particular zip code. 2006 PA 46.

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In 2011, the registry was totally restructured. Registrants were retroactively categorized into tiers, with tier classifications determining the length of registration terms and frequency of reporting. 2011 PA 17, 18. Tier classifications were based solely on the conviction, without any individualized assessment whatsoever. *Id*. Under the 2011 amendments, almost 17,000 people had their registration terms retroactively extended from 25 years to life. *Does III* Data Rept, Ex 2, ¶132. The 2011 amendments also retroactively imposed extensive new reporting requirements, mandating in-person and in some cases "immediate" (three-day) reporting of vast amounts of personal information. 2011 PA 17, 18.

B. The Sixth Circuit Finds SORA Is Punishment in *Does I*

In 2012, five registrants challenged SORA's constitutionality. The district court dismissed the ex post facto claim, *Does #1-4 v Snyder*, 932 F Supp 2d 803 (ED Mich, 2013). After discovery, the court held that parts of SORA were unconstitutionally vague or violated the First Amendment, that registrants could not be held strictly liable for SORA violations, and that retroactively extending the duration of certain internet reporting requirements violated the First Amendment. *Does #1-5 v Snyder*, 101 F Supp 3d 672, 713-714 (ED Mich, 2015); *Does #1-5 v Snyder*, 101 F Supp 3d 722, 730 (ED Mich, 2015).

On appeal, the Sixth Circuit held that SORA is punishment and that "retroactive application of SORA's 2006 and 2011 amendments to Plaintiffs is unconstitutional, and it must therefore cease." *Does I*, 834 F3d at 705-706. The decision mooted all other claims. The U.S. Supreme Court denied certiorari. *Snyder v Does #1-5*, 583 US 814 (2017).

C. The Eastern District Finds SORA Is Punishment in *Does II*

Michigan ignored the Sixth Circuit's and district court's decisions in *Does I*, and continued to subject tens of thousands of people to SORA. The legislature did not amend the statute,

and law enforcement continued to enforce the unconstitutional provisions.[2]

In June 2018, six registrants filed a class action seeking to ensure the *Does I* decisions were applied to all Michigan registrants.[3] *Does II*, 16-cv-13137, 2d Am Compl, R 34. The claims brought were those decided in plaintiffs' favor in *Does I* by the Sixth Circuit and district court. The state stipulated to class certification, *id.*, Stip Class Cert Order, R 46, and the court postponed briefing repeatedly to permit ongoing stakeholder negotiations about revising SORA. *Id.*, Sched Orders, R 41, 44, 45, 47, 51, 54. In May 2019, the parties, hoping to spur legislative action, proposed and the court entered a stipulated order granting a judgment declaring the 2006 and 2011 amendments to be unconstitutional as to the ex post facto subclasses. *Id.*, Stip Order for Decl Judg, R 55. The court deferred ruling on injunctive relief "to avoid interfering with the Michigan legislature's efforts to address the *Does I* decisions and their findings of constitutional deficiencies with SORA." *Id.*, PageID 784.

After stakeholder negotiations for a new SORA failed, *see* Section I.E, *infra*, the *Does II* case moved forward. In February 2020, the court granted plaintiffs' summary judgment motion, incorporating the Sixth Circuit's and district court's *Does I* holdings, as applied to the appropriate subclasses, and enjoining SORA's retroactive application. *Does II*, 449 F Supp 3d at 731-733. The injunctions were to become effective 60 days after judgment to give the legislature one last chance to pass a constitutional law. *Id.* at 739. Before judgment entered, however, the pandemic hit, making it difficult for the state to provide notice to registrants, the legislature to work on a new law, and registrants to obey SORA's requirements due to Covid stay-at-home orders.

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[2] See, e.g., *Roe v Snyder*, 240 F Supp 3d 697 (ED Mich, 2017); *Doe v Curran*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued Jan 10, 2020 (Case No. 18-11935), 2020 WL 127951, at *8, Ex 6.

[3] The complaint was initially filed by private counsel in 2016 and stayed pending resolution of the then-pending *Does I* cert petition.

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Accordingly, in April 2020, the court entered an interim order delaying entry of judgment and suspending enforcement of most SORA requirements, including registration, verification, and fees. *Does II*, 16-cv-13137, Interim Order, R 91.

The final judgment, which was entered over a year later in August 2021, declared the old SORA to be ex post facto punishment and barred retroactive application of the 2006 and 2011 amendments. The judgment permanently enjoined enforcement of the old SORA against people whose registrable offense predated 7/1/2011. *Id.*, Amended Final Judgment, R 126.

D. This Court Finds SORA to Be Punishment in *Betts*

While the *Does I* and *II* cases worked their way through the federal courts, a parallel criminal case was proceeding through the state courts. In July 2021, this Court held that the old SORA was punishment, and that its retroactive application violated the federal and state constitutional prohibitions on ex post facto laws. *Betts*, 507 Mich 527.

E. The Failure of Reform Efforts

The litigation described above put pressure on the executive and legislative branches to revise SORA. Senate Judiciary Committee staff convened a stakeholder workgroup to draft a new law. That workgroup—which included legislative liaisons from both parties in both houses, representatives from the governor's office, the Michigan State Police (MSP), the Michigan Department of Corrections (MDOC), the Prosecuting Attorneys Association, victims' rights advocates, the Attorney General's Office, and *Does II* class counsel—met for about a year-and-a-half while the *Does II* case was pending. Although there was disagreement about details, the workgroup generally recognized that the old SORA was not evidence-based, that offense-based registration does not correlate with risk, and that individual assessments can be used to identify lower-risk/higher-risk groups. The workgroup considered shorter registration terms (supported by MSP), paths off the registry for rehabilitated people, reduction in the number of registrable offenses, simplifi-

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cation of reporting, ending registration of children, and provisions for people with disabilities. By summer 2019, the Legislative Services Bureau had prepared a draft bill. *Does III*, Facts,[4] R 123-1, ¶¶121-122.

Despite bipartisan agreement among stakeholders that SORA reform was necessary, and despite a looming federal court injunction, in the fall of 2019, as the 2020 election approached, the executive branch agencies stopped participating and the workgroup was disbanded. True SORA reform proved to be politically impossible. Instead, in March 2020, legislators introduced a bill that was basically the 2011 law with some tweaks. The new bill did not incorporate any of the work done by the workgroup. To the contrary, the bill *retained* most features of the old SORA that the courts had criticized, including the geographic exclusion zones. *Id.*, ¶¶122-124; 2020 HB 5679.

During three hearings on HB 5679, the House Judiciary Committee received about 170 submissions, all but two of which opposed or expressed reservations about the bill. The only favorable oral testimony came from a victims' rights advocate, who told the committee that registrants should be punished for life. Experts testified that registries do not prevent recidivism or make communities safer and may in fact increase recidivism. There was no contrary testimony. *Does III*, Facts, R 123-1, ¶¶126-127. Michigan Attorney General Dana Nessel submitted comments expressing concerns about the bill's constitutionality, noting that the Sixth Circuit had criticized SORA for its lack of individualized assessment. She expressed concern that the bill's offense-based approach would not address the courts' concerns and did not correspond with the

[4] In *Does III*, the parties engaged in extensive discovery, prepared numerous expert reports and declarations, took dozens of depositions, and reviewed hundreds of documents. That record, with citations to the underlying evidence, is summarized in Plaintiffs' Statement of Material Facts ("Facts"), filed at R 123-1, in *Does III*, 22-cv-10209 (ED Mich).

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social science evidence. And she criticized the continuation of in-person reporting for decades or life. "The bill needs considerably more work if the State is going to avoid future litigation over the constitutionality of its registry." *Does III*, AG Comments, R 128-1.

In the lame duck session (November-December 2020), the legislature passed a substitute version of HB 5679 that removed the exclusion zones but was otherwise almost identical to the original bill. The Senate Judiciary Committee did not hold any hearings on the substitute bill. Instead, the Senate suspended its rules and pushed the bill through without further public input. SORA 2021 was passed by the legislature in late December 2020 and signed by the governor. It took effect on March 24, 2021. *Does III*, Facts, R 123-1, ¶¶129-130; 2020 PA 295.

F. The *Does III* Litigation

In February 2022, plaintiffs from the *Does I* and *Does II* litigation—who found themselves again subject to nearly the same law that they had successfully defeated—filed a new class action challenging SORA 2021. *Does A-H v Whitmer*, 22-cv-10209 (ED Mich) (*Does III*). The court granted certification of the class and various subclasses, including one comprising people convicted of non-sex offenses who must register as sex offenders.[5] *Id.*, R 35, ¶¶2, 6. One of the eleven *Does III* claims is that requiring non-sex-offenders to register violates due process and equal protection. The named plaintiff for that claim is Doe A, who under SORA 2021 is a lifetime registrant for a 1990 non-sexual kidnapping. (He forcibly moved a teenage boy during an attempted robbery of his former employer—a McDonalds). *Id.*, R 123-1, ¶¶3-8. See also *Does I*,

[5] That subclass is defined as "members of the primary class who are or will be subject to registration for an offense without a sexual component including convictions for violating MCL 750.349 (other than convictions for violating MCL 750.349(1)(c) or MCL 750.349(1)(f)), 750.349b, 750.350, or a substantially similar offense in another jurisdiction." *Does III*, R 35, ¶6.

834 F3d at 703 (expressing concern about his registration—there as Doe #1—for a non-sexual offense).

II. SORA 2021 Retains the Key Defects of the Unconstitutional 2011 Law

Exhibit 1 highlights which provisions of SORA 2021 were added in 2011 and which in 2021. It shows both how few changes were made in 2021 and that SORA 2021 retains almost all the 2011 amendments and continues to apply them retroactively.

SORA 2021 remains conviction-based. SORA 2021 retains the same structure: it classifies registrants into 15-year, 25-year, and lifetime tiers based solely on their offense of conviction without any individualized review. MCL 28.722(q)-(v), 28.725(11)-(14), 28.725a. SORA 2021 continues the retroactive extension of pre-2011 registrants' terms from 25 years to life (without any individualized determination of whether lifetime registration is warranted). 2011 PA 17, 18; 2020 PA 295; MCL 28.722(r)-(w); 28.725(10)-(13). There are some 16,700 people (about 37% of current registrants) whose registration terms were so extended. Data Rept, Ex 2, ¶132.

SORA 2021 continues to bar virtually all registrants from petitioning for removal. MCL 28.728c(1), (2), (12), (13). Regardless of the circumstances of the offense, passage of time, or proven rehabilitation or incapacitation, there is, in almost all cases, no path off the registry.

SORA 2021 makes no changes to the crimes requiring registration. People who were never convicted of a sex offense must still register. MCL 28.722(r)(iii), (r)(x), (v)(ii), v(iii), (v)(viii). SORA 2021 continues to require children as young as 14 to register for life. MCL 28.722(a)(iii)-(iv). Disabled people must still register, even if they lack the ability to comply with the Act. People who had sexual relationships with younger teens or who committed other less serious offenses must still register, in most cases for life. MCL 28.722(r), (t), (v). The only change is that SORA no longer applies to a few people with expungements or who completed diversion programs. MCL 28.722(a)(i)-(ii).

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SORA 2021 keeps the 2011 requirements for reporting vast amounts of personal information, including names, nicknames, Social Security number, date-of-birth, addresses, employers (including temporary jobs/assignments and travel routes for non-fixed employment), volunteer work,[6] domestic/international travel, schools attended or one plans to attend, phone numbers, vehicles, driver's licenses, occupational/professional licenses, personal IDs, passports, and immigration documents. MCL 28.725, 28.727; Obligations Summary, Ex 3. Post-2011 registrants must report all emails and internet identifiers. MCL 28.725(2)(a); 28.727(1)(i). As before, registrants must appear in person to verify this information quarterly, twice-yearly, or annually, depending on their tier. MCL 28.725a(3).

Indeed, SORA 2021 requires reporting of even more information. The statute, read literally, requires registrants to report every single use of a phone or vehicle ever.[7] MCL 28.727(1)(h), (j) (2021). Reporting requirements for electronic identifiers also appear to cover every use. Post-2011 registrants[8] must now report "all electronic mail addresses and internet identifiers registered to or used by the individual,"[9] with internet identifiers broadly defined to include "all designations used for self-identification or routing in internet communications or posting." MCL 28.725(2)(a); 28.727(1)(i); 28.722(g). SORA 2021 thus appears to require registrants to report everything from an IP address for a smart thermostat to a username for a public transit app. Further, SORA 2021

[6] MSP interprets SORA 2021 as requiring in-person reporting within three days when starting/discontinuing volunteer activities. Explanation of Duties, Ex 4, ¶6.b.

[7] The Legislature addressed vagueness problems with the old law—which required reporting of phones numbers "routinely used" and vehicles "regularly operated," MCL 28.727(1)(h), (j) (2020)—not by limiting reporting to one's own phone and vehicles, but by adopting a new requirement to report every use. MCL 28.727(1)(h), (j) (2021).

[8] In response to *Does I*, email/internet reporting is now limited to post-2011 registrants. MCL 28.725(2)(a), 28.727(1)(i).

[9] The old statute required reporting of assigned email and instant message addresses, and login names/identifiers for email and instant messaging. MCL 28.727(1)(i) (2020).

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permits what the old law *prohibited*—registrants' email and internet IDs can now be posted online. *Compare* 2011 PA 18, § 8(3)(e) (barring publication of this information), *with* 2020 PA 295 (removing this prohibition), and *with Lymon* at 39. While MSP has not yet posted such information, registrants reasonably fear their identifiers could become public at any time.[10] See *Doe v Harris*, 772 F3d 563, 581 (CA 9, 2014).

SORA 2021 also keeps the 2011 requirement to report within three business days any changes to all sorts of information.[11] MCL 28.724a, 28.725, 28.727. Registrants must still report in advance if they travel for more than seven days, with 21 days' notice for foreign travel. MCL 28.725(2)(b), (8). While a few changes—phones, vehicles, internet/email, and domestic travel—can now be reported by mail, many changes—including addresses, employment, volunteer work,

[10] The prosecutor incorrectly asserts that federal law bars posting identifiers. The cited provisions from the Sex Offender Registration and Notification Act (SORNA), 34 USC 20916(c), 20920(b)(4), do not bind states. Rather, SORNA seeks to incentivize states to adopt SORNA-congruent registries by withholding 10% of a specified grant if states do not "substantially implement" SORNA, 34 USC 20927(a). Congress "did not"—and in our federal system could not—"insist that the States" adopt SORNA-congruent registries. *United States v Kebodeaux*, 570 US 387, 398 (2013). While all states have registries, they vary greatly in terms of who must register, for how long, what registration requirements apply, and whether registration is based on individualized assessments. It is a state's "sovereign prerogative" to "choose[] not to comply with SORNA." *United States v Felts*, 674 F3d 599, 604 (CA 6, 2012). Indeed, a large majority of states have not implemented SORNA; the Department of Justice considers only 18 to be "substantially compliant." Department of Justice, *Jurisdictions That Have Substantially Implemented SORNA*, <https://smart.ojp.gov/sorna/substantially-implemented> (accessed December 8, 2023). Most states reject SORNA either because of the high costs (see Scott, Governing, *States Find SORNA Non-Compliance Cheaper* (November 7, 2011) <https://www.governing.com/archive/states-find-sorna-non-compliance-cheaper.html>, or out of concern for the "public safety impacts of supplanting established risk-based classification systems with a less discriminating system linked exclusively to conviction offense." Harris et al, *Widening the Net: The Effects of Transitioning to Adam Walsh Act's Federally Mandated Sex Offender Classification System*, 37 Crim Just & Behav 503, 504 (2010).

[11] The prosecutor incorrectly states there is no longer "immediate" in-person reporting. Appellant Brf, p 35. SORA 2021's change from "immediate" reporting to reporting within three business days is not substantive since "immediately" was previously defined to be within three business days. MCL 28.722(g) (2020).

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enrolling/disenrolling in classes, name changes, inter-jurisdictional moves, student movement, and international travel longer than seven days—must still be reported in person.[12] MCL 28.724a, 28.725; Obligations Summary, Ex 3; Explanation of Duties, Ex 4.

Under SORA 2021, the online registry continues to brand people—including people who were never convicted of sex offenses—as dangerous sex offenders. The website publishes their pictures, personal information (including weight, height, hair and eye color, tattoos/scars), birthdate, home address, employer address, school address, and vehicle information. MCL 28.728(2). Tier level information is no longer posted, which makes everyone on the online registry appear equally dangerous. MCL 28.728(3)(e).

Under SORA 2021, registrants must continue to pay an annual fee. MCL 28.725a(6). The law continues to punish non-compliance with prison terms of up to ten years, as well as *mandatory* revocation of probation, parole, or youthful trainee status for even technical non-compliance or failure to pay fees. MCL 28.729. The only compliance change is that, in response to the *Does* decisions holding strict liability to be unconstitutional, convictions for SORA violations require proof of willfulness. *Id.*

SORA 2021 does eliminate the 1,000-foot geographic exclusion zones that barred registrants from living, working, or loitering within 1,000 feet of a school. 2020 HB 5679. But the practical impact of this change is limited because the state continues to brand people as dangerous sex offenders on the internet, posting their home and employment addresses and providing a

[12] The law itself continues to mandate that certain information be reported in person. See, e.g., MCL 28.725(8); 28.724a(1)(a); 28.724a(1)(b); 28.725(7)-(8); 28.725(3). Moreover, although SORA 2021 provides that certain three-day-reportable information can be reported "in a manner prescribed by [MSP]," MCL 28.725(1)-(2), MSP decided to require in-person reporting for addresses, employment, names, and volunteer work. Explanation of Duties, Ex 4; *Does III*, R 123-1, Facts, ¶¶266-275.

mapping tool so that anyone using the internet can see where they live and work. Registrants continue to face severe housing and employment difficulties. *See Does III*, Facts, R 123-1, ¶¶328-354.

In sum, SORA 2021 retains the identical tier system, the identical lengthy/lifetime registration periods, and very similar reporting requirements and online registry, all without any individual review.

III. Who Is on Michigan's Registry

The *Does III* plaintiffs obtained MSP registry data which was then analyzed by experts. The resulting expert report, attached as Exhibit 2 (Data Rept), provides the first-ever portrait of Michigan's registry. The results defy common assumptions.

There are 45,145 people subject to SORA (as of 1/24/23). Data Rept, Ex 2, ¶1. This compares to about 17,000 registrants in 1997. *Does I*, 12-cv-11194 (ED Mich), Joint Statement Facts, R 90, ¶1023. Of Michigan registrants, 80% live in the community and 20% are incarcerated. Data Rept, Ex 2, ¶¶ 2, 33-34. Almost three-quarters (73%) are Tier III (lifetime), 20% are Tier II (25-year), and 7% are Tier I (15-year). *Id.*, ¶¶5, 42. About 98% of registrants are male and 2% are female. 72% are white, 25% are Black, and 3% are other races. Blacks, who make up 14% of the Michigan population, are over-represented on the registry. *Id.*, ¶¶3, 37-39.

Of those in the community, more than half are over 50, and more than a quarter are over 60. *Id.*, ¶¶4, 40. Nearly two-thirds (64%) have been living in the community without a new sex offense conviction for ten years or more. *Id.*, ¶¶ 10, 62-66. The longer people spend in the community without recidivating, the lower their risk. *Does III*, R 123-1, ¶¶179-198 (summarizing research).

Taking the normed research on recidivism rates of people with past sex convictions who have lived in the community without recidivating, and applying it to Michigan's registry popula-

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tion (based on the *Does III* class data), experts concluded that **between 17,000 and 19,000 people on Michigan's registry—about half of all registrants living in the community—are no more likely to be convicted of a future sexual offense than males in the general population.** Data Rept, Ex 2, ¶¶12, 69-71.

The experts also used the class data to calculate recidivism rates for people subject to SORA. They found that that **the vast majority of people being put on the registry today—93% to 95%—will not be convicted of another registrable offense** over a 10-year follow up period. *Id.*, ¶¶9, 60-61. Recidivism rates for some subsets of registrants are even lower. For example, 99% of child registrants have never been convicted of a second registrable offense. *Id.*, ¶¶18, 94. Of registrants living in the community with Michigan convictions, 84% have offenses other than criminal sexual conduct in the first degree. *Id.*, ¶¶15, 82-85.

IV. The Registration of Non-Sex Offenders as Sex Offenders

SORA 2021, likes its predecessor, requires people convicted of unlawful imprisonment of a minor (MCL 750.349b), kidnapping (MCL 750.349), and leading away of a child (MCL 750.350) to register as sex offenders without any finding that the offense had a sexual component.[13] There are approximately 300 people subject to SORA based on convictions for non-sex offenses. Data Rept, Ex 2, ¶¶24.d, 137-143.

After the Court of Appeals' *Lymon* decision, MSP temporarily removed some but not all non-sex-offenders from the registry pending this Court's decision. *Does III*, Facts, R 123-1, ¶¶455-463 (temporary removal of about 150 non-sex-offenders, apparently as a "risk management" precaution). If this Court reverses, MSP will put those non-sex-offenders back on the

[13] People with comparable convictions from other jurisdictions must also register. MCL 28.722(r)(iii), (r)(x), (v)(ii), (v)(iii), (v)(viii).

registry. *Id.*, ¶464.

SUMMARY OF ARGUMENT

This Court should not assume that the intent-effects test used to determine what constitutes punishment for ex post facto purposes is the standard by which to determine what constitutes punishment under Michigan's prohibition on "cruel or unusual punishment," Const 1963, art 1, §16. The analysis of a constitutional provision turns on discerning the provision's purpose. Article 1, §16 is concerned with excessively harsh sanctions, which can be meted out under either criminal or civil laws. A test focusing on whether a law is civil or criminal does not reflect the purpose of art 1, §16. The requirement in ex post facto jurisprudence for "clearest proof" of punitive effect to overcome legislative labeling of a law as civil is particularly inapt. What matters is whether a punishment is cruel or unusual, not whether the legislature has labeled it as criminal or civil. Because the interpretation of art 1, §16 has implications far beyond SORA—affecting constitutional limits on all sorts of sanctions—the Court should either (1) decide this case using the *Betts* framework without the "clearest proof" requirement, but reserve the question of what standard applies under art 1, §16; or (2) order further briefing.

If the Court applies the *Betts* framework, then SORA 2021 is punishment because it retains almost all of the features this Court identified as punitive in the old law. The Court's decision in *Betts* is controlling, not the outdated federal cases that appellant and its amicus Michigan State Police suggest the Court look to instead. SORA 2021, like its predecessor, resembles probation and parole, requiring periodic in-person reporting to law enforcement, in-person three-day updating for many changes, payment of fees, ongoing supervision, and imprisonment for failure to comply. Like its predecessor, SORA 2021 resembles shaming punishments, stigmatizes registrants—including those never convicted of sex offenses—as dangerous sex offenders, and allows the public to map and track them. SORA 2021 continues to impose a byzantine array of

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restrictions and obligations very similar those in the old law. SORA 2021 continues to serve the traditional aims of punishment for the same reasons this Court found that the old law did so. SORA 2021 is not rationally related to its ostensible public safety purpose. Because registries undermine housing, employment, and social support which are the key to successful reentry, registries do not decrease, and may in fact increase, recidivism. Finally, like its predecessor, SORA 2021 is excessive, imposing draconian requirements on tens of thousands of people with no individual review and no opportunity for removal. Indeed, experts who analyzed Michigan's registry concluded that there are between 17,000-19,000 registrants—about half of all registrants living in the community—who are no more likely to commit a sex offense than the average male.

Requiring non-sex offenders to register as sex offenders is cruel or unusual punishment. Falsely stigmatizing a person as a sex offender is a punishment that is neither tailored to nor proportionate to a non-sex offense. *Automatic* imposition of sex offender registration on non-sex offenders is a highly unusual sanction in Michigan, since most people convicted of non-sex offenses can only be subjected to registration after a judicial determination that their offense was sexual in nature. Moreover, the Third, Fifth, Ninth, Tenth and Eleventh Circuits have all held that sex offender restrictions cannot be imposed on non-sex offenders absent procedural protections, and many state courts have invalidated laws imposing sex offender registration on non-sex offenders. Finally, registration undermines rehabilitation.

ARGUMENT

I. The Test This Court Adopts for What Constitutes "Punishment" Under Article 1, Section 16, Will Have Significant Implications for Michigan's Jurisprudence Far Beyond the SORA Context

A. Both Civil and Criminal Punishments Can Be Cruel or Unusual

This Court interprets Michigan's "cruel or unusual punishment" clause, Const 1963, art 1, §16, to be more protective than its Eighth Amendment counterpart. *People v Stovall*, 510 Mich

301, 314 (2022); *People v Bullock*, 440 Mich 15, 30 (1992). Most cases under art 1, §16 ask whether a sanction is unconstitutionally "cruel or unusual," not whether it is punishment. Amicus has not identified any cases where this Court has considered what test should be used to determine what constitutes "punishment" under art 1, §16.[14] This case presents, as a matter of first impression, the question of what test applies.

The Court of Appeals and prosecutor assume that to determine what constitutes punishment under art 1, §16, one should apply the same ex post facto "intent-effects" test used in *Betts*.[15] But that is by no means clear. The test for determining what constitutes "punishment" can vary between different constitutional provisions. See, e.g., *Austin v United States,* 509 US 602, 609-610 (1993) (analysis of "punishment" under Eighth Amendment differs from analysis of "punishment" under other constitutional clauses); *United States v Ursery*, 518 US 267, 287 (1996) (civil forfeitures can constitute punishment for Eighth Amendment purposes while being non-punitive under double jeopardy analysis).

To identify the proper reach of a constitutional provision, courts should look to the provision's purpose, and "attempt[] to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate." *United States v Brown*, 381 US 437, 442 (1965). The federal and state ex post facto clauses are concerned with barring the legislature from retroactively inflicting greater punishment. *Collins v Youngblood*, 497 US 37, 42-43 (1990); *Betts,* 507 Mich at 542. Their concern "is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was

[14] Amicus has also not identified any U.S. Supreme Court cases answering that question for the Eighth Amendment's Cruel and Unusual Punishment Clause, though some courts of appeals have applied the *Smith* intent-effects test.

[15] Mr. Lymon suggests that the intent-effects test may not be proper. Appellee Brf, p 43 n 24-25.

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prescribed when the crime was consummated." *Weaver v Graham*, 450 US 24, 30 (1981). By contrast, constitutional prohibitions on cruel or unusual punishments are concerned with excessively harsh sanctions—in other words, with an individual's right to less punishment. *Stovall*, 510 Mich at 313-314.

Punishment can be meted out under both criminal and civil laws. Indeed,

> today's civil laws regularly impose penalties far more severe than those found in many criminal statutes.… Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's "civil" penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies.

Sessions v Dimaya, 584 US ---; 138 S Ct 1204, 1229 (2018) (Gorsuch, J., concurring in part).

The text of article 1, §16 suggests it is not limited to criminal punishments. Some provisions in our Declaration of Rights are limited to criminal cases. See, e.g., Const 1963, art 1, §17 (bar on self-incrimination "in any criminal case"); §20 (rights of accused "in every criminal prosecution"). Article 1, §16 contains no such limitation.

This Court and the Court of Appeals have applied the cruel or unusual punishment clause broadly. *Robison v Miner* found suspension of a liquor license to be punishment, holding that it was both cruel and unusual because "it seriously impairs the capacity of gaining a business livelihood." 68 Mich 549, 563 (1888), reaffirmed in *Bullock*, 440 Mich at 35 n 18. And in *In re Estes*, 392 Mich 645 (1974), this Court assumed that a one-year suspension from law practice was punitive, and addressed whether it was cruel or unusual given the attorney's misconduct. Similarly, the Court of Appeals has applied the "excessive fines" clause of Section 16—which sits adjacent to the "cruel or unusual punishment" clause—to civil forfeiture proceedings. See, e.g., *In re Forfeiture of 5118 Garden Road*, 253 Mich App 255, 258 (2002).

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Amicus submits that art 1, §16's prohibition on cruel or unusual punishment should apply whether the punishment is meted out under an ostensibly civil or avowedly criminal statute. For example, youth punished in the juvenile justice system surely should be able to challenge excessive detention as cruel/unusual, even though they are adjudicated in an ostensibly civil regime. Many offenses are civil infractions, but that cannot mean there is no constitutional limit on what punishment can be imposed. While punishing speeding with (civil) fines seems proper, seizing someone's car for going five mph over the limit feels like cruel or unusual punishment regardless of whether it is labeled a civil or criminal sanction. Similarly, businesses subject to civil sanctions might argue that Michigan's Constitution limits the harshness of the penalties imposed for noncompliance with a regulatory regime. In short, in interpreting art 1, §16, this Court should recognize that punishment can be imposed under both civil and criminal laws. And it can be exceedingly—and unconstitutionally—harsh under either.

B. The Court Should Not Assume that the Intent-Effects Test Applies

In *Betts*—when considering what constitutes punishment under Michigan's prohibition on ex post facto laws, Const 1963, art 1, §10—this Court applied the federal intent-effects test of *Smith v Doe*, 538 US 84 (2003), and the factors set out in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169 (1963). *Betts*, 507 Mich at 549-550. Because art 1, §10 prohibits retroactively increasing the punishment imposed for an offense, the question there was whether SORA increased the amount of punishment imposed on Mr. Betts for his crime. The question here—under art 1, §16—is different: whether SORA is a cruel or unusual punishment for Mr. Lymon when he was never convicted of a sex offense.

It is not clear that applying the intent-effects test from the ex post facto context to the cruel-or-unusual punishment context makes sense. The first step of the intent-effects test asks "whether the Legislature intended the statute as a criminal punishment or a civil remedy." *Betts*,

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507 Mich at 548 (citation omitted). Focusing on whether a sanction is civil or criminal is not helpful because, as discussed above, art 1, §16 is concerned with the severity of the penalty, regardless of whether it is labeled as civil or criminal. As the U.S. Supreme Court explained when it held that civil forfeiture can be punitive:

> The purpose of the Eighth Amendment ... was to limit the government's power to punish. The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment…. The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. Thus, the question is not, as the United States would have it, whether forfeiture ... is civil or criminal, but rather whether it is punishment.

Austin, 509 US at 609-610 (cleaned up). So too here.

The second step of the ex-post-facto intent-effects test asks "whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil," an analysis that typically involves consideration of the *Mendoza-Martinez* factors. *Betts*, 507 Mich at 549-550. But both courts and scholars have been critical of the *Mendoza-Martinez* test.[16] This Court appears only ever to have employed it in the ex post facto context. The U.S. Supreme Court has rejected its use in some other contexts. For example, in *Austin*, the Court declined to use the *Mendoza–Martinez* factors when analyzing excessive fines under the Eighth Amendment, noting that those factors were developed in a case where the question was whether safeguards for

[16] See, e.g., *Doe v Dep't of Pub Safety and Correctional Servs*, 62 A3d 123, 132-133 (Md App Ct, 2013) (Greene, J., plurality) (rejecting intent-effects test under Maryland's ex post facto clause); *City of Chattanooga v Davis*, 54 SW3d 248, 264-265 (Tenn, 2001) (declining, in determining whether sanction was penal, to use *Mendoza-Martinez* factors because they "do not adequately separate punitive penalties from those that are remedial in their actual purpose or effect"); Logan, *The Ex Post Facto Clause* (Oxford University Press, 2023), at 131 (*Mendoza-Martinez* test "is an inherently indeterminate test and contains readily manipulable factors, which are repetitive and selectively relied upon, and require normative judgments without guidance on how the factors are to be weighed").

criminal prosecutions (e.g., trial by jury) should be required for the civil penalty of stripping citizenship. 509 US at 610 n 6. The Court in *Mendoza-Martinez* said they should. 372 US at 167. By contrast, applying the *Mendoza-Martinez* factors to determine if excessive fines were being imposed would be improper since "sanctions frequently serve more than one purpose." *Austin*, 509 US at 610, 610 n 6. A law serving remedial purposes can still violate the Eighth Amendment if "it can only be explained as serving in part to punish." *Id*. The *Austin* Court concluded that because civil forfeiture does not "serve[] solely a remedial purpose," but also functions "in part" as punishment, it violated the Eighth Amendment's prohibition on excessive fines. *Id.* at 610, 622. (The functions-in-part-as-punishment test is, of course, different from the intent-effects test.)

The question of what test should be used to determine if a sanction constitutes punishment under art 1, §16 has implications far beyond SORA—implications that are hard to foresee because there are so many areas of the law where sanctions cannot neatly be classified as either civil or criminal, or as either remedial or punitive. This Court should not simply assume that the intent-effects test applies to cruel or unusual punishment cases.

Here, given that the briefing to date has assumed the *Betts* framework applies, given that the *Mendoza-Martinez* factors are merely "useful guideposts," *People v Earl*, 495 Mich 33, 44 (2014), and given that the minimally-altered SORA 2021 is clearly still punishment under the *Betts* analysis, the Court could simply decide to apply *Betts*. If it does, however, the Court should reserve the question of whether the intent-effects test is the proper one, and make clear it is not deciding that Michigan's constitutional prohibition on cruel/unusual punishment is limited to criminal sanctions. In the alternative, if the Court has any doubt that SORA 2021 is punishment

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under the *Betts* framework, amicus respectfully suggests the Court order further briefing on what test should apply.[17]

C. Like Other State Supreme Courts, this Court Should Reject a "Clearest Proof" Requirement

The *Smith* (five-member) majority required—for ex post facto purposes—that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 US at 92. But the concurring and dissenting Justices highlighted the flaws of this approach.[18] Justice Souter wrote that a "heightened burden makes sense only when the evidence of legislative intent clearly points in the civil direction*." Id.* at 107 (Souter, J., concurring). He found *Smith* a close case because there was evidence of both regulatory and punitive purposes. Since the evidence on legislative intent was mixed, there was

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[17] Amicus does not advocate here for a particular test, but simply highlights that courts have used various tests to determine whether sanctions are punishment for purposes of constitutional bans on cruel/unusual punishment or the closely related bar on excessive fines. See, e.g. *Austin*, 509 US at 610 (sanction violates Eighth Amendment if "it can only be explained as serving in part to punish"); cf *Dep't of Pub Safety*, 62 A3d at 133 (Greene, J., plurality) (adopting "disadvantage" standard for state ex post facto prohibition). Indeed, just in sex offender registration challenges, the Michigan Court of Appeals has applied at least two different tests. Compare *Lymon* at 37, with *People v Dipiazza*, 286 Mich App 137, 147 (2009) (considering "totality of circumstances" including legislative intent, historical treatment of analogous measures, and legislation's effects). Cf. *Does I*, 834 F3d at 701 (citing approvingly to definition of punishment offered by legal philosopher H.L.A. Hart); *Smith*, 538 US at 113 (Stevens, J, dissenting) ("sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment"); *Black's Law Dictionary* (11th ed, 2019) (defining "punishment" as a "sanction—such as a fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law").

[18] Some courts view the *Smith* clearest proof test as simply restating the familiar principle that all legislation comes with a presumption of constitutionality. See *EB v Verniero*, 119 F3d 1077, 1128 (CA 3, 1997) (Becker, J., concurring and dissenting) (warning against placing too much emphasis on "clearest proof," which is simply a reminder to give legislatures the benefit of the doubt, if there is benefit to give). If, however, the "clearest proof" requirement is interpreted as demanding more than the standard presumption, then it can be problematic, even in ex post facto cases.

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no justification for requiring the "clearest proof" that Alaska's law was punitive. *Id.*, at 110. Justice Ginsburg, joined by Justice Breyer, agreed:

> in resolving whether the Act ranks as penal for *ex post facto* purposes, I would not demand "the clearest proof" that the statute is in effect criminal rather than civil. Instead, guided by *Kennedy v Mendoza–Martinez*, 372 US 144 (1963), I would neutrally evaluate the Act's purpose and effects. See *id.*, at 168–169 (listing seven factors courts should consider "[a]bsent conclusive evidence of [legislative] intent as to the penal nature of a statute"). [*Id.*, at 115 (Ginsburg, J, concurring) (cleaned up)].

State supreme courts and scholars have likewise criticized the doctrine.[19] As Maine Supreme Court Justice Silver wrote:

> One of the greater protections afforded by our Constitution should be a standard of proof that is not as onerous as the "clearest proof" standard, which is both unnecessary and excessive when applying the ex post facto clause of the Maine Constitution…. [A]ny constitutional challenge to a statute is subject to the presumption that the statute is constitutional. We need not employ a more onerous standard under the Maine Constitution.

State v Letalien, 985 A2d 4, 28 (Me, 2009) (Silver, J., concurring) (quotation marks and citations omitted).

The Alaska, Indiana, Massachusetts, New Mexico, and Oklahoma supreme courts have all explicitly rejected a "clearest proof" requirement when interpreting their state constitutions. See *Doe v State*, 189 P3d 999, 1008 n 62 (Alas, 2008) (given that all legislation is presumed constitutional, "imposing a heightened presumption requiring 'clearest proof' of punitive effect could threaten rights protected by the Alaska Constitution"); *Wallace v State*, 905 NE2d 371, 378 n 7 (Ind, 2009) ("[O]ur standard of review for challenges to the constitutionality of a statute has never included a clearest proof element. Instead, a statute is presumed constitutional, and the party challenging its constitutionality has the burden of overcoming the presumption by a contrary showing."); *Commonwealth v Cory*, 911 NE2d 187, 194 (Mass, 2009) (rejecting "clearest proof"

[19] See, e.g., Logan, *The Ex Post Facto Clause*, at 67, 134-135.

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standard and declining to impose a "heightened burden" of proof because statute had evidence of both civil and criminal intent); *State v Nunez*, 2 P3d 264, 277, 281 (NM, 1999) (New Mexico "does not defer to legislative intent nor does it require the insurmountable 'clearest proof' standard" when determining whether a statute imposes punishment); *Starkey v Okla Dep't of Corrections*, 305 P3d 1004, 1020-1021 (Okla, 2013) (conducting "neutral" analysis of the *Mendoza-Martinez* factors and noting that "how we apply the intent-effects test is not governed by how the federal courts have independently applied the same test under the United States Constitution as long as our interpretation is at least as protective as the federal interpretation").

In *Earl*, 495 Mich at 44, this Court, without discussion, applied the federal "clearest proof" caselaw in an ex post facto case. See also *Betts*, 507 Mich at 549 (same). The Court need not revisit the standard for ex post facto cases here. But it should recognize that this case under Michigan's constitutional prohibition on cruel or unusual punishment presents a different question. There is no reason to think that a legislative decision to impose (possibly excessive) consequences based on past misconduct should receive *greater* deference than any other civil or criminal law.[20] Requiring the "clearest proof" that the legislature intended a law to be civil makes no sense under art 1, §16, where the question is not whether the law is civil or criminal, but whether it is unconstitutionally punitive. The cruel/unusual punishment context is very different from the ex post facto one. This Court should not import the "clearest proof" standard into the art 1, §16 analysis. Focusing on whether a law is civil or criminal doesn't fit with the constitutional

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[20] Cf Logan, *The Ex Post Facto Clause*, at 135 (noting the "irregularity" of applying a "clearest proof" requirement to the Ex Post Facto Clause when it is not applied to the Bill of Attainder Clause, which is also contained in Article 1, Section 10, of the U.S. Constitution and also turns on whether a law is punitive).

goal of preventing excessive punishment, whether that punishment is imposed under a civil or criminal law.

II. SORA 2021 Is Punishment

A. This Court and the Sixth Circuit Found the Very Similar Prior Version of SORA to be Punishment

Both this Court and the Sixth Circuit Court of Appeals, considering ex post facto challenges, held that the prior version of SORA, which is very similar to SORA 2021, was punishment. This Court held that SORA resembled traditional shaming because of the breadth of information made public, the subscription-based notices to the public, the lack of active effort needed to get registry information, and the encouragement of social ostracism. *Betts*, 507 Mich at 550-552. SORA resembled the traditional punishment of parole because registrants had to report in person to law enforcement, be subject to investigation and supervision, pay fees, and face prison for failure to comply. *Id.* at 552-553. The requirement to report in person to verify and update information imposed an affirmative disability. *Id.* at 554. The fact that SORA "made no individualized determination of the dangerousness of each registrant … indicat[es] that SORA's restrictions were retribution for past offenses rather than regulations to prevent future offenses." *Id.* at 557. Such "demanding and intrusive requirements"—imposed on tens of thousands of people long after they complete their sentences, regardless of risk and without evidence of SORA's efficacy—were excessive. *Id.* at 562. **None of this has changed**.

Similarly, the Sixth Circuit found the former law to be punishment. SORA requires "time-consuming and cumbersome" reporting, compelling registrants to interrupt their lives "with great frequency in order to appear in person before law enforcement to report even minor changes to their information," in most cases for life. *Does I*, 834 F3d at 703, 705. SORA "makes no provision for individualized assessments of proclivities or dangerousness" and categorizes people into tiers

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without any individual review. *Id.* at 705. It "marks registrants as ones who cannot be fully admitted into the community," "discloses otherwise non-public information," and imposes criminal penalties for non-compliance. *Id.* at 703-705. SORA resembles traditional shaming punishments and probation/parole, *id.* at 702-703; imposes "significant restraints on how registrants may live their lives," *id.* at 703; advances traditional aims of punishment, *id.* at 704; lacks a rational relationship to a non-punitive purpose, *id.* at 704-705; and imposes blanket restrictions whose punitive effects "far exceed even a generous assessment" of possible benefits. *Id.* at 705. **Again, none of this has changed.**

B. SORA 2021 Is Punishment under the Intent-Effects Test

Although as argued above the Court should reserve the question of whether the intent-effects test applies, SORA 2021 is clearly punishment even under that test.

First, the Court must determine "whether the Legislature intended the statute as a criminal punishment or a civil remedy." *Betts*, 507 Mich at 542. In *Betts*, this Court noted that SORA's purpose statement—MCL 28.271a, which was adopted in 2002 and has not been revised since—suggests a non-punitive purpose. The Court emphasized, however, that "other aspects of SORA suggest a punitive intent," such as the fact that the law seeks to deter future crimes, is imposed as a consequence of criminal convictions, is enforced by law enforcement, and results in criminal sanctions. *Betts*, 507 Mich at 548. Indeed, registration is intertwined with the criminal law. An unregistered defendant cannot be sentenced. MCL 28.724(5). Registration is recorded *in* the judgment. SCAO Judgment of Sentence Form CC 219b, Box 3. Registration can be improper if not included in the judgment. MCL 769.1(13); *People v Lee*, 489 Mich 289, 295-230 (2011). Moreover, the registration process is handled by criminal justice agencies, including MDOC, probation and parole agents, MSP, and local police. MCL 28.724.

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While this Court ultimately concluded that "the Legislature likely intended SORA as civil regulation rather than a criminal punishment," *Betts*, 507 Mich at 549, this is not a case where "the evidence of legislative intent clearly points in the civil direction." *Smith*, 538 US at 107 (Souter, J, concurring). See also *Does I*, 834 F3d at 700-701 (SORA had "some features that might suggest a punitive aim").

Even assuming the legislature intended SORA to be civil regulation when it was first adopted in 1995, the facts that (1) Michigan continued to enforce SORA for years after it was held unconstitutional in *Does I*; (2) the Legislature adopted SORA 2021 after being presented with uncontroverted evidence that registries don't work, see Background, I.E; and (3) the Legislature kept in place the features of the law that the courts had criticized support a finding that SORA 2021 is intended to punish. The Court should "critically look past the civil regulatory façade to the obvious punitive intent" of imposing harsh registration requirements. *State v Hinman*, 530 P3d 1271, 1288 (Mont, 2023) (Sandefur, J., concurring).

If the legislature's intent was not punitive, then the next question is "whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Betts*, 507 Mich at 549 (citations omitted). In *Betts*, the Court looked to the *Mendoza-Martinez* factors, while noting that those factors are "neither exhaustive nor individually dispositive." *Id.* at 545, 550. Under those factors, SORA 2021, like its predecessor, is clearly punishment.

1. SORA 2021 Imposes Sanctions Historically Regarded as Punishment.

a. <u>Resemblance to Probation and Parole</u>. This Court has already found that unchanged parts of SORA resemble parole: periodic in-person reporting to law enforcement, payment of fees, imprisonment upon failure to comply, and the "significant amount of supervision by the state." *Betts*, 507 Mich at 553. Other courts have found the same, likening registration to probation or parole. See, e.g., *Does I*, 834 F3d at 703; *Commonwealth v Muniz*, 164 A3d 1189, 1212-1213

(Pa, 2017); *Starkey*, 305 P3d at 1022-1023; *Wallace*, 905 NE2d 371; *Doe*, 189 P3d at 1012; *Dep't of Pub Safety*, 62 A3d at 140. Even the U.S. government has recognized the similarity: its Small Business Administration bars assistance to probationers/parolees and treats a registrant "as if the individual is on probation or parole." SBA SOP 50 10 5(K) Subpart C, at 293 (April 1, 2019), available at <https://shorturl.at/bekO3>.

In fact, the requirements and consequences of registration "well exceed those associated with customary probation and parole." Logan, *Knowledge as Power: Criminal Registration and Community Notification Laws in America*, Stanford University Press (2009), p 138. Probation/parole periods typically last a few years, while SORA requires most people to register for life (and even the lesser periods are 25 or 15 years). MCL 28.725(11)-(13). Sentences for SORA violations—up to ten years—exceed those that most probation/parole violators face. MCL 28.729.

Appellant argues that because the three-day reporting requirement now allows mail-in rather than in-person reporting of some information, SORA is less like probation/parole. But probationers and parolees also can use non-in-person methods to update information (and, unlike registrants, can sometimes do so by phone or email). More importantly, registrants must still report in person at regular intervals. MCL 28.725a(3). A Tier III registrant who spends 50 years on the registry will appear before the police 200 times (not counting any in-person reporting for the listed changes). And SORA's three-day in-person reporting requirement still applies to employment (apparently including lay-offs, job site changes, etc.), housing, volunteering, enrolling/disenrolling in a class, name changes, international travel, and inter-jurisdictional moves. Obligations Summary, Ex 3, §11.

b. <u>Resemblance to Shaming Punishments</u>. This Court has also already held that SORA

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resembles shaming, again for reasons that have not changed:

> The breadth of information available to the public—far beyond a registrant's criminal history—as well as the option for subscription-based notification of the movement of registrants into a particular zip code, increased the likelihood of social ostracism based on registration. While the initial version of SORA might have been "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," *Smith*, 538 US at 99, its 2011 iteration contained more personal information and required less effort to access that information…. When SORA's notification provision was used, members of the public were alerted to this information without active effort on their behalf, in sharp contrast with the endeavor of visiting an official archive for information.

Betts, 507 Mich at 551. This Court also recognized that the internet has changed. Today, the registry is a world-wide wall of shame where registrants are "branded [as] a potentially violent menace by the state." *Id.* at 561. Other courts agree. See, e.g., *Does I*, 834 F3d at 702; *Muniz*, 164 A3d at 1212 ("*Smith* was decided in an earlier technological environment"); *Doe v State*, 111 A3d 1077, 1097 (NH, 2015) ("[T]he internet is our town square. Placing offenders' pictures and information online ... holds them out for others to shame or shun."); *Dep't of Pub Safety*, 62 A3d at 141; *Doe v Rausch*, 382 F Supp 3d 783, 796 (ED Tenn, 2019); *Doe*, 189 P3d at 1009-1010, 1012; *Wallace*, 905 NE2d at 380; *Letalien*, 985 A2d at 23; *Hinman*, 530 P3d at 1276-1279. See also *State v Peterson-Beard*, 377 P3d 1127, 1145 (Kan, 2016) (Johnson, J., dissenting) (arguing that *Smith* would come out differently today because the "current Supreme Court would be more attuned to the repercussions of Internet dissemination").

Technology has dramatically changed the form, function, and reach of registry information in the two decades since *Smith*. A *Does III* expert said that search engine optimization often lists registry information as the *top result*, and that registrant data is "pushed" on internet users who are not looking for it. Lageson Rept, Ex 5, *Id.*, ¶¶16, 49-69. Michigan's website does not just list convictions. Its architecture "encourage[s] browsing, mapping, and tracking regis-

trants, rather than accessing targeted archival information," and its design conveys that "each person listed [is] a current danger to society." *Id.*, ¶¶12-13.

The initial registry search page, shown below, signals dangerousness, warning of "future criminal sexual acts by convicted sex offenders."[21] The website allows users to "browse" lists of registrants, rather than requiring (like most criminal record data) a targeted name search. Users can discover that a neighbor or colleague is on the registry simply by entering a city or zip code to see registrants in their neighborhood.

Internet users who search an address, city, county, or zip code generate an interactive map showing all registrants within a specified radius.

[21] The images shown are registry screenshots. See https://mspsor.com/Home/Search.

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Michigan Sex Offender Registry
Michigan State Police

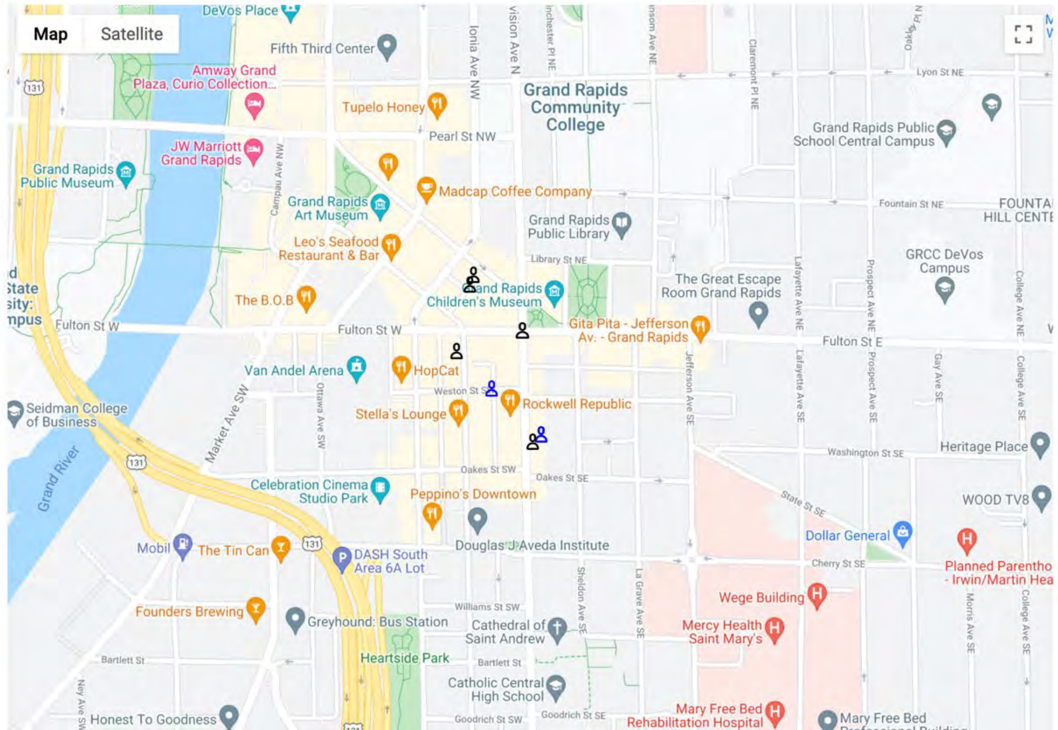
Offender Search Results - Map

Return to Offender Search

Search Criteria

Address:
City: grand rapids city
Zip:
County:

Radius
5 Miles



Users need only click on registrant icons to pull up the photo and registry details for each person, as shown below.

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Clicking on a person's image—whether on the map or registrant list—takes users to the person's registry page, which contains a photo, extensive personal information, and links to numerous other pages with even more information. Prominent colored buttons on each registrant's page invite users to "track offender," "map offender," and "submit a tip," all of which suggest the person is dangerous. Users need only click the "map offender" button to see a map pinpointing the person's home, with a balloon showing personal details.

The "track offender" button allows the user, with a click, to sign up for continuous updates about a registrant, as shown below.

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mspsor.com/Home/TrackOffender?id=14cb8d45-508f-4ea1-bc96-1903834aa605

Michigan Sex Offender Registry
Michigan State Police

Search Registry   Email Alerts

Track Offender

To better ensure that you receive the latest information within your neighborhood, please add the following email address to your personal address book: notifications@configurable.com

You will receive a confirmation email within 24 hours confirming your registration. If you do not receive an email confirming your registration in your inbox (not sent to bulk or junk folders) it may be due to not having added the notifications@configurable.com to your contact list.

Register Now (Offender: [redacted])

Email: johndoe@example.com — This is a required field.

Confirm Email: johndoe@example.com — This is a required field.

By submitting your information you are agreeing to our Terms Of Use. Please view our Privacy Policy.

Register   Reset

Experiencing Problems? Contact us at 517-241-1806 if you are experiencing technical problems or need assistance using this site.

Users who click "submit a tip" are asked to "[p]lease provide information regarding this offender."

Offender Tip Submission

If you wish to remain Anonymous, check the box at the top of the form below. If you choose to report anonymously, please provide all the details that you can in your tip, as local law enforcement will not be able to contact you for further clarifying details.

Your contact information

Do you wish to remain Anonymous?

First Name: Anonymous   Middle Name: Anonymous   Last Name: Anonymous

Address: Anonymous — Do not enter P.O. Box

City: Anonymous   State: Zip: Anonymous

Email: Anonymous   Confirm Email: Anonymous

Primary Phone: Anonymous   Work Phone: Anonymous

Offender information

Subject: [redacted]

Please provide information regarding this offender — This is a required field.

Submit   Reset

One of the first items shown on a registrant's page is whether the person is "compliant," which suggests that every registrant is sufficiently dangerous to require continuous supervision.

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ate: 10/16/2017

Last Verification Date: **07/01/2021**
Compliance Status: **Non-Compliant**

- **Fee Violation**

Clicking on the "offenses" tab shows the person's registrable convictions. Contextual information that would likely be apparent in court files—e.g., that the offense involved youths, one of whom was under-age—is not provided. Presenting old offense information alongside a current photo conveys that the person is currently dangerous. Additional clicks pull up information about "aliases" (e.g., maiden names), offenses, scars/tattoos, vehicles, etc. Much of the information (such as registration status, last verification date, registration and MDOC number) similarly suggests the person is being monitored as a current danger.

In addition to tracking specific registrants, users can receive alerts about any registrants who move within a selected radius of a specified address.

Sign up for Alerts by Location

By registering an address, you agree to receive email alerts about any registered offender(s) moving within the selected radius of the address provided.

You will receive a confirmation email within 24 hours confirming your registration. If you do not receive an email confirming your registration in your Inbox, please check your Junk or Bulk Email folders.

Search within .25 mile(s) of

Address: 123 Rawles Avenue
Do not enter P.O. Box
This is a required field.

City: Lansing

State: MI

Zip: 48917

Email: johndoe@example.com

Confirm Email: johndoe@example.com

By submitting your information you are agreeing to our Terms Of Use. Please view our Privacy Policy.

Submit Reset

In sum, the registry is unlike other forms of criminal records, which require a targeted search of a specific person; do not allow for browsing lists of convicted people; do not include

mapping, tracking, or alert capabilities; and do not present up-to-date personal information. The interface, interactivity, format, and text of the registry website are unlike a criminal records archive: the registry does not simply provide historical conviction information but portrays people as presently dangerous.

The U.S. Supreme Court and this Court have both emphasized the need to account for evolving technology in considering constitutional claims. *See Carpenter v United States*, 138 S Ct 2206, 2218 (2018); *Riley v California*, 573 US 373, 385 (2014); *Kyllo v United States*, 533 US 27, 35-36 (2001); *Johnson v Vanderkooi*, 509 Mich 524, 550-560 (2022) (WELCH, J., concurring). The Sixth Circuit has recognized that the internet has changed the consequences of making criminal history information readily available. *See Detroit Free Press, Inc v Dep't of Justice*, 829 F3d 478 (CA 6, 2016) (en banc) (overruling an earlier case which held that people have no privacy interest in mugshot photos). "In 1996, this court could not have known or expected that a booking photo could haunt the depicted individual for decades." *Id.* at 485 (citation omitted). Disclosure "casts a long, damaging shadow over the depicted individual," and "heightens the consequences" because in today's society the internet and computers "'can accumulate and store information that otherwise would have surely been forgotten.'" *Id.* at 482 (quoting *Reporters Comm for Freedom of the Press*, 489 US at 771). See also *US Dep't of Justice v Reporters Comm For Freedom the of Press*, 489 US 749, 764 (1989) ("vast difference" between court files and clearinghouse of information); *Doe v Dep't of Pub Safety*, 444 P3d 116, 129-130 (Alas, 2019). In analyzing the registry's punitive impact, this Court should likewise consider how, as a result of technological change, branding people as "sex offenders" on the internet causes harms that were unimaginable when *Smith* was decided.

Finally, a person who looked Mr. Lymon up in a criminal records archive would not think

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he is a convicted sex offender. The registry, on the other hand, stigmatizes Mr. Lymon by falsely depicting him as something he is not.

2. *SORA 2021 Imposes Severe Obligations, Disabilities, and Restraints*

The *Does III* class data analysis shows the registry's devastating consequences. 45% of registrants living in the community reported no current employment at a time when the statewide unemployment rate was 4.3%. Data Rept, Ex 2, ¶20. 12% of registrants who had reported addresses for at least ten years reported being homeless at some time. *Id.*, ¶ 21. Among those required to report email and internet identifiers, only 60% reported using email, and only 24% reported using some other non-email internet identifier (e.g., Facebook). *Id.*, ¶22. By contrast, 93% of adult Americans use the internet. *Id.*

Not only are registrants stigmatized, but they must comply with a dizzying array of restrictions too extensive to set out here, but which are cataloged in the attached Obligations Summary, Ex 3. They are subject to ongoing supervision, including police sweeps. *Does I*, Facts, R 123-1, ¶¶292-298. As this Court said about similar restrictions under the old statute, "it belies common sense to suggest that a newly imposed lifetime obligation to report to a police station every ninety days to verify one's identification, residence, and school, and to submit to fingerprinting and provide a current photograph, is not a substantial disability or restraint on the free exercise of individual liberty." *Betts*, 507 Mich at 556. Other courts agree. See, e.g., *Does I*, 834 F3d at 703; *Muniz*, 164 A3d at 1211; *Starkey*, 305 P3d at 1022-1023; *Wallace*, 905 NE2d at 379; *Doe*, 189 P3d at 1011-1012.

In addition, "courts have found sex-offender registry requirements to be amplified when the failure to comply with the requirements could result in harsh prosecution and penalties, such as a fine or imprisonment." *Betts*, 507 Mich at 554 (citation omitted). A failure to comply with SORA "carries with it the threat of serious punishment, including imprisonment" for up to 10

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years. *Does I*, 834 F3d at 703; MCL 28.729. Some 20,000+ registrants have been prosecuted for SORA violations, even though failure to register or comply with registry requirements does not correlate with sexual recidivism. *Does III*, R 123-1, Facts, ¶¶165, 310. For the rest, the threat of "being lugged off in cold irons bound ... [is] always in the background." *Does I*, 834 F3d at 703.

SORA destroys a person's right to live like other free persons. It is state-sanctioned ostracism, it damages registrants' ability to find jobs and housing, and it triggers countless other legal barriers.[22] The U.S. Supreme Court, in holding that a similar all-encompassing regime—denaturalization—was punishment, said:

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society.... [The individual has] lost the right to have rights.

Trop v Dulles, 356 US 86, 101-102 (1958). SORA 2021 is at least as destructive.

3. SORA 2021 Serves the Traditional Aims of Punishment

This Court held the old SORA served the traditional aims of punishment: deterrence was "a main feature of the statutory scheme," and SORA was retributive since it "was imposed on offenders for the sole fact of their prior offenses and made no individualized determination of the dangerousness of each registrant." *Betts*, 507 Mich at 556-557. SORA 2021 does exactly the same thing.[23]

4. SORA 2021 Is Not Rationally Related to Non-Punitive Interests

SORA is not rationally related to its purpose of "preventing and protecting against the

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[22] Registration under SORA triggers a labyrinthine array of federal, state, and local laws. See, e.g., 24 CFR 982.553(a)(2) (barring access to subsidized housing); 22 USC 212b (requiring identifiers on passports). Such laws cover everything from whether one can go to churches, libraries, or parks, to whether one can access hurricane shelters, to where one can vote. Private entities, from social media platforms to gyms, use registry status to deny services. *Does III*, R 123-1, Facts, ¶¶399-403.

[23] See also *Commonwealth v Baker*, 295 SW3d 437, 444 (Ky, 2009); *Muniz*, 164 A3d at 1215-1216; *Starkey*, 305 P3d at 1027-1028; *Doe*, 189 P3d at 1014.

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commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a. First, **SORA does not promote, but rather undermines, public safety**. As Dr. James J. Prescott, a leading scholar in the field, explains:

> [C]ommunity notification laws do not appear to be effective at reducing recidivism; if anything, they increase it. The many burdens registrants experience when subject to notification—the extreme notoriety that accompanies it, and the poor and unstable housing and employment and the difficulty of reintegrating into society that emanate from it—go a long way toward making sense of why my research finds notification laws are associated with *increases* in recidivism. [*Does III*, R 123-10, Prescott Rept, ¶19.]

Elizabeth Letourneau, another leading scholar, concurs:

> [R]egistration and notification laws—and especially laws based largely on conviction offense versus validly estimated recidivism risk—simply do not reduce sexual (or nonsexual) recidivism.... [L]aws like Michigan's don't work and are costly. They also have unintended effects that may imperil community safety.... Registries also increase the likelihood of ex-offenders experiencing joblessness, homelessness, and disconnection from prosocial friends and family, which in turn *increase* sexual and non-sexual recidivism. [*Does III*, R 123-9, Letourneau Rept, ¶11, 23.]

In addition, SORA misidentifies the source of the risk. The vast majority of convictions for sexual offenses (90 to 95%) involve people who are not on registries.[24] Moreover, research suggests that registration/notification can discourage survivors from reporting abuse[25] and make it more difficult to obtain convictions for sex offenses.[26]

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[24] Levenson & Zgoba, *Community Protection Policies and Repeat Sexual Offenses in Florida*, 60 Int'l J Offender Therapy & Compar Criminology 1140 (2016); Sandler, Freeman, & Socia, *Does a Watched Pot Boil? A Time Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 Psychology, Public Policy, and Law 284 (2008).

[25] See *Does III*, Baliga Rept, R 123-17; Hlavka & Uggen, *Does Stigmatizing Sex Offenders Drive Down Reporting Rates? Perverse Effects and Unintended Consequences*, 35 N Kentucky L Rev 347, 368-369 (2008); Edwards & Hensley, *Contextualizing Sex Offender Management Legislation and Policy: Evaluating the Problem of Latent Consequences in Community Notification Laws*, 45 Int'l J Offender Therapy & Compar Criminology 83, 93 (2001); Longo, *Prevention or Problem*, 8 Sexual Abuse: J Research & Treatment 91, 96 (1996).

[26] Letourneau et al., *The Effects of Sex Offender Registration and Notification on Judicial Decisions*, 35 Criminal Justice Review 295 (2010).

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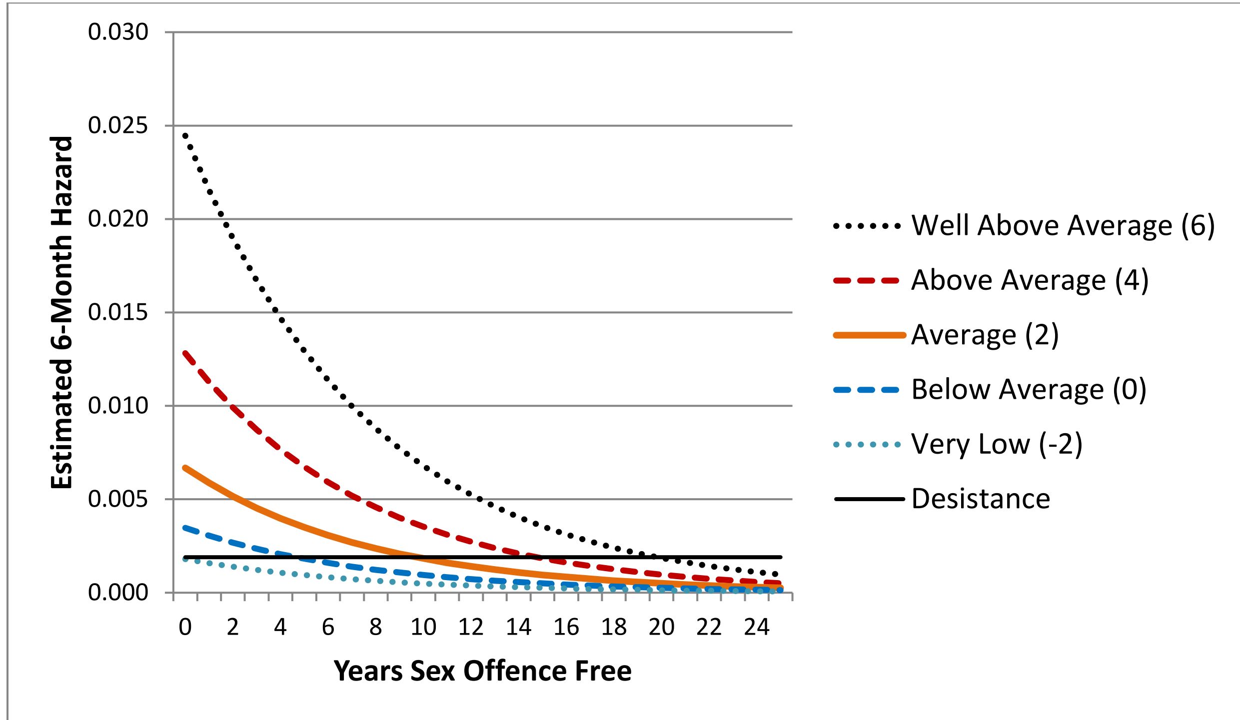
Law enforcement testified in *Does III* that they do not need or use the registry. MSP's Legal Advisor said that "the legislature tagged us [MSP] with maintaining a registry that we don't even need for a law enforcement purpose … because all this information is already available to us." *Does III*, Beatty Dep, R 126-1, at 242; *see id.* at 303 ("[MSP] does not need the database to do our job"). MSP's former commander of governmental affairs testified that the registry "wasn't a value add … [and] nobody regularly consulted the registry for … an investigative purpose." *Does III*, Fitzgerald Dep, R 126-2, at 61-64. Indeed, during *Does II*, enforcement of SORA was suspended for almost a year due to Covid (4/6/20-3/24/21). *Does II*, R 91, Interim Order; 2020 PA 295. There is no evidence that suspension had any impact on public safety whatsoever.

The second reason SORA is irrational is that it "fail[s] to distinguish between the large percentage of people who present a lower risk of re-offending (especially over time) and the much smaller percentage of people who present a higher risk of re-offending (although that risk also decreases over time)." *Does III*, R 123-9, Letourneau Rept, ¶6. There is a scientific consensus that (1) not all people with past sexual convictions are the same, and risk varies depending on well-known risk factors, and (2) risk decreases with time recidivism-free in the community. *Does III*, R 123-1, Facts, ¶¶179-181 (citing plaintiffs' and defendants' experts).

By looking at actuarially-determined risk levels and time in the community, researchers have calculated when different groups will reach desistance—the point at which a person's risk is no greater than that of the average male in the community. The graph below, from the seminal study,[27] shows when groups with different actuarially-determined risk levels reach desistance, with risk levels depicted by different colored lines and years in the community shown on the

[27] Hanson et al, *Reductions in Risk Based on Time Offence Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 Psychology, Public Policy and Law 48 (2018).

bottom axis.



As noted above, **experts who analyzed the *Does III* class data estimate that between 17,000-19,000 Michigan registrants are just as safe in the community as the average male; thousands more present only a slightly higher risk**. Data Rept, Ex 2, ¶¶12-13. The *Does III* data analysis also shows that **SORA 2021's tier levels are *inversely* correlated to risk**: **people in Tier I have the highest risk scores, Tier II the next highest, and Tier III the lowest**. *Id.*, ¶¶19, 99-104. This is consistent with national research showing that the tier levels in the federal SORNA statute either do not correspond to the likelihood that people will recidivate or are actually backwards.[28] Indeed, there is broad scientific consensus that using the offense of convic-

[28] See, e.g. Zgoba et al, *The Adam Walsh Act: An Examination of Sex Offender Risk Classification Systems*, 28 Sexual Abuse: J Research & Treatment 722 (2016). Individual risk assessments are far more accurate than the offense of conviction in predicting risk. See Freeman & Sandler, *The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?*, 21 Crim J Pol Rev 31 (2009); Zgoba et al., *A Multi-State Recidivism Study Using*

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tion to create tiers of ostensible dangerousness doesn't work. *Id.*, ¶103.

Ignoring the science, amicus MSP repeats thoroughly debunked claims about recidivism. See Ellman & Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Const Com 495 (2015) (explaining how the Supreme Court in *Smith* was misled by junk science). MSP provides misleading statistics without context,[29] and asks this Court to credit affidavits that are not based on personal knowledge.[30] In fact, the recidivism rate of people with past sex offense convictions is much lower than the recidivism rate (to commit a new offense of the same type as the previous offense) of people convicted of virtually any other type of crime.[31] The prosecutor speculates that the registry might be the reason why registrants' recidivism rates are so low. Appellants' Brf, at 40-41. But that notion has been thoroughly disproved by research.[32] Speculation is not enough to establish rationality. See *Bannum, Inc v City of Lou-*

Static-99R and Static-2002 Risk Scores and Tier Guidelines from the Adam Walsh Act (research report submitted to the National Institute of Justice, 2012).

[29] Recidivism rates are meaningless without consideration of the sample group studied (since risk varies widely) or the follow-up period. While cumulative recidivism rates over long periods of time will be higher than over short periods (since offenses in later years will be added to those in earlier years), a person's risk of recidivating drops off dramatically over time. *Does III*, Hanson Rept, R 123-7, ¶¶15-17.

[30] MSP provides data from *Does III* affidavits by Sharon Jegla. MSP Brief, p 47. Discovery in *Does III* revealed that Ms. Jegla did not have personal knowledge of facts in her declaration, had no training in statistics, and relied on data fields that experts found to be completely unreliable. *Does III*, Jegla Dep, R 126-4, at 8, 27, 34-69; Data Rept, Ex 2, ¶¶87-90 (explaining why victim age data couldn't be analyzed).

[31] A recent DOJ study found recidivism rates for the same type of crime of: sex offenses (7.7%); robbery (16.8%); non-sexual assault (44.2%); drug offenses (60.4%); property offenses (63.5%); public order offenses (70.1%); and murder (2.7%). Non-sexual assaultive offenders were rearrested for a new assault at *six times* the rate that registrants were rearrested for a new sex crime, and drug offenders were rearrested for a new drug crime at *nine times* that rate. Alper, Durose & Markman, *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period* (2005-2014), Bureau of Justice Statistics 4, tbl.2 (2019).

[32] See *Does III*, R 123-9, Letourneau Rept, ¶¶7-11 (surveying all studies in the field); *Does III*, Socia Rept, R 123-11, Finding #1; Sandler, et al, Does a Watched Pot Boil?, *supra*, 284-302.

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isville, 958 F2d 1354 (CA 6, 1992) (striking, on rational basis review, a law limiting reentry housing because city's rationale was an unsupported assertion that former prisoners might reoffend); *Hoffman v Village of Pleasant Prairie*, 249 F Supp 3d 951, 960 (ED Wis, 2017) (laws based on "conjecture about the dangers posed by sex offenders" are irrational). Rather than rely on speculation, the Court can look at hard facts from the *Does III* class data analysis, which shows—for the very population subject to SORA (not some non-comparable sample)—that recidivism rates are low and drop even further with time in the community. Data Rept, Ex 2, ¶¶7-9, 48-72.

The science—and the fact that researchers know much more about registries now than when the early cases were decided—matters. The U.S. Supreme Court has long recognized that "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v Carolene Prod Co*, 304 US 144, 153 (1938). New facts matter when real-world conditions change. In *Carpenter v United States*, for example, the Court held that a warrant was necessary to obtain cell-site location information even though prior precedent held otherwise. 138 S Ct at 2211-2218. The Court reasoned that when the earlier doctrine was established, "few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements." *Id.* at 2217. See also *South Dakota v Wayfair, Inc*, 138 S Ct 2080 (2018) (holding physical-presence tax rule outdated in increasingly virtual economy).

In *Dias v City & Cnty of Denver*, the Tenth Circuit held that a constitutional challenge to a pit bull ban should not have been dismissed, rejecting the argument that the ban was constitutional simply because past cases had upheld similar bans. 567 F3d 1169 (CA 10, 2009). Plaintiffs

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had plausibly alleged that "although pit bull bans sustained twenty years ago may have been justified by the then-existing body of knowledge, the state of science [today] is such that the bans are no longer rational." *Id.* at 1183. See *Henderson v Thomas*, 891 F Supp 2d 1296, 1305 (MD Ala, 2012) (prior decision upholding policy of segregating HIV+ prisoners did not bar suit where plaintiffs alleged that factual premise informing earlier decision was no longer true).

The chart below shows the differences between the facts assumed to be true in *Smith* and the facts scientifically established today.

Facts Underpinning *Smith*	**Facts Known Today**
Registrants have high recidivism rates. 538 US at 103.	The vast majority of registrants do not recidivate. 17,000-19,000 current Michigan registrants are just as safe as unregistered people.
Registrants are dangerous as a class and likely to reoffend for long after conviction. *Id.* at 103-104.	The likelihood of reoffending varies based on known risk factors. Risk drops dramatically over time and with age.
Conviction-based registration requirements are reasonably related to the danger of recidivism. *Id.* at 102.	Conviction-based registration requirements do not correspond to risk. SORA's tier levels are backwards.
There is no evidence that registration causes substantial occupational or housing disadvantages; registrants are free to live/work like anyone else. *Id.* at 100-101.	Registration severely limits housing and employment.
Registrants are not required to report in-person and are not subject to supervision. *Id.* at 101.	SORA 2021 requires extensive in-person reporting, often within three days, and in most cases for life. Registrants are subject to police sweeps. Supervision is similar to or more restrictive than probation/parole.
Registrants "are free to move where they wish." *Id.* at 101.	Travel is restricted by reporting requirements.
The harms registrants experience flow from the fact of conviction. *Id.* at 101.	The harms registrants experience result from being on the registry, and far exceed the consequences of a conviction.
The registry simply disseminates accurate criminal record information. *Id.* at 98.	The registry's design, language, and functionality convey the message that every person listed is a current danger.

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The registry is like visiting a records archive because the public must look up information. *Id.* at 99.	The digital age has fundamentally changed the consequences of registration, and information about registrants is pushed out to internet users who are not looking for it.

Courts have increasingly recognized the science, including the academic consensus that registries do not work. See, e.g., *Betts*, 507 Mich at 560 ("growing body of research" questioning efficacy); *Ortiz v Breslin*, 142 S Ct 914, 916 (2022) (Sotomayor, J, re denial of certiorari) (citing research that registry restrictions "may actually increase the risk of reoffending"); *Does I*, 834 F3d at 704 (questioning SORA's rationality based on evidence that registration "has, at best, no impact on recidivism"); *Cornelio v Connecticut*, 32 F4th 160, 173 & n.7 (CA 2, 2022) (collecting cases); *Hoffman,* 249 F Supp 3d at 960-962; *Rausch*, 461 F Supp 3d at 767; *Hinman*, 530 P3d at 1278; *Reid v Lee*, 476 F Supp 3d 684, 708 (MD Tenn, 2020); *In re TB*, 489 P3d 752, 768 (Colo, 2021). Given the science showing registries are ineffective or counterproductive, SORA 2021 is not rationally related to its purpose.

5. SORA 2021 Is Excessive in Relation to Non-Punitive Interests.

SORA 2021 is excessive in relation to its avowed public safety goals. Like its predecessor, SORA 2021 subjects people to life-altering restrictions *without any individualized assessment* and *without any evidence that the registry protects the public.* The central features of the old SORA that this Court and the Sixth Circuit found excessive—the stigmatization of registrants, the byzantine code of endless requirements, the lengthy/lifetime registration terms, and the lack of individualized assessment—remain. As before, "while the statute's efficacy is at best unclear, its negative effects are plain on the law's face.... [The law's] punitive effects ... far exceed even a generous assessment of [its] salutary effects." *Does I*, 834 F3d at 705. See also *Muniz*, 164 A3d at 1218 (over-inclusiveness of law in requiring registration of people who do not pose a risk

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makes it excessive); *Doe*, 111 A3d at 1100 (lifetime registration "without regard to whether [registrants] pose a current risk to the public" is "wholly punitive"); *Wallace*, 905 NE2d at 384 (excessive because no mechanism to end registration even on clear proof of rehabilitation); *Starkey*, 305 P3d at 1030; *Doe*, 189 P3d at 1018; *Doe*, 444 P3d at 132.

Weighing the *Mendoza-Martinez* factors, this Court, the Sixth Circuit, and courts around the country—e.g., in Alaska, Indiana, Maine, Maryland, Montana, New Hampshire, Ohio, Oklahoma, and Pennsylvania—have all recognized that today's "super-registration" statutes have become punitive, citing the lack of individual review, onerousness of ongoing reporting, length of the registration terms, and extraordinary harm of being stigmatized as a "sex offender."[33] Imposing extensive burdens on tens of thousands of people, many of whom have lived successfully in the community for decades, is excessive.

Finally, MSP urges a narrow ruling focused on non-sex offenders. Certainly, SORA 2021 is even more irrational and excessive when applied to people who never committed a sex offense. But MSP's alarmism that other constitutional challenges may follow a decision holding SORA 2021 to be punitive is unpersuasive. The broader constitutional challenges are already being litigated—both in federal court and the lower state courts—so the Court might prefer to weigh in

[33] See *Hinman*, 530 P3d at 1276 ("defies common sense" not to recognize registration as punishment); *Letalien*, 985 A2d at 26 (retroactive lifetime registration and in-person reporting without opportunity for removal is punitive); *Starkey*, 305 P3d at 1029 (extending registration terms without individual review is punitive and violates ex post facto prohibition); *State v Williams*, 952 NE2d 1108, 1113 (Ohio, 2011) (punitive to register for long periods absent finding of dangerousness); *Wallace*, 905 NE2d at 384 (registration without regard to risk is punishment); *Doe*, 189 P3d at 1017, 1019 (punitive because extensive burdens without distinctions based on risk or opportunity for removal); *Doe*, 111 A3d at 1101 (registration could be retroactively applied only after a hearing, and periodic review, to assess if person posed a risk); *Dep't of Pub Safety*, 62 A3d at 143; *Rausch*, 382 F Supp 3d at 798 ("stated legislative purposes appear to be supported by popular stereotypes rather than any individualized assessment of dangerousness"); *Muniz*, 164 A3d at 1218-1219; *Does v Wasden*, 982 F3d 784, 791-792 (CA 9, 2020).

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now and hold that SORA 2021 is punishment. Period.

To be clear, recognizing that SORA 2021 is punishment does not bar Michigan from imposing reasonable restrictions on people who are shown to be *currently dangerous*. See *Kansas v Hendricks*, 521 US 346, 357, 364, 368-369 (1997) (civil commitment of people with sexual convictions was not punitive because it "unambiguously requires a finding of dangerousness," restrictions ended immediately "upon a showing that the individual is no longer dangerous," and state had "taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards"). Michigan can also impose punishments that are proportionate. Recognizing SORA 2021 for what it is—punishment—simply means that the state will have to operate within constitutional constraints when imposing restrictions on people convicted of sex offenses.

C. The Out-Dated Case Law on Federal SORNA Is Unpersuasive

The caselaw on whether registration is punishment—almost all of which arises in the ex post facto context—is concededly mixed. Some courts find registry laws punitive and other courts conclude they are not. This Court, in analyzing SORA 2021, should be guided by the most relevant caselaw, namely:

- decisions analyzing Michigan's SORA, particularly this Court's own decision in *Betts* and the Sixth Circuit's decision in *Does I*;
- decisions of other states' supreme courts holding laws very similar to SORA 2021 to be punishment under their state Constitutions; and
- recent decisions that consider (a) the modern social science evidence demonstrating that registries are ineffective/counter-productive, and (b) how technological change has transformed the consequences of online registration.

The prosecutor and amicus MSP ignore the fact that SORA 2021 retains most of the features this Court and Sixth Circuit found punitive in *Betts* and *Does I*. They also cannot distinguish the decisions of other state supreme courts. So instead, they ask this Court to rely on

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federal decisions about SORNA under the federal Ex Post Facto Clause that were almost all decided long ago in a different technological environment without consideration of the scientific evidence. Those cases are not persuasive.

First, the SORNA cases do not involve interpretation of Michigan's Constitution. Michigan has the "sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution." *PruneYard Shopping Center v Robins*, 447 US 74, 81 (1980). "[I]t is this Court's obligation to independently examine our state's Constitution." *People v Tanner*, 496 Mich 199, 222 (2014). See generally *State v Bradberry*, 522 A2d 1380, 1389 (1986) (Souter, J, concurring) ("If we place too much reliance on federal precedent we will render the State rules a mere row of shadows."); Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law*, New York: Oxford University Press (2018) (criticizing practice of reflexively interpreting state constitutions in "lockstep" with federal constitution). Indeed, after the U.S. Supreme Court in *Smith* found Alaska's registry law was *not* punitive, the Alaska Supreme Court held that it *was*, under the Alaska Constitution. *Doe*, 189 P3d at 1007 (even when applying the same test, "the results of the federal opinions do not control our independent analysis").

Second, the prosecutor and MSP spill much ink on alleged similarities between SORA 2021 and SORNA. But as this Court noted in *Betts*, 507 Mich at 519 n 27, the statutes have significant differences.[34] More importantly, many of the features identified in *Betts* and *Does I* as

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[34] Differences between SORA and SORNA, beyond those noted in *Betts*, include:

- SORA requires all children over age 14 to register for any Tier III offense. MCL 28.722(a)(iii)-(iv). SORNA limits juvenile registration to offenses comparable to or more severe than aggravated sexual abuse (or attempt/conspiracy). 34 USC 20901(8) .
- SORA mandates revocation of probation, parole or youthful trainee status for a violation, MCL 28.729(5)-(7), while SORNA does not, 28 CFR 72.8(b).

punitive (e.g., tiering without individual review, extensive in-person lifetime reporting, etc.) were precisely the features added to SORA in 2011 to make the law SORNA-congruent.[35]

SORA 2021 is also remarkably like other state registry statutes found to be punitive by other state Supreme Courts.[36] In deciding which line of cases is most persuasive, this Court should look to the strength of the underlying analysis. Some of the cases cited by the prosecutor/MSP

- SORA has additional documentation requirements. See, e.g., MCL 28.724a(5) (requiring "written documentation of employment status, contractual relationship, volunteer status, or student status").
- SORA requires a registrant who "intends" to temporarily reside at any place other than his/her residence for more than 7 days to report in advance, MCL 28.725(2)(b); SORNA only requires reporting where a person "is staying." 28 CFR 72.6(c)(2).
- SORNA requires only email addresses, internet identifiers and phone numbers that the person currently "uses." 28 CFR 72.6(b). SORA appears to require reporting of all email addresses, internet identifiers, and phone numbers "registered to or used by the individual," without apparent time limitation, MCL 28.725(2)(a); 28.727(1)(h).
- Unlike SORNA, SORA 2021 requires the posting of nicknames (not just names and aliases). *Compare* MCL 28.728(2)(a) *with* 28 CFR 72.6(a).
- Unlike under SORNA, 34 USC 20916(c), under SORA 2021 the online registry can include a person's email and other internet IDs, increasing the likelihood of online harassment. *See* Senate Substitute for 2020 HB 5679, 100th Leg, Reg Sess (Mich 2020) (striking §8(3)(e)).
- While SORNA incentivizes states to have an online registry that posts certain registrant information, 34 USC 20920, Michigan has chosen to build a website whose "design, language, and functionality ... represent each person listed as a current danger to society," rather than simply posting public record information. Lageson Rept, Ex 5, ¶¶12-13.

[35] The 2011 amendments were adopted in part because Michigan wanted to have a SORNA-based registry. See House Fiscal Agency Legislative Analysis, 2011 SB 188, 189, 206..

[36] See, e.g., *Hinman*, 530 P3d at 1274-1276 (punishment where Montana registry disseminated online, registrants reporting to law enforcement, and only limited options for removal); *Letalien*, 985 A2d at 18-26 (punishment where Maine law required regular in-person reporting, registration retroactively extended to life, and online dissemination without consideration of rehabilitation); *Wallace*, 905 NE2d at 380 (Indiana law imposed punishment where registry available online, annual reporting, updating of changes, long registration terms, and no individual review); *Doe*, 189 P3d at 1017, 1019 (Alaska statute at issue in *Smith* was punishment under state Constitution); *Doe*, 111 A3d at 1100 (New Hampshire statute was punishment where tiered online registry, regular verification requirement, and no individual assessment); *Dep't of Pub Safety*, 62 A3d at 139-142 (ex post facto violation where Maryland had online registry with searchable map and in person verification).

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are irrelevant because they address an entirely different legal question: whether SORNA is *retro-active*, not whether it is punishment.[37] Most of the remaining cases are criminal appeals from failure-to-register convictions—not (as here) an affirmative challenge to the punitive nature of registration writ large. Criminal appeals often do not give courts reason to consider whether the burdens imposed by the statutory scheme as a whole, rather than a single simple registration requirement, are punitive.

Most importantly, the SORNA cases—and *Smith* as well—are woefully dated, stemming from a time when much less was known about the ineffectiveness of registries. The modern research establishes that the assumptions undergirding the old SORNA cases are wrong. And the few recent SORNA cases almost all simply adopt language from older cases without analysis. For example, amicus MSP relies on *Willman v Attorney General of United States*, 972 F3d 819 (CA 6, 2020). There the Michigan state defendants stipulated to plaintiff's removal from Michigan's registry, conceding that applying SORA to him was unconstitutional retroactive punishment. *Id.* at 822. In rejecting the remaining claims against the U.S. Attorney General, the court only cursorily addressed each count of plaintiff's kitchen-sink complaint, citing old cases finding SORNA non-punitive without any analysis or attempt to distinguish *Does I*. *Id.* at 824-825. That is hardly persuasive, especially when compared to this Court's and the Sixth Circuit's thorough analysis in *Betts* and *Does I*.

In sum, the SORNA cases rest on inaccurate assumptions that have been conclusively disproven and do not account for the fact that the internet revolution has fundamentally altered

[37] See, e.g., *Felts*, 674 F3d at 606 (two-year sentence did not violate ex post facto prohibition because it did not punish original sex offense, but punished new offense of failing to register); *United States v Lawrance*, 548 F3d 1329, 1336 (CA 10, 2008).

the consequences of registration. The more persuasive case law—including that from other state Supreme Courts—recognizes that the world has changed.

III. Requiring Non-Sex Offenders to Register as Sex Offenders Is Cruel or Unusual Punishment

This Court's cases on art 1, §16 focus on proportionality, and emphasize the differences between the more expansive text of our Constitution compared to its federal counterpart. See, e.g., *Bullock*, 440 Mich at 31; *People v Lorentzen*, 387 Mich 167, 171-172 (1972). The Court must first consider the harshness of imposing sex offender registration for a non-sex offense. *Bullock*, 440 Mich at 33. SORA does not define the term "sex offender," but the dictionary defines a "sex offender" as "a person who has been convicted of a crime involving sex." *Merriam-Webster.com*. People not convicted of sex crimes are not sex offenders. "There is no rational reason for applying this intensely stigmatizing designation" to a person who did not commit a sex crime. *Yunus v Robinson*, unpublished opinion of the United States District Court for the Southern District of New York, issued Jan 11, 2019 (Case No. 17-cv-5839), 2019 WL 168544, at *11, Ex 7. "[T]o be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt." *Bullock*, 440 Mich at 39 (citation omitted). Being stigmatized as a sex offender when one has not committed a sex offense is not tailored to—and hence not proportionate to—a non-sexual offense, even if the offense is a serious one. It is as if the state "designat[ed] all persons convicted of felonies as 'murderers,' with registration and reporting requirements," such that neighbors were alerted that a "murderer" had moved nearby, when in reality the person was convicted of an election-law felony. *State v Reine*, unpublished opinion of the Court of Appeals of Ohio, issued Jan 10, 2003 (Case No. 19157), 2003 WL 77174, at *4, Ex 8. "It is the misnaming, or mis-characterization, of the offense" that "confounds this ordinary understanding of the words used." *Id.*

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Second, the cruel-or-unusual punishment analysis requires consideration of how the penalty imposed compares to penalties imposed for other offenses in Michigan. *Bullock*, 440 Mich at 33. There are two situations where Michigan requires registration for offenses with no sexual element. First, SORA's "catch-all" provision requires registration for an offense "that by its nature constitutes a sexual offense against an individual who is a minor." MCL 28.722(r)(vii). This "catch-all" provision requires a *judicial determination* that the conduct was sexual in nature. MCL 769.1(13). Under the "catch-all" provision, a person cannot be required to register if the court determines that offense was non-sexual or if the statute's procedural protections aren't met. *Lee*, 489 Mich at 295-301. Second, SORA requires registration for certain offenses without any finding of a sexual component, as in Mr. Lymon's case.[38] Thus, in most cases, Michigan does not impose sex offender registration on people convicted of non-sex offenses unless a judge has determined that their offense was sexual in nature. MCL 769.1(13). By contrast, Mr. Lymon must register without any such judicial determination. In short, imposing registration is aberrational where there has been no judicial determination that the crime was a sexual one.

The same is true when one considers the practice of other jurisdictions, the third factor under *Bullock*, 440 Mich at 33. Precisely because being labeled a sex offender is so stigmatizing, the Third, Fifth, Ninth, Tenth, and Eleventh Circuits have all held, either in the registry or prison context, that a person who "was not convicted of a sex offense ... is owed procedural due process before sex offender conditions may attach." *Meza v Livingston*, 607 F3d 392, 401-402 (CA 5, 2010). See also *Neal v Shimoda*, 131 F3d 818, 829 (CA 9, 1997) ("We can hardly conceive of a

[38] Those are kidnapping (MCL 750.349), unlawful imprisonment (MCL 750.349b), leading away of a child under 14 (MCL 750.350), and comparable out-of-state offenses (MCL 28.722 (r)(iii), (r)(x), (v)(ii), (v)(iii), (v)(viii)). The prosecutor incorrectly states that additional non-sexual offenses require registration. Appellant Brf, at 51.

state's action bearing more 'stigmatizing consequences' than the labeling of [a person] as a sex offender.") (quoting *Vitek v Jones*, 445 US 480, 494 (1980); *Renchenski v Williams*, 622 F3d 315, 326 (CA 3, 2010); *Coleman v Dretke*, 395 F3d 216 (CA 5, 2004); *Gwinn v Awmiller*, 354 F3d 1211 (CA 10, 2004); *Kirby v Siegelman*, 195 F3d 1285, 1292 (CA 11, 1999). Numerous state courts too have held sex offender registration for non-sex offenders to be unconstitutional. See, e.g., *ACLU of New Mexico v City of Albuquerque*, 137 P3d 1215, 1225-1226 (NM Ct App, 2006); *State v Small*, 833 NE2d 774, 783 (Ohio Ct App, 2005); *State v Robinson*, 873 So 2d 1205 (Fla, 2004); *People v Bell*, 3 Misc 3d 773, 787 (NY Sup Ct, 2003); *Raines v State*, 805 So 2d 999, 1003 (Fla Dist Ct App, 2001).

While these cases arise in various constitutional contexts, the principles are applicable to the cruel-or-unusual punishment analysis: because people convicted of non-sex offenses were not found guilty of a sex offense, a punishment targeted at sexual offending is cruel or unusual when the offense was not sexual in nature.

The final *Bullock* factor is whether the sanction advances rehabilitation. *Bullock*, 440 Mich at 34. Because registration undermines a person's ability to obtain housing, employment, and social support—the key factors to successful reentry—it cannot be rehabilitative.

CONCLUSION

This Court should not import the "clearest proof" standard into the art 1, §16 context, and should either reserve, or order briefing on, the question of whether the intent-effects test is the proper one. If the Court applies the *Betts* framework, it should hold that SORA 2021 is punishment, both by intention and because—as the Court of Appeals found—the new statute retains almost all of the features that this Court found punitive under the old statute. Finally, the Court should hold that imposing sex offender registration on people who did not commit sexual offenses is cruel or unusual punishment. The judgment of the Court of Appeals should be affirmed.

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