STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee, Cross-Appellant,

v

CORA LADANE LYMON,

Defendant-Appellant, Cross-Appellee.

_____/

Supreme Court No. 164685

Court of Appeals No. 327355

Wayne Circuit Court
No. 14-010811-FC

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

CORRECTED AMICUS BRIEF OF THE MICHIGAN STATE POLICE IN SUPPORT OF THE WAYNE COUNTY PROSECUTOR'S OFFICE

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STATEMENT OF QUESTION PRESENTED

1. In response to federal litigation challenging the constitutionality of Michigan's Sex Offender Registration Act, the Michigan Legislature revised SORA effective March 24, 2021, in three primary ways to eliminate the ways in which it extended beyond the obligations of the federal Sex Offender Registration and Notification Act (SORNA) to make the duties virtually the same in substance. The Court of Appeals determined that the new SORA remained punitive in evaluating a claim by Cora Lymon under Michigan's constitution that his sentence was cruel or unusual. Did the Court of Appeals err in ruling that the new SORA is punitive?

   Wayne County Prosecutor's answer: Yes.

   The Michigan State Police answer: Yes.

   Lymon's answer: No.

   Court of Appeals' answer: No.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan State Police is currently defending the constitutionality of Michigan's Sex Offender Registration Act as revised by the Legislature effective March 24, 2021 (new SORA or the Act) from a challenge to its constitutionality in federal court. Under the Act, the Michigan State Police maintains the database of registrable sex offenders. There are currently more than 40,000 offenders listed on Michigan's registry.

The issue here arises under Michigan's constitution, in which Cora Lymon has challenged the validity of the requirement that he register for 15 years under the Act based on the fact that his conviction for unlawful imprisonment did not include a sexual component. The Court of Appeals ruled that this was cruel or unusual punishment where there "are no facts in this case supporting an inference that there was any sexual component to the offenses he committed." Slip op, p 19. This is a significant issue by itself, because there are approximately 260 other offenders on the registry convicted of one of three listed offenses that do not include a sexual element, i.e., child enticement, false imprisonment, and kidnapping.

In reaching its decision, the Court of Appeals applied the standard from federal constitutional ex post facto law – under *Kennedy v Mendoza-Martinez*, 372 US 144 (1963) – in determining that Michigan's new SORA is punitive. On the same issue, the federal courts have applied that same test and uniformly reject the conclusion that federal SORNA is punitive in nature. The Court of Appeals did not consider the overwhelming weight of precedent against it in reaching its conclusion.

INTRODUCTION

Michigan's new SORA is not punishment. It is not designed to punish, and its overall effect is not punitive. That was the entire point of the Michigan Legislature's revision to the law in Public Act 295 of 2020. This is the only issue that the State Police addresses in this brief, and it warrants this Court's review.

While the issue arises in a challenge to a conviction under Michigan's constitution on whether the punishment was cruel or unusual, the test the Court of Appeals applied is the federal one for ex post facto law, applying the *Mendoza* factors. See slip op, p 11.[1] Just as the federal courts' application of that test has been persuasive to this Court for the old SORA, see *People v Betts,* 507 Mich 527 (2021), the federal courts' application of the *Mendoza* standard should also be persuasive where the state courts have applied a federal test for a state constitutional standard.

On this point, the Michigan new SORA is virtually substantively identical to the federal SORNA. In the new SORA, the Legislature eliminated the student safety zones, allowed for another means of reporting for minor changes to the registry, i.e., notification by mail, and eliminated the public nature of the tiering. Thus, it is compelling that the federal courts have without fail rejected the claim that federal SORNA is punitive when applying the *Mendoza* factors. While strictly speaking, this Court need not address these cases as they apply in a distinct legal arena – ex post facto – the test is still an identical one. This Court should grant leave and reverse.

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[1] "Because the constitutional prohibition against cruel or unusual punishment requires that there first be a punishment imposed, the first step in our analysis is to determine whether [the 2021 SORA] . . . was so punitive either in purpose or effect as to negate the State's intention to deem it civil."

STATEMENT OF FACTS AND PROCEEDINGS

Since its enactment in 1994, the Michigan SORA has been amended many times, but the key revisions occurred in 2006, when the student safety zones were added, in 2011 when the Legislature revised the law to add obligations consistent with the federal Sex Offender Registration and Notification Program (SORNA), 34 USC 20901 *et seq.*, and in 2021 when revised to ensure that the law was not punitive, removing the significant ways Michigan's SORA extended beyond SORNA.

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

Michigan first enacted its Sex Offenders Registration Act (SORA) in 1994. 1994 PA 295. That same year, Congress passed an Act, which "conditions certain federal law enforcement funding on the States' adoption of sex offender registration laws and sets minimum standards for state programs." *Smith v Doe*, 538 US 84, 89 (2003).

Because Lymon was convicted in 2014 for a listed offense, he was required to register as a sex offender. See MCL 28.725(1) (2011); 2011 PA 17 ("An individual required to be registered under this act who is a resident of this state shall report in person and notify the registering authority having jurisdiction where his or her residence or domicile is located immediately [i.e., within three business days] after any of the following occur"). SORA requires Lymon to report annually and to notify law enforcement of certain changes, such as changes to his name and residential address, and it requires him to register for 15 years. MCL 28.725(11).

In the years since it was first enacted, SORA has undergone a series of amendments.[2] In 1996, Michigan amended SORA to require law-enforcement agencies to make offender information available to the public. 1996 PA 494. Certain information on Michigan's registry is now available to the public on the internet. MCL 28.728(2).

In 2006, Michigan adds student safety zones to the SORA.

Like other states, Michigan has modified its registry law multiple times since its initial adoption. Importantly, Michigan amended SORA in 2006 to create "student safety zones," which generally prohibited offenders from residing, working, or loitering within 1,000 feet from school property. See MCL 28.733–736 (2006); 2005 PA 127.

Effective March 24, 2021, these provisions were repealed. See 2020 PA 295.

In 2006, Congress enacts SORNA and conditions federal funding for states on substantial compliance with its minimum standards for the state registries.

In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA) to strengthen the nationwide network of sex-offender registration and notification programs. 34 USC 20901 *et seq*. In addition to updating the federal registry law, SORNA established minimum standards for state registries in order to qualify for funding, and it created its own substantive obligations for sex offenders under federal law.

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[2] See, e.g., 1994 PA 295; 1996 PA 494; 1999 PA 85; 2002 PA 542; 2004 PA 240; 2005 PA 121; 2005 PA 127; 2005 PA 132; 2006 PA 46; 2011 PA 17; 2011 PA 18; 2020 PA 295.

To avoid a reduction in federal funding, states must "substantially implement" SORNA's requirements. 34 USC 20927(a) & (d). To assist the states in their implementation efforts, in 2008 the U.S. Attorney General issued guidelines that describe the minimum standards a state must meet to achieve substantial compliance. See National Guidelines for Sex Offender Registration and Notification 10 (July 2008) (Guidelines).[3] SORNA and the Guidelines "set[] a floor, not a ceiling," for state registry programs. 73 Fed Reg at 38032. It also established its own substantive obligations, "directly prescrib[ing] registration requirements that sex offenders must comply with." *Id.* at 38034.

In 2011, Michigan amends its registry law to comply with federal standards.

To comply with SORNA's minimum standards, Michigan again amended its registry law in 2011. See 2011 PA 17; 2011 PA 18. Among other changes, the law imposed additional requirements not previously present in Michigan's SORA law:

(1) classified offenders into three tiers according to their underlying offenses, MCL 28.722(r)–(w) (2011), see also 2011 PA 17 and 2011 PA 18;

(2) required periodic in-person reporting, as well as in-person reporting within three business days of certain changes, including changes in vehicle use or ownership, name, and e-mail address or other designations used in Internet postings, MCL 28.725(1) (2011), MCL 28.725a(3)(c) (2011), see also 2011 PA 17 and 2011 PA 18; and

(3) required tier-III offenders to register for life, MCL 28.725(10)–(12) (2011) and MCL 28.725a(3) (2011), see also 2011 PA 17 and 2011 PA 18.

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[3] These guidelines may be found at the following web address:

https://www.federalregister.gov/documents/2008/07/02/E8-14656/office-of-the-attorney-general-the-national-guidelines-for-sex-offender-registration-and

(Last accessed October 21, 2021.)

In 2016 and 2020, the federal courts rule that Michigan's SORA law violates the Ex Post Facto Clause based on the 2006 and 2011 amendments.

In 2016, the Sixth Circuit reviewed an ex post facto challenge brought by five plaintiffs who committed their registerable offenses before 2006, and they argued that Michigan's SORA constituted punishment and therefore was unconstitutional. *Does 1–5 v Snyder*, 834 F3d 696, 703–706 (CA 6, 2016), cert den 138 S Ct 55 (2017). The Sixth Circuit agreed and it emphasized three statutory features that it found rendered the SORA statute punitive: (1) the student safety zones; (2) the public classification of offenders into tiers; and (3) the requirements on offenders to appear in person to report even minor changes to certain information. See *Does #1–5*, 834 F3d at 702–703, 705. It summarized it ruling in its final concluding paragraph:

> A regulatory regime
>
> [1] that severely restricts where people can live, work, and "loiter,"
>
> [2] that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and
>
> [3] that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska's first-generation registry law.
>
> SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information.
>
> We conclude that Michigan's SORA imposes punishment. [*Id.* 834 F3d at 705 (first paragraph break added; brackets added).]

In 2016, the State sought a petition for certiorari from this decision, and the U.S. Supreme Court called for the views of the U.S. Solicitor General, who recommended that the Court deny certiorari, noting that Michigan's SORA was different from the federal SORNA's requirements because it extended the duties of an offender beyond the federal SORNA in three significant respects. (See Ex A, U.S. Solicitor General's Amicus (2017), p 18 ("The court of appeals explained that SORA is punitive because of the cumulative effect of three statutory features: the school-safety zones in which a sex offender is not permitted to live, work, or loiter; the requirement that an offender be categorized into a tier based on his underlying offense without an individualized assessment and that his assigned tier be made public; and the requirement that sex offenders appear in person 'to report even minor changes to their information.' ").)

In 2020, the federal district court then ruled that this same decision in *Does* rendering the 2011 SORA unconstitutional on ex post facto grounds applied to all the pre-2011 sex offenders and was prepared to enjoin the law, but it provided a window of time in which the Legislature could act to remedy Michigan law. *Doe v Snyder*, 449 F Supp 3d 719, 729, 737 (ED Mich, 2020) . ("To be clear: SORA will not become unenforceable as of the date of this order. Rather, the holdings in this opinion will become effective and enforceable only after the entry of a final judgment, at the time specified in that final judgment.")

In 2020, the Michigan Legislature revises the SORA to eliminate the ways in which it extends beyond the federal SORNA by eliminating student safety zones, the requirement for in-person *reporting for minor changes, and the public tiering.*

In December 2020, the Legislature revised Michigan's SORA laws to address the federal court rulings that found Michigan's SORA laws unconstitutional. (See Ex B, Legislative Analysis of HB 5679 (12-9-20), pp 7–8.) The Legislature did so by repealing the student safety zones, MCL 28.733 through 736, removing the public nature of the tiering in MCL 28.728(2), and allowing for the Michigan State Police to provide another means to update information rather than doing so in person for minor changes such as a new motor vehicle under MCL 28.725(2) ("in the manner prescribed by the department"). They took effect on March 24, 2021.[4] Consistent with the MSP's duty to notify registrants of changes to the law, see MCL 28.725a(1), the MSP provided notice to the registrants that they would be able to update their minor changes under MCL 28.725(2) by mail. (See Ex C, MSP Notice, p 2.)

Significantly, with the changes to Michigan law, the substantive obligations under state law and under federal SORNA are now virtually the same. (See Ex D, Comparative Chart for the SORA and the federal SORNA.)[5]

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[4] One of the other significant legislative changes in Public Act 295 of 2020 addressed the different provisions that the federal district court found unconstitutionally vague, violative of due process, or violative of the First Amendment. See *Doe v Snyder*, 2021 WL 2525436, at *3 (ED Mich, June 21, 2021) ("the new SORA removes or modifies all provisions that this court found to be unconstitutional in its February 14, 202[0] opinion in *Does II*.").

[5] The Wayne County Prosecutor's Office also attached a comparative chart, which has been employed by the State defendants as well in their federal litigation. This is the most updated version of the comparative chart.

In 2021, this Court rules in People v Betts *that the 2011 SORA law is an ex post facto violation by finding that the old Michigan SORA is punitive.*

In July 2021, this Court ruled that Michigan's 2011 SORA violated ex post facto when reviewed in aggregate, finding that its obligations were punishment for offenders who committed their offenses before July 1, 2011. See *People v Betts,* 507 Mich 527, 574 (2021). This conclusion was predicated on three points.

First, the Court ruled that the law was different in character from the Alaska law, which was reviewed by the U.S. Supreme Court in *Smith v Doe,* 538 US 84 (2003). *Betts,* 507 Mich at 547 ("Michigan's SORA as initially enacted was similar to the Alaska sex-offender registry at issue in *Smith*"). The Michigan SORA before 2006 did not include an individual assessment, but it imposed a duration of registration obligations based on the crime. This was also true of Alaska's registry law. *Smith,* 538 US at 90 ("If the offender was convicted of a single, nonaggravated sex crime, he must provide annual verification of the submitted information for 15 years"). Before *Betts,* in 2007 the Court of Appeals ruled that "compliance with SORA is not a punishment." *People v Golba*, 273 Mich App 603, 616 (2007) ("we conclude that compliance with SORA is not a punishment and, therefore, that ordering defendant to comply with SORA does not violate the *Apprendi–Blakely* rule.").

Second, this Court then reviewed the five factors that the U.S. Supreme Court examined in *Smith* to determine whether Michigan's 2011 SORA was punitive: "whether, in its necessary operation, the regulatory scheme" in relation to the five *Mendoza* factors:

> [1] has been regarded in our history and traditions as a punishment;
>
> [2] imposes an affirmative disability or restraint;
>
> [3] promotes the traditional aims of punishment;
>
> [4] has a rational connection to a nonpunitive purpose; or
>
> [5] is excessive with respect to this purpose. [*Betts,* 507 Mich at 545 (numbered brackets added), citing *Smith,* 538 US at 93–96.]

After examining those five factors, this Court summarized its analysis that the 2011 SORA law was excessive, identifying the lack of individualization, the student safety zones, and the in-person reporting, including for even "minor life changes":

> Over 40,000 registrants were subject to the 2011 SORA's requirements without any individualized assessment of their risk of recidivism. The duration of an offender's reporting requirement was based solely on the offender's conviction and not the danger he individually posed to the community. Registrants remained subject to SORA—including the stigma of having been branded a potentially violent menace by the state—long after they had completed their sentence, probation, and any required treatment.
>
> *All registrants were excluded from residing, working, and loitering within 1,000 feet of a school, even those whose offenses did not involve children and even though most sex offenses involving children are perpetrated by a person already known to the child. As described, this restriction placed significant burdens on registrants' ability to find affordable housing, obtain employment, and participate as a member of the community.*
>
> *Registrants were also required to make frequent in-person reports to law enforcement upon* ***minor life changes*** *and regular in-person reports—sometimes multiple times a year—even when no information had changed.* These demanding and intrusive requirements, imposed uniformly on all registrants regardless of an individual's risk of recidivism, were excessive in comparison to SORA's asserted public-safety purpose.

> Considering the *Mendoza-Martinez* factors cumulatively, the 2011 SORA's aggregate punitive effects negate the state's intention to deem it a civil regulation. Accordingly, the retroactive imposition of the 2011 SORA increases registrants' punishment for their committed offenses in violation of federal and state constitutional prohibitions on ex post facto laws.
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> [*Betts*, 507 Mich at 561–562 (paragraph breaks added; citation and footnote omitted; emphasis added).]

Third, this Court then rejected the severance arguments advanced by the prosecution. In doing so, it explained that a "a majority of the former SORA provisions underlying *our conclusion that the 2011 SORA constitutes punishment* ***were added by its 2006 and 2011 amendments***." *Betts,* 507 Mich at 564 (emphasis added):

> See, e.g., MCL 28.733 to MCL 28.736, as amended by 2005 PA 121 (creating the student-safety zones excluding registrants from living, working, or loitering within 1,000 feet of a school);
>
> MCL 28.727, as amended by 2011 PA 18, and MCL 28.725(1), as amended by 2011 PA 17 (adding events triggering an in-person reporting requirement and decreasing the reporting period to three days);
>
> MCL 28.722, as amended by 2011 PA 17 (creating the tiered classification system and basing SORA's requirements on those tiers).
>
> [*Id.*]

STANDARD OF REVIEW

This Court reviews constitutional questions of law de novo. See *People v Beck*, 504 Mich 605, 618 (2019).

ARGUMENT

I. The new Michigan SORA is not punitive.

The threshold issue on the question whether Cora Lymon was subject to cruel or unusual punishment under Michigan's SORA is whether the Act, as revised, remains punitive. The brief of the Wayne County Prosecutor's Office persuasively explains why the new SORA is not punitive in applying the five *Mendoza* factors. See Wayne's Br, pp 22–34. The State Police here seek to support this argument by making two points.

First, the new SORA, which took effect on March 24, 2021, is virtually the same substantively to the federal SORNA. This is significant because every court, apparently without exception, has found federal SORNA *not* to be punitive. While this analysis appears in addressing federal ex post facto challenges, the analysis of the Court of Appeals below applies the same *Mendoza* factors and thus the federal case law should be persuasive to the Court in examining the claim here.

Second, the specific examination of the *Mendoza* factors by the federal appellate courts have persuasively refuted the conclusion here that these obligations are effectively punitive. They are not. The federal courts have found that the SORNA, just as the new SORA in Michigan, is quite similar to the Alaska law found not to be punitive in *Smith v Doe*. That same answer should govern here for the analysis under Michigan's constitution in determining whether the new SORA is punitive as a threshold question to whether Lymon's sentence was cruel or unusual punishment. Because SORNA is not punitive, so Michigan's SORA is also not punitive.

A. The new SORA in Michigan and the federal SORNA are almost substantively identical.

While the new SORA in Michigan has not been subject to review in the appellate courts about whether it constitutes punishment before the decision below, the federal SORNA has repeatedly been challenged as punitive. Thus, the analysis of the federal appellate courts should be relevant to this Court on the threshold question here if the two laws are pretty much the same. They are.

The two registries may be digested into six basic components: (1) the duty to register based on the commission of certain criminal offenses, the vast majority of which are criminal sexual offenses; (2) the duty to report periodically depending on the nature or seriousness of the offense, known as the tiering, and the duration that a person must appear on the registry; (3) the duty to update the registry based on different changes, which may further be digested into two categories, i.e., more significant changes and other more minor changes; (4) the time and method by which a registrant may update this information; (5) the severity of punishment for a violation; and (6) the information included on the public registry. For all six categories, there are virtually no significant substantive distinctions between Michigan and federal law other than the conviction here, unlawful imprisonment under MCL 750.349b, is a tier I offense subject to the Michigan registry for fifteen years, see MCL 28.722(r)(iii), as contrasted with federal SORNA, which apparently excludes "a parent or guardian" for "false imprisonment" as a specified offense against a minor, see 34 USC 20911(7)(B). Cf. Ex D, pp 8 (SORA) and 3 (SORNA).

In particular, like the federal registry, the primary focus of the Michigan SORA are sex offenses such as the four degrees of criminal sexual conduct, see MCL 28.722(v), for which the comparable offenses under federal law are "aggravated sexual abuse," "sexual abuse," and "abusive sexual contact," see 34 USC 20911(4). And they are broken into three tiers, the most serious of which is tier III, and the least serious of which is tier I. MCL 28.722(r), (s), (v); 34 USC 20911(2), (3), (4). A tier I offender must register for 15 years, a tier II offender for 25 years, and a tier III offender must register for a lifetime. MCL 28.725(11), (12), and (13); 34 USC 20915(1), (2), (3). The tier I offenders must report yearly, the tier II offenders biannually, and the tier III offenders quarterly. MCL 28.725a(3)(a), (b), (c); 34 USC 20918(1), (2), (3). The durations of the registries are the same.

For changes to a registrant's status, both registries separate the more significant changes, i.e., residence, employer, student status, and changes to name, see MCL 28.725(1); 34 USC 20913(c), from other more minor changes, i.e., vehicle information, electronic email addresses and internet identifiers, telephone numbers, and temporary residence, see MCL 28.725(2); 28 CFR 72.7(e). The more serious changes require changes in person reporting within three business days, see MCL 28.725(1), 34 USC 20913(c), while the others may be changed by some other means within three business days, see MCL 78.725(2), Ex C (by mail); 28 CFR 72.7(e) ("by whatever means the jurisdiction allows"). In other words, the obligations to update the registry are substantively pretty much the same.

A violation of Michigan's SORA is a four-year felony for the first offense, seven-year for a second offense, and a ten-year felony thereafter. MCL 28.729(1). For the federal SORNA, the failure to register is a ten-year felony. 18 USC 2250(a)(3).

Both registries include the same basic information on the public registry: name, residential address, address of employer, and picture. The Michigan SORA lists these four categories, among others. See MCL 28.728(2)(a), (c), (d), and (i). The federal SORNA notes that it should maintain "the Dru Sjodin National Sex Offender Public Website and shall participate in that website as provided by the Attorney General." 34 USC 20920. The federal registry then lists those four categories of information, and links to the State's registry. See, e.g., the entry for Paul J. Betts, who is required to register under the federal SORNA (and under the new SORA).[6]

As noted in the statement of the case, the significant ways in which Michigan had imposed obligations under the old SORA that extended beyond federal SORNA were removed by the Legislature for the new SORA, which took effect on March 24, 2021. Those three components had been created by the 2006 and 2011 amendments to SORA:

1. The in-person reporting requirements for temporary residence, electronic mail or instant messages, or regular use of a vehicle, see MCL 28.725(e), (f), (g) (2011);
2. The public nature of the tiering, see MCL 28.728(2)(l) (2011); and
3. The student safety zones. See MCL 28.733, 28.734, 28.735, and 28.736 (2006).

[6] See https://www.nsopw.gov/en/Search/Results (last accessed October 21, 2022.)

Among other changes to the old SORA, Public Act 295 of 2020 remedied all three of these legal arenas, aligning the Michigan SORA with federal SORNA. See Ex E, HB 5679, passed by both houses on December 16, 2020 (redline version) (allowing for reporting "in the manner prescribed by the department [of state police]" for minor changes, p 19, removing the public nature of the tiering, p 36, and repealing the school safety zones, p 41). In doing so, the Michigan Legislature matched the Michigan SORA to the federal SORNA. This is significant because the federal SORNA has been found not to be punitive, where the federal appellate courts have rebuffed challenges to the federal substantive obligations to report on sexual offenders who committed their crimes before the enactment of the SORNA in 2006. See, e.g., *Willman v Attorney General of United States,* 972 F3d 819, 825 (CA 6, 2020) (for an offender whose sexual offense was committed in 1993) ("SORNA is not punishment for purposes of the Eighth Amendment").

The remaining differences between the new Michigan SORA and the federal SORNA are minor in nature, and they do not merit a difference in substantive analysis on the issue of whether they constitute punishment. This Court identified some of those differences in its analysis of the old SORA and whether the unconstitutional elements could be severed from the law. See *Betts*, 507 Mich at 570–571, n 27 (noting that the new SORA (1) continues to impose a $50 registration fee, (2) requires a registrant to maintain more specific information for driver's license, (3) requires notification of new residence before rather than after moving,

and (4) requires the registry to include the original charge and not just the convicted charge).[7] These are all minor differences, which would not merit a difference in evaluation about whether the federal SORNA is punitive in contrast to Michigan SORA.

Moreover, that analysis does not account for the way in which Michigan's new SORA imposes fewer obligations than SORNA. For example, Michigan's new SORA continues not to require advance notice of international travel, and it only requires this notification where a person will be in another country for "more than 7 days." MCL 28.725(8). In contrast, SORNA imposes a requirement to provide advance notice, and it does not limit its application for stays longer than seven days. See 34 USC 20914(7) ("[i]nformation relating to intended travel of the sex offender outside the United States, including any anticipated dates"). Nor did this Court address the fact that Michigan's SORA applies to those sexual offenders who were convicted on or after October 1, 1995, or were subject to the jurisdiction of the Department of Corrections for a listed offense on that date. See MCL 28.723(1), (2). The federal SORNA does not appear to have any time limit for when the duty to comply with it applies. See 28 CFR 72.3 ("sex offenders must comply with all requirements of that Act, regardless of when the conviction of the offense for which registration is required occurred").

[7] This Court further noted that the new SORA imposed a maximum of punishment of 4, 7, or 10 years, while SORNA merely required a complying state registry to include a maximum punishment that "is greater than 1 year." *Id.* at 571, n 27, citing 34 USC 20913(e). But this Court fails to account for punishment that the federal SORNA itself substantively imposes for a violation, which makes it a ten-year felony federally for failing to register. See 18 USC 2250(a)(3).

In the current federal challenge to the new SORA on various constitutional grounds, *Does v Whitmer* (ED Mich, 22-cv-10209), the plaintiffs and the State defendants (the MSP and the Governor) have briefed this issue about whether there are any significant substantive differences between the federal SORNA and the Michigan SORA. See Exhibits F and G (State's Motion, May 31, 2022, pp 8–10 and Pls' Response, July 18, 2022, pp 28–31). The Michigan State Police contends that this briefing only further supports the conclusion that the two registries are substantively nearly the same, with only small differences remaining. Thus, the analysis of the federal courts on SORNA about whether it constitutes punishment should be relevant to the inquiry here.

B. The new SORA is not punishment.

As noted earlier, the Wayne County Prosecutor's Office has already provided an analysis applying the *Mendoza* factors and arguing why Michigan's SORA is not punitive. The Michigan State Police intend to supplement this analysis, emphasizing the federal case law, which supports this conclusion based on its review of SORNA.

As a starting point, it is worth noting that the federal SORNA has almost unanimously been found by the federal appellate courts not to be punishment. See *United States v Felts*, 674 F3d 599, 606 (CA 6, 2012) ("[T]he unanimous consensus among the circuits [that have ruled] that SORNA does not violate the Ex Post Facto Clause. SORNA provides for a conviction for failing to register; *it does not increase the punishment for the past conviction*.") (Emphasis added.)

See also *United States v Parks*, 698 F3d 1, 5–6 (CA 1, 2012); *United States v Young*, 585 F3d 199, 204–205 (CA 5, 2009); *United States v Meadows*, 772 Fed Appx 368, 369–370 (CA 7, 2019); *United States v Elk Shoulder,* 738 F3d 948, 958 (CA 9, 2013); *United States v Lawrance*, 548 F3d 1329, 1333 (CA 10, 2008); *United States v WBH*, 664 F3d 848, 855–860 (CA 11, 2011).[8] This Court should grant leave and reach the same conclusion here for Michigan's new SORA.

In analyzing whether a regulatory scheme has the effect of being punitive, this Court considers whether the scheme: (1) has been regarded in our history and traditions as a punishment; (2) imposes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) has a rational connection to a nonpunitive purpose; or (5) is excessive with respect to this purpose. *People v Earl*, 495 Mich 33, 43–44 (2014); *Smith*, 538 US at 97, citing *Kennedy v Mendoza-Martinez*, 372 US 144, 168–169 (1963). See also *Betts,* 507 Mich at 550–560. These factors are "neither exhaustive nor dispositive," but are "useful guideposts." *Smith*, 538 US at 97. And it is worth noting that the Court ordinarily defers to the Legislature's stated intent, "*only the clearest proof* will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Earl*, 495 Mich at 44 (emphasis added). The party objecting to the statutory scheme bears the burden of showing this "clearest proof." *Id.*

[8] The only contrary result, *U.S. v Juvenile Male,* 590 F3d 924, 942 (CA 9, 2009), addressing juvenile offenders, was vacated as lacking a case or controversy, 564 US 932, 933 (2011) ("[T]he Court of Appeals had no authority to enter that judgment").

1. Like SORNA, SORA has not historically been regarded as punishment.

As a relatively new regulatory scheme, SORA laws are " 'of fairly recent origin,' " which suggests they have not historically been regarded as punishment. *Smith*, 538 US at 98. In concluding this *Mendoza* factor weighed in favor of the government in evaluating whether federal SORNA was punitive, the Fourth Circuit quoted *Smith*, reasoning that "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *United States v Under Seal*, 709 F3d 257, 265 (CA 4, 2013), quoting *Smith*, 538 US at 98. In other words, the federal courts support this analysis, ruling that SORNA does not shame sexual offenders, contrary to the finding of the court below. See slip op, p 14.

Not shaming

While offenders listed on sex-offender registries may feel shame, the federal SORNA does not resemble the traditional punishment of shaming. "Like Hester Prynne with her scarlet 'A,' " the colonial chastisement of shaming "required criminals to stand in public or bear brands displaying their crimes for 'face-to-face' public shaming[.]" *United States v WBH*, 664 F3d 848, 855 (CA 11, 2011), citing *Smith*, 538 US at 98. The federal SORNA "does not subject sex offenders to 'face-to-face' public shaming or banishment to any greater degree than the Alaska statute in [*Smith v Doe*]." *WBH,* 664 F3d at 856. "Sex offenders are not forced to stand in pillories in the middle of town to face a barrage of bad-mouthing from the town's browbeaters and blowhards." *Id.* The same is true of the new Michigan SORA.

On this point, the U.S. Supreme Court has correctly distinguished sex-offender registration from traditional shaming. The Court acknowledged that publicity from SORA "may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism." *Smith,* 538 US at 98–99. But it held that, "[i]n contrast to the colonial shaming punishments," Alaska's SORA did not "make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme." *Id.* Publication on the Internet does not alter the analysis, even though "the humiliation" to the offender "increas[es] in proportion to the extent of the publicity." *Id.* at 99. The *Smith* Court focused on the key factor that "the purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender." *Id.* The same is true here.

Indeed, if publication alone rendered SORA punitive, then having a public trial in any criminal case would be punitive, rather than part of our commitment to transparency in the criminal process. See *Smith*, 538 US at 99 ("[O]ur criminal law tradition insists on public indictment, public trial, and public imposition of sentence."). That is why the federal courts have held that the federal SORNA is not punitive when it publishes truthful information about juvenile sex offenders. See, e.g., *Under Seal*, 709 F3d at 265 (not punitive to publish previously non-public youthful offender information); *WBH*, 664 F3d at 855 (same).

The new Michigan SORA is also unlike shaming because it does not affirmatively publicize, like a public service announcement, who is on the registry and does not seek the public's ridicule.

Rather, the SORA merely makes offender information available for the public to search, sign up for notifications, or share a registrant's profile with individual contacts. See *Smith*, 538 US at 99. By contrast, the federal SORNA requires officials to distribute notice of an offender's status to "each school and public housing agency" in the area where the offender resides. See 34 USC 20923(b)(2). Further, Michigan's registry allows the public to search by area and by non-compliant status, not just by name, which is consistent with its purpose of promoting public safety, as opposed to shaming particular individuals. It does not allow users to post comments for public view on a registrant's profile.

Not resemble probation or parole

SORA also is not akin to probation or parole. Indeed, the Supreme Court rejected this analogy in *Smith*. 538 US at 101. In applying *Smith* in its review of Oklahoma's SORA law, the Eighth Circuit noted that "no specific officer with the Department of Corrections is assigned," an "absence of supervision," and a lack of conditions "beyond regular reporting," to contrast the SORA law at issue there from "probation as it has been historically understood." *Shaw v Patton,* 823 F3d 556, 564–566 (CA 10, 2016). The same is true of Michigan offenders under the new SORA, who must report information for a database but are not under supervision. See MCL 28.722(g), MCL 28.725(1), MCL 28.725a(3)(c). No specific officer was assigned to supervise Lymon, nor did SORA subject him to the stringent requirements that would occur for probation. On the first factor, the federal appellate courts support the conclusion that Michigan's SORA is not punishment.

2. Like SORNA, SORA imposes only minor affirmative disabilities or restraints.

Nor does SORA impose a substantial disability or restraint akin to punishment, contrary to the ruling of the Court of Appeals below. See slip op, pp 14–15. The relevant inquiry when determining whether a law imposes an affirmative disability or restraint is "how the effects" of the Act "are felt by those subject to it." *Betts*, 507 Mich at 554, quoting *Smith*, 538 US at 99–100. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* Just like the federal SORNA, that is the case here.

SORA imposes only minor restraints that further its regulatory purpose, and it leaves offenders with substantial freedom. As the outset, SORA compliance does not resemble the "infamous punishment" of imprisonment, which is "the paradigmatic affirmative disability or restraint." See *Earl*, 495 Mich at 44–45. SORA's requirements of in-person or mail-in reporting "impose no physical restraint[.]" *Smith*, 538 US at 100.

As noted by the First Circuit in reviewing federal SORNA as whether it imposes a physical disability, it found that while reporting in person is "doubtless more inconvenient than doing so by telephone, mail or web entry," it "serves the remedial purpose of establishing that the individual is in the vicinity," "confirms identity by fingerprints," and "records the individual's current appearance." *Parks*, 698 F3d at 6. In that way, the inconvenience of in-person reporting is minor "compared to the disadvantages of [registration in general] in its consequences for renting housing, obtaining work and the like—consequences that were part of the package that *Smith* itself upheld." *Id.*

And while the *Smith* Court noted that Alaska's statute did not require in-person reporting, the Court's decision did not depend on that fact, as evidenced by the fact that the federal courts have determined that in-person reporting under SORNA are not punitive under *Smith*. See *Parks*, 698 F3d at 5–6 (CA 1) (upholding quarterly in-person reporting); *Under Seal*, 709 F3d at 265 (CA 4) ("Although Appellant is required under SORNA to appear periodically in person to verify his information and submit to a photograph, see [34 USC § 20916], this is not an affirmative disability or restraint."); *United States v Young*, 585 F3d 199, 206 (CA 5, 2009) ("After analyzing the Alaskan statute under these factors [including issue of affirmative disability], the Supreme Court in *Smith* concluded that the act was not punitive in effect—and that it was not even a close call. Upon review, there is no reason for us to come to a different conclusion with SORNA—particularly without any prompting from Young."); *United States v Shannon*, 511 Fed App'x 487, 491 (CA 6, 2013) ("Shannon is not physically restrained by the SORNA registration requirement, nor is he likely to be more than inconvenienced by its condition"); *WBH*, 664 F3d at 852, 855, 857–858 (CA 11) ("Appearing in person may be more inconvenient, but requiring it is not punitive."). See also *United States v Leach*, 639 F3d 769, 773 (CA 7, 2011) (ruling that SORNA is "a civil, rather than penal, statute," noting that "Leach has not identified any aspects of SORNA's registration provisions that distinguish this case from *Smith*."), overruled on its statement of the standard for applying ex post facto, *Koch v Village of Hartland*, 43 F4th 747, 749 (CA 7, 2022).

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

3. Like SORNA, SORA does not promote the traditional aims of punishment.

The next factor asks whether the law promotes the traditional goals of punishment: deterrence and retribution. *Smith*, 538 US at 102. Because SORA's deterrence and retributive effects are minimal and incidental to the goal of protecting the public from potentially dangerous offenders, see *Earl*, 495 Mich at 45–47, this factor does not lean toward a determination that SORA is punishment, contrary to the ruling of the court below. See slip op, p 16.

The federal courts have accorded this factor less emphasis in the intent-effects analysis under SORNA, given *Smith*'s admonition that "[a]ny number of governmental programs might deter crime without imposing punishment." *Id*. Nonetheless, in reviewing the *Mendoza* factors for whether SORNA is punitive, the federal appellate courts have weighed this factor in favor of the government. See, e.g., *Under Seal*, 709 F3d at 265 (CA 4) ("SORNA does not promote the traditional aims of punishment"); *Shannon*, 511 Fed App'x 487, 492 (CA 6) (same); WBH, 664 F3d at 858–859 (CA 11) ("Regarding the traditional aims of punishment, SORNA is no different from the Alaska registration statute upheld in *Doe*.") The same applies here.

4. Like SORNA, SORA rationally advances a non-punitive purpose.

A statute's rational connection to a non-punitive purpose is the "most significant factor" in the determining whether the statute's effects are punitive. *Smith*, 538 US at 102. And here, as in *Smith*, Michigan's SORA rationally furthers the "legitimate and non-punitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *Id.*

The Michigan Legislature enacted SORA pursuant to its police power "to better assist law enforcement [] and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a. The Legislature determined that "a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state." *Id.* SORA's registration requirements "are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger." *Id.*

Smith recognized that these non-punitive purposes are important. 528 US at 102–103. The Court cited "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class," describing it as "frightening and high," citing statistics from the U.S. Department of Justice. *Id.* at 103. SORA's requirements rationally advance those purposes. Registration assists authorities in keeping track of offenders, alerts the public to their presence, and helps parents make informed decisions regarding child care and victimization prevention. *Id.*

The Court of Appeals below quoted *Betts'* reference to studies that contend that the "dangerousness of sex offenders has been historically overblown." Slip op, p 17, quoting *Betts,* 507 Mich at 560. The findings of these studies are unwarranted and are unsupported by the federal courts in their review of SORNA.

In a July 2015 report, the U.S. Department of Justice's Office of Justice Programs has cited a large study of sex-offender recidivism showing that, while sex offenders had a lower overall rearrest rate than non-sex offenders within three years of release, their *sex crime* rearrest rate was *four times higher* than the rate of non-sex offenders. *Sex Offender Management and Assessment Initiative* (July 2015), "Recidivism of Adult Sexual Offenders," p 2, citing Langan, Schmitt, and Durose (2003).[9] And the same report cited a large 2004 study by Harris and Hanson finding an even higher recidivism rate: it found that the 15-year sexual recidivism rates for sex offenders was 24%. *Id*. at 3. A rational legislator could think that a one-in-four chance that the offender will commit another sexual offense is a public-safety issue. The federal appellate courts have agreed that this factor weighs in favor of the government in rejecting the claim that SORNA is punishment. See, e.g., *Under Seal*, 709 F3d at 265 (CA 4) ("SORNA has a rational connection to a legitimate, non-punitive purpose—public safety—which is advanced by notifying the public to the risk of sex offenders in their community"); *Shannon*, 511 Fed App'x at 492 (CA 6) (same).

[9] Available at https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/recidivismofadultsexualoffenders.pdf_ (Last accessed October 21, 2022.)

The issue of recidivism and the most effective method of ensuring the safety of the community would appear to be an executive function, particularly where the actual recidivism rate of sexual offenders is difficult to measure. As the Office of Justice Programs explained in its July 2015 report, at 4, "there is universal agreement in the scientific community that the observed recidivism rates of sex offenders are underestimates of actual reoffending." Related to this kind of factual analysis, the federal courts have deferred to the judgment of Congress on the efficacy of the SORNA. See, e.g., *United States v Gould*, 568 F3d 459, 473 (CA 4, 2009) ("When the high incidence of recidivism is coupled with the interstate movement of sex offenders intending to avoid state registration or to seek more lax registration requirements, Congress could rationally perceive a need to create national standards for sex-offender registration and notification."); *United States v Ambert*, 561 F3d 1202, 1209 (CA 11, 2009) ("the restrictions contained in the federal statute, similarly, are rationally related to Congress' legitimate goal in protecting the public from recidivist sex offenders").

It is also rational to classify offenders based on the severity of their offense of conviction, rather than conducting individualized risk determinations. Indeed, the U.S. Supreme Court has squarely held that the constitution "does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith*, 538 US at 103. The test is "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith*, 538 US at 105.

A regulatory regime is not punitive "simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 US at 102–103. That is why the federal appellate courts have upheld classification of offenders under SORNA based on offense in the absence of an individualized determination of dangerousness. See, e.g., *WBH*, 664 F3d at 859–860 (CA 11) ("Both statutory regimes [i.e., SORNA and Alaska's SORA] group the offenders in categories instead of making individual determinations of dangerousness. Because *Doe* held that the regulatory scheme of the Alaska statute is not excessive in relation to its non-punitive purpose, it necessarily follows that SORNA's is not either"). Lymon has not shown that SORA's non-punitive purpose is a "sham or mere pretext." See *Smith,* 538 US at 103. The Michigan Legislature's decision to monitor this population is rational.

5. Like SORNA, SORA is not excessive in relation to its regulatory purpose.

Nor is SORA excessive in relation to its regulatory purpose. The requirements of SORA help achieve the Legislature's important purpose of protecting the public. The burdens of SORA are not excessive in light of this benefit, just as the federal courts have ruled in reviewing the federal SORNA.

The duration of registration – be it 15 years, 25 years, or for life as required by SORNA (see 34 USC 20915(a)) – is not excessive. As shown by the data cited in the Office of Justice Program's July 2015 report, "[s]tudies employing longer follow-up periods consistently report higher rates of recidivism." *Sex Offender Management and Assessment Initiative* (July 2015), p 4. See also *Smith*, 538 US at 104

("most reoffenses do not occur within the first several years after release," but may occur "as late as 20 years following release").

In accordance with these statistics, the federal courts have upheld SORNA, which includes the same requirements of registration and the same duration of registration. See, e.g., *Parks*, 698 F3d at 5–6 (CA 1) (on issue of whether SORNA is excessive, the First Circuit ruled that "we join every circuit to consider the issue and reject the main claim made by Parks") (citing four other circuits); *WBH*, 664 F3d at 852, 859–860 (CA 11) (finding SORNA not excessive in light of its non-punitive purpose). The excessiveness inquiry "is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy." *Smith*, 538 US at 105. Consistent with the holdings of the federal courts, like SORNA Michigan's SORA requirements do not constitute punishment.

* * *

One final point. The Sixth Circuit in 2020 reaffirmed the fact that the federal SORNA is not punitive in a challenge brought by a Michigan offender, convicted in 1993 of a listed offense. See *Willman,* 972 F3d at 825. Willman argued that he should not have to comply with federal SORNA where he was not required under Michigan SORA based on a 2019 judgment. *Id.* at 822. In reviewing the claim, the Sixth Circuit noted the independent nature of the federal SORNA obligations and that these duties – all basically the same obligations at issue here as a facial matter – did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. It ruled that way because "SORNA is not punishment for purposes of the Eighth Amendment." *Id.* at 825. That same is true for Michigan's new SORA.

CONCLUSION AND RELIEF REQUESTED

This Court should grant leave and reverse.

Respectfully submitted,

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