STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v **No. ******

CORA LYMON,
Defendant-Appellee.

Third Circuit Court No. 14-10811
Court of Appeals No. 327355

PLAINTIFF-CROSS APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Filed under AO 2019-6

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Case **Page**

Court Rule

Statutes

STATEMENT OF JURISDICTION AND JUDGMENT APPEALED

On June 16, 2022, the Court of Appeals, in an unanimous decision of the three judges: Presiding Judge Kirsten Frank Kelly, Judge Michael J. Kelly, and Judge Amy Ronayne Krause, affirmed defendant's convictions but reversed the condition of defendant's sentence requiring registration on the sex offender registry.[1] The Court held that the 2021 version of the Sex Offender Registration Act (SORA) constituted punishment and, as applied to a defendant who was not convicted of an offense containing a sexual component, was cruel or unusual under the Michigan Constitution.

The People now apply to this Supreme Court requesting leave to appeal the Court of Appeals decision on the issue of defendant's registration on the sex offender registry. The Supreme Court has jurisdiction over these proceedings through MCR 7.303(B)(1). Since the Court of Appeals order found the 2021 SORA legislation to be punishment and held a portion of that legislation to be unconstitutional, the People's application concerns an issue involving a substantial question about the validity of a legislative act, that has significant public interest, and is of major significance to the state's jurisprudence.[2]

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[1] *People v. Lymon*, ___ Mich App ___ (2022). Attached as Appendix A.
[2] MCR 7.305(B).

STATEMENT OF QUESTION PRESENTED

I

The Michigan Constitution prohibits cruel or unusual punishments. Here, the condition of defendant's sentence for a conviction of Unlawful Imprisonment requiring him to register under SORA was neither punishment nor cruel or unusual. Does defendant's registration under SORA violate the Michigan Constitution's prohibition against cruel or unusual punishments?

The trial court did not answer this question.

The People answer, "NO."

Defendant would answer, "YES."

The Court of Appeals answered: "YES."

STATEMENT OF FACTS

The People concur in the description of facts contained in the Court of Appeals opinion provided in Appendix A of this application:

"On September 5, 2014, Lymon confronted his wife, Jacqueline Lymon, with what he believed was proof that she was having extramarital affairs. His children, both of whom were minors, were present during the confrontation. When Jacqueline stated that she did not believe him, he said he had text messages to prove it, but, instead of showing her messages, he broke his phone by slamming it onto the table. He left the house to fix his phone, and when he returned, his argument with Jacqueline continued. Eventually, she stated that she wanted to end the marriage. Lymon called her a "cold-hearted bitch" and a "whore." He then fetched his handgun from the pantry. One of his children testified that Lymon "cocked" the gun, and the other saw a bullet enter the chamber when Lymon pulled the slide back.

Lymon pointed the gun at Jacqueline and made her sit at the table. He told her that she was "cold" and "should have left him a long time ago." Jacqueline stood up with her back to the door. One of the children moved to stand in front of her, so Lymon pointed the gun at his child. The child pleaded with him to calm down, saying, "dad, that's our mother. Let's not take it this far." Lymon sat down, but continued to hold the gun and complain that Jacqueline had "done him wrong for so many years." He again pointed the gun at his child and told him, "Well, you can get it, too."

Ranting and raving, Lymon forced Jacqueline and the children to move to the sofa in the family room. While pointing the gun at them, he told his children, "if I kill her, I'm gonna have to kill you guys, too." They described him as angry, noting that his veins were "popping out." They begged and pleaded for their lives, holding their mother and prayed to God that Lymon would not kill their mother. Lymon demanded, "What about me? Don't you love me?" The children, crying and upset, said that they did but that "right now" he was trying to kill their mother. Lymon made Jacqueline and the children get off the sofa and kneel in front of the fireplace. He again stated that he was going to kill them. One of the children testified that they were all screaming at the top of their lung, hoping that the neighbors would hear them.

Jacqueline tried to get Lymon to think about God, but he responded "F God." She told him that she thought "angels are here to protect us." Lymon warned that she was "gonna see angels; you're gonna see a lot of angels in a minute." He then stated, "This is it" and held the gun up. Jacqueline and the children feared they were about to die, but Lymon did not shoot them. Instead, he separated Jacqueline from the children. He paced and continued to make comments that if he killed Jacqueline, he had to kill the children because they "wouldn't be able to take it." He also said he was going to do "demonic … shit" and was "gonna burn this thing down after I kill you all."

Eventually, he had Jacqueline sit on the sofa next to him. He asked questions and when he did not like the answer, he would hit or slap the back of her head. One of the children told him to stop. Lymon pointed the gun at him and asked what he was going to do about it. He

continued to call Jacqueline a bitch and a whore while he had the gun pointed at her side.

At one point, Lymon put the gun in his mouth and told his family to pull the trigger. They did not do so. At another point, Lymon went into the kitchen. One of the children got up from the floor and ran out of the house. He described that he was "freaking out," "scared," and was having trouble breathing. He got to the driveway and stopped because his mother and brother were still inside. Lymon instructed Jacqueline to go and get the child. She went out and convinced him to return to the home because of what might happen to his brother if he did not. She also told him that they could calm Lymon down.

After they returned to the house, Lymon continued to put the gun in his own mouth and point it at his head. They told him not to, that they loved him, and asked him to calm down. He seemed to calm. He allowed everyone to sit on the sofa and placed the gun on a table near to him. He did not permit anyone to leave the room. When the children needed to use the bathroom, he told them that they could urinate against the wall or in a cup because he was "going to burn it down anyway." Around midnight, one of the children was able to retrieve his phone, set an alarm for the morning, and go upstairs. He did not call the police because he was afraid, and after a few minutes, Lymon ordered him to come back downstairs.

Lymon kept Jacqueline and the children in the family room until morning. At some point, someone turned on the television. No one paid attention to it, however, because Lymon still had the gun. The children slept fitfully. One explained that his difficulty sleeping was because he

thought he would get killed while he slept. In the morning, Lymon apologized; the children told him that he had just had a bad night and that they would simply forget about it. Lymon drove one child to work and again apologized to the other child and agreed that Jacqueline could take that child with her when she went to work. Later in the day, Jacqueline picked up both children and they made a police report."

On April 8, 2015, defendant was convicted of three counts of Torture, three counts of Unlawful Imprisonment, one count of Felonious Assault, and one count of Felony Firearm. He was sentenced on April 22, 2015 to three terms of 126 months to 20 years imprisonment for the Torture convictions, three terms of 7 to 15 years imprisonment for the Unlawful Imprisonment convictions, and a term of 2 to 4 years imprisonment for the assault conviction. Those terms would be served concurrent with each other. Defendant was also sentenced to a mandatory term of 2 years imprisonment for the Felony Firearm conviction, which would be served consecutive to the Torture sentences. Because two of the victims of the Unlawful Imprisonment convictions were minor children, he was required by statute to register under the Sex Offender Registration Act (SORA) for a period of 15 years.

Defendant appealed, of right, his convictions and sentences to the Michigan Court of Appeals. Defendant claimed that the prosecution produced insufficient evidence at trial to establish guilt beyond a reasonable doubt. Defendant also claimed that his registration on the sex offender registry was cruel and/or unusual punishment. Defendant's appeal was held in abeyance in the Court of Appeals for a number of years while the appellate courts considered other SORA-related issues.

After the abeyance was lifted, defendant filed a supplemental brief again claiming that the condition of his sentence requiring SORA registration was cruel and/or unusual punishment and also raising two challenges to the scoring of the legislative sentence guidelines. On June 16, 2022, the Court of Appeals, in a published opinion, held that the prosecution had presented sufficient evidence to support defendant's convictions. The Court also found that the current version of SORA, effective in 2021, constituted punishment. As applied to defendant, convicted of offenses lacking a sexual component, SORA registration was disproportionate and constituted cruel or unusual punishment under the Michigan Constitution.

The People now apply to this Supreme Court for leave to appeal the Court of Appeals opinion. While this Court, in *People v. Betts*,[3] found the previous version of SORA constituted punishment and violated the ex post facto clauses of the federal and state constitutions, the language of SORA has since been amended. The provisions that this Court, and the federal courts, cited as punitive in the 2011 SORA have been removed and the current version is nearly identical to the federal sex offender registry statute found, using the same standard employed by Michigan courts, not to be punishment. The Court of Appeals reversibly erred in both holding that the 2021 SORA was punishment and that it constituted cruel or unusual punishment as applied to defendant.

[3] *People v. Betts*, 507 Mich 527 (2021).

ARGUMENT

I.

The Michigan Constitution prohibits cruel or unusual punishments. Here, the condition of defendant's sentence for a conviction of Unlawful Imprisonment requiring him to register under SORA was neither punishment nor cruel or unusual. Defendant's registration under SORA does not violate the Michigan Constitution's prohibition against cruel or unusual punishments.

Standard of Review

This Court generally reviews both constitutional issues and the interpretation of statutes de novo.[4] However, defendant did not preserve his claim that his registration under SORA was unconstitutional by raising it in the trial court. Unpreserved constitutional issues are reviewed for plain error affecting substantial rights.[5] A defendant's substantial rights are affected by plain error is (1) there was an error, (2) the error was plain—that is, clear or obvious, and (3) the error prejudiced defendant. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings."[6]

Discussion

The Court of Appeals reversibly erred in finding that registration under the 2021 SORA constitutes punishment. The Court compounded

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[4] *People v. Fonville*, 291 Mich App 363, 376 (2011).
[5] *People v. Carines*, 460 Mich 750, 764 (1999).
[6] Id., at 763.

this error by further finding that, applying this "punishment" upon a defendant who was convicted of an offense that lacked a sexual component, was cruel or unusual in violation of Article 1, Section 16 of the Michigan Constitution. The Court reached its holdings by comparing the provisions of the 2021 SORA with the provisions of the 2011 SORA. This Court, as had the Sixth Circuit, found specific provisions of the 2011 SORA rendered the entirety of the statutory scheme to be punitive. While not every provision mentioned by this Court when addressing the 2011 SORA was excised from the 2021 SORA, those provisions the Court found the most punitive and which resulted in the Court's decision to find that the 2011 SORA, as a whole, constituted punishment were removed by the legislature. The Court of Appeals found that, since specific portions of the punitive 2011 SORA remained in the 2021 SORA, the latter statutory scheme was also punishment. The Court erred by flyspecking the 2021 SORA for any specific provisions remaining from the 2011 SORA that may be deemed punitive rather than analyzing the 2021 SORA on its own terms and determining if the Act, as a whole and not by its individual parts, was punishment. Only if defendant proved that the entirety of the Act was punishment, and cruel or unusual punishment at that, could the Court have found the 2021 SORA to be unconstitutional. Defendant failed in this burden and the Court of Appeals erred in its analysis. Had the Court properly considered the entire content of the 2021 SORA, it would have found that it is nearly identical to the statutory scheme contained in the sex offender registries of other jurisdictions, including the federal SORNA, which, after submitting to the same standard of analysis as that used by the Court

of Appeals in *Lymon* and this Court in *Betts*, were found not to constitute punishment. Without a finding of punishment, there was no reason to then determine if the 2021 SORA was cruel or unusual as applied to defendant.

A. Unlike the 2011 SORA, the 2021 SORA statutory scheme is not punishment.

To best understand the differences between the 2011 SORA that was found to be punishment and the 2021 SORA that does not constitute punishment, it is important to consider the evolution of the sex offender registry in Michigan, including the legal challenges to the Act. The Michigan Legislature first enacted a sex offender registration law in 1994.[7] The registry was first limited only to law enforcement, but later became available to the public.[8] Over the years, SORA was amended a number of times. Each amendment had aspects that were more onerous to registrants in some respects and less restrictive in others.

In 2006, the legislature created student safety zones which restricted registrants from living, working, or loitering within 1,000 feet of a school. These student safety zones remained in the Act with the 2011 amendments.[9] The Legislature in 2011 also created a tier system which categorized registrants into three publicly available tiers that were applied retroactively. The tier system was adopted, in part, to comply with the comparable federal SORNA legislation.[10] The 2011 SORA also added a retroactive in-person reporting requirement that

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[7] 1994 PA 295.
[8] 1999 PA 85.
[9] 2011 PA 17.
[10] 34 USC § 20911(1)-(4).

mandated a registrant to report in-person to the registering authority. The registrant was required to immediately report in-person certain activities or life events, such as 1) residence or place of domicile changes; 2) place of employment; 3) status of employment; 4) enrollment or unenrollment from an institution of higher education; 5) legal name changes; 6) extended travel plans; 7) establishment of email or social media presence; and 8) purchase or sale of a vehicle.[11] A registrant's willful violation of the registration requirements carried possible criminal penalties or the revocation of the registrant's probation, parole, or youthful trainee status.

In 2012, six registrants challenged the 2011 SORA in the federal courts, raising various constitutional claims. In 2015, in two opinions, the United States District Court for the Eastern District of Michigan found some portions of the Act constitutional and others unconstitutional. The decisions were appealed to the Sixth Circuit Court of Appeals which limited its opinion solely to the question of whether the 2011 SORA violated the Ex Post Facto Clause.[12] The Court relied heavily upon the United States Supreme Court decision in *Smith v Doe*.[13] In *Smith*, the Court set out the framework for determining whether a statutory scheme constituted punishment. First, the Court asked whether the legislature intended to impose punishment? If not, the determining question was whether the statutory scheme was so punitive either in purpose or effect as to negate the legislature's intent

[11] 2011 PA 17, 18.
[12] *Does #1-5 v. Snyder*, 834 F3d 696 (CA 6, 2016) (*Does I*).
[13] *Smith v. Doe*, 538 US 84, 123 S Ct 1140, 155 L Ed 2d 164 (2003).

to deem it civil.[14] This last question is answered by analyzing the statutory scheme using the *Mendoza-Martinez*[15] factors: 1) does the law inflict what has been regarded in our history and traditions as punishment? 2) does it impose an affirmative disability or restraint? 3) does it promote the traditional aims of punishment? 4) does it have a rational connection to a non-punitive purpose? and 5) is it excessive with respect to this non-punitive purpose?[16]

The Sixth Circuit found both the student safety zone provisions and the publication of the tier classification on the publicly accessible SORA website were akin to the traditional punishments of banishment and shaming.[17] Further, the requirement of immediate in-person reporting for a multitude of life events resembled the traditional punishments of parole or probation.[18] Accounting for the historical and traditions of punishment, the Sixth Circuit found both the 200 and 2011 SORA to be punitive. The Court next found the student safety zone, public listing of tier classification, and in-person reporting provisions imposed an onerous and affirmative disability or restraint.[19] The Sixth Circuit further found that, although it had a rational connection to a non-punitive purpose, the 2011 SORA advanced the traditional aims of punishment.[20] Finally, the Court determined that the Act dictated

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[14] *Smith*, supra at 92.
[15] *Kennedy v. Mendoza-Martinez*, 372 US 144, 83 S Ct 554, 9 L Ed 2d 644 (1963).
[16] *Smith*, supra at 97.
[17] *Does I*, supra at 701-702.
[18] *Id.*, at 703.
[19] *Id.*, at 704.
[20] *Id.*

where a registrant could live or work but had no positive impacts to counterbalance this burden.[21] In addition to the plainly punitive in-person reporting requirements, this provision made the Act excessive to its non-punitive purpose. The Sixth Circuit ultimately found that the cumulative effect of the student safety exclusion zones, the public posting of tier classifications, and the immediate in-person reporting of life events requirement amounted to punishment and, since the provisions of the Act were retroactive, constituted an ex post facto violation.[22]

In 2016, another federal class action complaint was filed raising the same grounds that the Sixth Circuit did not address in *Does I*.[23] This complaint was brought on behalf of various classes of registrants. After many delays to allow the Michigan Legislature to amend the Act in compliance with *Does I*, the District Court eventually entered an order finding the 2011 SORA to be punishment and several of its provisions unconstitutional as applied to subclass members.

In 2021, this Court considered whether the 2011 SORA violated the federal and state ex post facto clauses.[24] The Court's reasoning in *Betts* mirrored the reasoning of the Sixth Circuit in *Does I* and cited to the same provisions of the Act—the exclusionary zones, the publication of tier classifications, and the immediate in-person reporting

[21] *Id.*, at 705.
[22] *Id.*, at 705-706.
[23] *Doe v. Snyder*, (*Does II*) 449 F Supp 719 (E.D. Mich, 2020).
[24] *Betts*, supra.

requirements—as grounds to find the 2011 SORA to be punishment and a violation of ex post facto.

Finally, in 2021, a new SORA became effective.[25] The 2021 SORA amended and repealed the provisions of the old SORA that were found to be unconstitutional in *Does I*, *Does II*, and *Betts*. The new Act, among other changes, repealed the student safety zone provisions in their entirety; removed the retrospective in-person reporting requirements for email addresses and internet identifiers and permitted reporting to be done by means other than in-person reporting; removed the registration requirement for the vast majority of new juvenile offenders; removed the remaining youthful trainees from the public registry; and eliminated the publishing of tier information on the public SORA website.[26] In short, the new SORA removed or modified all provisions found to be unconstitutional in *Does I* and *Does II* and now largely mirrors the federal SORNA.[27]

The similarity between the current SORA and the federal SORNA is crucial. The federal SORNA has repeatedly sustained constitutional scrutiny employing the same *Smith* standard employed by this Court in *Betts* and the Court of Appeals in *Lymon*.[28] While the Michigan Constitution is broader than the federal constitution in the breadth of

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[25] 2020 PA 295.
[26] See, Appendix B: MSP Notice to Registrants.
[27] See Appendices C and D: Charts Comparing 2021 SORA with SORNA.
[28] See, e.g., *Willman v. Attorney General*, 972 F3d 819 (CA 6, 2020); *United States v. Under Seal*, 709 F3d 257 (CA 4, 2013); *United States v. Felts*, 674 F3d 599 (CA 6, 2012); *United States v. Juvenile Male*, 670 F3d 999 (CA 9, 2012); *United States v. Wass*, 954 F3d 184 (CA 4, 2020).

the "cruel or unusual" prong of the constitutional analysis,[29] no space exists between how either jurisdiction determines the issue of punishment. Both rely upon the standard set out in *Smith*. A statutory scheme cannot be deemed cruel and/or unusual punishment unless it first is determined that it is punishment. That the provisions of the 2021 SORA and the provisions of the federal SORNA bear such similarity, there should be no reason for courts to reach opposite conclusions as to whether those similar provisions constitute punishment.

Both this Court in *Betts* and the Supreme Court for the United States in *Smith* employed the same two-step inquiry for determining if a statutory scheme is punitive. First, this Court must determine "whether the Legislature intended the statute as a criminal punishment or a civil remedy."[30] If the Court determines that the legislative intent was to impose criminal punishment, then the inquiry ends, and the statutory scheme is deemed punishment. Here, this Court has already recognized that, in MCL 28.721a, the Legislature indicated its "intent in enacting SORA was the promotion of public safety, a nonpunitive goal."[31] The Legislature intended SORA to be civil regulation, rather than a criminal punishment.[32]

Once it is determined that the intent of the Legislature was to further a nonpunitive goal, the burden then falls to the party challenging the statute—here the defendant—to provide "the clearest

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[29] *People v. Bullock*, 440 Mich 15, 30 (1992).
[30] *Smith*, supra at 96; *People v. Earl*, 495 Mich 33, 38 (2014).
[31] *Betts*, supra at 548.
[32] *Id.*, at 549.

proof that the statutory scheme is so punitive either in purpose or effect to negate the State's intention to deem it civil."[33] "In determining whether defendant has satisfied this burden, we do not examine individual provisions of SORA in isolation but instead assess SORA's punitive effect in light of all the act's provisions when viewed as a whole."[34] As previously stated, this Court and the federal Supreme Court have both turned to the *Mendoza-Martinez* factors for determining if a defendant has met the burden of clearly proving that the statutory scheme is so punitive either in purpose or effect as to negate the nonpunitive intent. The particularly relevant factors for consideration are "whether, in its necessary operation, the regulatory 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."[35] These factors are neither exhaustive nor individually dispositive.

1. The 2021 SORA does not resemble traditional forms of punishment.

The first *Mendoza-Martinez* factor asks the court to consider "whether SORA has 'been regarded in our history and traditions as a form of criminal punishment.'"[36] Because sex offender registries are of

[33] *Kansas v. Hendricks*, 521 US 346, 361; 117 S Ct 2072; 138 L Ed 2d 501 (1997).
[34] *Betts*, supra at 549.
[35] *Smith*, supra at 97.
[36] *Betts*, supra at 550.

relatively recent origin, they have no direct analogies in our history or traditions.[37] The inquiry under this factor concerns whether the 2021 SORA resembles the traditional punishments of banishment, shaming, and parole. The People agree with the Court of Appeals that "the 2021 SORA does not resemble the traditional punishment of banishment."[38] But the People disagree with the Court of Appeals that the Act resembles shaming and parole.

The lower court's determination that the Act resembles shaming relies on a misconception. The Court believed that the 2021 SORA allows the posting of a registrant's Internet-based information, including email addresses, instant message addresses, and internet identifiers, on the publicly accessible website. "Because a registrant's Internet-based identifiers are no longer prevented from being included on the public website, the registrant is subjected to both ostracization in his or her community as well as while he or she interreacts with individuals using Internet-based communications and interactions. As a result, we conclude that the 2021 SORA continues to resemble the traditional punishment of shaming."[39] Contrary to the court's belief, email addresses and internet identifiers are not publicly posted.[40] Most importantly though, federal regulations prohibit the public posting of a registrant's internet identifiers.[41] Further, the personal information that is posted on the public website—name, address, vehicle

[37] *Smith*, supra at 97.
[38] *Lymon*, at *12.
[39] Lymon, at *13.
[40] See, the Public Registry at http://msp.com/Home/Search
[41] See, 34 USC §§ 20916(c), 20920(b)(4).

information, birthdate, height and weight, registering conviction, etc.--is easily discoverable through other means in an era where a plethora of information is available through simple Google searches or routine background checks run by employers, landlords, or real estate agents. While the public availability of this basic information may have a lasting and painful impact on the registrant, the consequences flow not from the SORA registration and its public posting, but from the fact of conviction, already a matter of public record.

The information posted to the public website is not analogous to shaming. The 2021 SORA no longer requires the public posting of tier classifications. The Act no longer requires youthful trainees or juvenile offenders to be posted on the public website. The only significant difference between the information currently publicly posted under the 2021 SORA and the information posted under the Alaska statute upheld in *Smith* is that the 2021 SORA requires registrants to provide the address of any post-secondary or trade school they currently attend. This information is not so dissimilar to the requirement of the Alaska statute requiring disclosure of the registrant's place of employment. The information required to be provided to the public is "accurate information about a criminal record, most of which is already public."[42] A state may maintain a publicly accessible website that publishes, as Michigan does, "the offenders' names, addresses, photos, physical descriptions, license numbers, places of employment, dates of birth, crimes of conviction, dates and places of conviction, and length of sentences, as well the offenders' compliance with the registration

[42] *Smith*, supra at 98.

requirements."[43] In contrast to traditional shaming punishments, the 2021 SORA does not make the publicity or any resulting stigma an integral part of the objective of the regulatory scheme.[44] Any resulting public shame or embarrassment is a "collateral consequence of a valid regulation" arising from the traditional insistence on public indictment, public trial, and public imposition of sentence.[45]

The 2021 SORA likewise does not bear resemblance to the traditional punishment of probation and parole. The new SORA removed any restrictions on where a registrant may work, reside, or remain. The Act also removed the requirement that registrants immediately report minor life changes in-person. In its analysis, the Court of Appeals cited to the requirements that registrants periodically report to law enforcement, that they pay registration fees, that law enforcement have the ability to investigate a registrant's status at any time, based upon an anonymous tip, and that the willful failure to comply with these requirements subjects a registrant to imprisonment as reasons why the Act resembles parole.[46] But these requirements are also part of the federal SORNA and have been recognized by the Sixth Circuit as not offensive to the Constitution.[47] The requirements of the 2021 SORA are clearly distinguishable from the characteristics of probation or parole. Individuals on probation or parole are subjected to mandatory conditions of release, regular supervision, and revocation of

[43] *Does I*, supra at 700.
[44] *Smith*, supra at 99.
[45] *Id.*
[46] *Lymon*, at *14.
[47] *Does I*, supra at 700.

release in the event of an infraction.[48] Those conditions typically involve significant limitations on the offender's daily life, "such as mandating employment, requiring consent before moving or changing jobs, and forbidding drug and alcohol use."[49] Similarly, law enforcement plays a far more active role in a probationer's life by overseeing their reentry, meeting regularly, and providing the required consent for any changes in the offenders living or working conditions. The 2021 SORA obligations fall short of the sort of active law-enforcement supervision typical of probation and parole. As mentioned, the new SORA removed any constraints on where a registrant may live, work, or loiter. The new SORA does not require the registrant to obtain permission before making basic decisions about his or her life. The 2021 SORA requires registrants to report changes in their address, employment, or other circumstances only if and after they occur.[50] Unlike with probation or parole, prior consent for or prohibitions on basic or minor life decisions do not exist. The new SORA does not resemble the traditional punishments of banishment, shaming, or parole.

2. The 2021 SORA is not an affirmative disability or restraint.

The next *Mendoza-Martinez* factor is how the effects of the 2021 SORA are felt by registrants—is it an affirmative disability or restraint? If the restraint is minor or indirect, its effects are not likely to be

[48] *Smith*, supra at 101.
[49] *Millard v. Camper*, 971 F3d 1174, 1182-1183 (CA 10, 2020).
[50] See, *Shaw v. Patton*, 823 F3d 556, 565 (CA 10, 2016).

considered punitive.[51] The Court of Appeals found that the 2021 SORA imposes significant affirmative obligations on registrants by mandating upon pain of imprisonment that they report common life changes within a short period of time, sometimes in person and sometimes in a manner not specified in statute. The court cited to requirements that registrants report life events within three days, including the reporting of changes to the respondent's Internet identifiers. The Court of Appeals found that, although the time for reporting changes to Internet identifiers had been extended from "immediately" to three days, the burden was still onerous because, as this Court observed in *Betts*, given the ubiquity of the Internet in daily life, this requirement might be triggered dozens of times within the year.[52] the court also cited to the requirement that registrants make periodic in-person reports to law enforcement. The court found this to be onerous to those who might have difficulty in traveling, such as health issues, lack of access to public transportation, and the lack of funds for private transportation.[53] Finally, the court cited to the potential for imprisonment if the registrant willfully fails to comply with the requirements.

The Court of Appeals relied heavily upon this Court's analysis in *Betts* of the 2011 SORA for why the reporting of life events were onerous. Yet, the Court of Appeals ignored a crucial fact specifically cited by this Court in *Betts* that differentiated the provisions of the 2011 SORA with the provisions contained in the 2021 SORA. The reporting requirements

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[51] *Smith*, supra at 100; *Lymon*, at *14.
[52] *Lymon*, at *15, citing *Betts*, supra at 555.
[53] *Lymon*, at *15, citing *Betts*, supra at 556.

of the 2011 SORA were "particularly onerous" because they were required to be done in-person.[54] The 2021 SORA removed the in-person requirement and allowed the reporting of changes to life events in another manner "as prescribed by the department." While the Act does not specify what these other manners might be, the Michigan State Police has made it clear that these changes can be reported via first-Class Mail, by simply dropping the form off at registering authority, or in-person.[55] The ability to make these reports without appearing in-person, dramatically decreases the burden that is placed on registrants.

The Court of Appeals also ignored the determination of the Sixth Circuit that SORA's periodic reporting requirements do not offend the Constitution.[56] SORA's periodic in-person reporting of registrants serves the legitimate purpose of establishing that the individual is in the vicinity and not in some other jurisdiction and confirms the registrant's identity and required information.[57] This purpose is rationally related to the Legislature's stated non-punitive intent to provide an appropriate, comprehensive, and effective means for the public and law enforcement to monitor individuals convicted of specific legislatively enumerated crimes. Admittedly, while periodic in-person reporting may be an inconvenience to the registrant, to some registrants even a substantial inconvenience, that burden is not enough to transform the

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[54] See, *Betts*, supra at 555-556 ("Particularly onerous was the requirement in former MCL 28.725(1)(f) of *immediate in-person* reporting…")("Cumulatively, these *frequent in-person* reports imposed a burden on registrants…")
[55] See Appendix B: MSP Notice to Registrants.
[56] *Does I*, supra at 700.
[57] See, *United States v. Parks*, 698 F3d 1, 6 (CA 1, 2012).

regulation into a punishment.[58] "To appear in person to update a registration is doubtless more inconvenient than doing so by telephone, mail or web entry; but it serves the remedial purpose of establishing that the individual is in the vicinity and not some other jurisdiction where he may not have registered, confirms identity by fingerprints and records the individual's current appearance."[59] The 2021 SORA provision is comparable to the periodic in-person requirement of the federal SORNA, which has been specifically determined not to constitute an affirmative disability or restraint.[60]

Nothing in the reporting requirements of the 2021 SORA constitutes an affirmative disability or restraint on the registrants. The 2021 SORA is significantly different than the 2011 SORA analyzed in *Betts*. For common life changes, the registrant is relieved of the burden of in-person reporting and, can satisfy the requirement remotely. The onerous burden of immediately reporting changes to Internet identifiers has been modified to allow the registrant three days to report and to do so without appearing in-person. The periodic in-person reporting requirement, although an inconvenience, does not rise to the level of punishment. Contrary to the Court of Appeals determination, to the extent the reporting requirements impose a disability or restraint, it is minor and non-punitive.

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[58] See, e.g., *Parks*, supra; *Doe v. Cuomo*, 755 F3d 105, 112 (CA 2, 2014); *Under Seal*, supra at 265; *Hatton v. Bonner*, 356 F3d 955, 964 (CA 9, 2003); *United States v. WBH*, 664 F3d 843, 855 (CA 11, 2011); *Shaw v. Patton*, supra at 568-569.

[59] *Parks*, supra at 6.

[60] *Felts*, supra at 605-606.

3. Like the 2011 SORA, the 2021 SORA can be found to promote traditional aims of punishment.

The next *Mendoza-Martinez* factor is whether the 2021 SORA promotes the traditional aims of punishment: retribution and specific and general deterrence. The Legislature made its intent clear that SORA was to prevent and protect against the commission of future criminal sexual acts by convicted sex offenders.[61] Yet, to "hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' … would severely undermine the Government's ability to engage in effective regulation.'"[62] This Court has already determined that the Legislature's expressed deterrent intent is a main feature of SORA.[63] Since the 2021 SORA did not amend this expressed intent, it appears that deterrence remains a main feature of the statutory scheme. Further, the ongoing obligations under the 2021 SORA all stem from the registrant's prior commission of a legislatively enumerated offense which this Court has construed as promoting the aim of retribution.[64] As such, there is support that the 2021 SORA promotes the traditional aims of punishment. However, as Smith instructed, this one factor is not determinative of whether the statutory scheme as a whole is punishment.[65]

4. The 2021 SORA has a rational connection to a non-punitive purpose.

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[61] MCL 28.721a; *Betts*, supra at 556-557.
[62] *Smith*, supra at 102.
[63] *Betts*, supra at 557.
[64] *Id.*
[65] *Smith*, supra at 97.

The next *Mendoza-Martinez* factor is whether there is a rational connection to a non-punitive purpose. As previously stated, the Legislature set out its non-punitive purpose in MCL 28.721a. The purpose of SORA is to keep the public safe, attempt to prevent recidivism, and provide an "appropriate, comprehensive, and effective means to monitor those persons who pose … a potential danger" to the people of Michigan. This intent mirrors the Congressional intent in the federal SORNA to create a non-punitive regulatory framework to keep track of sex offenders.[66] This Court in *Betts*, the Court of Appeals in *Lymon*, and the Sixth Circuit in *Does I* have all agreed that SORA, by identifying potentially recidivist sex offenders and alerting the public, has a rational connection to this non-punitive purpose.

5. **The 2021 SORA is not excessive**.

The last *Mendoza-Martinez* factor is whether the regulatory means chosen are reasonable in light of the non-punitive objective.[67] This factor is analyzed for what is reasonable and not "whether the legislature has made the best choice possible to address the problem it seeks to remedy."[68]

The Court of Appeals recognized that the restraints placed upon registrants in the 2021 SORA were lesser than those imposed by the 2011 SORA. Still, the court found that the restraints were excessive. The court cited to studies supporting "the uncertainty of the 2021 SORA's efficacy at decreasing recidivism" and the stigma of branding registrants

[66] *Under Seal*, supra at 264-265.
[67] *Smith*, supra at 105.
[68] *Id.*

as a menace by the state without an individualized assessment of a registrant's risk of recidivism.[69]

The Court of Appeals suggests that the registry is excessive because, according to studies and statistics, recidivism rates might be "overblown" or some people on the registry have a lower likelihood of reoffending. However, the Court of Appeals seemingly misses the point that perhaps the reason why recidivism rates may be less or registrants less likely to reoffend is because the registry is effective in its purpose. Because individuals are on the registry, the public is aware of potential danger and more likely to avoid it. Because individuals are on the registry they might be more likely to comport their behavior in compliance to avoid further legal issues. The end result of registration is that the likelihood of reoffending, as compared to the rates among those not on the registry, is lowered. The studies arguing to the uncertainty of SORA's effectiveness also ignore the fact that the rates of recidivism reported underestimate the actual rate. The reported recidivism rates are tracked by how many offenders return to the courts on new charges. Yet, it is extremely common knowledge that the number of sexual assaults committed far outpaces the number of those assaults reported and prosecuted. For a myriad of complex social, psychological, and personal reasons, countless numbers of sexual assault victims simply do not report their assaults. Further, arguments that recidivism rates might be "overblown" and that the rates are actually lower diminish the value of any reduction in the rate of recidivism caused by the registry. Every sexual assault and every enumerated crime against

[69] *Lymon*, at *18.

a minor has tremendous meaning, not just to the victim of the offense but to every person in this state. Preventing an offender from reoffending means something to the person who might otherwise find an intruder in their bedroom at night, or be covertly drugged at a bar, or forced into an unconsented to encounter with a date, friend, or partner. Preventing an offender from reoffending means something to the child who might be kidnapped or forcibly constrained by a stranger or whose sense of trust and innocence may be shattered by a parent, relative, neighbor, or teacher. Preventing an offender from reoffending matters to the citizens who can avoid the expenditure of resources necessary to police, arrest, and prosecute future offenses. Every single instance where the registry keeps the public safe, prevents recidivism, and monitors potential dangers to the public has monumental meaning and value. The regulatory means of the 2021 SORA are reasonable to achieve the highly valuable and non-punitive objective of reducing recidivism.

The 2021 SORA is not excessive simply because an individual assessment of each registrant's likelihood to reoffend is not employed. The United States Supreme Court has specifically rejected finding that a registry is unconstitutional because registrants' risk to the public are not individually assessed. "The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment [under review for constitutionality]."[70]

[70] *Smith*, supra at 104.

6. Consideration of all the Mendoza-Martinez factors confirms that the 2021 SORA is not punishment.

The legislative changes in the new SORA addressed those provisions of the 2011 SORA found to be punitive and excessive and eliminated them. The resulting Act closely mirrors the provisions of the federal SORNA that have been repeatedly upheld as non-punitive.[71] A cumulative consideration of the Mendoza-Martinez factors reveals that the collective requirements of the new SORA are appropriate, effective, and reasonable to address the clearly stated non-punitive civil intent of the Legislature. Defendant has not clearly proven the effects of the 2021 SORA's statutory scheme negate the intent to establish a civil regulatory scheme. The new SORA is not punishment and therefore cannot be found to be cruel or unusual punishment under the Michigan Constitution.

B. Even if the statutory scheme could be deemed punishment, applying the 2021 SORA to defendant for a conviction that does not contain a sexual element was not cruel or unusual.

Assuming, for the sake of argument, that the 2021 amendments to SORA amount to punishment, the requirement that defendant register is not cruel or unusual. That is, SORA registration is not "unjustifiably disproportionate" to a conviction for the offense of unlawful imprisonment of a minor.[72] By including it as a "listed

[71] See, e.g.. *Willman*, supra; *Under Seal*, supra; *Felts*, supra; *Wass*, supra.
[72] *Bullock*, supra at 30.

offense," our Legislature clearly "deemed registration for those convicted of [unlawful imprisonment of a minor] to be a necessary measure to protect the safety and welfare of children of this state."[73] Importantly, "it is well settled that legislatively mandated sentences are presumptively proportional and presumptively valid."[74] In adopting the principle of proportionality for sentences, this Court explained in *People v Milbourn* that the Legislature itself, in developing a sentencing scheme, employed this principle:

> First, the Legislature has endeavored to provide the most severe punishments for those who commit the most serious crimes. The crime of murder, for example, is punishable by a longer term than is the lesser included crime of assault. Second, offenders with prior criminal records are likewise subject to harsher punishment than those with no prior convictions, as reflected in the general and specific habitual offender provisions of the penal statutes. These two elements combine to form what might be called the "principle of proportionality." [75]

In a similar way, SORA is structured so that an offender of a less-severe crime—for instance, fourth-degree criminal sexual conduct—is required to register for a shorter period than someone convicted of a more-severe crime like first-degree criminal sexual conduct. Tier I offenders must only register for 15 years, while Tier III offenders must

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[73] *Fonville*, supra at 380.
[74] *People v Eliason*, 300 Mich App 293, 317 (2013), quoting *People v Brown*, 294 Mich App 377, 390 (2011) (cleaned up).
[75] *People v Milbourn*, 435 Mich 630, 650 (1990).

register for life.[76] Even more, lifetime electronic monitoring is required only for those convicted of the most egregious offenses of first and second-degree criminal sexual conduct.[77] In addition, like habitual felonious offenders, defendants convicted of a subsequent listed offense are subject to longer registration periods.[78] An individual registered as a Tier I offender who commits a subsequent listed offense must register as a Tier II offender; a Tier II offender who commits a subsequent listed offense must register as a Tier III offender.[79] Implicit in this Court's holding in *Milbourn* "is a presumption not only of proportionality for a legislatively mandated sentence, but of validity as well."[80] It follows that the Legislature's inclusion of unlawful imprisonment of a minor as an offense requiring SORA registration is not grossly disproportionate, but presumptively proportional and valid.

In Michigan, whether a punishment is cruel or unusual requires consideration of four factors to determine if it is "unjustifiably disproportionate" to the offense committed:[81] (1) a comparison of "the gravity of the offense and the harshness of the penalty," (2) a comparison of "the sentences imposed on other criminals in the same jurisdiction," (3) a comparison of "the sentences imposed for commission of the same crime in other [states]," and (4) whether the goal of the punishment is

[76] MCL 28.725(11), (13). Tier II offenders must register for 25 years. MCL 28.722(12).
[77] MCL 750.520n.
[78] MCL 28.722(s)(i); MCL 28.722(u)(i).
[79] MCL 28.722(s)(i); MCL 28.722(u)(i).
[80] *People v Williams*, 189 Mich App 400, 404 (1991).
[81] *Bullock*, *supra*.

rehabilitation.[82] To overcome the presumption that SORA registration for an unlawful-imprisonment-of-a-minor conviction, "defendant must present *unusual circumstances* that would render the presumptively proportionate sentence disproportionate."[83]

1. SORA registration is not harsh when the gravity of defendant's offense is considered.

In support of his claim that the gravity of his unlawful imprisonment conviction is outweighed by the harshness of the requirement that he register under SORA, defendant relied on *People v Dipiazza*, from which this case is easily distinguished.[84] In *Dipiazza*, the defendant was an 18-year-old boy who had a consensual sexual relationship with his 15-year-old girlfriend, whom he later married.[85] He was adjudicated under HYTA[86] for attempted third-degree criminal sexual conduct[87] and the charge was dismissed after he successfully completed a period of probation.[88] On appeal, the Court of Appeals held that the requirement that the defendant register under SORA for 10 years amounted to cruel and unusual punishment because the numerous, lasting negative effects of SORA were an overly harsh

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[82] *Bullock*, *supra* at 33-34 (cleaned up).
[83] *People v Bowling*, 299 Mich App 552, 558 (2013) (quotation marks and citation omitted; emphasis added).
[84] *People v Dipiazza*, 286 Mich App 137 (2009).
[85] *Dipiazza*, *supra*, at 140.
[86] Holmes Youthful Trainee Act, MCL 762.11 *et seq*. HYTA is a diversion program that allows eligible youthful offenders dispose of a criminal charge, while still avoiding a criminal conviction.
[87] MCL 750.520d; MCL 750.92.
[88] *Dipiazza*, *supra* at 140.

penalty unique to Michigan and, as the defendant posed no risk of reoffending, SORA registration did not serve rehabilitation.[89]

In finding the defendant's conduct in *Dipiazza* was not very grave, the court pointed out there was only a slight age difference between the defendant and the victim, their relationship was consensual—indeed even approved by their parents, and the defendant eventually married the victim.[90] Conversely, here, though not sexual in nature, the gravity of defendant's offense was far more severe. "The gravity of an offense can be assessed by comparing the harm caused to the victim or society and the culpability of the offender with the severity of the penalty."[91] Defendant both caused and threatened harm and violence to the victims. He is the father of the minor victims—a grown man, significantly older, and presumably one of the most influential people in their lives. The actual circumstances of this case are far more heinous than those in *Dipiazza*. Defendant held the victims hostage for roughly 12 hours. Not only did he do so without their consent, but he spent most of that time terrorizing his sons (and wife) by repeatedly threatening to kill them and burn the house down. 4/7/2015, 121-122, 152-161, 182-189. What is more, defendant was armed during the entire crime, which only added to the power imbalance that he had over the victims. 4/7/2015, 112-113, 153, 189. He displayed a willingness to follow through with his threats by ordering the victims to get on their knees and huddle together on the

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[89] *Dipiazza*, *supra*, at 155-156.
[90] *Dipiazza*, *supra*, at 154.
[91] *People v Carmony*, 127 Cal App 4th 1066, 1077; 26 CalRptr3rd 365 (2005). The People recognize that a decision from the Third District California Court of Appeal is not binding on this Court. That court's explanation for how to assess the gravity of an offense, however, may be helpful and persuasive.

floor; he proceeded to point a gun at their heads, making the victims fear they would be shot "execution style." 4/7/2015, 116-117, 154-155. Defendant even put the barrel of the gun in his own mouth and begged his sons and wife to pull the trigger. 4/7/2015, 119, 157, 184. He had them under such control that he forced the minor victims, I.L. and S.L.,[92] to urinate in cups in the family room, as opposed to allowing them to use the men's room. 4/7/2015, 121, 156, 185. Defendant terrorized the victims to the extent that they were afraid to call for help or even sleep. 4/7/2015, 121, 123-124, 160-162, 183.

Additionally, here, unlike *Dipiazza*, defendant was not eligible for HYTA, as he was twice the maximum age to qualify for the diversion program.[93] Indeed, he was sentenced to 7 to 15 years' incarceration for the crime of unlawful imprisonment—on top of 2 years for felony-firearm. 4/22/2015, 24-25. When the most serious conviction is considered, defendant will not even be eligible for parole until he has served 12.5 years. Though defendant contended in his Court of Appeals brief that his 15-year period of SORA registration[94] will not begin until he is released from prison, he neglected to acknowledge that he is not currently incarcerated, as he was granted bond pending appeal by the trial court. 10/28/2020, 21. Since the time to register under SORA is between conviction and sentence,[95] his registration period has already

[92] Throughout this brief, for the protections of their identities, the names of minors are abbreviated to their respective initials.
[93] MCL 762.11, as amended, 2004 PA 239. Defendant was 43 years old at the time of the crime.
[94] MCL 28.725(11).
[95] MCL 28.724(5).

commenced.[96] Moreover, the statutory maximum in Michigan for an unlawful-imprisonment conviction is 15 years' imprisonment.[97] Considering the gravity and heinousness of defendant's crime, the penalty of 15 years' SORA only requires defendant to register—not remain in prison. Compared to the gravity of defendant's crime, therefore, registration is not excessively harsh.

2. SORA registration, though not imposed for a majority of crimes, is not the only mandatory penalty in Michigan.

To reiterate, the crime for which defendant must register under SORA, unlawful imprisonment, is a Tier I offense. Tier I offenses are the least severe and require 15 years' registration, as opposed to 25 years or lifetime registration.[98] True, a majority of criminal offenses in Michigan do not require SORA registration at all. But the fact that it is a mandatory penalty is by no means novel, as numerous other offenses carry statute-mandated punishments.[99] Moreover, as the Court of Appeals pointed out in *Fonville*, the intended purpose of the Legislature,

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[96] MCL 28.725(14). It should be noted that a search of SORA reveals that defendant is not registered, despite the fact that MCL 28.724(5) specifically states registration should have been completed between conviction and sentence. The Michigan State Police has confirmed that defendant is not registered, but no explanation was provided for why that is the case.

[97] MCL 750.349b(3).

[98] MCL 28.725(11), (12), and (13).

[99] See, MCL 750.316(1) (mandatory life imprisonment without parole for first-degree murder conviction); MCL 750.227b(1) and (2) (mandatory prison terms for felony-firearm convictions); MCL 769.12(1)(a) (mandatory minimum of 25 years of imprisonment for fourth-habitual-violent offenders); MCL 750.520b(2)(b) and (c) (mandatory minimum of 25 years' imprisonment for convictions of first-degree criminal sexual conduct with a victim under 13 years old).

when it enacted SORA, was to "protect public safety and monitor those persons who pose a potential danger to children"[100] because:

> The legislature has determined that a person who has been convicted of committing an offense covered by this act [(SORA)] poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state.[101]

Moreover, while a majority of the "listed offenses" included in MCL 28.722 involve a sexual element or nature, many do not. In addition to unlawful imprisonment of a minor, such listed, non-sexual offenses that require SORA registration include tier I crimes requiring 15 years of registration—indecent exposure[102] and voyeurism of a minor[103]—tier II crimes requiring 25 years of registration—forced labor of a minor,[104] accosting a child for an immoral purpose,[105] and use of the internet or computer to commit a crime[106]— and tier III crimes requiring lifetime registration—kidnapping[107] and leading, taking, carrying away a minor.[108] Accordingly, compared to other offenses in Michigan, SORA registration for defendant's conviction of unlawful imprisonment of a minor, though non-sexual, is not unusual.

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[100] *Fonville*, *supra*, at 380.
[101] *Fonville*, *supra*, at 380.
[102] MCL 750.335a.
[103] MCL 750.539j.
[104] MCL 750.462e.
[105] MCL 750.145a.
[106] MCL 750.145d.
[107] MCL 750.349.
[108] MCL 750.350.

3. Michigan is one of many states that require SORA registration for unlawful-imprisonment-of-a-minor convictions.

As for whether other states require sex-offender registration for unlawful imprisonment, said crime was added to the listed offenses requiring SORA registration in 2011. That year, the Michigan Legislature made extensive changes to SORA in order to comply with the federal counterpart, SORNA ("Sex Offender Registration and Notification Act") requirements. Pursuant to federal statute, any state that "fails to substantially implement" the federal counterpart to SORA "shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction."[109] Since SORNA required individuals convicted of an offense involving false imprisonment of a minor to register as a sex offender, the State of Michigan amended SORA to include it as well.[110] Indeed, Michigan is one of 18 states, 136 tribes, and 4 territories that have "substantially implemented SORNA's requirements."[111] More specifically, over 25 percent of states in the U.S. require a defendant convicted of unlawful imprisonment of a minor, regardless of whether the victims are the offender's children, to register as a sex offender.[112] As a result,

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[109] 34 USC 20927(a).

[110] 42 USC 16911(7)(B); MCL 28.722(s)(iii), as amended 2011 PA 17.

[111] See, *Jurisdictions That Have Substantially Implemented SORNA*, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, <https://smart.ojp.gov/sorna/substantially-implemented> (accessed March 18, 2022).

[112] While SORNA carves out an exception for parents convicted of unlawfully imprisoning their children, several states—some within substantial compliance, like Michigan, and some not in substantial compliance with

Michigan's registration requirement is not materially different from other states' sex-offender registries. That is, the requirement that those convicted of unlawful imprisonment of a minor register under SORA is not unique or unusual to Michigan.

Even more, other jurisdictions have addressed the constitutionality of registration statutes where the crime contained no sexual element, and the circumstances of the crime contradicted any sexual motive. Many have concluded that sex-offender registration for defendants convicted of non-sexual offenses against minors is not a constitutional violation. The United States District Court, in *Collins v Thomas*, held that Alabama's sex-offender registration statute did not violate due process because the purpose of the ASORCNA 'is to assist law enforcement in carrying out their duties and, *most importantly*, to protect the public, *especially children*' and 'further the primary governmental interest of protecting vulnerable populations, *particularly children*,' by 'monitoring and tracking' individuals convicted of sex offenses as defined by state law. 'The . . . intent in imposing certain [restrictions] on sex offenders is not to punish sex offenders but *to protect the public and, most importantly, promote child safety*.' . . . In light of

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SORNA—require registration regardless of the relationship status between the offender and the victim. See, e.g., Md Code Ann 11-701(q)(3) (Maryland); Minn Stat Ann 243.166 subd. 1b(2)(ii) (Minnesota); Miss Code Ann 45-33-23(h)(i) (Mississippi); Mo Rev Stat 589.414(5)(e) (Missouri); NH RSA, tit LXII, § 651-B:1(VII)(a) (New Hampshire); Ohio Rev Code Ann 2950.01(E)(1)(e) (Ohio); Pa Consol Stat 9799.14(b)(2) (Pennsylvania); RI Gen Laws 11-37.1-2(f)(1) (Rhode Island); SDCL 22-24B-1(8) (South Dakota); Tex Crim Pro Code Ann 62.001(5)(E) (Texas); Vt 32 VSA 5401(10)(B)(ii) (Vermont); Va Code Ann 9.1-902(A) (Virginia); Wy Stat Ann, 7-19-301(a)(iv)(C) (Wyoming).

the foregoing, the court finds that ASORCNA is not violative of substantive due process.[113]

Also, in an Alabama federal district court, in *Waldman v Conway*, the court held the defendant, who was convicted of kidnapping a minor, and admitted that he did so for ransom or to use the child as a shield, could "hardly argue that the State shocks the conscience by imposing restrictions on his release in the name of protecting children."[114] The Arizona Court of Appeals held in *State v Coleman*, "[W]e conclude that requiring [the defendant] to register based on his conviction for unlawful imprisonment of a minor who is not his child without a finding that it was committed with sexual motivation does not violate either equal protection guarantees or substantive due process."[115] The Georgia Supreme Court held in *Rainer v State* that the requirement of sex offender registration for the defendant's conviction of false imprisonment of a minor, though it did not involve sexual activity, was not cruel and unusual punishment and did not violate substantive or procedural due process.[116] The Illinois Supreme Court held in *People v Johnson* that, "regardless of whether [the offender's] conduct was sexually motivated," registration as a sex offender for his aggravated kidnapping of a minor (by a nonparent) conviction was not a violation of due process.[117] The Kentucky Court of Appeals held in *Moffitt v Commonwealth* that because the purpose of Kentucky's sex offender

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[113] *Collins v Thomas*, No. 212-CV-950-WHA, 2015 WL 5125750, at 7 (MD Ala Aug 31, 2015) (citations omitted, emphasis in original).
[114] *Waldman v Conway*, 871 F3d 1283, 1293 (11th Cir 2017).
[115] *State v Coleman*, 241 Ariz 190, 196; 385 P3d 420, 426 (Ct App 2016).
[116] *Rainer v State*, 286 Ga 675; 690 SE2d 827 (2010).
[117] *People v Johnson*, 225 Ill2d 573; 870 NE2d 415 (2007).

registration was the protection of children, it was irrelevant whether the defendant's conviction of child kidnapping included a sexual component (even though, in this case, it did), and there was no violation of substantive or procedural due process.[118] In *Thomas v Mississippi Dep't. of Corr.*, the Mississippi Supreme Court held, "Therefore, our statute and the federal statutes are not in 'conflict' such that our statute violates [the defendant's] constitutional rights, as [the defendant] contends. Rather, our Legislature decided to expand the definitions found in the federal statutes to include, as a sex offense subject to classification and registration, the crime of kidnapping a minor under the age of sixteen. The Legislature's expansion of the sex-offender registration laws was permissible and not violative of [the defendant's] constitutional rights."[119] The New York trial court's ruling in *People v Cintron*, 827 NYS2d 445, 460 (NY Sup Ct 2006) was upheld on appeal: "Treating kidnap[p]ing and unlawful imprisonment of a minor as sex offenses subject to registration and notification is rationally related to the legitimate governmental objectives underlying the adoption of JWA[120] and SORA."[121] In *State v Sakobie*, the North Carolina Court of Appeals upheld the requirement that the defendant register as a sex offender for his conviction of kidnapping for nonsexual purposes.[122] Finally,

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[118] *Moffitt v Commonwealth*, 360 SW3d 247, 255-257 (Ky Ct App, 2012).
[119] *Thomas v Mississippi Dep't. of Corr.*, 248 So3d 786, 790-791 (Miss, 2018).
[120] Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (JWA) conditioned federal funding on states establishing "programs that require a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense" to register with the state. 42 USC 14071.
[121] *People v Cintron*, 13 Misc3d 833; 827 NYS2d 445, 460 (2006).
[122] *State v Sakobie*, 165 NC App 447; 598 SE2d 615 (2004).

Wisconsin Supreme Court, in *State v Smith*, concluded that, "The legislature opted not to exempt [the defendant], and others like him, from the registration requirement despite the fact that his crime of false imprisonment of a minor *was not of a sexual nature*. We must afford deference to the words chosen by the legislature and *cannot conclude* that requiring registration of such offenders *is not rationally related to a legitimate government interest*."[123] Clearly the requirement that those convicted of unlawful imprisonment of a minor register under SORA is not unique or unusual to Michigan.

4. SORA registration may have a deterrent effect on defendant.

While this Court observed in *Betts* that there is some uncertainty surrounding the rehabilitative effects of SORA, the requirement that defendant register for 15 years is not unjustifiably disproportionate because it may have a deterrent effect on him. Defendant's conviction, though it lacked a sexual component, nonetheless demonstrated the fact that he poses a risk to the health, safety, morals, and welfare to children.[124] When released from MDOC, defendant will be monitored, which will serve as a deterrent for him to reoffend.

[123] *State v Smith*, 323 Wis2d 377; 780 NW2d 90, 100 (2010) (emphasis added).
[124] *Fonville*, *supra* at 380.

RELIEF

THEREFORE, the People request that this Honorable Court affirm defendant's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with AO 2019-6. The body font is 12 pt. Century Schoolbook set to 150% line spacing. This document contains 9903 countable words.

/s/ *Jon P. Wojtala*

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