State of Michigan

In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

Robert Kardasz

Defendant-Appellant.

MSC No. 165008

COA Nos. 343545 & 358780

Macomb County Circuit Court

Case No. 17-2252-FC

Robert Kardasz's
Supplemental Brief

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Table of Contents

Index of Authorities

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

Statement of the Questions Presented

First Question

Does 2021 SORA constitute punishment where nearly all the punitive portions this Court identified in *Betts* remain, and the features that made it punishment in *Lymon* apply equally to sexual offenses?

Mr. Kardasz answers: Yes.

The Court of Appeals answered: Yes.

The trial court did not answer.

Second Question

Is SORA's mandate that Mr. Kardasz register as a sex offender for life, without an individualized assessment of risk or any means for him to petition for removal, a disproportionate sentence that constitutes cruel or unusual punishment in violation of the Michigan Constitution?

Mr. Kardasz answers: Yes.

The Court of Appeals answered: No.

The trial court did not answer.

Third Question

Does SORA's mandate that Mr. Kardasz register as a sex offender for life, without an individualized assessment of risk or any means for him to petition for removal, violate the Federal Constitution's prohibition on cruel and unusual punishment?

Mr. Kardasz answers: Yes.

The Court of Appeals answered: No.

The trial court did not answer.

Fourth Question

Does the requirement that Mr. Kardasz submit to lifetime electronic monitoring without an individualized assessment of risk and no means of petitioning for cessation constitute cruel or unusual punishment in violation of the Michigan Constitution?

Mr. Kardasz answers: Yes.

The Court of Appeals answered: No.

The trial court did not answer.

Fifth Question

Does the requirement that Mr. Kardasz submit to lifetime electronic monitoring without an individualized assessment of risk and no means of petitioning for cessation constitute cruel and unusual punishment in violation of the Federal Constitution?

Mr. Kardasz answers: Yes.

The Court of Appeals answered: No.

The trial court did not answer.

Sixth Question

Does the mandate that Mr. Kardasz submit to lifetime electronic monitoring, without an individualized assessment of risk or opportunity

to petition for cessation, constitute an unreasonable search in violation of the Michigan and United States Constitutions?

Mr. Kardasz answers: Yes.

The Court of Appeals answered: No.

The trial court did not answer.

Statement of Facts

Robert Kardasz was charged with two counts of criminal sexual conduct in the first degree (CSC1) for allegedly sexually abusing the complainant, his then-five-year-old daughter. After deliberating, the jury hung on the first CSC count, but convicted Mr. Kardasz of the second CSC count. T V 10.[1] The trial court sentenced Mr. Kardasz to a minimum of 30 years in prison without articulating a reason why it was imposing a sentence above the mandatory minimum of 25 years and the sentencing guidelines. *Id.* On appeal, the Court of Appeals affirmed Mr. Kardasz's conviction, but remanded with instructions to the trial court to either impose the 25-year mandatory minimum sentence or explain why a different sentence was proportionate. *Id.* The trial court ultimately imposed the mandatory minimum sentence of 25 years. RS 7. The trial court also ordered that Mr. Kardasz, pursuant to the Sex Offenders Registration Act (SORA), MCL 28.72 *et seq.*, register as a sex offender for life and be subject to lifetime electronic monitoring (LEM). RS 7-8. Mr. Kardasz challenged the constitutionality of lifetime registration and LEM, but the Court of Appeals upheld their constitutionality and affirmed Mr. Kardasz's conviction.

Mr. Kardasz filed an application for leave to appeal and this Court held his case in abeyance while it heard *People v Lymon* (Docket No. 164685). See 9/13/23 Order. This Court subsequently determined in *Lymon* that the application of SORA to non-sexual offenders constituted

[1] Mr. Kardasz's trial will be cited by T, the volume number, and the page number(s), for example, T IV 5. His resentencing will be cited by RS and the page number(s), for example, RS 10. His preliminary hearing will be cited as PE and page number(s), for example, PE 13.

cruel or unusual punishment in violation of the Michigan Constitution. *People v Lymon*, __ Mich __ (2024) (Docket No. 164685); slip op at 1-2.

On May 31, 2024, this Court vacated its abeyance order, again considered Mr. Kardasz's application, and scheduled oral argument on the application. This Court instructed the parties to file supplemental briefs addressing whether: (1) requiring Mr. Kardasz to register as a sex offender under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., as amended by 2020 PA 295, effective March 24, 2021 (the 2021 SORA), for the rest of his life constitutes cruel or unusual punishment under Const 1963, art 1, § 16 or cruel and unusual punishment under US Const, Am VIII; (2) lifetime electronic monitoring, when imposed without an individualized assessment of the defendant's recidivism risk and without providing a mechanism for removing the monitoring requirement, constitutes cruel and unusual punishment under US Const, Am VIII or cruel or unusual punishment under Const 1963, art 1, § 16, see generally *People v Betts*, 507 Mich 527 (2021), but see *People v Hallak*, 310 Mich App 555, 577 (2015), rev'd in part on other grounds 499 Mich 879 (2016); (3) lifetime electronic monitoring constitutes cruel and/or unusual punishment as applied in this case; and (4) lifetime electronic monitoring constitutes an unreasonable search in violation of US Const, Am IV or Const 1963, art 1, § 11, see *State v Grady*, 372 NC 509 (2019), and *Park v State*, 305 Ga 348 (2019), but see *Hallak*, 310 Mich App at 581.

Accordingly, Mr. Kardasz submits this supplemental brief for this Court's consideration.

Arguments

I. 2021 SORA is punishment because nearly all the punitive portions this Court identified in *Betts* remain, and the features that made it punishment in *Lymon* apply equally to sexual offenses.

Issue Preservation & Standard of Review

Counsel preserved challenges to Mr. Kardasz's sentence by filing a motion to remand in the Court of Appeals, which the court denied. The issue is preserved. MCR 6.429(C); MCR 7.211(C)(1).

Questions of constitutional law are reviewed de novo. *People v Parks*, 510 Mich 225, 245 (2022). This Court alone is "the ultimate authority with regard to the meaning and application of Michigan law." *Id.*, quoting *People v Bullock*, 440 Mich 15, 27 (1992).

Discussion

In ruling that the application of 2021 SORA to non-sexual offenses constitutes cruel or unusual punishment, this Court "le[ft] for another day and case whether the 2021 SORA constitutes punishment – and, more specifically, cruel or unusual punishment – when applied to other offenders." *Lymon*, __ Mich __ (2024); slip op at 8 n 6. That day is here. This Court should reach the same conclusion it reached in *Lymon*.

The current version of SORA (2021 SORA) is punishment for many of the same reasons this Court determined that 2011 SORA was punishment:

- It is a public-facing internet registry that posts substantial personal information about the registrant.

- It is offense-based, where "reporting duration [is] . . . based on an offender's conviction rather than an individualized assessment of the risk a particular offender posed to the community."

- Most people cannot petition to be removed.

- There are long periods, up to life, of registration after state supervision has ended.

- It imposes burdensome and "immediate reporting requirements," including in-person reporting requirements "to law enforcement upon potentially frequent life changes."

- If a person violates it, they can be guilty of a felony and sentenced to jail or prison.

Lymon, slip op at 2-3, citing *People v Betts*, 507 Mich 527, 549-562 (2021).[2]

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[2] Federal case law interpreting a different statute (the federal Sex Offender Registration and Notification Act (SORNA)) is not controlling. This Court has already addressed that 2021 SORA is not the federal SORNA. In drafting and enacting 2021 SORA, the Legislature "again created a statutory scheme containing several deviations from its federal counterpart." *Betts*, 507 at 570 n 27.

Nor is *Smith v Does*, 538 US 84 (2003) any more instructive for this Court, as that case was decided twenty years ago when the internet was a very different place. Indeed, many Americans were still using AOL

To determine whether a statute is punishment, this Court first determines whether the Legislature intended the regulation as criminal punishment or a civil remedy. *Betts*, 507 Mich at 548; *Lymon*, slip op at 10, citing *People v Earl*, 495 Mich 33, 38 (2014). This Court has determined that, based on the Legislature's statement of intent indicating the promotion of public safety as a goal, 2021 SORA was intended as a nonpunitive statute. *Lymon*, slip op at 10, citing *Betts,* 507 Mich at 548-549 (pointing to MCL 28.721a).

This Court next examines "whether the statutory scheme [is] so punitive either in purpose or effect as to negate" a state's intention to deem it civil. *United States v Ward*, 448 US 242, 248-249 (1980); *Betts*, 507 Mich at 549. To determine if the effects of a statute are punitive, this Court analyzes the factors outlined in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169 (1963), with the five most relevant

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and dial-up internet, Facebook had not been founded, Google was not a publicly traded company, and Americans did not carry the internet in their pockets, as the first iPhone was not released to the public until 2007. Furthermore, fundamental differences between the statute underlying *Smith* and 2021 SORA remain, including that the Alaska statute did not require any in-person reporting. *Smith*, 538 US at 101. Of relevance to this Court, the Alaska Supreme Court found punitive the same statute that the United States Supreme Court found to be non-punitive under its own state constitution.

Reliance on *Smith* and other federal cases would require this Court to largely ignore its holding in *Betts*. While the geographic exclusion zones were removed, if those were the only punitive portions of 2011 SORA, this Court could have severed them from the statute. But, this Court did not do that because of the other punitive portions, which by and large remain. *Betts*, 507 Mich at 562-569. As with the 2011 version, after evaluating 2021 SORA as a whole, these provisions have a cumulative effect that is punitive.

factors as: history and tradition, affirmative disability or restraint, traditional aims of punishment, rational relation to a non-punitive purpose, and excessiveness. *Smith v Doe*, 538 US 84, 97 (2003); *Betts*, 507 Mich at 550-562; *Lymon*, slip op at 11. Just as this Court held in *Lymon*, 2021 SORA is so punitive in effect that any intention to label it as civil is negated.

A. Because of the intense state supervision for long periods up to life, onerous reporting requirements, and public nature of the registry, SORA registration is like probation, parole, and the historical punishment of shaming.

This Court held that 2011 SORA resembled the traditional punishments of parole and shaming. *Betts*, 507 Mich at 551-553. This Court held the same with respect to 2021 SORA. *Lymon*, slip op at 14-15. Because nothing much changed between the two versions of the statutes as to these points and because the sexual nature of Mr. Kardasz's offense does nothing to make 2021 SORA less like parole and shaming, this Court should again hold that this factor weighs in favor of a finding that 2021 SORA constitutes punishment.

1. As this Court has already determined, SORA registration resembles parole. And it resembles probation.

This Court has determined that registration under 2021 SORA "continues to resemble the traditional punishment[ ] of parole" because registrants, like parolees, are subject to significant reporting and supervision requirements arising from their conviction. *Lymon*, slip op at 14-15. Much of the same can be said for probation too. Specifically:

- For the life of their supervision term, parolees, probationers, and registrants are all given conditions that must be followed. See MCL 791.236 (parole); MCL 771.3 (probation); *Lymon*, slip op at 14, citing MCL 28.724 (SORA).

- Parolees, probationers, and registrants all must pay supervision fees. See MCL 791.236a (parole); MCL 771.3(1)(d); 771.3c (probation); MCL 28.725a(6) (SORA).

- Parolees, probationers, and registrants are all subject to penalties for violating a term of probation or parole, including incarceration. MCL 791.238, MCL 791.239, MCL 791.239a, MCL 791.240a (parole); MCL 771.4, MCL 771.4b, MCL 771.5, MCL 771.7 (probation); MCL 28.729 (SORA).

- Parolees, probationers, and registrants generally must report regularly in person, with some options for virtual and written reporting. MCL 791.236 (parole); MCL 771.3(1)(c) (probation); MCL 28.724a, MCL 28.725(1), (3), (7)-(8), MCL 28.725a(3), MCL 28.725(2) (SORA). As a Tier III registrant, Mr. Kardasz would have to report in person to law enforcement four times per year. MCL 28.725a(3)(c).

However, some of the features these punishments share (term length, conditions, public nature) are even more onerous under 2021 SORA than if a person was on probation or parole:

1. Length of term:

    a. Subject to limited exceptions, probationary terms cannot exceed three years. MCL 771.2(1). It can be extended twice (for one year each time), but only if the trial court makes a specific, individualized finding that "there is a specific rehabilitation goal that has not yet been achieved, or a specific, articulable, and ongoing risk of harm to a victim that can be mitigated only with continued probation supervision." *Id.* Most probationers can petition to be discharged from probation early after serving half their probationary term. MCL 771.2(2).

    b. Parole terms are generally two years, but rarely, if ever, exceed four years. MCL 791.234(8)(d); Michigan Department of Corrections, *Policy Directive 06.05.104.*[3]

    c. SORA registration lasts 15 years at a minimum, and in the majority of cases, for a person's lifetime, as it will here for Mr. Kardasz. MCL 28.725.

2. Individualized conditions:

    a. Conditions for parole and probation are imposed based on an individualized assessment. They often loosen over time,

[3] Available at https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Policy-Directives/PDs-06-Field-Operations/PD-06-05-Parole-Evaluation-Eligibility/06-05-104-Parole-Process-effective-10-04-21.pdf?rev=dd142faad2684d5ebd079d2282ede7e3 (accessed September 18, 2024).

based on the person's adjustment, and an agent can allow for phone or electronic reporting, neither of which are available to registrants.

i. Parole: "The conditions of the parole must be individualized, must specifically address the assessed risks and needs of the parolee, must be designed to reduce recidivism, and must consider the needs of the victim, if applicable, including, but not limited to, the safety needs of the victim or a request by the victim for protective conditions." MCL 791.236(4).

ii. Probation: While some conditions are uniformly mandated, there is a requirement that most conditions be individualized: "The conditions of probation imposed by the court under subsections (2) and (3) must be individually tailored to the probationer, must specifically address the assessed risks and needs of the probationer, must be designed to reduce recidivism, and must be adjusted if the court determines adjustments are appropriate." MCL 771.3(11).

b. SORA's requirements are based solely on the offense of conviction, with no room for individualization or a personalized risk assessment.

3. Public posting:

   a. There is no public website like SORA for probationers or parolees. The Offender Tracking Information System[4] (OTIS) is searchable by name and has only a fraction of the personal identifying information that is included on SORA.

   b. SORA's website is a significantly more invasive web-based platform than OTIS, providing the public (including would-be vigilantes or scam artists, see Section II.D *infra*) with detailed personal information about the registrant and the ability to track the registrant's movements via a mapping function and automatic email updates.

This Court's analysis and conclusion in *Lymon* that 2021 SORA resembles the traditional punishment of parole wholly applies here, and in keeping with *Lymon*, this Court should again find the same.

2. Because the internet pervades every facet of daily living, registration is like shaming.

This Court ruled that "2021 SORA also continues to resemble the traditional punishment of shaming." *Betts*, 507 Mich at 551-552; see also *Lymon*, slip op at 16-17. This was because of the "breadth of information available to the public" and "the option for subscription-based notification of the movement of registrants into a particular zip code" as reasons a registrant may face "social ostracism based on registration." *Betts*, 507 Mich at 551; see also *Lymon*, slip op at 16 (identifying the

[4] Available at https://mdocweb.state.mi.us/OTIS2/otis2.html (accessed October 11, 2024).

same concerns in support of its conclusion that 2021 SORA resembles shaming).[5] Indeed, this Court in *Betts* explained that the Legislature's stated purpose in enacting MCL 28.721a was to "provid[e] the public, not just law enforcement, with the means to monitor persons with sex-offense convictions, encouraging public participation and engagement with the registry and further the stigma of registration." *Betts*, 507 Mich at 551. Shame is inexorably tied to the public nature of SORA's internet registry.

In *Betts*, while realizing that registration was like shaming, this Court also noted it was not a perfect resemblance because there was not "a conduit for the public to directly criticize and shame registrants," like in an online forum or public comment space. *Betts*, 507 Mich at 552; see also *Lymon*, slip op at 16-17. But while SORA itself may not have an online forum or public comment space, the public can use the information from the registry to create their own public square, and has done so:

[5] In analyzing a prior version of SORA, the Court of Appeals in 1999 noted that "[a] law designed to punish a sex offender would not contain these strict limitations on public dissemination." *In re Ayres*, 239 Mich App 8, 17 (1999). Because of the many amendments over the last twenty years, the strict limitations noted by the court in *Ayres* no longer exist.

The Michigan-focused Facebook group from which the screenshotted post above is taken has 6,000 members, and the moderators pull directly from the registry website to create some of the posts. See Section II.D.2 *infra* (showing an example of a Facebook post that screenshots the registry website). Further, 96% of adults in America use the internet[7], 85% use the internet at least daily, and 31% are online "almost constantly."[8]

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[6] See September 9, 2020 post on Michigan Predator Files (Exposing the Darkness) Facebook group <https://www.facebook.com/groups/1476930155790767/> (accessed October 29, 2024).

[7] Pew Research Center, *Internet/Broadband Fact Sheet* <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/> (accessed November 22, 2024).

[8] Perrin and Atske, *About three-in-ten U.S. adults say they are 'almost constantly' online* <https://www.pewresearch.org/short-

The foregoing leads to one conclusion: the internet is the new town square,[9] and internet shaming and cancel culture are the modern equivalents of face-to-face colonial shaming. From looking into someone's background before going on a first date to job interviews, in today's internet age our reputations often precede us. And SORA's unique form of branding is *worldwide* (unlike colonial times where communities were significantly more insular) and *permanent* for people like Mr. Kardasz.

In sum, SORA is nothing like going to a courthouse to search for a physical file about a person's offense. See *Lymon*, slip op at 16. The breadth of information on the public registry, the ease with which a person can obtain information, and the Lord-of-the-Flies-type impact the internet has on informing societal beliefs (e.g., that people who commit sex offenses should be killed or subject to vigilante justice, see

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reads/2021/03/26/about-three-in-ten-u-s-adults-say-they-are-almost-constantly-online/> (accessed November 12, 2023)

[9] The United States Supreme Court acknowledged this when it struck down a North Carolina statute that prohibited registrants from accessing "commercial social networking Web site[s]." *Packingham v North Carolina*, 582 US 98, 101 (2017). The Court found that it violated the First Amendment, due largely in part to the ubiquity of the internet: "[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." *Id.* at 104, quoting *Reno v ACLU*, 521 US 844, 868 (1997) (internal citations omitted).

Section II.D.2 *infra*), at the very least make SORA resemble shaming, if not outright serve as the modern equivalent.[10]

B. SORA's multiple requirements and obligations, including the public internet registry and in-person reporting requirements, create affirmative disabilities and restraints.

This factor considers how the effects of 2021 SORA are felt by those required to register. *Lymon*, slip op at 18.

In determining that this factor weighed in favor of finding that 2021 SORA constitutes punishment, this Court concluded that while 2021 SORA does not include geographic exclusion zones and removes some immediate in-person reporting that existed in 2011 SORA, "the 2021 SORA continues to impose significant obligations on registrants. . . ." *Lymon*, slip op at 20-21 (making no mention of the non-sexual nature of Mr. Lymon's offense in analyzing this factor). It should conclude similarly here.

This Court cited as especially burdensome the continued three-day reporting requirement for certain changes in personal information, in-person periodic reporting even if no information has changed (four times per year for Tier III registrants like Mr. Kardasz per MCL

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[10] If calling a person a "sick b***h [who] doesn't deserve to be free" and should be "spayed" in a public forum after posting screen shots of their SORA page does not constitute shaming, undersigned counsel can think of little else that would. See June 21, 2021 post on Michigan Predator Files (Exposing the Darkness) Facebook group <https://www.facebook.com/groups/1476930155790767/> (accessed November 12, 2023).

28.725a(3)(c)), and the reporting requirement surrounding internet identifiers in light of "the ubiquity of the Internet in daily life." *Lymon*, slip op at 19, quoting *Betts*, 507 Mich at 555. As recognized by this Court in *Lymon*, 2021 SORA imposes immediate in-person reporting requirements for changes to a person's address, employment status, legal name change, and enrollment changes at an educational institution, and equally immediate (but with a mail-in option)[11] reporting requirements for changes to a person's vehicle information, e-mail address, internet identifiers, phone numbers, and travel more than 7 days. MCL 28.724a; MCL 28.725(1)-(3), (7)-(8).

As a practical matter, that means a poor person convicted of a Tier III offense, like Mr. Kardasz, will likely be required to have frequent contact with the government, often in person. Take, for example, a year where the following typical life events occur, triggering SORA's reporting requirements: (1) the person has to report four times for his annual check in, (2) he has to report a job change, which is a common feature of low-wage work[12] and is compounded by the housing and

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[11] But see *infra* (arguing that any convenience stemming from a mail-in option is overshadowed by the substantial risk to the person of mail being lost and the inability to prove their efforts to comply).

[12] Harvard Business Review article reporting that "[r]oughly half the employers in our survey estimated that turnover among their low-wage earners was greater than 24% a year, and almost a quarter estimated that it was greater than 50%." Joseph Fuller, *The High Cost of Neglecting Low-Wage Workers*, Harv Bus Rev (May-June 2023), available at https://hbr.org/2023/05/the-high-cost-of-neglecting-low-wage-workers (accessed October 30, 2024).

employment stigma associated with his registration status,[13] (3) he has to report one time because he found a cheaper phone plan, (4) he has to report one time a home address change because he found a cheaper apartment or his landlord found out about his registry status and he was forced to move, (5) he has to report one time because he spent a couple weeks at his parent's house for the holidays, and (6) he has to report *nine* times because he got an email address to communicate for work, a bank account with a chat function to communicate with an investment professional, an Amazon account to get necessities delivered to his home, a Facebook account to stay in touch with friends, an online newspaper subscription to stay informed, a Venmo or Cash App account, a Grubhub account for food delivery, a gym membership where he has a profile for online classes, and a Microsoft or PlayStation account to play video games. Many of these reporting triggers are the byproducts of low-

[13] Online registration "might result in the reduction of both housing and employment opportunities as companies desire to avoid association with registrants to avoid harm to the companies' public image." *Lymon*, slip op at 20. See also Meyer, I.H., Bouton, L., Maszak-Prato, S., Semple, L. & Lave, T.R. (2022). *LGBTQ People on Sex Offender Registries in the US*. Los Angeles, CA: The Williams Institute, UCLA School of Law. (Showing 56% of all registrants lost a job due to being on the registry, and 30% of registrants changed jobs once, twice, or more in two years; 50% of all registrants were refused a rental because of being on a registry, and 31% of registrants moved once or twice in two years; Tables 11 and 12). Available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/SORS-LGBTQ-May-2022.pdf> (accessed November 12, 2023). See also *Montana v Hinman*, 412 Mont 434, 444-445 (2023) ("[E]mployers are now aware that any registrant they hire will be required to continually apprise law enforcement of their affiliation . . . exacerbate[ing] the stigma and collateral social consequences of being convicted of a sexual offense.").

wage work[14] or life in the internet age where online profiles are used for most innocuous life functions, from ordering home improvement materials through Home Depot's website to learning a new language through Duolingo's app. And the need to report new internet identifiers is likely even broader than the situations contemplated above. See MCL 28.722(g) (defining "internet identifier" as "all designations used for self-identification or routing in internet communications or posting").[15]

As this Court recognized in *Betts* and reiterated in *Lymon*, "[t]hese in-person reports 'impose[ ] a burden on registrants, especially for those who might have . . . difficulty traveling to make the reports—such as those who d[o] not have access to public transportation, d[o] not have the financial resources necessary for private or public transportation, or ha[ve] health or accessibility issues that [may] impede[ ] transportation.' " *Lymon*, slip op at 18 quoting *Betts*, 507 Mich at 556. Their effect "is a considerable sacrifice of privacy and a permanent system of state surveillance." *Lymon*, slip op at 19 quoting *State v Hinman*, 412 Mont 434, 446 (2023).

By way of contrast, these in-person reporting requirements were not present in the Alaska scheme at issue in *Smith*, and the lack of in-person reporting was one of the reasons the Court found there was no disability

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[14] The negative impact of SORA registration on a registrant's finances and job prospects is discussed in detail in Section II.D *infra*.

[15] See also *Does III v Whitmer*, __ F Supp 3d __, (Docket No 22-cv-10209) (ED Mich Sept 27, 2024); slip op at 99-107 (concluding that 2021 SORA's internet-identifier reporting requirements violate the First Amendment because they "chill[] a wide swath of speech activity – regardless of whether such activity could further the commission of a sex crime," and deter anonymous online speech).

or restraint. *Smith*, 538 US at 101. Likewise, Justice Viviano, in his partial concurrence and partial dissent in *Betts*, acknowledged the punitive aspect of in-person reporting and would have severed all in-person requirements. See *Betts*, 507 Mich at 581-585 (Viviano, J, concurring in part, dissenting in part).

The Sixth Circuit described 2011 SORA's in-person reporting requirements as "direct restraints on personal conduct." *Does #1-5 v Snyder*, 834 F3d 696, 703 (2014). In response to the state's assertion that the effects were "minor and indirect," the Sixth Circuit reasoned: "But surely something is not 'minor and indirect' just because no one is actually being lugged off in cold irons bound. Indeed, those irons are always in the background since failure to comply with these restrictions carries with it the threat of serious punishment, including imprisonment." *Id.*

This Court acknowledged the same: "Imprisonment is the 'paradigmatic' affirmative restraint . . . and the 2011 SORA ensured adherence to its many requirements on the potential for imposition of imprisonment. Although SORA has always contained such a penalty provision, the conditions that a registrant must satisfy to avoid incarceration have increased." *Betts*, 507 Mich at 554 (internal citations omitted).

Even though the Michigan State Police allows for reporting some changes by mail (see MCL 28.725(2)), the tens of thousands of people on the registry are required to report in-person either quarterly, biannually, or annually. MCL 28.725a. They will also need to report in-person within three days if, for example, they lose their housing or job. MCL 28.725(1). Further, any convenience stemming from a mail-in

option is overshadowed by substantial risk, as the person has no way to prove they mailed something within the three required days, or that the Michigan State Police received it and entered it. One letter lost by the post office could result in years of prison time. While a person could use certified mail, given the socioeconomic situations of many people on the registry and the need to physically go to a post office to exercise this option, this does not look much different than in-person reporting.

And, this is all provided a person understands which items require in-person reporting and which items allow for mail reporting. Some may choose to play it safe and always report in-person. That is the reality of living under the dictates of a statute that is confusing for lawyers and judges, let alone lay people who face the threat of incarceration if they assume incorrectly.[16] If the government is able to provide the public with a web-based platform that tracks the activity of people on the registry, it remains unclear why a person cannot report an update (e.g., getting a new email address) to the government through a website, just as members of the Michigan State Bar do to renew their license or report changes in contact information.

Numerous other state supreme courts have recognized the disability and restraint imposed by in-person reporting requirements. See, e.g., *Hinman*, 412 Mont at 444 ("Requiring such regular in-person contact with law enforcement . . . is akin to being placed on permanent probation, and the Court concludes that these provisions have an effect like punishment."); *Muniz*, 640 Pa at 735-736 (finding Pennsylvania's

[16] While any violation of SORA must be willful, MCL 28.729, it is likely that a prosecutor will argue every violation is willful if the registrant signs the explanation of duties form, which they are usually forced to do.

in-person reporting requirements "to be a direct restraint"); *Starkey v Oklahoma Dep't of Corr*, 305 P3d 1004, 1022 (Okla 2013) (holding that Oklahoma's "affirmative 'in person' registration and verification requirements alone cannot be said to be 'minor and indirect' especially when failure to comply is a felony"); *Wallace v Smith*, 905 NE2d 371, 379 (Ind 2009) (holding that Indiana's registry "imposes significant affirmative obligations and a severe stigma on every person to whom it applies"); *State v Letalien*, 985 A2d 4, 18 (Me 2009) quoting *Doe v District Attorney*, 932 A2d 552, 562 (Me 2009) (in-person reporting "place[s] substantial restrictions on the movements of lifetime registrants and may work an 'impractical impediment that amounts to an affirmative disability'").[17]

Even if this Court found in-person reporting requirements were not affirmative disabilities or restraints, SORA imposes an affirmative disability and restraint because SORA brands people as dangerous sexual predators and encourages the public to monitor, and potentially harm, registrants in ways that a criminal record alone does not. See Section I.A.2., *supra*; see also July 29, 2021 post on Michigan Predator Files (Exposing the Darkness) Facebook group, posting information from a registrant's SORA page and telling the 6,000 members of the Facebook group where the registrant was going to be (at a fair) and warning people to "[b]e aware." [18]

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[17] After the court decided *Letalien*, the Maine Legislature amended its registry to require verification by *writing*, and in-person verification only *once every five years* for lifetime registrants. *Doe I v Williams*, 61 A3d 718, 727 (Me 2013).

[18] Available at <https://www.facebook.com/groups/1476930155790767/> (accessed November 22, 2024).

Michigan's SORA allows the public to submit an anonymous tip on the internet. This may lead the police to show up at a person's house, school, or work, even if that person is fully compliant, just to investigate the anonymous allegations of someone clicking a button or two on the internet. SORA allows "a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" *Packingham*, 582 US at 107, quoting *Reno v ACLU*, 521 US 844, 870 (1997). And in this case, that "person with an Internet connection" could cause someone to lose their job or home, or even go to prison.

The in-person reporting requirements and public internet registry are affirmative disabilities and restraints.

C. SORA advances the traditional aims of punishment.

This Court held that 2011 SORA promoted deterrence and retribution. *Betts*, 507 Mich at 556-558. Deterrence was "necessarily encompassed by SORA's stated [legislative] purpose." *Id.* at 556. Retribution was evident because registration was required based on offense alone and no individualized determination of the risk of sexually reoffending. *Id.* at 557.[19]

Because the changes to 2021 SORA did not materially affect this Court's analysis of this factor as to 2011 SORA, this Court adopted in full its analysis and conclusions from *Betts*, and ruled that 2021 SORA advances the traditional aims of punishment:

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[19] The Sixth Circuit also held that Michigan's "SORA advances all the traditional aims of punishment: incapacitation, retribution, and specific and general deterrence." *Does #1-5*, 834 F3d at 704.

> [T]he purpose of the 2021 SORA remains deterrence of future criminal sexual acts. Further, the 2021 SORA did not implement any individualized assessment of risk, and so its requirements continue to be imposed on offenders for the sole fact of their prior offenses. Accordingly, the 2021 SORA also supports the traditional penological goal of retribution.

Lymon, slip op at 21-22. This Court's analysis was not dependent on the fact that Mr. Lymon had not committed a sex offense.

Consistent with *Lymon*, this Court should affirm that 2021 SORA advances the traditional aims of punishment.

D. SORA's obligations, disabilities, and restraints are not rationally connected to its non-punitive purpose of preventing people convicted of a sex offense from committing another sex offense.

The Legislature's stated purpose in enacting 2021 SORA is to "prevent[] and [protect[] against the commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a. This is a very specific goal. But, SORA's restrictions are not rationally related to this goal, as there is no evidence that SORA works to prevent people convicted of a sex offense from committing a future sex offense. See Section II.C and II.D.5 *infra*.

In *Lymon*, in determining that this factor weighed against a finding of punishment, this Court explained that "[a] rational connection is all that is required; '[a] statute is not deemed punitive simply because it

lacks a close or perfect fit with the nonpunitive aims it seeks to advance.'" *Lymon*, slip op at 22 quoting *Smith*, 538 US at 103.

But, it is irrational to require every single registrant to report in-person without any consideration of the person's reporting or compliance history. See Section I.E. *infra*. It is irrational to require people to register for the rest of their life with no individualized assessment of their risk. *Id*. It is irrational to not allow people to petition for removal based on a demonstrated lack of risk. *Id*. It is irrational to publicly brand every single registrant as a dangerous sexual predator when that is not actually true. *Id*.

Nonetheless, while Mr. Kardasz does not believe there is a rational connection between SORA and preventing the repeated commission of sexual offenses, because this Court has twice held recently that there is a rational connection, Mr. Kardasz acknowledges that it will likely do so again. In any event, the inquiry does not end as this factor is not dispositive. Indeed, this Court found a rational connection in *Betts* and *Lymon,* but still found SORA to be punitive.[20]

[20] The Supreme Courts of Indiana, Maine, New Hampshire, Oklahoma, and Pennsylvania all found that their registries had rational relationships to non-punitive purposes yet still held their registries were unconstitutional Ex Post Facto punishment. See *Wallace*, 905 NE2d at 382-384; *Letalien*, 985 A2d at 22, 26; *Doe v State*, 167 NH 382, 409-411 (2015); *Starkey*, 305 P3d at 1028, 1030; *Muniz*, 640 Pa at 745-746, 749.

E. Requiring tens of thousands of people to register without an understanding of their level of risk is excessive in relation to the purported non-punitive purpose of preventing people convicted of a sex offense from committing another sex offense.

It bears repeating the very specific purpose of 2021 SORA. It is to "prevent[] and [protect[] against the commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a. SORA is so bloated that this goal cannot possibly be met.

This Court found 2011 SORA to be excessive given the "uncertainty of the 2011 SORA's efficacy." *Betts*, 507 Mich at 561-562.[21] This Court found excessive:

- that "[o]ver 40,000 registrants were subject to the 2011 SORA's requirements without any individualized assessment of their risk of recidivism." *Id.* at 561.
- That the duration of registration "was based solely on the offender's conviction and not the danger he individually posed to the community." *Id.*
- "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." *Id.*

[21] The Sixth Circuit found SORA to be excessive: "The punitive effects of these blanket restrictions thus far exceed even a generous assessment of their salutary effects." *Does #1-5*, 834 F3d at 705.

- In-person reporting. *Id.* at 562.

In sum, "[t]hese 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." *Id.*

The same bullet points from *Betts* with regards to 2011 SORA still exist in 2021 SORA, making it excessive, too:

- Registration is based on offense alone. MCL 28.723. As of this writing, 40,301 people are on the public registry.[22]

- The length of registration is based on the offense alone and extends past a person's sentence. MCL 28.725.

- The public registry continues to brand people as "a potentially violent menace." *Betts*, 507 Mich at 561; see MCL 28.728(2).

- There are in-person reporting requirements. MCL 28.725a(3); MCL 28.724a, MCL 28.725(1), (3), (7)-(8).

SORA places individuals on a public internet registry for lengthy periods of time and labels them as dangerous sexual predators, without any regard to the actual risk a given person poses of reoffending sexually. The Legislature's professed non-punitive purpose is "preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a. But, the lack of individualized risk assessments, lengthy registration terms, and the

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[22] *Michigan Sex Offender Registry* <https://mspsor.com/Home/RegistrySearch?searchtype=all> (accessed November 1, 2024).

sheer number of listed offenses makes SORA over-inclusive and excessive. The public will not be safer if the state cannot determine who may *actually* pose a threat of reoffending sexually.

Twenty years after *Smith* and countless research studies later, we know that claims of high recidivism rates in people convicted of a sex offense are not true. This Court has already acknowledged this: "[a] growing body of research supports" that "the dangerousness of sex offenders has been historically overblown and that, in fact, sex offenders are actually less likely to recidivate than other offenders." *Betts*, 507 Mich at 560.[23]

The Sixth Circuit similarly noted the "significant doubt cast by recent empirical studies" on the statement in *Smith* that registrants had a "frightening and high" recidivism rate. *Does #1-5*, 834 F3d at 704. Registrants are actually "*less* likely to recidivate than other sorts of criminals," registration has "no impact on recidivism," and registration may "actually *increase* the risk of recidivism." *Does #1-5*, 834 F3d at 704-705 (emphasis in original).

SORA remains based on three primary misconceptions: all registrants are the same, all are likely to reoffend sexually, and

[23] For additional studies and research on the nonexistent, and possibly harmful, effect of registries on recidivism, Mr. Kardasz refers this Court to the briefing that will be submitted by amici. See also Sections II.C and II.D.5 *infra*.

registries will reduce sexual offending. These are misconceptions because:

- risk varies among people who have been convicted of sex offenses;
- offense of conviction does not correlate to risk;
- risk decreases the longer a person has been offense free and as a person ages;
- people with sex offense convictions recidivate at much lower rates than those convicted of other types of crimes;
- the risk of stranger danger is overstated;
- registries do not decrease but in fact may increase sexual offending.

Based on various studies, this Court concluded that the efficacy of registries are unclear. See *Betts*, 507 Mich at 560-561. Those studies tell us that risk of reoffending depends on a person's actual risk assessment, and that for all registrants, risk declines over time. Hanson et al, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 Psychol Pub Pol'y & L 48, 49 (2018).[24]

[24] While it is true that sex offenses can be underreported, see *Betts*, 507 Mich at 582-582 (Viviano, J., concurring in part and dissenting in part), both offenses by registrants and by non-registrants are underreported, meaning the fact of underreporting does not change the overall scientific research establishing that recidivism rates are low, and registries are not effective in combating recidivism.

By failing to use an individualized risk assessment, 2021 SORA does not distinguish between people who may actually be at risk of reoffending by committing another sex offense and people who have minimal risk. There are risk assessments that accomplish this task, such as the STATIC-99. *Id.* The MDOC already uses this risk assessment tool. See, e.g., Report to the Legislature (noting that STATIC-99Rs are completed upon entrance to the MDOC).[25] But, right now, SORA publicly brands individuals as dangerous sexual predators regardless of the actual risk of reoffending sexually, if any, that they pose. This governmental branding can last the rest of someone's life, as it will for Mr. Kardasz.[26]

There are likely thousands of people on SORA who present no more of a threat of committing a new sex offense than any random person who has never been convicted of a sex offense. A registry that fails to distinguish between people who are likely or unlikely to reoffend

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[25] *Report to the Legislature* <https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Legislative-Reports/2023/Assaultive-Offender-and-Sex-Offender-Programming-3rd-Quarter.pdf?rev=e8ca68d1f5e249f79cb0a61eae89e04a&hash=34CEA64C30502BAC42262D9DE02A0B9A> (accessed November 12, 2023).

[26] To be clear, a ruling from this Court that 2021 SORA is unconstitutional would not mean that Mr. Kardasz would not have to register as a sex offender for the rest of his life. Rather, Mr. Kardasz's challenges a statute that ignores available scientific measures of recidivism risk and mandates lifetime registration without any individualized assessment or ability to petition for removal. Should the legislature enact a constitutional iteration of SORA, it is possible that Mr. Kardasz would have to register for life after receiving an individualized assessment from a reviewing court.

sexually is not a useful tool to protect against people recommitting sex offenses.

As the Sixth Circuit concluded, "the record before us provides scant support for the position that SORA in fact accomplishes it professed goals." *Does #1-5*, 834 F3d at 704. Empirical research demonstrates that SORA is counterproductive to public safety because it exacerbates risk factors for recidivism such as unemployment and housing instability, and it impedes successful reintegration into society. Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* 54 JL & Econ 161 (2011).

Numerous jurisdictions have found registries like SORA to be excessive. The Supreme Court of Montana recently found, like this Court did in *Betts*:

> First, a growing body of research into the effectiveness of sex offender registries has cast significant doubt on their capacity to prevent recidivism. Second, the burdens and intrusiveness of SVORA have increased substantially through the subsequent amendments. . . . The effect is a considerable sacrifice of privacy and a permanent system of state surveillance. On balance, faced with the unclear efficacy of the registry at achieving its aims and the greatly broadened scope of its burdens, we can no longer conclude that SVORA's expanded collection and dissemination of information is narrowly tailored to the scheme's public protective purpose. The present SVORA structure clearly points toward recognizing the Act as punitive in effect. *Hinman*, 412 Mont at 446 (internal citations omitted).

See also *Starkey,* 305 P3d at 1029 (finding that Oklahoma's registry obligations were excessive, including the elimination of the ability to petition for removal, in-person reporting, public dissemination of personal information, and the lack of an individualized determination of risk); *Doe v State*, 189 P3d 999, 1016-1017 (Alaska 2008) (holding for similar reasons that it's statute was excessive); *Doe v State*, 167 NH at 410 (New Hampshire finding its registry excessive given that most offenders had to register for life "without regard to whether they pose a current risk to the public," making the statute "wholly punitive").

In *Smith*, the Supreme Court noted that the individual assessment required in *Hendricks v Kansas*, 521 US 346 (1997) for involuntary civil commitment was not required in the context of a sex offender registry because "[t]he magnitude of the restraint made individual assessment appropriate. The Act, by contrast, imposes the more minor condition of registration." *Smith*, 538 US at 104.

However, as this Court made clear in *Betts* and *Lymon*, and as argued throughout this brief, registration today is not "minor." Given the lengthy periods of registration, the inability to petition for removal, the magnitude of reporting requirements including in-person reporting, and the public branding and shaming that flows from the internet registry, 2021 SORA is excessive in relation to its professed regulatory purpose. People must be individually assessed to determine whether they actually pose a risk of reoffending by committing a sexual offense.

The *Mendoza-Martinez* factors lead to the inescapable conclusion that 2021 SORA is punishment. Relying on the same rationale from *Betts* and *Lymon* about the punitive features of SORA, its "aggregate

punitive effects negate the state's intention to deem it a civil regulation." *Betts*, 507 Mich at 562.

II. SORA's mandate that Mr. Kardasz register as a sex offender for life, without an individualized assessment of risk or any means for him to petition for removal, is a disproportionate sentence and constitutes cruel or unusual punishment in violation of the Michigan Constitution.

Issue Preservation & Standard of Review

Counsel preserved challenges to Mr. Kardasz's sentence by filing a motion to remand in the Court of Appeals, which the court denied. The issue is preserved. MCR 6.429(C); MCR 7.211(C)(1).

Questions of constitutional law are reviewed de novo. *People v Parks*, 510 Mich 225, 245 (2022). This Court alone is "the ultimate authority with regard to the meaning and application of Michigan law." *Id.*, quoting *People v Bullock*, 440 Mich 15, 27 (1992).

Discussion

The Michigan Constitution's "cruel *or* unusual punishment" clause is broader than the United States Constitution's protection from "cruel *and* unusual punishment." *Parks*, 510 Mich at 241; *Bullock*, 440 Mich at 30; *People v Lorentzen,* 387 Mich 167, 172 n 3 (1972). The weight of Michigan case law provides a "compelling reason not to reflexively follow the . . . United States Supreme Court's Eighth Amendment analysis." *Bullock*, 440 Mich at 35. This Court has declined to follow federal precedent regarding the constitutionality of life without parole sentences for possessing more than 650 grams of cocaine, and life without parole sentences for 18-year-olds convicted of murder, and life with parole sentences for kids under 18 convicted of murder. *Bullock*,

440 Mich at 30; *Parks*, 510 Mich at 242; *People v Stovall*, 510 Mich 301, 313 (2022).

Michigan's cruel or unusual punishment "standard is informed by 'evolving standards of decency that mark the progress of a maturing society.'" *Parks*, 510 Mich at 241, quoting *Lorentzen*, 387 Mich at 179. "[T]his standard is 'progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a human justice.'" *Id.*, quoting *Lorentzen*, 387 Mich at 178.

Sentences in Michigan must be proportional. *Parks*, 510 Mich at 241. To determine if a sentence is proportional under the cruel or unusual punishment clause, four factors are considered "(1) the severity of the sentence relative to the gravity of the offense; (2) sentences imposed in the same jurisdiction for other offenses; (3) sentences imposed in other jurisdictions for the same offense; and (4) the goal of rehabilitation, which is a criterion specifically 'rooted in Michigan's legal traditions . . . .'" *Id.* at 242, quoting *Bullock*, 440 Mich at 33-34.

Parks is instructive. This Court reasoned that "an automatically harsh punishment without consideration of mitigating factors is unconstitutionally excessive and cruel." *Parks*, 510 Mich at 259-260. SORA is such an unconstitutionally excessive and cruel punishment, given that it is mandatory with numerous harsh requirements, there is no individualized assessment of risk of reoffending sexually, there is no way for most people to petition for removal, and the public nature of the registry is harmful in and of itself.

If the Legislature wants an effective registry, the only people who should have to register are people who may actually pose a risk[27] of reoffending sexually, which is the Legislature's stated purpose. MCL 28.721a.[28]

A. Lifetime public registration with in-person reporting requirements, no individualized assessment of risk, and no means of petitioning for removal, is an excessively harsh penalty

The first prong weighs the gravity of the offense against the severity of the punishment. *Parks*, 510 Mich at 242.

While Mr. Kardasz was undoubtedly convicted of a grave offense, *lifetime* registration is a disproportionately severe sentence because of

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[27] Assessments exist to determine the likelihood of a person reoffending sexually. See *In re McBrayer*, 511 Mich 403, 410, 417 (2023). And, a person will not be paroled without a psychological or psychiatric evaluation if that person was convicted of a predatory or assaultive sexual offense. Mich Admin Code, R 791.7715(5). The MDOC routinely uses various risk assessments. See Michigan Department of Corrections, *Policy Directive 04.01.05* <https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Policy-Directives/PDs-04-Institutional-Operations/PD-0401-General-Provisions/04-01-105-Reception-Facility-Services-effective-10-01-19.pdf?rev=1f8b02488447437e9fdc028277384f9a> (accessed November 25, 2024).

[28] See also *Parks*, 510 Mich at 260 ("Life without parole is the harshest available punishment in Michigan and is seldom mandatorily imposed. It stands to reason that such a harsh sentence should be reserved for those whose criminal culpability mandates automatic, permanent removal from society.")

the multiple obligations imposed, and their adverse impact on unalienable rights, without a personal risk assessment or means of petitioning for removal.

Mr. Kardasz must register for the rest of his life. MCL 28.725(13). As such, he will be publicly branded as a sex offender – a Scarlet Letter that will result in his social ostracization and subject him to Hester Prynne-like treatment by his community. *Betts*, 507 Mich at 551-552; see also Section I.A.2. *supra* and Section II.D *infra*. The social stigma of being labeled a sex offender will follow Mr. Kardasz, and others like him, until he dies, even after he has completed his quarter century prison sentence. It will impact virtually every aspect of daily living, including where he can live, his ability to get a job, his interactions with coworkers, his interactions with neighbors, his interactions with a potential future spouse, his ability to participate in social groups, his personal safety from vigilantes,[29] his vulnerability to scam artists,[30] and his mental health.[31] He must report, often in-person and quickly, if any of his

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[29] See Sections I.A.2 *supra* and II.D *infra*, discussing social media and internet forums that encourage the public to physically harm registrants and, in some cases, directing users to the detailed tracking information on the registrant's SORA page.

[30] See Section II.D *infra*, discussing scams in numerous states where registrants are financially victimized by scam artists posing as law enforcement.

[31] See Meyer, I.H., Bouton, L., Maszak-Prato, S., Semple, L. & Lave, T.R. (2022). LGBTQ People on Sex Offender Registries in the US. Los Angeles, CA: The Williams Institute, UCLA School of Law, available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/SORS-LGBTQ-May-2022.pdf> (accessed November 12, 2023) (Showing 56% of all registrants lost a job due to being on the registry, and 30% of

registration information changes. MCL 28.724a, MCL 28.725a, MCL 28.725(1), (3), (7)-(8).

This is a burdensome punishment. See Section I.B., *supra*. The numerous in-person reporting requirements trigger adverse impacts on housing, finances, marriage prospects, social life, physical health, and mental health, which all strike at the core unalienable rights that the founding fathers recognized belong to every human – life, liberty, and the pursuit of happiness. See The Declaration of Independence para 2 (US 1776). The harshness of SORA's penalty is intensified because Mr. Kardasz cannot petition for removal if he could show he is not at risk of reoffending by committing another sex offense. MCL 28.728c.

This Court listed the publicly available information[32] in 2011 SORA. The only thing that was removed from that list in 2021 SORA was the tier classification. MCL 28.728(2). This Court should remain as concerned about the breadth of personal information that can be easily accessed as it was in *Betts*. *See Betts*, 507 Mich at 551. Because of the notification provision, the public could be provided information about a registrant with no "active effort on their behalf," which was very different than physically going to a courthouse to obtain old court records. *Id.* Because this information could "precede [a registrant] into a community," it would be more likely that person could face ostracism.

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registrants changed jobs once, twice, or more in two years; 50% of all registrants were refused a rental because of being on a registry, and 31% of registrants moved once or twice in two years; Tables 11 and 12).

[32] This included: "information regarding a registrant's criminal conviction . . . registrant's home address, place of employment, sex, race, age, height, weight, hair and eye color, discernible features, and tier classification." *Betts*, 507 Mich at 551.

Id. All those features remain available to the public in 2021 SORA and flow directly from the registry itself.[33]

SORA takes a one-size-fits-all approach to imposing its excessively harsh, lengthy-to-lifetime punishment on a broad swath of registrants. Notwithstanding the fact that CSC offenses cover a broad range of conduct, SORA indiscriminately doles out the same punishment, regardless of the registrant's risk of reoffending. Because the punishment is never tailored to the offense, it is harsh. It is harsh to continue to punish a person – after he has served a substantial portion of his life behind bars, after he has completed the conditions of his parole, and after he is supposed to have all of his rights restored – without assessing whether he presents a danger to the public of reoffending sexually based on his individual circumstances.

Mr. Kardasz's risk was never analyzed by the trial court because registration was mandatory. This Court has struck down mandatory penalties where the circumstances of the offender and the offense were not able to be considered. See *Parks*, 510 Mich at 268; *Bullock*, 440 Mich at 37-38; *Lorentzen*, 387 Mich at 176.

Individualized punishment has been the cornerstone of Michigan sentencing jurisprudence for over fifty years. See *People v McFarlin*, 389 Mich 557, 574 (1973) ("[T]he sentence should be tailored to the particular circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential."). This Court has continued to recognize the necessity of individualized punishment, finding that the

[33] "[T]he ignominy under SORA flows not only from the past offense, but also from the statute itself." *Does #1-5*, 834 F3d at 703.

advisory guideline regime "maintain[s] flexibility sufficient to individualize sentences when necessary." *People v Lockridge*, 498 Mich 358, 391 (2015). "[T]his Court has consistently required sentencing decisions to be based on the principle of proportionality across different sentencing regimes." *People v Posey*, 512 Mich 317, 352 (2023). Punishment must be proportionate to the "seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636 (1990). See also *People v Steanhouse*, 500 Mich 453, 474-475 (2017) (returning to the *Milbourn* test for proportionality after the guidelines became advisory in *Lockridge*). Sentences that are not individualized are harsh.

In *Parks*, this Court recognized the problems with mandatory, across-the-board sentences with no individualization. Mandatorily sentencing 18-year-olds to die in prison ran contrary to Michigan's sentencing principles and this Court's interpretation of the cruel or unusual punishment clause, given that "for a punishment to be 'constitutionally proportionate' it 'must be tailored to a [person's] personal responsibility. . . .'" *Parks*, 510 Mich at 259, quoting *Bullock*, 440 Mich at 39.

But SORA ignores these principles. It does not tailor the punishment to the particular circumstances of the case or the person, and places society's need for protection (regardless of whether there is any need for protection in that specific case) above its interest in maximizing a person's rehabilitative potential. Requiring Mr. Kardasz to register is not at all tailored to his "personal responsibility" because there was no individualized assessment of his risk of reoffending.

It is this Court's job to determine the constitutionality of legislatively enacted sentences. See *Parks*, 510 Mich at 255 ("We cannot shirk our duty and defer to the Legislature's choice of punishment when its choice is offensive to our Constitution."). Requiring Mr. Kardasz to register as a sex offender for life, in the absence of any court assessing his likelihood of reoffending sexually or providing him with the ability to petition for removal, and mandating he meet all SORA's obligations under the threat of incarceration, is excessively harsh.[34]

B. Lifetime public registration with in-person reporting requirements, no individualized assessment of risk, and no means of petitioning for removal is a disproportionate sentence in Michigan.

The second prong compares the sentence with other sentences in the same jurisdiction. *Parks*, 510 Mich at 242.

Besides Lifetime Electronic Monitoring, there are no other mandatory post-incarceration punishments in Michigan that last for a person's entire life.[35] There is no longer any provision in Michigan law

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[34] Mr. Kardasz does not argue that lifetime SORA registration is always excessively harsh. He argues that it is excessively harsh in the absence of any court assessing a registrant's likelihood of reoffending sexually or providing registrants with the ability to petition for removal, especially given the long periods up to life of registration and the public nature of the registry.

[35] For aggravated stalking convictions, the length of a probation term for stalking can be for any number of years over 5 years. MCL 750.411i(4). However, it appears the length of a probation term is subject to proportionality review. See Appendix M, *People v Drallette*, unpublished per curiam opinion of the Court of Appeals (Docket No.

for lifetime probation or parole.[36] Even in cases of commutation, where a life-in-prison sentence has been commuted, the person on parole serves a four-year term of parole (in contrast with the more typical parole term of two years). MCL 791.234(8)(d); Michigan Department of Corrections Policy Directive 06.05.104.HH.[37] Additionally, for the person who paroled off of a life sentence, there are no other attendant responsibilities for reporting or otherwise being monitored by law enforcement, except for those imposed at the discretion of the Parole Board and the parole agent, which would only last the length of the parole term. This can include parole for murder. State monitoring for such lengthy terms is a unique punishment and one rarely applied in Michigan.

Lifetime public registration with in-person reporting requirements, no individualized assessment of risk, and no means of petitioning for

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184591), issued March 25, 1997, citing *People v Milbourn*, 435 Mich 630 (1990). If a person is found guilty but mentally ill, there is a mandatory minimum term of probation of 5 years, but the person can move to discontinue probation. MCL 768.36(4).

[36] Lifetime probation for drug offenses was eliminated in 2002 PA 666. See House Fiscal Agency, *Drug Sentencing Revisions Enrolled Analysis* <http://www.legislature.mi.gov/documents/2001-2002/billanalysis/House/pdf/2002-HFA-5394-x5.pdf> (accessed December 9, 2024).

[37] Available at <https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Policy-Directives/PDs-06-Field-Operations/PD-06-05-Parole-Evaluation-Eligibility/06-05-104-Parole-Process-effective-10-04-21.pdf?rev=dd142faad2684d5ebd079d2282ede7e3> (accessed November 25, 2024).

removal is a disproportionate sentence compared to other sentences in Michigan.

C. Because Michigan's SORA is more restrictive than the federal SORNA, and only one-third of states have substantially complied with the minimum standards found in SORNA, Michigan's SORA is a disproportionate sentence compared to other jurisdictions.

The third prong compares the sentence with the sentences for the same crime in other jurisdictions. Here, this Court must determine whether there are other jurisdictions with the exact same registry requirements as Michigan.

As a starting point, only 18 states, including Michigan, have substantially implemented the minimum standards found in the federal Sex Offenders Registration and Notification Act (SORNA), 42 USC § 16901, *et seq* through their own state registries. https://smart.ojp.gov/sorna/sorna-implementation-status (accessed November 25, 2024); see also Stephanie Buntin, *The High Price of Misguided Legislation: Nevada's Need for Practical Sex Offender Laws*, 11 Nev L J 770 (2011), n 10. The fact that only a third of states have implemented the bare minimum demonstrates that Michigan, having chosen to do so (and add even more requirements than SORNA), is sentencing disproportionately to other states. States choosing not to substantially implement SORNA, even in the face of lost federal funding, is likely because there is not a uniform consensus that

registries work to increase public safety, let alone one as burdensome as Michigan's. See *Betts*, 507 Mich at 560.[38]

But, regardless of whether other states have complied with the minimum requirements of a federal act, Michigan's SORA is more disproportionate because registration is a mandatory condition, even though Mr. Kardasz has never been assessed as posing a future risk to children. As one example of a substantive difference between registries, in some states, obligations are discretionary based on a registrant's risk. See, e.g., *Moe v Sex Offender Registry Board*, 467 Mass 598 (2014); *Doe v Pataki*, 120 F3d 1263 (CA 2, 1997); *Weems v Little Rock Police Dept*, 453 F3d 1010 (CA 8, 2006); *Minnesota Department of Corrections Community Notification Act Fact Sheet* <https://mn.gov/doc/assets/Community%20Notification%20Act_tcm1089-301295.pdf> (accessed December 7, 2024); NH Rev Stat Ann § 651-B:6

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[38] *See, e.g.*, United States Department of Justice, Alper & Durose, *Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-2014)* (May 2019), available at https://bjs.ojp.gov/content/pub/pdf/rsorsp9yfu0514.pdf (accessed November 25, 2024) (concluding that sex offenders are less likely than other offenders to be rearrested for any crime); Huebner et al, *An Evaluation of Sex Offender Residency Restrictions in Michigan and Missouri* (July 1, 2013), p 72, available at https://www.ojp.gov/pdffiles1/nij/grants/242952.pdf (accessed November 25, 2024) concluding that residency restrictions "are unlikely to mitigate or reduce the risk of recidivism among sex offenders"); Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J L & Econ 161, 192 (2011) (concluding that notification requirements in a typical sex-offender registry "effectively increases the number of sex offenses by more than 1.57 percent," likely "because of the social and financial costs associated with the public release of their criminal history and personal information").

(New Hampshire's registry includes the ability to petition for removal from the public list, including the use of a risk assessment); Rhode Island Parole Board, *Sexual Offender Community Notification* <https://paroleboard.ri.gov/sexual-offender-community-notification> (accessed December 7, 2024); *Criminal History Records and Texas Sex Offender Registration Program FAQ*, <https://www.dps.texas.gov/section/crime-records/faq/criminal-history-records-and-texas-sex-offender-registration-program-faq#Sex-offender> (accessed December 7, 2024).

But, even if every state had a registry exactly like Michigan's, this factor would not be dispositive. This Court said in *Parks* (where 17 states and the federal government allowed for mandatory life without parole for people convicted of first-degree murder) that even if "Michigan is not as overwhelming of a national outlier in this case as it was in *Bullock*," the fact remains that our Constitution does not allow for excessively harsh punishment. *Parks*, 510 Mich at 263-264 (internal citations omitted).

D. Lifetime public registration with in-person reporting requirements, no individualized assessment of risk, and no means of petitioning for removal, does not advance the penological goal of rehabilitation and likely hinders rehabilitation.

The fourth factor is whether the penalty imposed advances the penological goal of rehabilitation.

It does not. In fact, the Court of Appeals "agree[d] with [Mr.] Kardasz that lifetime registration will not assist his rehabilitation." Appendix A, *People v Kardasz*, unpublished per curiam opinion of the Court of

Appeals, issued September 22, 2022 (Docket No. 358780). Having to register as a sex offender can ruin almost every aspect of a registrant's life. As outlined above, SORA's punishment pervades every aspect of daily living for registrants like Mr. Kardasz, stifling their efforts to reintegrate into society and condemning them to live out their days as social pariahs. See also Catherine Wagner, *The Good Left Undone: How to Stop Sex Offender Laws from Causing Unnecessary Harm at the Expense of Effectiveness*, 38 Am J Crim L 263, 267-274 (2011). In frustrating people's unalienable rights to "life, liberty, and the pursuit of happiness," 2021 SORA actively hinders rehabilitation.

1. SORA harms the job prospects, financial security, and housing stability of registrants.

Registration under SORA negatively impacts areas essential to daily living that many of us take for granted – employment, finances, and housing.

With respect to employment, a 2022 national study of registries across the US found that 56% of registrants lose a job owing to their registration status, and 30% of registrants changed jobs once, twice, or more in two years. See Meyer, I.H. et al (2022), *LGBTQ People on Sex Offender Registries in the US*, Los Angeles, CA: The Williams Institute, UCLA School of Law (Tables 11 and 12).[39] Participants in the Meyer study also reported having job offers rescinded after their prospective employer learned of their registration status. *Id*. at 27.

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[39] Available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/SORS-LGBTQ-May-2022.pdf> (accessed November 25, 2024).

A 2023 national study found that prior to their conviction, 91.4% of registrants were employed (full or part time) but after their sex-offense conviction only 55.3% were employed, reflecting a 36.1% decrease. See Bailey, J.S. et al (2023), *Contextualizing the Effects of Sexual Offender Registration and Notification (SORN) Policies on Employment and Economic Status of Persons Convicted of Sexual Offenses*, J Crime & Crim Behav, 3:1, at 11.[40]

There was also a significant change in job classification for those who were able to get a job. Specifically, before conviction,[41] 31.7% of the surveyed registrants worked in blue collar positions and 61.2% worked in white collar positions. *Id*. at 12-13. Immediately after conviction, the number of surveyed registrants relegated to blue collar positions doubled to 62.4%, while the number of registrants who were able to secure white collar positions fell by more than half to 26.7%:

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[40] Available at https://www.arfjournals.com/image/catalog/Journals%20Papers/JCCB/2023/No%201%20(2023)/1_Danielle%20J.pdf (accessed November 6, 2024).

[41] While the Bailey study was designed to focus on the effects of *registration* on income and employment, the authors are somewhat relaxed with their language and often use the term *conviction*. But see Bailey, J.S. et al (2023) at 2 (arguing that it is time to better understand "the registration/notification and employment relationship" and lamenting that prior literature "fails to isolate the effects of registration status"). Notwithstanding this imprecision in vocabulary, the study's findings should still be informative to this Court with respect to the impact of registries on people.

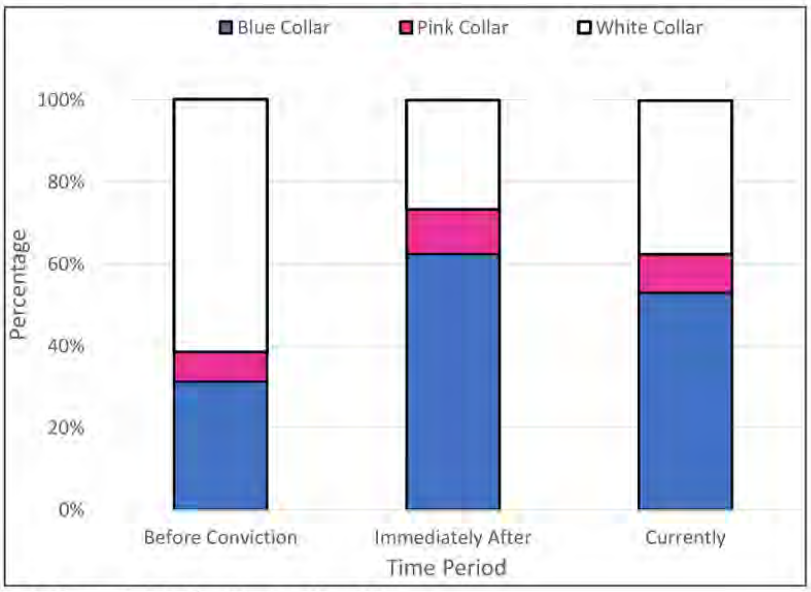

Figure 2: Change in Job Classification Over Time

Id.

Naturally, job insecurity and ineligibility for white collar work impacts the finances of registrants. This is another harm that is borne out through the data. Registrants in the Bailey study reported an average income loss of nearly $24,000 annually post-conviction. See Bailey, J.S. et al (2023) *supra*, at Table 5 (reporting an average household income of approximately $72,000 annually before conviction, $28,000 immediately after conviction, and $49,000 at the time of the study). The income loss that flows from sex offender registration negatively impacted the standard of living for surveyed registrants as well, relegating many who were formerly in the middle and upper-middle class to the lower class. *Id.* at 10. Indeed, before conviction, only 6.9% of surveyed registrants identified as lower class, but immediately after conviction, 53.7% were pushed into that category – a greater than 675% increase:

Table 3: Change in Perceived Socio-Economic Class Over Time

Perceived Socio-Economic Class	*Before Conviction (%, N=744)*	*Immediately After (%, N=687)*	*Currently (%, N=742)*
Lower	6.9	53.7	36.7
Lower-Middle	18.4	24.7	30.7
Middle	43.7	17.2	23.3
Upper-Middle	27.8	4.1	8.0
Upper	3.2	0.3	1.3

Id.

Owing to their vulnerable status and the detailed information readily available about them online, registrants are also prime targets for financial scams that prey on their fears of being sent back to prison for failing to comply with SORA's numerous and obscure requirements. In fact, last year, Michigan's Oakland County Sheriff's Office warned registrants about a phone scam where the caller impersonates the registrant's compliance officer, claims that the registrant is out of compliance (e.g., did not report for a DNA profile), and claims that the registrant will be arrested if a portion of bond is not paid, resulting in the loss of $2,000 for one Michigan registrant. Brandon Carr, *Oakland County Sheriff's Office warns residents not to fall for latest sex offender scam*, Local 4 News Click On Detroit (November 6, 2023).[42] M.R., a 69-year-old Tier II registrant, experienced a similar scam in August 2022. Appendix B, M.R. Declaration ¶15.[43] M.R. reported the criminal activity

[42] Available at https://www.clickondetroit.com/news/local/2023/11/06/oakland-county-sheriffs-office-warns-residents-not-to-fall-for-latest-sex-offender-scam/ (accessed November 6, 2024).

[43] For this Court's convenience, Mr. Kardasz refers to throughout and appends declarations from Michigan registrants subject to SORA that were filed in *Does III v Whitmer*, No. 22-cv-10209 (ED Mich 2024).

to police but was told that there was no recourse available. *Id*. Many states have reported similar scams that target registrants. See, e.g., Colorado Bureau of Investigation Notice[44]; King County Washington Sheriff's Notice[45]; Nevada Department of Public Safety Notice.[46]

The negative effects of the registry extend to housing as well. In the Meyer study, nearly 30% of surveyed registrants had to move for financial reasons caused by the registry and 22% had to move owing to registry related difficulties like harassment from neighbors. See Meyer, I.H. et al (2022), *supra*, at Table 12. 50% of surveyed registrants had had trouble with landlords who refused to rent to them because of their registration status. *Id*.

But this Court should not be swayed just by data and raw numbers. This Court should be swayed by the realities of living life as a registered sex offender as told by Michigan registrants.

Consistent with the data presented above, H.M. (a 68-year-old Tier III registrant subject to lifetime registration) shared that the registry had been "absolutely devastating" for his life. Appendix C, H.M. Declaration ¶¶1-2. Even though he holds a bachelor's degree from the University of Michigan and a juris doctor degree, he has been denied jobs well below his qualifications since his release from prison. *Id*. ¶¶7-8. Whenever an employer asked whether H.M. was on the registry, it

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[44] Available at https://cbi.colorado.gov/news-article/sex-offenders-targeted-in-phone-scam (accessed November 6, 2024).

[45] Available at https://kingcounty.gov/en/legacy/depts/sheriff/news-media/scam-alert (accessed November 6, 2024).

[46] Available at https://rccd.nv.gov/About/Sex-Offender-Community-Notification/ (accessed November 6, 2024).

was often "the kiss of death," and he has been denied jobs at Meijer's stacking cans and at U-Haul loading trucks. *Id.* ¶9. H.M. was disbarred due to his conviction and shared the hurdles he had to overcome to get reinstated to the bar, observing that his placement on the registry, more than the underlying CSC conviction itself, was the main objection to his reinstatement. *Id.* ¶8. H.M. also had trouble with finding housing, as he could not qualify for public housing owing to his registry status and could not live in places that he could afford because landlords would refuse to rent to him once they found out he was on the registry. *Id.* ¶17.

B.P., another lifetime registrant, reported similar difficulties with finding and keeping a job, sharing that at one point he was let go from Rite Aid once his employer learned of his registration status. Appendix D, B.P. Declaration ¶3. B.P tried two approaches to job hunting, not divulging his registry status and immediately divulging his registry status, but found that neither method was effective at securing or keeping employment. *Id.* Notwithstanding his good performance at a Sportswear store and being encouraged to apply for a managerial position, B.P. did not do so because he was afraid that it would place a spotlight on his registry status. *Id.* ¶4.

After spending time working for himself as a consultant, M.R., a former corporate Human Resources Officer, was able to secure employment as a general manager for a family-owned company. Appendix B, M.R. Declaration ¶¶17, 19. Before accepting the full-time job with good pay and good benefits, M.R. disclosed his registry status to the employer, and the owner still "graciously" offered him the position. *Id.* When he was fired two months later for "fail[ing] to disclose" his background, M.R. learned through his employment attorney that the reason was because he had to report his work address

on the registry website as required by SORA. *Id.* ¶20. "This change triggered 'alerts' to the surrounding residents who wrote letters to the company with threats of going to the press about how they hired sex offenders." *Id.*

Notwithstanding his advanced degrees, T.R. spent much of his time unemployed following his release from prison. Appendix E, T.R. Declaration ¶6. TurboTax withdrew an employment offer that had been extended to him for an *over-the-phone* consulting position, even though T.R. had notified them of his status throughout the application process. *Id.*

K.M. was denied opportunities to serve his country and his community. He was prevented from enlisting in the military and prevented from serving as a firefighter because of his registry status. Appendix F, K.M. Declaration ¶8. K.M. pivoted from the job denials and opened his own business, as he realized like many other registrants that working for himself would negate the risk of being fired. But the registry worked against him there too, disrupting his client base. In fact, his registry status was spread around on social media with many members of his community commenting and tagging his business. *Id.* ¶9. As a result, he lost many clients, thousands of dollars, and had to lay off two employees. *Id.* And, his children were kicked out of their cheer and karate programs once his registry status was spread online through social media. *Id.* ¶13 ("My kids should be able to enjoy life without having to deal with the backlash of what I did when I was a teenager.").

Because landlords refused to rent to him or would evict him upon finding out about his registry status, J.M. ended up homeless and spent the end of 2021 through the start of 2022 living out of motels, which

made reporting requirements for his frequent address changes even more onerous. Appendix G, J. M. Declaration ¶4.

SORA harms the job prospects, financial security, and housing stability of registrants, all of which hinder rehabilitation.

2. SORA jeopardizes the physical safety of registrants.

Approximately 21% of the participants in the Meyer study reported having been hit, beaten, physically attacked, or sexually assaulted while on a sex offender registry. See Meyer, I.H. et al (2022), *supra*, at Table 14. 45% had been threatened with violence, 66% had been verbally insulted or abused, and nearly 37% had been the victim of robbery or vandalism. *Id*. Nearly 90% of these incidents were attributable to the registrant's status. *Id*. And, 33% of participants in the Meyer study reported that their family members had been verbally insulted or abused owing to their association with a person on the sex offender registry. *Id*.

On a personal note, J.M. was living with his roommate who also was his landlord. When his roommate found out about his registry status, he tackled J.M., pointed a gun at J.M., and yelled aloud that J.M. was a child rapist. Appendix G, J.M. Declaration ¶5.

When T.P. was on the registry, his home and cars were repeatedly vandalized. Appendix H, T.P. Declaration ¶6. In addition, his high-school aged daughter was harassed by other students about his registry status so incessantly that she started skipping her classes. *Id*.

K.N. was working in a restaurant when the owner, who knew about her registry status, weaponized it against her by telling her co-workers

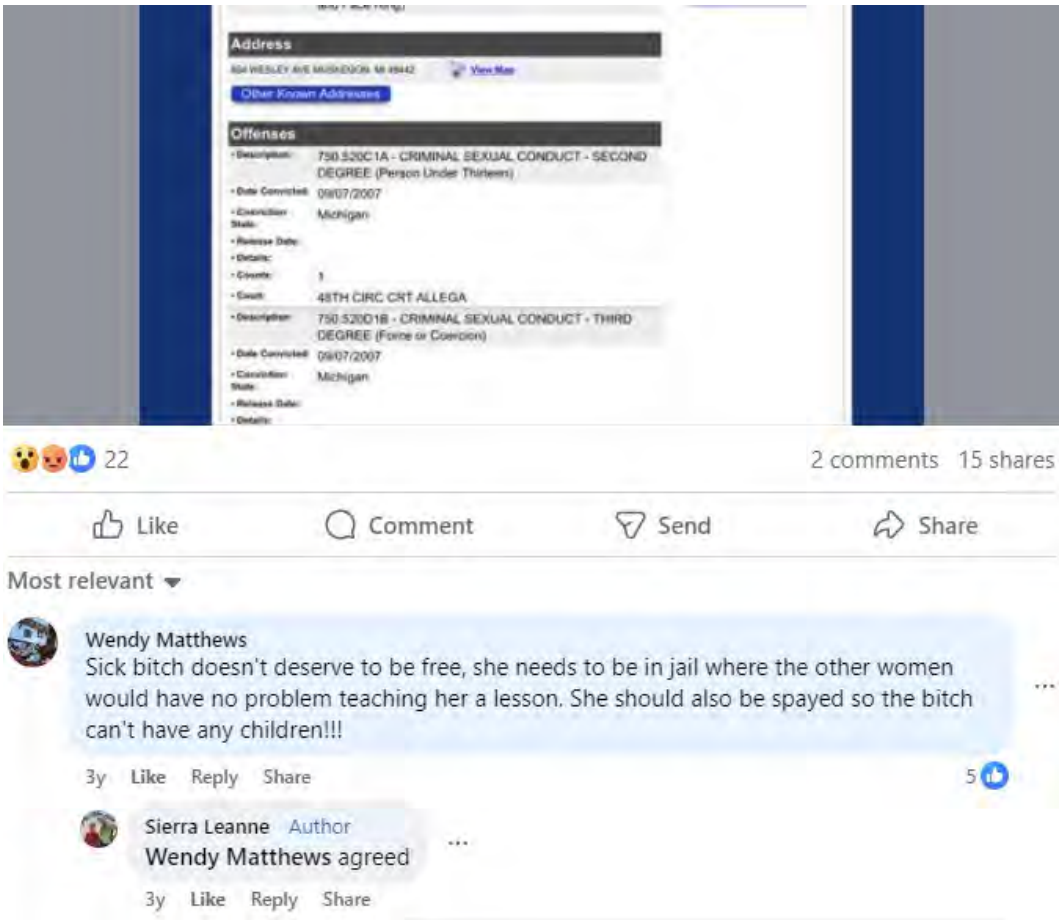
that she was a sex offender after she rebuffed his inappropriate sexual advances. Appendix I, K.N. Declaration ¶5. Not only did K.N.'s co-workers start treating her differently, but the owner physically attacked her one day and hit her on the head with a large container at work. *Id*. "As I stumbled out of the restaurant to try to find help, I heard him brag to the rest of my co-workers about *how 'freeing' hitting me felt*." *Id*. K.N. had to go to the hospital to seek medical attention and the person who took her defended the actions of the owner. *Id*. Police refused to investigate or press charges against K.N.'s assaulter, claiming that there was not enough evidence despite K.N.'s hospital visit and possession of a recording where the owner admitted to how good it had felt to hit K.N. *Id*. ¶6.

This Court should find the sentiment expressed by K.N.'s boss – that it felt "freeing" to assault her – particularly alarming, as it shows that the registry website is being used by some members of the public as a catalyst for cathartic violence somewhat reminiscent of the Purge.[47]

That some people may feel free to act on their violent impulses should come as no surprise. Parading as free speech, social media platforms nurture mob mentality calls for violence. See, e.g., July 27, 2020 post on Michigan Predator Files (Exposing the Darkness) Facebook group (encouraging the public to shoot their local pedophile):

[47] The Purge is a 2013 dystopian horror movie in which the US Government sanctions an annual event where all crime, including murder, is legal for a 12-hour period. This event, the Purge, serves as a violent and yet cathartic release for citizens, "freeing" them to act on their most primal desires.

See also *id*. at March 3, 2021 post (commenter posting under a screenshot of a registrant's registry page, "I say bring back the death penalty for these sick f**ks"). SORA's internet registry has a direct role in enabling such violence, as the readily accessible website offers e-mail alerts, tracking features, and can be shared on social media pages, making it easy for any internet user to identify, target, and persecute people on the registry. See, e.g., *id*. at June 1, 2021 post (screenshotting the registrant's SORA page, suggesting that the registrant should be subjected to assault, and stating that the "sick b**ch" should be "spayed"):



SORA's public internet registry does not just make registrants targets for physical violence, but also SORA's one-size-fits-all in-person reporting requirements can directly inflict physical harm on registrants.

G.O., a 74-year-old veteran of the Korean and Vietnam wars who relies on a mobility scooter, has leg disabilities that make it very difficult for him to drive or walk. Appendix J, G.O. Declaration ¶¶3-4. When G.O. drives, he has to have his car set to cruise control because applying pressure to the pedals causes his leg bones to painfully scrape together. *Id.* ¶4. G.O. has to travel 100 miles roundtrip multiple times per year to his nearest state police post to register. *Id.* ¶7. With no one willing or able to drive him, he fears that as he continues to age and his disability

continues to worsen, he will have no way to register and will be sent back to prison. *Id*. ¶8.

T.R. suffered heart failure in 2014 that left him so incapacitated that he had trouble climbing the stairs to leave his basement apartment. Appendix E, T.R. Declaration ¶12. Concerned about his ability to physically report in person at his next registration deadline, T.R. contacted staff and state police, but no one knew what to do about his situation and no one afforded him an accommodation. *Id*. He was only able to avoid falling into non-compliance because he just so happened to recover just enough by the time of his next check-in to leave his apartment. *Id*.

SORA jeopardizes the physical safety of registrants.

3. SORA harms the mental health of registrants.

A person's mental health is an equally important consideration for this Court.

Nearly 71% of the participants in the Meyer study considered suicide while on the registry. See Meyer, I.H. et al (2022), *supra*, at Table 17.

Another study of registrants located in the Northeastern United States found that registrants' descriptions of their mental health captured the primary DSM-5 symptoms for post-traumatic stress disorder (PTSD), including intrusive thoughts, avoidance, negative emotions, and hypervigilance. See Harris, D.A. et al, *Life on "the List" is a Life Lived in Fear: Post-Conviction Traumatic Stress in Men Convicted of Sexual Offenses*, Int'l J Offender Therapy & Compar Criminology

(2020), at 17.[48] These findings were tied to registrants living in a constant state of fear and anxiety about housing instability, physical safety, vigilantism, meeting new people, having romantic relationships, and having hobbies. *Id.* at 8-10. "The techniques [registrants] used to navigate their re-entry were commonly marked by fear-management, paranoia, hyper-vigilance, and self-enforced isolation." *Id.* at 13, 17.

This is not surprising, given the physical and psychological harms registrants endure every day – many for the rest of their lives, years after they have served their prison time. Living in a perpetual state of fear – struggling to find work, struggling to keep a steady income, struggling to maintain stable housing, enduring verbal harassment, enduring vandalism, enduring physical assault, losing family, losing friends, being deprived of the ability to travel – wreaks havoc on one's mental health.

As far as Michigan registrants, H.M. experienced constant harassment and isolation, and his family, including his children, nieces, and nephews, have also been harassed and mocked by other kids who ask about his registration status. Appendix C, H.M. Declaration ¶19.

T.R.'s neighbors have been told not to talk to him and people yell "Look out for that pedophile!" as he picks up the trash that they throw onto his property when they drive by. Appendix E, T.R. Declaration ¶16.

T.P. shared that being on the registry made him feel like the world would prefer that he be dead. Appendix H, T.P. Declaration ¶7. "Every

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[48] Available at https://floridaactioncommittee.org/wp-content/uploads/2021/10/Life-on-the-List-PTSD-Jill-Levenosn-Sep-2020.pdf (accessed November 8, 2024).

day I worried that if someone found out I was on the registry, they would no longer want anything to do with me." *Id*.

SORA harms the mental health of registrants.

4. SORA erects serious barriers to a registrant's ability to have human connection.

SORA also raises serious hurdles to registrants' ability to have relationships with family, friends, or intimate partners. And, it interferes with registrants' ability to attend major out-of-state life events, such as funerals, weddings, or to visit sick relatives.

Half of the participants in the Meyer study had been subject to in-person harassment, half had been subject to harassing or threatening calls, emails, and notes, and half reported that they had been unable to date or have intimate partners. See Meyer, I.H. et al (2022), *supra*, at Table 15. 75% lost a friend when the friend learned of their registry status. *Id*.

H.M., an attorney on the registry, described leaving Michigan to attend his brother's funeral as "entering a minefield." Appendix C, H.M. Declaration ¶ 18. "The problem is that – even for a lawyer – the laws are so long and convoluted, and so vague, and so different from state to state. . . . [I]f you make one mistake," you risk being sent back to prison. *Id*.

B.P. shared that the "requirements around reporting internet activity and identifiers" have been especially confusing for him and reported that he was sent back to prison for three years because he

didn't realize he needed to report a World of Warcraft[49] account on a computer that his probation officer had given him permission to use. Appendix D, B.P. Declaration ¶6. B.P. used to enjoy travel, seeing new places, and trying new foods, but since he has been on the registry for the past 10+ years, he has been afraid to leave his house for anything other than work, groceries, or doctor's appointments. *Id.* ¶ 7. In fact, B.P. missed his father's funeral in Texas because changing his initial travel plans could have resulted in him being out of Michigan for more than 7 days without first notifying law enforcement. *Id.* ¶8.

T.R. compared his experience for two years on parole (where he felt that his conditions were clear and that it was easy to contact his parole agent if he had questions) to his experience off of parole with SORA, where he "feel[s] like no matter what [he] do[es] or how careful [he] [is], [he] [is] almost certainly in danger of coming up short on something," and is terrified any time that he has mandated contact with law enforcement that he will be sent back to prison for an unsuspected violation. Appendix E, T.R. Declaration ¶10. He reported that he avoids travelling all together and has been unable to visit his sister in Florida, despite her requests, because he would have to provide advance notice of his travel plans, register in Florida, and look up the requirements of each state he drives through to make sure there are no additional requirements in the event he is stopped. *Id.* ¶15. His fears about violating SORA make the benefits of seeing family not worth the risk. *Id.* Like B.P., not only does T.R. find SORA's requirements unclear, but also reports that law enforcement finds the requirements unclear. *Id.* ¶11 ("The staff are not very informed about the reporting system (like

[49] World of Warcraft is a popular online video game that requires an internet connection, like the vast majority of video games today.

what has to be reported and what doesn't), so I sometimes leave not knowing if I am compliant or not.").

SORA erects serious barriers to a registrant's ability to have human connection.

5. SORA registration does not reduce recidivism and based on the above, likely increases the likelihood of recidivism.

This Court acknowledged in *Betts* that a growing body of research has shown that "the dangerousness of sex offenders has been historically overblown," and "at a minimum" that SORA's efficacy in decreasing recidivism "is unclear." *Betts*, 507 Mich at 560. Although the public – and legislative – perception is that sex offenders reoffend at high rates, "[i]n reality, the most current research indicates that sex offenders, as a group, reoffend less than other criminal offenders as confirmed by federal, state, and academic studies." Tennen, *Risky Policies: How Effective Are Restrictions on Sex Offenders in Reducing Reoffending?*, 58 Boston Bar J 25, 27 (2014) (collecting sources); see also Elmann, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Constitutional Commentary 495, 497-498 (2015) (tracing how an unsubstantiated claim in *Smith v Doe* about the high rate of recidivism of people who have committed a sex offense has been debunked by current scientific research); Section II.C *supra*. Further, sex offender registries "likely and paradoxically increase risk for reoffending by producing traumatic stress that leads to emotional dysregulation." See Harris, et al (2020), *supra*, at 21.

The mandatory and arbitrary statutory scheme allowing lifetime public registration violates the Michigan Constitution's protections against "cruel *or* unusual punishment" – protections greater than those offered by the United States Constitution. *Lorentzen*, 387 Mich at 172; *Bullock*, 440 Mich at 30. This Court must apply the greater protections of the Michigan Constitution to evaluate a categorical ban on mandatory registration under SORA. The lack of an individualized assessment of risk, the unique lengthy/lifetime and public nature of the registry, the lack of a means to petition for removal, and the lack of a penological justification are the hallmarks of a disproportionate and excessive sentencing scheme, which violates the Michigan Constitution.

III. SORA's mandate that Mr. Kardasz register as a sex offender for life, without an individualized assessment of risk or any means for him to petition for removal, violates the Federal Constitution's prohibition on cruel and unusual punishment.

Issue Preservation & Standard of Review

Counsel preserved challenges to Mr. Kardasz's sentence by filing a motion to remand in the Court of Appeals, which the court denied. The issue is preserved. MCR 6.429(C); MCR 7.211(C)(1).

Questions of constitutional law are reviewed de novo. *People v Parks*, 510 Mich 225, 245 (2022). This Court alone is "the ultimate authority with regard to the meaning and application of Michigan law." *Id.*, quoting *People v Bullock*, 440 Mich 15, 27 (1992).

Discussion

Under the federal constitution, the United States Supreme Court frequently employs an "as applied" analysis because the Eighth Amendment embodies a theory of proportionality. The "right not to be subject to excessive sanctions" necessarily "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Roper v Simmons,* 543 US 551, 560 (2005).

Certain punishments may not violate the Eighth Amendment per se but are found to be a violation when applied to a certain class of people or when applied in a mandatory fashion. See, e.g., *Kennedy v Louisiana,* 554 US 407 (2008) and *Atkins v Virginia,* 536 US 304 (2002) (the death penalty is not cruel and unusual punishment per se, but is when applied

to individuals who have committed non-homicide crimes or to intellectually challenged people); *Roper, supra* (Eighth Amendment bars the death penalty when applied to children); *Woodson v North Carolina,* 428 US 280 (1976) (plurality opinion) and *Lockett v Ohio,* 438 US 586 (1978) (Eighth Amendment bars mandatory imposition of the death penalty); *Graham v Florida*, 560 US 48 (2010) (life without possibility of parole is not cruel and unusual per se, but is when applied to children who have committed non-homicide offenses); *Miller v Alabama*, 567 US 460 (2012) (life without possibility of parole violates the Eighth Amendment when mandatorily applied to children).

At its heart, the Eighth Amendment prohibition against cruel and unusual punishment is proportionality. *Weems v United* States, 217 US 349, 367 (1910). "[T]he Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive" and employs a test that has the same first three factors as Michigan's test. *Graham*, 560 US at 59-60. As such, Mr. Kardasz's sentence is "grossly disproportionate" and unconstitutional under the Eighth Amendment. See Sections II.A-C, *supra*.

SORA is categorically unconstitutional under the Eighth Amendment. In addressing categorical bars, the Court follows a two-part test and considers:

> "[O]bjective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the

> Eighth Amendment's text, history, meaning, and purpose," the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. [*Graham*, 560 US at 59-60, quoting *Roper*, 543 US at 572 and *Kennedy*, 554 US at 421 (internal citations omitted)].

A reviewing court "must look beyond historical conceptions 'to the evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 58, quoting *Estelle v Gamble*, 429 US 97, 102 (1976). Determining cruelty "embodies a moral judgment," and while "[t]he standard itself remains the same . . . its applicability must change as the basic mores of society change." *Kennedy*, 554 US at 419.

When it comes to registries, "the basic mores of society" have changed as we have learned more. No longer is it a given that registries are effective but rather support the opposite conclusion. See Elmann, "*Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Constitutional Commentary 495, 497-498 (2015) (tracing how an unsubstantiated claim in *Smith v Doe* about the high rate of recidivism of people who have committed a sex offense has been debunked by current scientific research). At best, SORA's efficacy in preventing a person who has committed a sex offense of committing another is "unclear." *Betts*, 507 Mich at 561. Society's standards, especially with the explosion of the internet as the new town square, see Sections I.A.2 and II.D, *supra*, are changing when it comes to public, online registries. See also *Packingham v North Carolina*, 582 US 98, 101, 107 (2017) (striking down a North Carolina statute that prohibited registrants from accessing social networking websites where "the 'vast

democratic forums of the Internet' . . . and social media in particular," constitute the "modern public square").

Mr. Kardasz's sentence under SORA is cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution. US Const, Am VIII.

IV. Requiring Mr. Kardasz to submit to lifetime electronic monitoring without an individualized assessment of risk and no means of petitioning for cessation is cruel or unusual punishment in violation of the Michigan Constitution.

Issue Preservation & Standard of Review

Counsel preserved challenges to Mr. Kardasz's sentence by filing a motion to remand in the Court of Appeals, which the court denied. The issue is preserved. MCR 6.429(C); MCR 7.211(C)(1).

Questions of constitutional law are reviewed de novo. *People v Parks*, 510 Mich 225, 245 (2022). This Court alone is "the ultimate authority with regard to the meaning and application of Michigan law." *Id.*, quoting *People v Bullock*, 440 Mich 15, 27 (1992).

Discussion

This Court has already acknowledged that lifetime electronic monitoring (LEM) is punishment. *People v Cole*, 491 Mich 325, 336 (2012). This Court should hold that this particular punishment is cruel or unusual under the Michigan constitution.

Michigan's cruel or unusual punishment "standard is informed by 'evolving standards of decency that mark the progress of a maturing society.'" *Parks*, 510 Mich at 241, quoting *Lorentzen*, 387 Mich at 179. "[T]his standard is 'progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a human justice.'" *Id.*, quoting *Lorentzen*, 387 Mich at 178.

Sentences in Michigan must be proportional. *Parks*, 510 Mich at 241. To determine if a sentence is proportional under the cruel or unusual punishment clause, four factors are considered "(1) the severity of the sentence relative to the gravity of the offense; (2) sentences imposed in the same jurisdiction for other offenses; (3) sentences imposed in other jurisdictions for the same offense; and (4) the goal of rehabilitation, which is a criterion specifically 'rooted in Michigan's legal traditions . . . .'" *Id.* at 242, quoting *Bullock*, 440 Mich at 33-34.

A. Attaching an electronic monitor to a person's ankle for the rest of their life is an excessively harsh penalty.

Mr. Kardasz does not dispute the gravity of his offense. However, a growing body of research has shown that "the dangerousness of sex offenders has been historically overblown." *Betts*, 507 Mich at 560. Nonetheless, the number of registrants subject to LEM has continued to grow astronomically over the last decade. In 2015, on average, only 94 Michiganders were subject to LEM each month. See MDOC Report to the Legislature (March 2016) at Table 8.[50] However, by 2023, the number of Michiganders subject to LEM each month had increased almost ten-fold to 895. See MDOC Report to the Legislature (March 2024) at Table 8.[51] Because a person could pose no future risk of

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[50] Available at https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Legislative-Reports/2016/Electronic-Monitoring-Program.pdf?rev=426e4fadd65248778151d56d6a8c971f&hash=87176C85B4D537FD318E19970BFBB05C (accessed November 8, 2024).

[51] Available at https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Legislative-

committing another sex offense, but the LEM statute does not permit courts to assess risk of recidivism before imposing a sentence or to cease monitoring at a later point, LEM is a disproportionately harsh punishment.

No court has or will assess Mr. Kardasz's risk of future dangerousness, even though there are scientifically reliable ways to do so.[52] Even considering the facts of the offense, monitoring Mr. Kardasz through an ankle bracelet will have minimal to no impact on public safety. From a practical standpoint, had Mr. Kardasz been wearing an ankle monitor at the time of his offense, it would not necessarily have prevented a crime from occurring nor corroborated the occurrence of a crime; the monitor would have shown that Mr. Kardasz spent the night inside of his home.

"Just as there can be no dispute that [Mr. Kardasz's] crime was serious, there can also be no dispute that his sentence is severe." *Parks*, 510 Mich at 257. Living under constant government surveillance in the form of a device physically affixed to your body for the rest of your life inflicts serious physical and psychological trauma. See Section IV.D *infra*. And LEM is the only punishment in Michigan that lasts the life of the offender after probation or parole. See Section IV.B *infra*. Nor is this severe sentence reserved exclusively for those convicted of CSC1 offenses involving children, as mandatory LEM applies to any CSC1

Reports/2024/Electronic-Monitoring-Program.pdf?rev=4f52e87913e34f77b4985a503a2a08d9&hash=E2C86D3CB1740080BF88FAC9CD644878 (accessed November 8, 2024).

[52] Common assessments used in the MDOC are the VASOR and Static-99.

conviction. See *People v Brantley*, 296 Mich App 546, 558-559 (2012), abrogated on other grounds by *People v Comer*, 500 Mich 278 (2017); see also MCL 750.520b(2)(d).[53]

In the absence of any indication that Mr. Kardasz poses a future danger to children and in the absence of any opportunity for Mr. Kardasz to petition for cessation, LEM represents an overly harsh punishment that has minimal to no impact on public safety.

B. Lifetime electronic monitoring is a disproportionate sentence in Michigan.

This prong can be analyzed similarly to lifetime registration under SORA, as discussed in Section II.B *supra*.

LEM is the *only* mandatory post-incarceration punishment in Michigan that lasts for a person's entire life.[54] There is no longer any

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[53] Mandatory LEM also applies to those convicted of CSC2 under MCL 750.520c where the defendant is 17 or older and the victim is 13 or younger. *Brantley*, 296 Mich App at 558-559; see also MCL 750.520c(2)(b); MCL 750.520n(1).

[54] For aggravated stalking convictions, the length of a probation term for stalking can be for any number of years over 5 years. MCL 750.411i(4). However, it appears the length of a probation term is subject to proportionality review. See *People v Drallette*, unpublished per curiam opinion of the Court of Appeals (Docket No. 184591), issued March 25, 1997, citing *People v Milbourn*, 435 Mich 630 (1990). If a person is found guilty but mentally ill, there is a mandatory minimum term of probation of 5 years, but the person can move to discontinue probation. MCL 768.36(4).

provision in Michigan law for lifetime probation or parole.[55] Even in cases of commutation, where a life-in-prison sentence has been commuted, the person on parole serves a four-year term of parole (in contrast with the more typical parole term of two years). MCL 791.234(8)(d); Michigan Department of Corrections Policy Directive 06.05.104.HH.[56] Additionally, for the person who paroled off of a life sentence, there are no other attendant responsibilities for reporting or otherwise being monitored by law enforcement, except for those imposed at the discretion of the Parole Board and the parole agent, which would only last the length of the parole term. This can include parole for murder. State monitoring for life is a unique punishment in Michigan.

In addition to being particularly disproportionate in operating as the only penalty that tracks a person until they die, the only other provisions in Michigan that allow for any electronic tracking are tied to pretrial release and probation, and have limited tracking time periods. See MCL 771.3f. Furthermore, this tracking is usually in exchange for something to benefit the person, namely in exchange for incarceration.

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[55] Lifetime probation for drug offenses was eliminated in 2002 PA 666. See House Fiscal Agency, *Drug Sentencing Revisions Enrolled Analysis* <http://www.legislature.mi.gov/documents/2001-2002/billanalysis/House/pdf/2002-HFA-5394-x5.pdf> (accessed December 9, 2024).

[56] Available at <https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Policy-Directives/PDs-06-Field-Operations/PD-06-05-Parole-Evaluation-Eligibility/06-05-104-Parole-Process-effective-10-04-21.pdf?rev=dd142faad2684d5ebd079d2282ede7e3> (accessed November 25, 2024).

LEM without any individualized assessment of risk or opportunity to petition for cessation is uniquely unusual and a disproportionate sentence when compared to other sentences in Michigan.

C. Lifetime electronic monitoring is a disproportionate sentence compared to other jurisdictions.

The third prong compares the sentence with the sentences for the same crime in other jurisdictions. Here, this Court must determine whether there are other jurisdictions like Michigan that impose LEM for criminal sexual conduct without an individualized assessment or ability to petition for cessation.

While most states have some form of monitoring for people convicted of criminal sexual conduct, only approximately 11 states including Michigan allow *lifetime* electronic monitoring.[57] Of those 11 states, LEM is often only mandated for very specific CSC offenses, and the imposition of LEM in Maryland[58] is discretionary in all cases. Furthermore, four of those 11 states provide opportunities for the cessation of LEM.[59]

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[57] California (CAL. PENAL CODE §3004(b), (c)), Florida (FLA. STAT. § 948.012(4)), Kansas (KAN. STAT. ANN. § 22-3717(v)), Louisiana (LA. STAT. ANN. § 15:560.3(A)(3)), Maryland (MD. CODE ANN., CRIM. PROC. § 11-723(d)(3)), Missouri (MO. REV. STAT. § 217.735(4); MO. ANN. STAT. § 559.106), Oregon (OR. REV. STAT. ANN. § 144.103; OR. REV. STAT. §§ 137.765), Rhode Island (11 R.I. GEN. LAWS § 11-37-8.2.1), South Carolina (S.C. Code Ann. § 23-3-540(H)), and Wisconsin (WIS. STAT. ANN. § 301.48).

[58] MD. CODE ANN., CRIM. PROC. § 11-723(d)(3).

[59] Maryland (MD. CODE ANN., CRIM. PROC. § 11-723(d)(4)), Missouri (MO. ANN. STAT. § 217.735(5)), South Carolina (2012 S.C. Acts. 255 (H.B. 3667)), and Wisconsin (WIS. STAT. ANN. § 301.48(6)-(7)).

In contrast, Michigan's LEM statutory scheme is one of the most restrictive among the 11 states that allow for LEM. Michigan is one of only four states that impose LEM as part of a sentence, instead of a condition of parole.[60] Additionally, Michigan imposes LEM for *all* first-degree criminal sexual conduct,[61] not just for specific offenses. Finally, Michigan does not provide an opportunity for cessation or mechanism for removal.

As such, LEM without any individualized assessment of risk or opportunity to petition for cessation in Michigan is a disproportionate sentence when compared to sentences in other states for criminal sexual conduct.

But, even if every state imposed LEM exactly like Michigan, this factor would not be dispositive. This Court said in *Parks* (where 17 states and the federal government allowed for mandatory life without parole for people convicted of first-degree murder) that even if "Michigan is not as overwhelming of a national outlier in this case as it was in *Bullock*," the fact remains that our Constitution does not allow for excessively harsh punishment. *Parks*, 510 Mich at 263-264 (internal citations omitted).

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[60] The other states are Florida (FLA. STAT. § 948.012(4)), Oregon (OR. REV. STAT. ANN. § 137.765(2)), and Wisconsin (WIS. STAT. ANN. § 301.48 (2)).

[61] Michigan also imposes LEM for CSC2 convictions where the defendant is 17 or older and the victim is 13 or younger. See Section II.B *supra*.

D. Lifetime electronic monitoring does not advance the penological goal of rehabilitation.

Subjecting people like Mr. Kardasz to a lifetime of electronic monitoring takes a severe toll on their health. The American Civil Liberties Union reported the stigma, social isolation, and stress that results from being monitored exacerbates depression and anxiety for wearers.[62]

A national survey of immigrants found that people "who are forced to wear electronic ankle monitors suffer from an emotional, mental and physical toll, which includes trouble sleeping, mental health problems, problems at work and thoughts of suicide."[63] 90% of the people surveyed experienced harm to their physical health due to their ankle monitor, ranging from discomfort to life-threatening situations.[64] People reported

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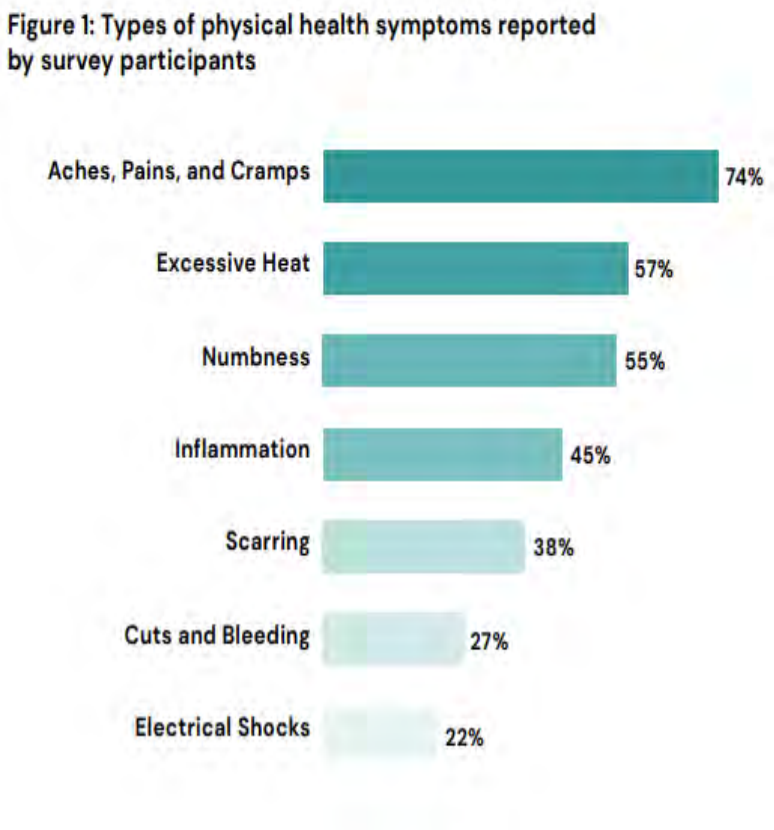
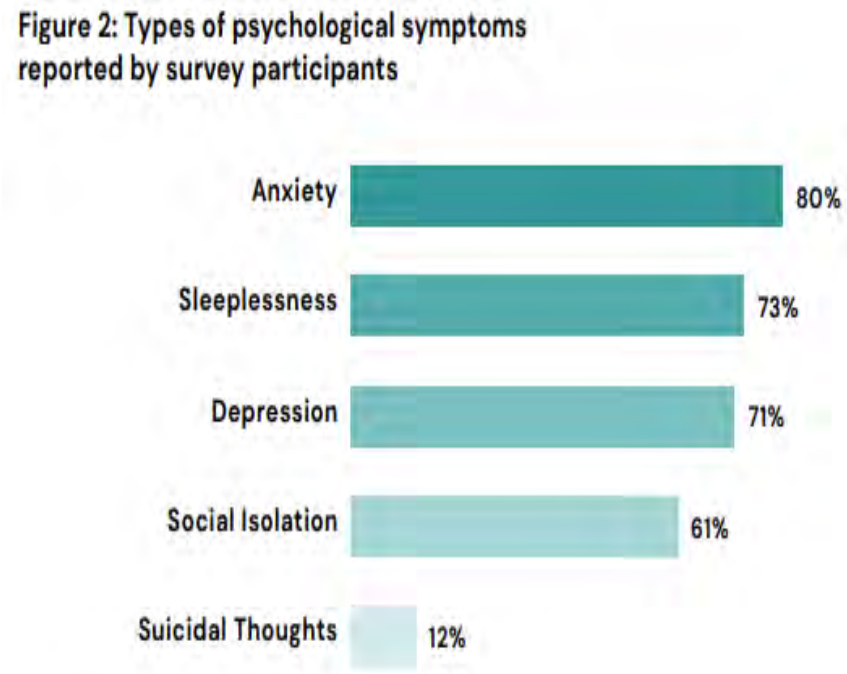
[62] Ayomikun Idowu, et al, Three People Share How Ankle Monitoring Devices Fail, Harm, and Stigmatize, ACLU Florida (September 29, 2022), https://www.aclufl.org/en/news/three-people-share-how-ankle-monitoring-devices-fail-harm-and-stigmatize.

[63] Sarah Betancourt, *'Traumatizing and Abusive': Immigrants Reveal Personal Toll of Ankle Monitors*, The Guardian (July 12, 2021), https://www.theguardian.com/us-news/2021/jul/12/immigrants-report-physical-emotional-harms-electronic-ankle-monitors#:~:text=Immigrants%20in%20the%20US%20who,suicide%2C%20a%20new%20report%20reveals (accessed November 25, 2024).

[64] Benjamin N. Cardozo School of Law Kathryn O. Greenberg Immigration Justice Clinic, et al., Immigration Cyber Prisons: Ending the Use of Electronic Ankle Shackles, 11-28 (July 2021), https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/60ec661ec578326ec3032d52/1626105377079/Immigration+Cyber+Prisons+report.pdf (accessed November 8, 2024).

numbness, swelling, inflammation, electric shocks, and bleeding cuts owing to chaffing caused by the plastic-to-skin contact. *Id.* at 13. 34% of people reported *permanent* negative effects on their physical health from ankle monitors, with some people reporting *permanent* skin scarring. *Id.* at 13.





88% of survey participants reported that the ankle monitor negatively impacted their mental health, and 12% had even considered suicide because of being monitored. *Id*. at 14-15.

Most people reported technical difficulties with their ankle monitor too. *Id*. at 16. These malfunctions caused anxiety and fears of being contacted by law enforcement, despite their efforts to comply. *Id*. People reported difficulty with sleeping while charging the device affixed to their ankle, because of battery-related sounds, lights, and vibrations. As summarized by the Guardian article:

> Nearly all participants felt social isolation as a result of the monitor, with one interviewee calling it "a modern day scarlet letter". More than two-thirds of participants reported their families had experienced financial hardship

> because they had lost or had difficulty obtaining work as a result of their electronic ankle shackle.[65]

Similarly, M.M., a student and law-firm employee on parole for more than three years, wrote about his experiences with electronic monitoring. M.M. shared his constant state of fear and pain living with an ankle monitor – causing him to bleed, experience numbness in his feet, interfering with his ability to sleep, requiring that he wake up early to charge so he wouldn't be arrested, his fear that someone at work would notice the bulge on his leg, and restricting his ability to wear shorts, dress pants, or visit the beach.[66]

Registrants subject to LEM in Michigan are no different. They remain tethered to a wall at least two hours every single day to charge their monitoring device, interfering with camping trips or travel to locations without reliable electricity. See Appendix K, MDOC LEM Program Participant Agreement at 2.[67] They also risk getting into trouble and being sent back to prison if they lose GPS signal while traveling, working, or moving in and out of buildings. "Electronic monitoring . . . can create challenges for landscaping, construction, or delivery jobs. Some buildings, such as warehouses, interfere with GPS

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[65] Betancourt article, *supra*.

[66] M.M., *Living With an Ankle Bracelet*, The Marshall Project (July 16, 2015), https://www.themarshallproject.org/2015/07/16/living-with-an-ankle-bracelet (accessed November 25, 2024).

[67] Available at https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/LG/Lifetime_GPS_Agreement_Form_050911_353535_7.pdf?rev=fa0dac4a61474f66aa09201c893d4183&hash=F99A619A58719BF93B3479D4F15EAA11. (accessed November 22, 2024).

signals, so people may need to leave work to pick up signal . . . ."[68] Consequently, people subject to LEM must be prepared at all times to drop whatever they are doing, including their responsibilities to their employer, and make themselves "immediately available" to MDOC staff to the extent their monitoring device loses a signal in a building with thick walls, warehouse, or a parking garage. Appendix K, MDOC LEM Program Participant Agreement at 2 and Attachment A.

Poor-signal alerts and false alarms are common. MDOC reports that over the last year (August 2023 through August 2024), their software received 11,990 LEM alerts. See Appendix L, 9/10/24 MDOC Response to FOIA Request. But only 267 – comprising of strap tampering alerts lasting longer than 10 minutes or battery failure alerts lasting longer than 24 hours – were reported to the Michigan State Police. *Id.* The remaining alerts were "handled internally" by MDOC staff. *Id.* That means that only 2% of the alerts were serious enough to report to police. But even for the remaining 98% non-serious[69] alerts, Michiganders subject to LEM still have to immediately stop what they are doing and respond to them. Appendix K, MDOC LEM Program Participant Agreement at 2 and Attachment A. LEM technology is faulty to the point that it not only causes permanent physical and mental harm to registrants, but also it generates numerous non-serious alerts that keep people living in a constant state of fear.

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[68] Electronic Frontier Foundation, *Electronic Monitoring*, https://sls.eff.org/technologies/electronic-monitoring (accessed November 22, 2024).

[69] That is, alerts that do not warrant involvement from Michigan State Police.

Worsening health, psychological, and financial problems caused by a state of constant government surveillance do not promote rehabilitation. LEM is just a different form of incarceration. James Kilgore, *We Need a New Paradigm Halt the Unprecedented Growth of Electronic Monitoring*, Truthout (October 24, 2022)[70]; see also Kate Weisburd, Punitive Surveillance, 108 Va. L. Rev. 148, 152 (2022) (the use of EM creates a "carceral experience [that] is no longer defined by physical walls and prison bars," and instead extends the walls of the prison to homes, workplaces, and neighborhoods); Ben A. McJunkin & J.J. Prescott, *Fourth Amendment Constraints on the Technological Monitoring of Convicted Sex Offenders*, 21 New Crim. L. Rev. 379, 399-400 (2018) (describing ankle monitors as literal "ball and chain[s]" that the wearer could never be free of and with "no lull in the intrusion"). That is particularly so where research has shown that recidivism rates decrease significantly with age and time since last offense. See, e.g., Blumstein & Nakamura, *"Redemption" in an Era of Widespread Criminal Background Checks*, US Dep't of Just, Nat'l Institute of Just J, No 263, at 11-13 (2009); Heilbrun, *Sexual Offending: Linking Assessment, Intervention, and Decision Making*, 4 Psychol Pub Pol'y & L 138, 139-43, 151 (1998); Zimring & Leon, *A Cite-Checker's Guide to Sexual Dangerousness*, 13 Berkeley J Crim L 65, 69-74 (2008).

Monitoring someone for the rest of their life without any individualized determination that they pose a risk of committing

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[70] Available at https://truthout.org/articles/we-need-a-new-paradigm-to-halt-the-unprecedented-growth-of-electronic-monitoring/ (accessed November 8, 2024).

another sex offense is cruel or unusual punishment in violation of the Michigan Constitution.

V. Requiring Mr. Kardasz to submit to lifetime electronic monitoring without an individualized assessment of risk and no means of petitioning for cessation constitutes cruel and unusual punishment in violation of the Federal Constitution.

Issue Preservation & Standard of Review

Counsel preserved challenges to Mr. Kardasz's sentence by filing a motion to remand in the Court of Appeals, which the court denied. The issue is preserved. MCR 6.429(C); MCR 7.211(C)(1).

Questions of constitutional law are reviewed de novo. *People v Parks*, 510 Mich 225, 245 (2022). This Court alone is "the ultimate authority with regard to the meaning and application of Michigan law." *Id.*, quoting *People v Bullock*, 440 Mich 15, 27 (1992).

Discussion

Under the federal constitution, the United States Supreme Court frequently employs an "as applied" analysis because the Eighth Amendment embodies a theory of proportionality. The "right not to be subject to excessive sanctions" necessarily "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Roper v Simmons,* 543 US 551, 560 (2005).

Certain punishments may not violate the Eighth Amendment per se but are found to be a violation when applied to a certain class of people or when applied in a mandatory fashion. See, e.g., *Kennedy v Louisiana,* 554 US 407 (2008) and *Atkins v Virginia,* 536 US 304 (2002) (the death penalty is not cruel and unusual punishment per se, but is when applied

to individuals who have committed non-homicide crimes or to intellectually challenged people); *Roper, supra* (Eighth Amendment bars the death penalty when applied to children); *Woodson v North Carolina,* 428 US 280 (1976) (plurality opinion) and *Lockett v Ohio,* 438 US 586 (1978) (Eighth Amendment bars mandatory imposition of the death penalty); *Graham v Florida*, 560 US 48 (2010) (life without possibility of parole is not cruel and unusual per se, but is when applied to children who have committed non-homicide offenses); *Miller v Alabama*, 567 US 460 (2012) (life without possibility of parole violates the Eighth Amendment when mandatorily applied to children).

At its heart, the Eighth Amendment prohibition against cruel and unusual punishment is proportionality. *Weems v United* States, 217 US 349, 367 (1910). "[T]he Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive" and employs a test that has the same first three factors as Michigan's test. *Graham*, 560 US at 59-60. As such, Mr. Kardasz's sentence is "grossly disproportionate" and unconstitutional under the Eighth Amendment. See Sections IV.A-C, *supra*.

Lifetime electronic monitoring is categorically unconstitutional under the Eighth Amendment. In addressing categorical bars, the Court follows a two-part test and considers:

> "[O]bjective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the

> Eighth Amendment's text, history, meaning, and purpose," the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. [*Graham*, 560 US at 59-60, quoting *Roper*, 543 US at 572 and *Kennedy*, 554 US at 421 (internal citations omitted)].

A reviewing court "must look beyond historical conceptions 'to the evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 58, quoting *Estelle v Gamble*, 429 US 97, 102 (1976). Determining cruelty "embodies a moral judgment," and while "[t]he standard itself remains the same . . . its applicability must change as the basic mores of society change." *Kennedy*, 554 US at 419.

Our "basic mores of society" pertaining to a person's privacy interests in their electronic data and the monitoring of their location have developed significantly within the past few years. As discussed in Section VI, *infra*, as technology and its applications to the legal system has developed, so has the law surrounding it. The United States Supreme Court has identified the privacy interests at stake in government access to a person's electronic data and location. See *Carpenter v United States*, 585 US 296, 297 (2018) (cell phone location data provides "near perfect surveillance" of the person carrying it, which raises grave privacy concerns); *United States v Jones*, 565 US 400 (2012) (Sotomayor, J., concurring) (monitoring a person's location necessarily discloses a "wealth of detail about her familial, political, professional, religious, and sexual associations" – all providing an intimate picture of that person's life). Government access to such intimate information for the rest of Mr. Kardasz's life based purely on his underlying offense does not comport with our society's growing interests in the privacy of

electronic data. See, e.g., McClain et al., *How Americans View Data Privacy*, Pew Research Center (October 18, 2023), available at https://www.pewresearch.org/internet/2023/10/18/how-americans-view-data-privacy/ (identifying the growing concerns of Americans regarding the government's access to their electronic data).

The United States Supreme Court has also refused to uphold punitive measures that limit a person's access to society based on the nature of their conviction after they have served their sentence. In *Packingham v North Carolina*, 582 US 98 (2017), the Court rejected the constitutionality of a state law prohibiting people with convictions for sex offenses from accessing *any* social media. The Court explained how "unsettling" it would be to allow for states to prohibit people from accessing a principle source of connection and association, which serves as the "modern public square." *Id.* at 107. While *Packingham* did not deal with electronic monitoring or an Eighth Amendment challenge, the decision is instructive here because it shows that as technology develops and society changes, so must our ideas surrounding punishment and crime prevention. See also Section IV.D, *supra* (discussing the significant limitations, tangible harms, and burdens imposed by LEM).

The requirement that Mr. Kardasz be subject to LEM following the completion of his incarceration is cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution. US Const, Am VIII.

VI. Mandating that Mr. Kardasz submit to lifetime electronic monitoring, without an individualized assessment of risk or opportunity to petition for cessation, constitutes an unreasonable search in violation of the Michigan and United States Constitutions.

Issue Preservation & Standard of Review

Counsel preserved challenges to Mr. Kardasz's sentence by filing a motion to remand in the Court of Appeals, which the court denied. The issue is preserved. MCR 6.429(C); MCR 7.211(C)(1).

Questions of constitutional law are reviewed de novo. *Parks*, 510 Mich at 245. This Court alone is "the ultimate authority with regard to the meaning and application of Michigan law." *Id.*, quoting *Bullock*, 440 Mich at 27.

Discussion

Tracking Mr. Kardasz's location by the government for the rest of his life, purely because he committed a specific type of offense, is an unreasonable and unconstitutional search. Constant, incredibly-accurate, government tracking of a person's location raises grave constitutional and privacy concerns. See *Carpenter*, 585 US at 297. This is especially true when a person is monitored for the rest of their life based solely on the underlying offense – without any individualized assessment of risk or way to petition for cessation. This lifetime tracking is an unreasonable search.

A. Affixing an electronic monitoring device to a person's body to track their movements is a search under the United States and Michigan Constitutions.

People have the right to be secure in their persons from unreasonable searches. US Const, Am IV; Const 1963, Art I, §11. As the United States Supreme Court has determined, electronic monitoring is a search within the meaning of the Fourth Amendment. *Grady v North Carolina*, 575 US 306, 310 (2015).

While it is clear that both the United States Constitution and the Michigan Constitution, prior to its recent amendment, protect electronic devices and their data from unreasonable search and seizure, see, e.g., *Jones*, 565 US 400; *People v Huges*, 506 Mich 512 (2020); *Riley v California*, 573 US 373 (2014), the recent amendment to our State Constitution cements those privacy interests even further. Const 1963, Art I, § 11 (amendment in effect as of December 2020). There can be no question that searches of electronic data and electronic communications must be closely scrutinized. The imposition of LEM without any individualized assessment of risk or opportunity to petition for cessation constitutes an unreasonable search both on its face and as applied to Mr. Kardasz.

"The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady*, 575 US at 310. Assessing reasonableness under the totality of the circumstances requires "a balancing of individual privacy interests and legitimate state interests to determine the

reasonableness of the category of warrantless search that is at issue." *Birchfield v North Dakota*, 579 US 438 (2016).

In determining whether a search is unreasonable, courts analyze: (1) whether the searches involved may be reasonable under the Fourth Amendment due to the individuals being searched having a diminished expectation of privacy, and (2) whether the warrantless searches authorized by the statute may be permissible based on "special needs." *Grady*, 575 US at 310.

B. Lifetime electronic monitoring constitutes an unreasonable search under *Jones*, *Carpenter*, and this Court's jurisprudence.

Constantly monitoring a person's location by physically intruding on their body, without probable cause to believe that person is committing a crime, is an invasion of privacy that our Constitutions are designed to protect against. The fact that an individual previously committed a specific type of offense does not completely negate their privacy interests,[71] and Mr. Kardasz's underlying offense does not nullify his Fourth Amendment protections. "[T]here is no precedent for the

[71] That is particularly so given the research showing that recidivism rates decrease significantly with age and time since last offense, making a mandatory lifetime search even more unreasonable. See, e.g., Blumstein & Nakamura, *"Redemption" in an Era of Widespread Criminal Background Checks*, US Dep't of Just, Nat'l Institute of Just J, No 263, at 11-13 (2009); Heilbrun, *Sexual Offending: Linking Assessment, Intervention, and Decision Making*, 4 Psychol Pub Pol'y & L 138, 139-43, 151 (1998); Zimring & Leon, *A Cite-Checker's Guide to Sexual Dangerousness*, 13 Berkeley J Crim L 65, 69-74 (2008).

proposition that whether a search has occurred depends on the nature of the crime being investigated." *Jones*, 565 US at 412.

1. Lifetime electronic monitoring is an unreasonable search under Federal jurisprudence.

In *Jones*, the Supreme Court held that the attachment of a GPS tracking device to Mr. Jones's car constituted a search. 565 US at 404. Five Justices agreed that the constant GPS tracking of an individual raised privacy concerns in addition to those raised by the physical intrusion. *Id*. at 404-05, 426, 428, 430. The Court in *Grady* later drew a connection between *Jones* and electronic monitoring, where it emphasized that the physical attachment of the monitoring device implicates additional privacy concerns by trespassing onto the body of the person being monitored. *Grady*, 575 US at 307-10. But *Jones* was also instrumental in paving the way for the Court's decision in *Carpenter*.

In *Carpenter*, the Court held that the police's acquisition of cell-site location data was a search that required a warrant. 585 US at 316. The Court discussed the reasonable expectation of privacy that individuals have in the whole of their physical movements – both in private and in public. *Id.* at 310; see also *Jones*, 565 US at 430. *Carpenter* raised concerns with the all-encompassing data accumulated by cell-site location records: "the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual

associations.' " *Id.* at 311.[72] Accessing this data is also relatively easy: it takes "just a click of a button, [and] the Government can access each carrier's deep repository of historical location information at practically no expense." *Id.* The Court held that the government invaded Mr. Carpenter's reasonable expectation of privacy "in the whole of his physical movements." *Id.* at 313. The concerns raised in *Carpenter* regarding cell-site location data are also present in the use of electronic monitoring – except this time, the government can track a device permanently affixed to a person's *body* (i.e., actual human anatomy) *for life.*

The Fourth Amendment prohibits *unreasonable* searches, and the reasonableness of the search depends on the totality of the circumstances. *Grady*, 575 US at 310. That an individual was previously convicted of a certain sex offense does not somehow make reasonable a constant, interminable search – particularly when there are scientific tools available to assess a person's risk of committing another sex offense. As the *Carpenter* Court cautioned, the ability of the government to track an individual's whereabouts is an invasion of privacy. Electronic monitoring creates an intimate reproduction of a person's life. The mere prospect that an individual could commit a future sex offense is not enough to override their constitutional rights and intrude upon their reasonable expectation of privacy. See *Grady*, 575 US at 310. Where additional reasonable protections exist (e.g., individualized assessments or the ability to petition for cessation), they should be observed before

[72] The Court also likened a cell phone to a "feature of human anatomy" because it "tracks nearly exactly the movements of its owner." *Carpenter*, 585 US at 311.

stripping an individual of a constitutional right and subjecting them to live under a state of permanent surveillance.

2. Lifetime electronic monitoring is an unreasonable search under the Michigan Constitution. The Court of Appeals decision in Hallack is wrongly decided.

This Court has defined the breadth of our State Constitution's protections again unreasonable searches involving electronic data. For instance, a search of digital cell-phone data pursuant to a warrant "must be reasonably directed at obtaining evidence relevant to the criminal activity alleged in that warrant." *People v Hughes*, 506 Mich 521, 516-17 (2020). Even where other criminal activity has authorized police to search the contents of a cell phone, any search of the cell phone data *must* be related to the criminal activity which supported the warrant. *Id.* at 529. In *Hughes*, this Court declined "to adopt a rule that it is always reasonable for an officer to review the entirety of the digital data seized pursuant to a warrant on the basis of the *mere possibility that evidence may conceivably be found*." *Id.* at 541 (emphasis added). When an individual is subject to mandatory LEM, however, that is *exactly* what happens. Their location is tracked or monitored 24/7 simply because there is a *mere possibility* that evidence of a future crime – specifically a sex offense – could be collected.

The Court of Appeals' recent decision in *Chandler* identified similar privacy interests to those at stake in cases involving LEM: the diminished privacy interest of individuals on probation or parole. *People v Chandler*, __ Mich App __ (2024) (Docket No 368736). There, the court correctly identified that a person's status as a probationer does not mean

they "forgo their Fourth Amendment rights in full." *Chandler*, slip op at 4. Instead, a warrantless search of a probationer's property still requires reasonable suspicion or express waiver of their Fourth Amendment protections. *Id.* at 4-5. This Court should reach a similar holding here: a person convicted of a sex offense does not automatically and irrevocably forgo their Fourth Amendment rights in full. That is especially so given that LEM applies long after an individual has successfully completed the terms of their probation or parole and lasts until they die.

The Court of Appeals' decision in *Hallak* does not align with our Constitution's protections against unreasonable searches when it comes to electronic data. "The applicable test in determining the reasonableness of an intrusion is to balance the need to search, in the public interest, for evidence of criminal activity against invasion of the individual's privacy." *People v Chowdhury*, 285 Mich App 509, 516 (2009). In *Hallak*, the Court of Appeals found that the public interest to both "punish and deter convicted child sex offenders and to protect society from a group known well for a high recidivism rate" significantly outweighed the "lower expectation of privacy" held by parolees and probationers. *People v Hallak,* 310 Mich App 555, 580-81 (2015), rev'd in part on other grounds 499 Mich 879 (2016); but see *Chandler*, slip op at 4. The court found (incorrectly) that the invasion of the monitored individual's privacy is not so significant, because "[t]he monitoring does not prohibit defendant from traveling, working, or otherwise enjoying the ability to legally move about as he wishes." *Hallak*, 310 Mich App at 581; but see Section IV.D *supra* (discussing the serious barriers LEM erects to travel, work, health, family, friendships, and more).

The court's analysis in *Hallak* is wrong in regard to *both* prongs of the applicable test. First, the public interest in conducting a constant

search of an individual's location is not as the Court of Appeals thought. The recidivism rate of people convicted of criminal sexual conduct is actually *lower* than those convicted of other crimes and has historically been overblown. See Section II.C and II.D.5 *supra*. The mere prospect of a crime, specifically a sex offense, being committed does not create a substantial enough public interest to override the privacy interests that belong to *everyone* under our Constitution.

Second, the privacy interest cannot so easily be outweighed by the alleged need to prevent future sex offenses. LEM was designed to track a person's movements, day in and day out, *both in real and recorded time*, until their death – and the information is retrievable at any time. MCL § 791.285(1). See also *Carpenter*, 585 US at 311, citing *Jones*, 565 US at 415 (Sotomayor, J., concurring) (recognizing the intrusiveness of this "near perfect" surveillance). The LEM statute gives the government unfettered power to intrude upon a person's life, owing to a conviction that supposedly makes them more dangerous than other people. Yet without an individualized assessment of their "dangerousness" or risk of recidivism, this invasion of privacy is overbroad, uninformed, and unreasonable.

This Court should not adopt *Hallack's* characterization of the privacy invasion as insignificant. Electronic monitoring systems place substantial limitations on a person's pursuit of life, liberty, and happiness. See Section IV.D *supra* (discussing the never ending

emotional, mental, and physical toll associated with a state of constant government surveillance).[73]

In sum, LEM embodies the beginnings of an Orwellian nightmare. Indeed, if this Court rules that LEM is constitutional, then it should be prepared to hold the same when the technology inevitably develops to the point that the government can track an individual's locations using a surgically implanted microchip. While this may seem like a farfetched idea from a James Bond movie, given the market developing around pet-based GPS and current microchipping efforts to identify lost dogs, it is not hard to imagine more discrete forms of surveillance being applied to humans.

In an opinion addressing the constitutionality of LEM under its search and seizure doctrine, the Georgia Supreme Court correctly concluded: "the permanent application of a monitoring device and the collection of data by the State about an individual's whereabouts twenty-four hours a day, seven days a week, through warrantless GPS monitoring for the rest of that individual's life, even after that person

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[73] Research has also revealed a new generation of smartphone-based electronic monitoring systems, which expand the intrusive reach of electronic monitoring by incorporating face and voice recognition technologies. There is an ongoing shift nationwide from ankle monitors to cellphone-based apps for electronic monitoring. While this transition may eliminate the visual stigma of a plastic shackle, it opens the door to a whole host of other privacy concerns associated with unlimited access to data on an individual's phone. See Kilgore, *We Need a New Paradigm to Half the Unprecedented Growth of Electronic Monitoring*, Truthout, https://truthout.org/articles/we-need-a-new-paradigm-to-halt-the-unprecedented-growth-of-electronic-monitoring/ (accessed November 21, 2024).

has served the entirety of his or her criminal sentence, constitutes a significant intrusion upon the privacy of the individual being monitored." *Park v State*, 305 Ga 348, 355 (2019), citing *Jones*, 565 US at 407; see also Section VI.C.2 *infra*.

This Court should overturn *Hallak* and hold that LEM is an unconstitutional search in violation of the Federal and State Constitutions, especially where there is no individualized assessment or ability to petition for cessation.

C. Several other state supreme courts have ruled that lifetime electronic monitoring constitutes an unreasonable search.

This Court should join other state supreme courts and hold that LEM is an unconstitutional, unreasonable search.

1. North Carolina

The Supreme Court of North Carolina held that the state's LEM program for recidivist sex offenders "constitute[d] a substantial intrusion into [their] privacy interests. . . ." that violated their right to be free from unreasonable searches under the Fourth Amendment. *State v Grady*, 372 NC 509, 544-45 (2019). There, Mr. Grady, whose status as a recidivist made LEM mandatory for him without any individualized determination to the reasonableness of the search, challenged the constitutionality of North Carolina's statute. *Id.* at 511. Like the studies relied upon by this Court in *Betts*, 507 Mich at 560, and identified in this brief (see Section II.C and II.D.5 *supra*), Mr. Grady pointed to studies showing that people who commit sex offenses are less likely to reoffend than other categories of people convicted of

felonies and that the vast majority of sex offenses are committed against victims who already know the offender. *Id*. at 517-518.

In ruling in Mr. Grady's favor, the Court pointed out that even if a person's expectation of privacy is "greatly diminished" or "drastically reduced," his expectation of privacy is not completely eliminated. *Id*. at 533-534. The state could not meet its burden in explaining how a person convicted of a sex offense has a reduced "expectation of privacy in his body and in his every movement every day for the rest of his life" where ankle monitors constitute "in essence, a feature of human anatomy." *Id*. at 529-530. The Court observed that "there is no precedent for the proposition that persons such as defendant, who have served their sentences and whose legal rights have been restored to them . . . nevertheless have a diminished expectation of privacy in their persons and in their physical locations at any and all times of the day or night for the rest of their lives." *Id*. at 533-534. The Court also held that the "special needs," doctrine did not apply to LEM because the state was unable to proffer any concerns beyond crime detection. *Id*. at 526-527.

Like many ankle monitors, the monitor in *Grady* required the user to charge it for two hours per day by plugging it into a wall and remaining tethered by the charging cord, as failure to charge the monitor or loss of signal would result in a violation. *Id*. at 518. After taking a careful look at the realities of living with an ankle monitor, the Court held that mandatory LEM "works a deep, if not unique, intrusion" upon a person's Fourth Amendment rights. *Id*. at 538. Such an intrusion could not give way to the state's legitimate interest in protecting the public where the State provided no concrete evidence showing that electronic monitoring is effective in preventing recidivism. *Id*. at 543-544, citing *Ferguson v City of Charleston*, 532 US 67, 86 (2001). The

Grady Court concluded its opinion with the following explanation, which is instructive here:

> The generalized notions of the dangers of recidivism of sex offenders, for which the State provided no evidentiary support, cannot justify so intrusive and so sweeping a mode of surveillance upon individuals, like defendant, who have fully served their sentences and who have had their constitutional rights restored. The unsupported assumption – that if a crime is committed at some unspecified point in the future, the ankle monitor worn during all of the intervening years by one of these individuals, who may or may not pose a risk, may potentially aid in inculpating or exonerating that individual – does not advance the State's interest in a manner that outweighs the intrusiveness of mandatory lifetime [electronic monitoring] upon that individual's legitimate expectations of privacy.

Id. at 545.

2. Georgia

The Supreme Court of Georgia found that Georgia's sex offender statute, which required people classified as "sexually dangerous predator[s]" – but who were no longer in state custody or on parole – to submit to LEM, authorized on its face "a patently unreasonable search that [ran] afoul of the protections afforded by the Fourth Amendment." *Park*, 305 Ga at 348. The *Park* Court was not persuaded by the state's argument that people designated as "sexually dangerous predators" have a diminished expectation of privacy, as all of the cases cited by the

state in support of its position concerned individuals who were still serving a criminal sentence, either on probation or on parole. *Id*. at 354 ("It cannot be said that an individual who has completed the entirety of his or her criminal sentence, including his or her parole and/or probation requirements, would have the same diminished privacy expectations as an individual who is *still* serving his or her sentence.") (emphasis in original).

With respect to the question of whether LEM constituted a "special needs" search, the *Parks* Court explained that because the GPS device used in implementing LEM is designed to obtain evidence of criminal conduct, the interest of preventing potential future crime is not "divorced from the State's general interest in law enforcement." *Id*. at 357. Therefore, the fact that the GPS monitoring device is designed to obtain evidence of criminal conduct that would be turned over to the police and admissible in a subsequent criminal investigation made the "special needs" exception to the Fourth Amendment warrant requirement inapplicable. *Id*.

Because the Georgia statute "simply allow[ed] for warrantless searches of individuals," that the people being searched had to pay for, "to find evidence of possible criminality for the rest of their lives, despite the fact that they have completed serving their entire sentences and have had their privacy rights restored," the Supreme Court of Georgia struck it down as a "patently" unconstitutional search. *Id*. at 360.

3. Massachusetts

The Massachusetts Supreme Court concluded that mandatory electronic monitoring of a person convicted of a sex offense was an

unreasonable search. *Commonwealth v Feliz*, 481 Mass 689, 690 (2019). The relevant statute, MA ST 265 § 47, was unconstitutional and overinclusive without a requirement that an individualized assessment be completed for each person that could be subject to GPS monitoring as a condition of probation. *Id.*

The court acknowledged the significant invasion of a person's privacy that GPS monitoring required, and the burdens it imposed. *Id.* at 704-705. For example, if a person received an alert on their monitoring device, much like in Michigan, they needed to communicate with someone in the probation department to resolve the issue without risking a subsequent arrest. *Id.* at 695. Mr. Feliz had experienced at least 31 alerts within his first 10 months of being on electronic monitoring and "[a] number of these alerts involved power disconnection and the failure of the defendant's GPS device to maintain a satellite connection." *Id.* at 695-696.

The court balanced the government's "strong interests" in protecting the public from "sexual predators" and in rehabilitating people convicted of sex offenses with a person's privacy concerns. *Id.* at 699. It held that GPS monitoring was "not a minimally invasive search." *Id.* at 700. And while a probationer has a diminished expectation of privacy, that does not give the government an unlimited ability to infringe upon their expectation of privacy. *Id.* at 700-701.

The court identified that the particularity requirement in Fourth Amendment searches required the government to provide a particularized reason as to why GPS monitoring furthered its interests "in protecting the public from sex offenders." *Id.* at 705. The prosecution had justified the "imposition of GPS monitoring on this defendant based

on the *potential use* of GPS data as a tool to investigate commission of sex crimes should they occur." *Id.* (emphasis added). Yet the court found that this generalized reasoning – the possibility of investigating a future crime – was not "evidence sufficient to indicate that this defendant poses a threat of reoffending, or otherwise of violating the terms of his probation." *Id.* at 705-706. Therefore, as applied to Mr. Feliz, electronic monitoring was an unreasonable search. *Id.* at 706, 709 ("The absence of evidence demonstrating a risk of recidivism anchored in facts related to this particular defendant tilts the balance against concluding that GPS monitoring is a reasonable search.").

This Court should reach the same conclusions as its sister Supreme Courts in North Carolina, Georgia, and Massachusetts. It is an unreasonable search to monitor hundreds of Michiganders without any individualized assessment as to whether there is a concrete benefit in doing so – whether doing so actually protects the public based on readily available scientific tools like VASOR or Static-99.[74] Michiganders subject to LEM have no less of an expectation to privacy than the people contemplated by the courts in *Grady*, *Park*, and *Feliz*. Generalized

[74] Michigan's LEM requirement is even more unreasonable than the electronic monitoring requirement in *Grady* because there is no opportunity to petition for cessation, whereas the North Carolina statute permitted a petition for cessation after one year. And even there, the *Grady* Court held that such a process "does little to remedy what is absent at the front end of this warrantless search—that is, 'the detached scrutiny of a' judicial officer 'ensur[ing] an objective determination whether an intrusion is justified in any given case.'" *Grady*, 372 NC at 534 quoting *Skinner v Ry Labor Execs' Ass'n*, 489 US 602, 622 (1989).

concerns of recidivism and the overblown gravity of the threat of a person convicted of a sex offense committing another sex offense cannot justify the permanent deprivation of constitutional rights to Michiganders no longer in government custody, on probation, or on parole. Nor can the government demonstrate a special need for the warrantless search beyond solving crimes and its general interest in law enforcement.

This Court should hold that LEM constitutes an unreasonable search in violation of the United States and Michigan Constitutions.

Conclusion and Relief Requested

For the reasons stated above, Robert Kardasz respectfully requests that this Honorable Court find mandatory lifetime sex offender registration and mandatory lifetime electronic monitoring to be unconstitutional, remand for resentencing, and grant whatever other relief it deems necessary and just.

Respectfully submitted,

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