STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT JAMES KARDASZ,

Defendant-Appellant.

Supreme Court No. 165008

Court of Appeals No. 358780

Macomb Circuit Court No. 2017-002252-FC

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

CORRECTED BRIEF OF AMICUS CURIAE OF THE MICHIGAN STATE POLICE IN SUPPORT THE PEOPLE AND THE MACOMB COUNTY PROSECUTOR

B. Eric Restuccia (P49550)
Deputy Solicitor General

Eric M. Jamison (P75721)
Assistant Attorney General

Attorneys for the Michigan State Police
Department of Attorney General
P.O. Box 30212
Lansing, MI 48909
(517) 335-7628
RestucciaE@michigan.gov

Dated: February 21, 2025

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STATEMENT OF QUESTIONS PRESENTED

In its May 31, 2024 order, this Court asks four questions, but only one relates to the Michigan 2021 Sex Offenders Registration Act (SORA), and that one question may be further divided into three questions:

1. Whether this Court should reach the issue whether the Michigan 2021 SORA is punitive where the law is clear that regardless of that question, the application of the 2021 SORA to Robert Kardasz is not cruel or unusual punishment.

   The MSP answers: No.

   Kardasz's answer: Yes.

   The People's answer: Did not answer.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

2. Whether requiring the defendant 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.

   The MSP answers: No.

   Kardasz's answer: Yes.

   The People's answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

3. Whether requiring the defendant 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 US Const, Am VIII.

The MSP answers:	No.
Kardasz's answer:	Yes.
The People's answer:	No.
Trial court's answer:	No.
Court of Appeals' answer:	No.

INTEREST OF AMICUS CURIAE

The Michigan State Police is currently defending Michigan law in a federal lawsuit that challenges the constitutionality of Michigan's Sex Offenders Registration Act as amended by the Legislature effective March 24, 2021 (Michigan's 2021 SORA or the Act). Under the Act, the MSP maintains the database of registrants. There are currently more than 40,000 offenders listed on Michigan's registry.

The Michigan State Police supported Wayne County in this Court on the question presented in *People v Lymon* (No. 164685), i.e., whether it is cruel or unusual punishment under Michigan's Constitution for a criminal defendant to have to register under Michigan's Sex Offenders Registration Act for his conviction for a crime that did not include a sexual component. See *Lymon*, slip op, p 19 ("there simply are no facts in this case supporting an inference that there was any sexual component to the offenses he committed."). The question here now addresses whether Michigan's 2021 SORA is cruel or unusual punishment with respect to sexual offenders. It is not. And that does not present a close question, particularly where the offender here – Robert Kardasz – could have received a life sentence in prison for his terrible crime and it would not be cruel or unusual punishment.

But this Court should reserve the threshold question – whether Michigan's 2021 SORA is punitive – for another day. That big question is joined by the Ex Post Facto Clause challenge pending in *People v Johnson* (No. 165814). Michigan's 2021 SORA is now virtually identical to the federal Sex Offender Registration and Notification Act (SORNA), which has been found not to be punitive by the federal courts. When the Court rules on the issue, it should rule likewise. Michigan's 2021 SORA is not punitive.

INTRODUCTION

The Michigan Sex Offenders Registration Act Sex (SORA) is not punishment, and it is not cruel or unusual punishment as applied to Robert Kardasz, who committed the gravest of sexual offenses, the rape of a five-year old child. But this is not the right case to address the threshold point, i.e., whether SORA is punitive at all. That is because, it is unmistakable that regardless of one's opinion on the threshold question, the requirement that Kardasz has to register for his entire life is not cruel or unusual where a life sentence in prison would not be cruel or unusual. He will not be released until 2042 at the earliest, and may be held until 2057, when Kardasz will be almost 74 years old, which itself may be a life sentence. All of the arguments that are advanced against the regulatory nature of SORA have the feel of claims about a future world, Michigan as it will be 20 or 30 years from now. The SORA has been amended as many as 15 times since its passage in 1995, and it is hard to predict how it may change in the next 20 years.

Rather, this Court should find that the SORA as applied to Kardasz is not cruel or unusual punishment, and reserve for another day the threshold question.

If this Court does reach the threshold question, it may lead to the next question about what should happen now if 2021 SORA is found to be punitive. In *Does v Whitmer* (ED Mich, 22-cv-10209), the federal district court ruled last fall that Michigan's SORA was punitive in an ex post facto challenge, suggested that the proper resolution for the pre-2011 offenders was to reduce the period of registration from lifetime to 25 years for those registrants whose registration periods increased in 2011 and that the in-person reporting requirements introduced in 2011 cannot be given effect. There has been more briefing since.

Indeed, lurking behind this case is the claim the SORA violates the Ex Post Facto Clause for those pre-2011 offenders, and that cohort reflects more than 30,000 offenders, i.e., more than two-thirds of all registrants. That issue is present in the case that this Court is holding in abeyance for this case, *People v Johnson* (No. 165814). Notably, the question whether the SORA is punitive for the pre-2011 offenders is different than the question whether it is punitive for Kardasz. Needless to say, the answer here would appear to resolve the issue for Kardasz alone and not engage the issue on ex post facto grounds. And, again, the issue of *what would happen now* would remain even if 2021 SORA is found to be punitive on ex post facto grounds.

Even so, if this Court reaches this threshold issue, Michigan's SORA is not punitive. The difference between applying its obligations to sexual offenders as against non-sexual offenders is like night and day. The Court's ruling in *People v Lymon* does not require a different result, as reflected in opinions from the Court of Appeals applying *Lymon*. The primary design of the SORA is to provide accurate information to the public about sexual offenders so that residents may use this information to inform their decisions, protect their families, and decide where to live. While it also changes the conduct of the offenders themselves, that is not its central feature.

And that is the primary error of the arguments of Kardasz, who examines the SORA almost exclusively from the vantage point of the offender. The SORA is not designed to keep tabs on offenders like probation or parole, but rather to give ordinary residents accurate information. It is for residents with children or young women and others with limited resources, looking for accurate information.

Kardasz's error is compounded by emphasizing the changed nature of the internet, which cuts exactly the other way. All of the information about Robert Kardasz's heinous crimes are available for the world to see apart from the registry. If you Google his name, two of the first three entries are from this Court's website and the Michigan registry does not appear in the first ten entries. The shame arises from the crimes, not the registry.

And make no mistake. This cohort of 40,000 or more offenders are some of the most dangerous in the state. The Court need not rely on studies, because this group has a 10% reconviction rate, i.e., 5,268 – having been convicted of a subsequent sexual offense, which does not account for the radical underreporting of sexual offenses and the even smaller number of arrests. This fact is staggering. Moreover, the suggestion is not well taken that ordinary residents, with limited means, do not enhance their safety when they rely on this registry to protect their children by checking on babysitters, or on determining where to live, or whether to befriend or date a newly made acquaintance. The SORA provides the ability for Michigan residents to make informed decisions about who comes into that orbit.

On the law, the crimes of Robert Kardasz are different in kind from those of Cora Lymon. This Court's analysis in *Lymon* does not contradict the regulatory nature of the SORA. The comparison of Michigan's 2021 SORA to the federal Sex Offender Registration and Notification Program (SORNA) should be persuasive as SORNA has universally been found to be non-punitive, and a review of its differences only underscore the way in which its requirements are *more* extensive.

A comparison to the Alaska law upheld by the U.S. Supreme Court in *Smith v Doe,* 538 US 84 (2003), is also intructive about why Michigan's SORA is not punitive. The federal case law also is persuasive that there is no Eighth Amendment violation.

Finally, if this Court is inclined to conclude that somehow Michigan's SORA is punitive and cruel or unusual as applied to Kardasz, the question of what that means would have to be the next step and the subject of additional briefing.

STATEMENTS OF FACTS AND PROCEEDINGS

Regarding the issue whether Michigan's 2021 SORA is punitive, the Michigan State Police as amicus is recommending that this Court defer the issue for another day because it is plain that the 2021 SORA is not cruel or unusual punishment for an offender like Robert Kardasz, who raped a five-year old child. The threshold issue is not joined. But the MSP argues that if this Court should reach this issue, it should rule that it is not punitive, just as all of the federal courts have done for the SORNA, which is now virtually identical in substance to the 2021 SORA.

For the statement of facts and proceedings, the MSP provides two narratives in its background for the body of the brief: (1) the decision below on this issue of cruel or unusual punishment; and (2) the background of the 2021 SORA in the event that this Court reaches that issue.

A. The Court of Appeals' ruling that Michigan's 2021 SORA is not cruel or unusual as applied to Robert Kardasz

The Court here has asked four questions, the first of which asks whether the 2021 SORA is cruel or unusual punishment as applied to Robert Kardasz where he was convicted of first-degree criminal sexual conduct against a five-year old girl. A panel of the Court of Appeals – Judges Gleicher, Markey, and Patel – ruled that it was not.

The Court of Appeals initially identified the two-part test, first whether the 2021 SORA is punishment, and second whether the 2021 SORA was cruel or unusual punishment as applied to Kardasz. On this first question, the Court of Appeals noted that it was duty bound to follow *People v Lymon* – before this Court vacated that part of the opinion – that it was a penalty. See slip op, p 2.

The Court then went on to provide five paragraphs that explain why the application of the 2021 SORA to Kardasz was not cruel or unusual punishment:

> [L]ifetime SORA registration is neither cruel nor unusual. First, lifetime SORA registration is not disproportionately harsh compared to the gravity of the offense committed in this case. . . .
>
> Further, lifetime SORA registration is not unduly harsh as compared to penalties imposed for other offenses in Michigan. . . .
>
> Lifetime SORA registration also is not an unduly harsh punishment when compared to punishments for similar offenses in other states. . . .
>
> As to the final factor—the impact of the punishment on rehabilitation—we agree with Kardasz that lifetime registration will not assist his rehabilitation. However, given the strength of the other factors, the lack of rehabilitative effect is not fatal. . . . .
>
> ***Given the severity of Kardasz's offense and the need to protect young children from sexual predation, requiring Kardasz to register under SORA for the remainder of his life is neither cruel nor unusual punishment.*** [Slip op, pp 2–3 (emphasis added).]

While the MSP contends that the 2021 SORA is not punitive, the final paragraph correctly rejects the claim in the end.

B. Michigan's 2021 SORA

Since its enactment in 1994, the Michigan SORA has been amended as many as fifteen times, but the key revisions occurred in four different years: (1) in 1999, when the periodic reporting was added; (2) in 2006, when the student safety zones were added; (3) in 2011, when the Legislature revised the law to add obligations consistent with the federal Sex Offender Registration and Notification Program (SORNA), 34 USC 20901 *et seq.*; and (4) in 2021, when the Legislature revised the law to ensure that it was not punitive, responding to the federal district court's decision in *Doe v Snyder* (*Does II*), 449 F Supp 3d 719 (ED Mich 2020), removing the ways in which Michigan's SORA extended beyond SORNA, including the student safety zones. As the Sixth Circuit explained, "Michigan passed a new (fourth) version of SORA, which became effective on March 24, 2021. This new SORA removed or modified the provisions that *Does II* had declared unconstitutional." *Does v Whitmer*, 69 F4th 300, 303 (CA 6, 2023).

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

The Legislature first enacted its SORA in 1994. 1994 PA 295. That same year, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which "conditions certain federal law enforcement funding on the States' adoption of sex offender registration laws and sets minimum standards for state programs." *Smith v Doe*, 538 US 84, 89 (2003).

In the years since it was first enacted, SORA has undergone a series of amendments.[1] In 1996, Michigan amended SORA to require law-enforcement agencies to make offender information available to the public. 1996 PA 494. Certain information reported by sex offenders is now available to the public on the Internet. See MCL 28.728(2). This original registry required offenders to "notify the local law enforcement agency" of a change to the individual's address within 10 day of the change. MCL 28.725(1) (1995); Public Act 295 of 1994.

In 1999, Michigan adds the periodic in-person reporting.

In order to keep the registry up to date, the Legislature added the requirement that offenders were required to report periodically in person either annually or quarterly, depending on the nature of their offense. See MCL 28.725a(4) (1999); Public Act 85 of 1999(4)(a)(requiring a registrant to "*report in person*" for listed misdemeanor "not earlier than January 1 or later than January 15 of each year"); (4)(b) (requiring a registrant to "*report in person*" for a listed felony "each April, July, October, and January following initial verification or registration.") (emphasis added).[2]

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[1] See, e.g., 1994 PA 295; 1996 PA 494; 1999 PA 85; 2002 PA 542; 2004 PA 240; 2005 PA 121 and 131; 2005 PA 127; 2005 PA 132; 2006 PA 46; 2011 PA 17; 2011 PA 18; 2014 PA 328; 2020 PA 295, 2024 PA 66.

[2] This Court in *People v Betts,* 507 Mich 527 (2021) mistakenly indicated that this periodic in-person reporting requirements were added in 2011. See *id.* at 535 ("The 2011 amendments further added a periodic reporting requirement that instructed registrants to present themselves to law enforcement, in person, one or more times a year, even if registrants had no changes to report. MCL 28.725a(3), as amended by 2011 PA 17.") As noted, these periodic in-person reporting were present since 1999, the change in 2011 being the addition of biannual reporting for Tier II offenders. See MCL 28.725a(3)(b) (2011); Public Act 17 of 2011.

In addition, the Legislature required offenders to update not just their address, but also update their work location or place of education within 10 days to the local law enforcement agency. See MCL 28.725a(1)(a); Public Act 85 of 1999.

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

The Legislature amended SORA in 2006 to create "student safety zones," which generally prohibited offenders from residing, working, or loitering within 1,000 feet of school property. See MCL 28.733–736 (2006); 2005 PA 127. As noted in response to the federal district court decision in *Does II*, effective March 24, 2021, the Legislature repealed these provisions. See 2020 PA 295.

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

In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA) to strengthen the nationwide network of sex-offender registration and notification programs throughout the United States. 34 USC 20901 *et seq*. Accordingly, the federal SORNA established minimum standards for state registries in order to qualify for funding, and it also created its own obligations for sex offenders under federal law. See, e.g., *Willman v Attorney General of United States*, 972 F3d 819, 821 (CA 6, 2020) ("a sex offender's obligations under SORNA are independent of any duties under state law.").

To avoid a reduction in federal funding, states must "substantially implement" SORNA's requirements. 34 USC 20927(a) & (d). In 2008, the U.S. Attorney General issued minimum standards a state must meet to achieve substantial compliance.

See National Guidelines for Sex Offender Registration and Notification 10 (July 2008) (Guidelines).[3] SORNA and the Guidelines "set[] a floor, not a ceiling," for state registry programs. 73 Fed Reg at 38032.

By establishing its own duties, SORNA also "directly prescribes registration requirements that sex offenders must comply with." *Id.* at 38034.

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

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

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

(2) independent of the periodic in-person reporting established in 1999, now required in-person reporting for updates within three business days for certain changes, including changes to residence, place of employment or education, and name as well as vehicle use or ownership, and e-mail address or other designations used in Internet postings, MCL 28.725(1) (2011), MCL 28.725a(3)(c) (2011), see also 2011 PA 17 and 2011 PA 18; and

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

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

https://www.federalregister.gov/documents/2008/07/02/E8-14656/office-of-the-attorney-general-the-national-guidelines-for-sex-offender-registration-and (last accessed February 6, 2025). There have been five other supplemental guidelines provided by the U.S. Attorney General: 86 Fed Reg 69856–69887 (Dec 8, 2021), 81 Fed Reg 50552–50558 (Aug 1, 2016), 76 Fed Reg 1630–1640 (Jan 11, 2011), 75 Fed Reg 27632–27366 (May 14, 2010), and 72 Fed Reg 8894–8897 (Feb 28, 2007).

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

In 2016, the Sixth Circuit reviewed an ex post facto challenge brought by six plaintiffs who committed their registerable offenses before 2006, and they argued that Michigan's SORA – as it existed pre-2021 – constituted punishment and therefore was unconstitutional. *Does 1–5 v Snyder*, 834 F3d 696, 703–706 (CA 6, 2016) (*Does I*), cert den 138 S Ct 55 (2017). The Sixth Circuit agreed and it emphasized three statutory features that it found rendered the old SORA statute punitive: (1) the student safety zones; (2) the public classification of offenders into tiers without an individual assessment; and (3) the requirements on offenders to appear in person to report even minor changes. See *Does 1–5*, 834 F3d at 702–705.

In 2020, the federal district court then ruled that *Does I* rendering the old SORA unconstitutional on ex post facto grounds applied to all the pre-2011 sex offenders and was prepared to enjoin the law, but it provided a window of time for the Legislature to remedy Michigan law. *Does II*, 449 F Supp 3d at 729, 737.

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

In December 2020, the Legislature revised Michigan's SORA laws to address the federal court rulings that found Michigan's SORA laws unconstitutional. The Legislature did so by repealing the student safety zones, MCL 28.733 through 736, removing the public nature of the tiering in MCL 28.728(2), and allowing for the Michigan State Police to provide another means to update information rather than doing so in person for minor changes such as a new motor vehicle under MCL 28.725(2)

("in the manner prescribed by the department"). They took effect on March 24, 2021. Consistent with the MSP's duty to notify registrants of changes to the law, see MCL 28.725a(1), the MSP provided notice to registrants that they may update minor changes under MCL 28.725(2) by mail. (See Ex A, MSP Notice, p 2.)

In a claim that state officials acted in violation of their constitutional duties by continuing to apply the old SORA after the Sixth Circuit's 2016 decision in *Does I,* the Sixth Circuit explained that this 2021 legislation "removed or modified" the challenged provisions, as noted above. But the point bears repeating:

> Michigan passed a new (fourth) version of SORA, which became effective on March 24, 2021. *Ibid. This new SORA* ***removed or modified*** *the provisions that Does II had declared unconstitutional.*
>
> [*Does,* 69 F4th at 303.]

Significantly, with the changes to Michigan law, the obligations under state law and under federal SORNA are now virtually the same in their requirements. See Ex B, Comparative Chart for the Michigan 2021 SORA and the federal SORNA.

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

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

First, the Court ruled that the law was different in character from the Alaska law, which was reviewed by the U.S. Supreme Court in *Smith v Doe,* 538 US 84 (2003). *Betts,* 507 Mich at 547 ("Michigan's SORA as initially enacted was similar to the Alaska sex-offender registry at issue in *Smith*"). The Michigan SORA before 2006 did not include an individual assessment, but it imposed a duration of registration obligations based on the crime. This was also true of Alaska's registry law. *Smith,* 538 US at 90 ("If the offender was convicted of a single, nonaggravated sex crime, he must provide annual verification of the submitted information for 15 years.").

Second, this Court then reviewed the five factors that the U.S. Supreme Court examined in *Smith* to determine whether Michigan's 2011 SORA was punitive. *Betts*, 507 Mich at 561–562. This Court summarized its analysis that the 2011 SORA law was excessive, identifying the lack of "individualized assessment," the student safety zones, and the in-person reporting, including for even "minor life changes," in finding it punitive in "aggregate." *Id.*

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

> See, e.g., MCL 28.733 to MCL 28.736, as amended by 2005 PA 121 (creating the student-safety zones excluding registrants from living, working, or loitering within 1,000 feet of a school);

> MCL 28.727, as amended by 2011 PA 18, and MCL 28.725(1), as amended by 2011 PA 17 (adding events triggering an in-person reporting requirement and decreasing the reporting period to three days);
>
> MCL 28.722, as amended by 2011 PA 17 (creating the tiered classification system and basing SORA's requirements on those tiers). [*Id.* at 564.]

In 2022, a new federal lawsuit is filed challenging the Michigan 2021 SORA on ex post facto grounds among other claims.

The Michigan State Police and the Governor are defending the constitutionality of Michigan's 2021 SORA in federal court, a challenge that was filed in 2022 and is currently awaiting entry of a final judgment. See *Does v Whitmer* (ED Mich, 22-cv-10209). The amended complaint runs more than 200 pages and brings eleven claims or counts against Michigan's 2021 SORA, including the first two counts that are Ex Post Facto challenges, one related to the claim that the duties are punitive and the other challenging the retroactive increase of registration periods from 25 years to lifetime. (See *Does,* 22-cv-10209, Amended Complaint, April 21, 2023, pp 183–206.)

In 2024, this Court in People v Lymon *addresses the 2021 SORA in a cruel or unusual punishment challenge to its application to those registrants convicted of a non-sexual offense where there was no sexual component to the crime.*

After this Court's decision in *Betts,* a criminal defendant convicted of unlawful imprisonment brought a challenge to his conviction on cruel or unusual punishment grounds under Michigan's Constitution because his crime did not include a sexual element. The Court of Appeals granted him relief, but in doing so, it ruled that Michigan's 2021 SORA was punitive as a facial matter in a published decision. *People v Lymon*, 342 Mich App 46, 81 (2022). This analysis was largely relying on its application of the decision in *Betts*.

This Court granted leave and reversed insofar as the Court of Appeals found that the 2021 SORA was punitive in relation to sexual offenders, leaving that question for another day. See *People v Lymon*, ___ Mich ___ (2024), slip op, p 30, n 20. ("Our opinion does not reach the question whether the 2021 SORA constitutes punishment as to sexual offenders—and, in fact, explicitly vacates the portion of the Court of Appeals opinion that so concluded."); *id.* at 38. The central feature of the analysis was the misfit between the registry's emphasis on sexual offenders as applied to a non-sexual crime: "Such offenders are branded dangerous sex offenders even though their crimes contained no sexual component[.]" *Id.* at 26.

It is important to note that the Court of Appeals has relied on this Court's decision in *Lymon* and found that the 2021 SORA does not constitute punishment as applied to a criminal defendant who was convicted of first-degree criminal sexual conduct. *People v Kiczenski*, ___ Mich App ___, 2024 WL 4595174, at *10 (Mich. Ct App, Oct 28, 2024).[4]

[4] It is worth noting that two judges from the Court of Appeals who reached the issued the original decision in *Lymon,* holding that it was punitive, appeared to reverse course after this Court's decision in *Lymon* when examining a cruel or unusual punishment challenge to the 2021 SORA by a sexual offender convicted of CSC I. See *People v Kozicki,* an unpublished per curiam opinion of the Court of Appeals (No. 362939, September 12, 2024) ("after reviewing [this Court's decision in *Lymon*], it appears to us that a stronger argument can be made in this case—involving a sexual offender—that the 2021 SORA has the impact of a civil regulation as opposed to criminal punishment. *In other words, we could conclude that the 2021 SORA is* ***not so punitive*** *in effect or purpose to negate the Legislature's intent to adopt a civil regulation.* But we need not decide that issue now[.]") (Emphasis added.) (attached as Ex C) (Judges Kirsten Frank Kelly and Michael Kelly were on this panel and both were on the *Lymon* panel).

In 2024, the federal court in Does v Whitmer *finds that the 2021 SORA is punitive, but it rejects the claim that a lack of individual determination violates due process and indicates that only the in-person reporting duties introduced in 2011 and the extension of registration periods to lifetime cannot be applied to the pre-2011 offenders.*

As noted, the MSP is defending the constitutionality of the 2021 SORA against a range of challenges. The federal district court issued a 115-page opinion on September 27, 2024, in which it found the 2021 SORA to be punitive in response to the Ex Post Facto Clause challenge, but appeared to limit the relief as follows:

> To be clear, this holding means that the in-person reporting requirements and retroactive extension of registration terms ***originally introduced*** *in SORA 2011* cannot be applied to a registrant who committed an offense before SORA 2011 was enacted.
>
> [*Does v Whitmer*, ___ F Supp 3d ___; 2024 WL 4340707, at *20 (ED Mich. Sept 27, 2024) (*Does III*), slip op, p 38, n 31 (emphasis added).]

This conclusion arose from its holding that "the 2006 and 2011 amendments to [2021] SORA violate the Ex Post Facto Clause," citing extensively this Court's rulings in *Betts* and *Lymon*. *Id.* at slip op, p 38, *id.* at 26–32. While subject to further briefing, the clear import of this ruling is that the registry remains applicable to pre-2011 offenders but the in-person updates that were introduced in 2011 in sections (1), (2), (3), (7), and (8) of MCL 28.725 cannot be applied to them and that the pre-2011 offenders whose registration period was 25 years before 2011 remains at 25 years. With regard to the State's argument that the 2021 SORA was essentially identical to federal SORNA, the district court did not need to reach that issue, ruling that the key case, *Willman,* failed to provide analysis and was not "control[ling]." *Id.* at 19–21, 22.[5]

[5] The federal district court has not issued a judgment with regard to the opinion, and the MSP has indicated its intention to appeal the judgment.

Notably, the district court rejected the claim that "lack of individualized review" violated due process or equal protection. Slip op, p 38. The court reasoned that 2021 SORA categorizes registrants into three tiers, depending on the severity of the crime, and making the duration of registration on that basis. *Id.* The district court also provided a significant analysis, explaining the lack of "feasibility" of that process, noting the "potentially towering costs." *Id.* at 38–43. The federal district court anticipated that it may issue a final judgment by the end of February 2025.

STANDARD OF REVIEW

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

ARGUMENT

I. This Court should defer the question whether the Michigan 2021 SORA is punitive for the pending case, *People v Johnson* (Case No. 361858), as the issue here is clear that there is no unconstitutionality in applying the 2021 SORA to a grave offender like Robert Kardasz.

The reasons to defer the threshold question – whether the 2021 SORA constitutes punishment – are manifold. The question as narrowly construed is a straightforward one. Regardless of one's views of the 2021 SORA, virtually no Michigan resident would think a grave offender like Robert Kardasz, who vaginally and orally raped his five-year old daughter, was being treated unfairly by having to register for life under Michigan's 2021 SORA. He could be given a life sentence in prison, and such a punishment would neither be cruel nor unusual. And the issue is not really ripe in any event. These obligations under the 2021 SORA will not have any practical significance for him until 2042 or maybe 2057 if he serves his entire sentence. The request to address the SORA here would be in effect an advisory opinion.

Moreover, this is not the right case to address the claim in any event, as there has been no analysis on relief. If this Court could even somehow think the question of cruel or unusual punishment was really in play, there has been no briefing on the significance of such a ruling. Any suggestion that a dangerous sexual offender like Kardasz does not have to register at all suggests that *no one has to register*. The registry would end for tens of thousands of registrants. That is not a tenable answer. And finally, the analysis on the question whether the 2021 SORA is punitive would not even answer the question pending in *Johnson* on ex post facto grounds. Not only is it a different legal claim, but the duties at issue for the pre-2011 registrants are also different. This Court should defer this threshold question for another day.

A. Just as the Court of Appeals ruled, the application of the 2021 SORA to Robert Kardasz is not cruel or unusual punishment regardless whether one believes the law to be punitive.

As this Court explained in *Lymon*, when entertaining a challenge that a statute constitutes cruel or unusual punishment with respect to a specific person, the Court first "assess[es] whether the penalty at issue is a criminal punishment or a civil regulation." *Lymon*, ___ Mich at ___, slip op, p 9, citing *People v Betts,* 507 Mich 527, 542–543 (2021). Only if determining that that statute at issue does impose a punishment does the Court then ordinarily move on to rule "whether that punishment is cruel or unusual." *Id.* at slip op, p 10.

As noted in the statement of the facts and proceedings, the Court of Appeals here accepted the ruling of the original panel in *Lymon* that found Michigan's 2021 SORA to be punitive. See slip op, p 2 ("And this Court recently reached the same conclusion [that it was punitive] with regard to the 2021 SORA, as adopted by 2020 PA 295, effective March 24, 2021. *Lymon*, —— Mich App at ——, p. 18.") (unpublished, per curiam) (Gleicher, Markey, Patel, JJ.). The Court of Appeals then went on to rule that the 2021 SORA was not punitive as applied to Robert Kardasz. See slip op, pp 2–3, quoted in part above, p 6. The conclusion here is an unimpeachable one that requiring Kardasz to comply with the 2021 SORA is not cruel or unusual where Kardasz falls into the category of the most serious offenders, the raping of his five-year-old daughter, both vaginally and orally, a crime which carries a mandatory minimum of 25 years in prison even for someone with no prior criminal record. See MCL 750.520b(2)(b).

The analysis on this point from the People is persuasive, see Macomb Co Br, pp 5–12, and this Court should reject the claim without weighing in on the initial question whether the 2021 SORA is punitive. It is also worth mentioning that it appears that every state imposes lifetime registration on the gravest offenders, such as Kardasz.[6]

B. Any ruling on the SORA obligations under the current law is premature as his obligations will not arise for at least another 17 years.

On remand, the state trial court imposed a prison sentence of 25-to-40 years. The earliest date on which Kardasz could be released is May 3, 2042, and the Department is authorized to hold him until May 3, 2057.[7] It is hard to predict what the world will look like in 2057, let alone what the registry will look like, where it has been amended as many as 15 times since its original passage in 1994. See p 8, n 1 above.

It is not even clear that the issue here is ripe as it seems like what the requirements Kardasz may face are "hypothetical or speculative," cf., e.g., *People v Conat*, 238 Mich App 134, 145–146 (1999), and the many arguments that Kardasz advances appear to invite an almost advisory opinion for courts in the future in the event that SORA does not change, and thus has to rely on the circumstances of other offenders. See Kardasz Br, pp 60–71 (citing H.M., B.P., M.R., T.R., K.M., J.M., T.P, K.N., G.O.).

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[6] See https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex offender-registration-obligations/ (last accessed February 10, 2025).

[7] https://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=650716 (last accessed February 10, 2025).

C. This is not a good vehicle to address the issue more generally as there has been no briefing on the result of an adverse ruling, which is a key consideration, as confirmed by the *Lymon* decision.

For a challenge to the SORA on either a claim that its application is cruel or unusual or that it constitutes an ex post facto problem, one of the key considerations is the application of any adverse ruling. There are two cases that illustrate the point.

Start with this Court's ruling in *Lymon* that found the Michigan's 2021 SORA was cruel or unusual punishment as applied to non-sexual offenders. See slip op, pp 37–38. The Court explained that its holding was "narrow," and that it cited with apparent approval the delineation between those convicted of a non-sexual offense for which there was no sexual component and those that were convicted that did:

> This ***narrow*** holding is workable. As represented by amicus the Michigan State Police, after the Court of Appeals rendered its decision in this case, 295 registrants like defendant who were convicted of non-sexual offenses and whose offenses had no sexual component were removed from the sex-offender registry. *Fourteen registrants who were convicted of non-sexual offenses but whose offenses* ***had a sexual component remain on the registry***. [Slip op, p 38, n 24 (emphasis added.]

In other words, the relief recognizes that the three offenses in the 2021 SORA in MCL 28.722 that did not require a finding of a sexual element – unlawful imprisonment, kidnapping, and child enticement – could still serve as a basis for registration where there was a finding of a "sexual component." In that way, the 2021 SORA continues to operate within this framework for even unlawful imprisonment and the other registrable crimes with no sexual element.

In a similar vein, in response to an ex post facto challenge for the pre-2011 registrants, the federal district court in *Does v Whitmer* determined that the 2006 and 2011 amendments to the SORA were violative of the Ex Post Facto Clause. See *Does III,* ___ F Supp 3d ___, slip op, p 38. But it then provided a description of the significance of this ruling, making clear that only two aspects of the 2021 SORA could not be applied to the pre-2011 registrants: (1) "the in-person reporting requirements" that were originally introduced in 2011; and (2) the "retroactive extension of registration terms" that were originally introduced in 2011, i.e., the extension of terms from 25 years to lifetime (approximately 17,000 offenders). *Id.* at 17, 38, n 31. While there has been further briefing from the parties for the final judgment yet to be entered, the clear import of this ruling is that the 2021 SORA would continue to operate for the pre-2011 registrants, including the periodic in-person reporting, which were introduced in 1999, see slip op, p 17.[8]

Taking the position of Kardasz, he argues that the 2021 SORA is unconstitutional as applied to him, see Kardasz Br, p 11, which is frankly a non-starter, but he also provides no further explanation of what should then happen. The suggestion is that he asks to be removed from the registry, which if somehow this Court found that a grave offender like Kardasz was entitled to complete removal, it would seem that he is really asking for everyone to be removed from the registry.

[8] As noted above, the MSP plans to appeal this ruling and will seek a stay so that any injunction from the final judgment will not go into effect.

That claim is also a non-starter. The best resolution is for this Court merely to hold the issue in reserve whether the 2021 SORA is punitive and reject Kardasz's claim that the registry is unconstitutional as applied to him.

D. Any ruling here on the question whether the 2021 SORA is punitive will not even govern the claims under the Ex Post Facto Clause as the claims are different and the requirements for the pre-2011 registrants who raise this claim are different.

The question whether the 2021 SORA is punitive should be reserved as a prudential matter, since the decision would not govern or provide guidance for the issue of the application of the claim whether there is a violation of the Ex Post Facto Clause for the pre-2011 registrants. This is true for two reasons.

First, the question whether the 2021 SORA is punitive for purposes of the Ex Post Facto Clause and whether the 2021 SORA is punitive for purposes of cruel or unusual punishment under the Michigan Constitution are, strictly speaking, distinct inquiries. They are not the same claim. That is true even though for each, this Court applies the multi-factored test from *Mendoza*. Compare *Lymon*, ___ Mich ___, slip op, pp 10–30 (applying the *Mendoza* factors) and *Betts,* 507 Mich at 549–562 (applying the *Mendoza* factors). As a result, the lower courts have merely reapplied one to the other, as the Court of Appeals did in *Johnson* in applying the original panel's decision in *Lymon* on cruel or unusual grounds to an ex post facto challenge for a pre-2011 offender. *People v Johnson,* an unpublished, per curiam opinion, dated April 17, 2023 (Nos. 361607, 361858), slip op, p 11 ("This Court expressly rejected the argument that the 2021 version of SORA is not a criminal punishment [in] *Lym[o]n*[.]")

Nonetheless, the issues remain distinct. And the case law from the federal courts should be directly persuasive for the Ex Post Facto Clause issue, while it is only analogously so for the challenge under Michigan's constitution. Thus, until this Court ruled in a case involving the Ex Post Facto Clause and provided direction, the MSP would be obliged in law to continue to apply the registry as is.

Second and equally important, the aggregate duties that are reviewed under the Ex Post Facto Clause are different in kind in two ways from the duties reviewed here. In order to determine whether there is a valid ex post facto claim for a pre-2011 offender, the Court examines the duties that the 2021 SORA requires of such a registrant "viewed as a whole," *Betts,* 507 Mich at 549, but marks the date pre-2011 to examines the ***new requirements*** for those offenders, not the duties already in place, see *id.* at 542 ("*retroactive* application" of "increases" in the requirements) (emphasis added). Each part of this standard is implicated. To begin, for the pre-2011 offenders, the 2021 SORA does not require them to provide updates for email addresses and internet identifiers. See MCL 28.725(2)(a) ("The requirement to report any change in electronic mail addresses and internet identifiers applies only to an individual required to be registered under this act after July 1, 2011.")[9] Moreover, for the pre-2011 offenders any registrant who committed an offense after September 1, 1999, the in-person periodic requirement was already in place. See PA 85 of 1999.

[9] This requirement for updating internet identifiers and email addresses will likely be struck for all registrants based on the ruling of the federal district court in *Does III,* slip op, p 107 ("SORA 2021's internet-identifier reporting requirements do not withstand intermediate scrutiny").

Consequently, any ruling that 2021 SORA is punitive here, which MSP would disagree with, would still leave the question whether 2021 SORA is punitive for purposes of ex post facto for another day. This Court should defer this question.

II. Michigan's 2021 SORA is not punitive, and therefore does not constitute cruel or unusual punishment, just as the federal SORNA is not punitive, which is virtually identical to 2021 SORA.

There has been a lot written about Michigan's SORA generally, and about the 2021 version of the law, but much – if not most – of the analysis approaches the law from the standpoint of the registrants. The thrust of the arguments challenging the law focus on the duties and how it affects the registrants. But the central vantage point of the registry comes from the eyes of the ordinary resident in Michigan, someone who seeks to have accurate information about sexual offenders, a group of offenders like Robert Kardasz, as residents seek accurate information about sexual offenders, given the deeply injurious nature of sexual offenses. They are not like other crimes. There is not a state registry of embezzlers or even armed robbers. Rather, the listed group of sexual offenders are uniquely dangerous. That they may reoffend is not a matter that need be subject to social science, since it is beyond dispute that approximately 10% of the registrants have been *reconvicted* of a second sexual offense. And since only about a quarter of sexual crimes are even reported, and only a third of those reported crimes result in an arrest, let alone a conviction, this 10% figure is astonishingly high. The reoffense rate – as contrasted with the reconviction rate – is thus far higher. The registry is filled with dangerous felons.

Not only does Kardasz fail to grapple with this fact, but he also fails to acknowledge that sexual crimes are uniquely injurious. The victim of criminal sexual assault, who was a 14-year-old child at the time of the assault, stated this month at the sentencing of her perpetrator, "My childhood was stolen from me, which altered my adult life. I sometimes wonder how my life could have been had I not had such a traumatic thing happen to me. I want nothing more than to go back in time and have a healthy childhood like everyone deserves but that's not what I was dealt in life. I've had nightmares for years from the assault all the way into my adulthood." See Attorney General Public Statement from February 10, 2025 about a 2005 "Cold Case Sexual Assault of a Minor."[10] She continued, "I'm now 33 years old and the images of what happened to me as a child will never go away. I've been to therapy and though it's a coping mechanism, it's not ever going to stop me from remembering the things this man has done to me when I was only a child." (*Id.*)

In closing, the survivor added, "I still need help dealing with this trauma that may never go away but I pray for my own deliverance from the pain and suffering that I've went through and still go through. Even though the case is over, and trial is done, and all the lawyers and jury and everyone who watched during trial gets to move on with life, this incident is something I'll never forget." (*Id.*)

[10] https://content.govdelivery.com/accounts/MIAG/bulletins/3d1880b (last accessed February 20, 2025).

In response, Kardasz relies heavily on the argument that the registry "shames" the registrants and impedes their ability to obtain employment, noting the expanded nature of the Internet to argue the punitive nature of the registry. But this points proves just the opposite. The ubiquitous nature of the Internet means there is information about the offenses online already, and the registry merely enables the ordinary resident to have easy and accurate information.

In applying the *Mendoza* factors, the 2021 SORA is not punitive, as confirmed by a comparison of it with the federal SORNA, which in its pre-2022 form has been found universally not to be punitive, and in comparison to the 2003 Alaska law upheld by the U.S. Supreme Court in *Smith v Doe*. This Court's analysis in *Lymon* that the registry is punitive for non-sex offenders also does not support the claim here. The later analysis from the Court of Appeals in applying *Lymon* supports this conclusion.

A. One of the Michigan SORA's primary tenets is to provide information to the public so that the residents of the State may take action to protect themselves and their families, a dynamic not significantly addressed by Kardasz.

The brief for Kardasz takes aim at the efficacy of the SORA in protecting Michigan residents, arguing that it does not reduce recidivism and may actually make Michigan's residents less safe. Kardasz Br, pp 38–39, 70–71. This argument is predicated on two distinct misunderstandings of law and fact. Once the issue is properly framed, the value of Michigan's registry to the residents of the State is unmistakable.

First, as a legal matter, a reviewing court does not begin with social science in evaluating the merits of the registry, but it begins with the legislative declarations. In this way, for challenges to the federal SORNA, the courts have started with the Congressional declarations in evaluating the functions and rationality of the federal registry. See, e.g., *United States v Ambert,* 561 F3d 1202, 1209 (CA 11, 2009) ("the restrictions contained in the federal statute, similarly, are rationally related to Congress' legitimate goal in protecting the public from recidivist sex offenders"). This general deferential approach taken is equally warranted here. And it is the determination of the Michigan Legislature that this system of "an appropriate, comprehensive, and effective means to monitor" assists in "preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a. This conclusion should frame any analysis of Michigan's 2021 SORA.

Second, the brief of Kardasz fundamentally misunderstands the functioning of Michigan's SORA, examining as if it were a system of probationary review or a pre-release set of services offered by the Michigan Department of Corrections to prepare a prisoner for release from prison. Instead, while the SORA as a regulatory law is designed to discourage registrants from committing further sexual offenses, one of the registry's central features is to provide information to the State's residents, and only secondarily for law enforcement, so that the residents may gauge their own conduct with respect to future interactions with known sexual offenders. SORA provides information so residents may change *their own* conduct.

That is the reason the Legislature selected the word "monitor[ing]." *Id.* And Michigan's SORA enables a resident to receive notifications when a sexual offender moves into a "designated" "geographic radius," *id.* at § 28.730(3),[11] which enables a resident to be familiar with any neighbors who are sexual offenders based on accurate information. While a majority of sexual offenses may be committed by those familiar to the victim, that point is contemplated by the registry. It provides reliable information about known sexual offenders to Michigan's residents. The federal district court in *Does III* expressly recognized this facet of this registry, i.e., its value to "members of the public." *Does III,* slip op, p 36 ("SORA provides members of the public with valuable information that they can use to protect themselves and their families.").

Consistent with the provision of this information, it is the ubiquitous experience of the ordinary person that a significant number of residents rely on the registry to identify a neighbor, a daycare provider, or a possible suitor for oneself or one's child to verify if that person is a sexual offender. While the numbers of searches that occur for Michigan's registry is not tabulated, for the federal registry that number is maintained, for which there were more than 85 million searches that occurred for the entire country in 2024, an almost tenfold increase since 2009.[12] And a 2009 study that suggested that 88.9% of Michigan respondents were aware of the sex offender registry

[11] See also *People v Pennington*, 240 Mich App 188, 191 (2000) ("allow persons living within the same zip code as a registered sex offender to access information about the offender").

[12] https://www.nsopw.gov/about-nsopw/historical-search-data (last accessed February 12, 2025).

and that 37% had accessed its information, noting that from a Nebraska study just above half of that number (56.5%) had done so for "safety purposes." See *Sex Offender Registration and Community Notification Laws: An Empirical Evaluation* (Cambridge, 2021),[13] Ch 5, "The Public and SORN Laws," pp 63–64 (citing a 2009 study). Even from the outdated 2009 numbers, this would still represent more than *a million Michigan residents* who used the registry for their safety. And if the federal registry search numbers are any indication of Michigan's usage, it would be a million Michigan residents who use it yearly. Not a small number.

Thus, like the Michigan Legislature and as noted by the federal district court in *Does III*, this Court should rely on the Michigan residents to rationally know their own interests, and they are able to make decisions about where to live, hire as daycare provider, whom they wish to admit to their home as a neighbor or a babysitter, or whom they wish to date or encourage their children to date based on this information. The suggestion of Kardasz is not well taken that a person acts out of animus or irrational prejudice in relying on the registry, which given the demonstrated dangerousness of this cohort, such an action would not only be inaccurately described as prejudice, but to the contrary would be in ordinary terms considered to be good judgment or prudence. The argument that the registry does not make Michigan residents' safer runs up against their actual experience of using it to make decisions about whether to invite convicted sexual offenders into their family or community life or home.

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B. Contrary to Kardasz's arguments, the SORA registrants are very dangerous offenders, who have a proven high recidivism rate, and the public relies on this information to protect itself.

Like the challenge to efficacy, Kardasz also asserts that "high recidivism rates in people convicted of a sex offense are not true" and that they "recidivate at much lower rates than those convicted of other types of crimes." Kardasz Br, pp 37, 39. Not so. These assertions are contradicted by the facts on the ground.

The most significant fact known about this cohort of Michigan offenders – more than 40,000 offenders – is really beyond dispute. This list of sexual offenders has a reconviction rate for a second registrable sexual offense of approximately 10%. That is the statistic cited by the MSP, as taken from the *Does III* litigation in federal court. Ex D, Affidavit of Sharon Jegla, February 7, 2023, p 2 (of 44,000 registrants, more than 10% or 5,268, had a subsequent registrable offense). Likewise, the expert for the plaintiffs in *Does III* identified the same percentage, 10%. See Ex E, Pls' Expert Report, p 13) ("Of the 41,133 registrants currently subject to SORA who have ever returned to the community following their initial registrable offense conviction . . . [a]bout 10% (4,000) have been convicted of at least one subsequent registrable offense.") The significance of this point cannot be overstated. It reflects the danger to Michigan's public.

The fact that approximately 10% of Michigan's listed sexual offenders committed a new offense merits some further consideration, because it demonstrates that the figure of *reoffense* as against *reconviction* is far higher than 10%.

To begin, it is an undisputed fact that victims of sexual violence radically underreport their crimes. According to the U.S. Department of Justice's 2023 report on Criminal Victimization, less than 25% of sexual assault or rapes were reported to the police.[14] And then add to that point that only approximately a third or less of those reported assaults results in arrests. Ex F, Declaration of Dr. Goodman-Williams, p 7021 ("of the already few sexual assaults that are reported compared to the number experienced, suspects are only arrested in 12.2%–33.9% of cases, with the remaining 66%–88% of reported sexual assaults not even passing through this first step"). To reiterate, less than 25% of the crimes result in a report to the police, and then one-third of that group results in arrests, which works out to single digits of arrests resulting from all sexual crimes. And the number of convictions is even smaller than that. Thus, needless to say, the actual percentage of sexual *reoffenses* for Michigan's registrants is *far higher* than 10%.

To match the actual data with the social science for Michigan's registrable offenders, if the Court is interested in identifying a concrete figure to anchor the recidivism rate there is every reason to credit a figure cited by the U.S. Department of Justice's Office of Justice in a July 2015 report. It referenced a large study by Harris and Hanson conducted in 2004 finding a 24% recidivism rate over 15 years for sex offenders. *Sex Offender Management and Assessment Initiative* (July 2015),

[14] "Criminal Victimization," Table 4, p 6 ("21.4[%]" of rapes/sexual assaults were reported to police), available at https://bjs.ojp.gov/document/cv22.pdf (last accessed February 12, 2025).

"Recidivism of Adult Sexual Offenders," p 3.[15] It is helpful also that this study was from 2004 that was early in the arc of the Michigan's registry, which was first established in 1995. The point is that the 10% reconviction rate for Michigan's registrants is not a something that arises from social science, but from fact.

When compared against either other convicted felons or other ordinary residents, a 24% reoffense rate or higher for Michigan's registrants for sexual crimes confirms the Legislature's statement that they "pos[e] a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state." See MCL 28.721a.

It is worth noting that for Michigan's registrants, ***the vast majority harmed victims under the age of 18*** – there were 36,545 victims under 18, and 4,657 adult victims. See Ex D, Affidavit of Jegla, Feb 7, 2023, p 2. In short, more than 80% of the registrants committed sexual offenses against children under the age of 18. *Id.* And 38% committed crimes against young children under the age of 13, reflecting 16,793 victims. *Id.* In this way, when considering the 10% reconviction rate for these sexual offenders – and the much higher reoffense rate of something like 24% or higher – the actions of the Legislature here to provide information to Michigan residents are not rooted in animus, but in common sense and fact.

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[15] https://smart.ojp.gov/somapi/chapter-5-adult-sex-offender-recidivism (last accessed February 12, 2025). In fact, for sexual offenders against children outside of the family, a March 2017 report from the U.S. Department of Justice noted a study finding as high as *52% recidivism rate based over a 25-year period*. See *Sex Offender Management Assessment and Planning Initiative* (March 2017), p 120, https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/somapi_full_report.pdf (last accessed February 12, 2025).

Moreover, this analysis does not even consider the unique harm caused by the crimes committed by sexual offenders as noted above. On this point, a casual search for research in the area only ratifies the common-sense understanding about how damaging sexual assaults are for the victims. For example, a 2022 study of the relationship between sexual violence and suicide found an approximately ten times higher rate of suicide attempt for victims of these kinds of crimes. See Health Science Reports, Jan 6, 2023 e973 ("Of the participants exposed to penetrating sexual violence, 49% stated that they had or had been diagnosed with depression, compared with 16% in the group not exposed to sexual violence. Similar findings were found for anxiety: 45% versus 12%; fatigue syndrome 28% versus 9%; post traumatic stress disorder 30% versus <0.1% and suicide attempts, *29% versus 3%*.") (Emphasis added.)[16]

The point is an obvious one that a crime of sexual violence, whether committed against a child or an adult, is one that every citizen fears. And for a group that has already committed a sexual offense, and one for which there is hard evidence to believe that one in four will commit another one of these kinds of crimes, it makes perfect sense that the government would take action to provide information to the state's residents so they can guide their actions and protect themselves and their children.

[16] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9719029/ (last accessed February 12, 2025).

And even on the plane on which the Kardasz brief operates in relying on studies to argue that Michigan SORA does not reduce the likelihood that its registrants will commit new sexual offenses, see Kardasz Br, p 39 ("registries do not decrease but in fact may increase sexual offending,") its argument is unsupported by the crime statistics.

Specifically, comparing the incidence of per capita crime according to the statistics of the Federal Bureau Investigation from 1994 (the year before the Michigan registry was established) and 2019 (the last year for which the FBI released its crime statistics publicly), the violent crime rate declined from 766.1 to 437.4 (per 100,000), and the forcible rape rate shows a consistent decline over twenty years from 70.8 in 1994 to 50.1 in 2016, with the three next years (2017 through 2019) seeing rates over 70, without explanation.[17] Related to this point of change in recidivism after the advent of the registry in social science, Justice Zahra in his dissent in *Lymon* martialed some reports, notably citing a 2008 U.S. Department of Justice report identifying a drop in recidivism from 10% to 7.6% after the creation of the federal SORNA. See *Lymon,* slip op, p 26, n 88 (Zahra, J., dissenting), citing U.S. Department of Justice, "Megan's Law: Assessing the Practical and Monetary Efficacy" (December 2008), p 30.[18]

[17] See https://www.disastercenter.com/crime/micrime.htm (last accessed February 12, 2025).

[18] https://www.ojp.gov/pdffiles1/nij/grants/225370.pdf (last accessed February 12, 2025).

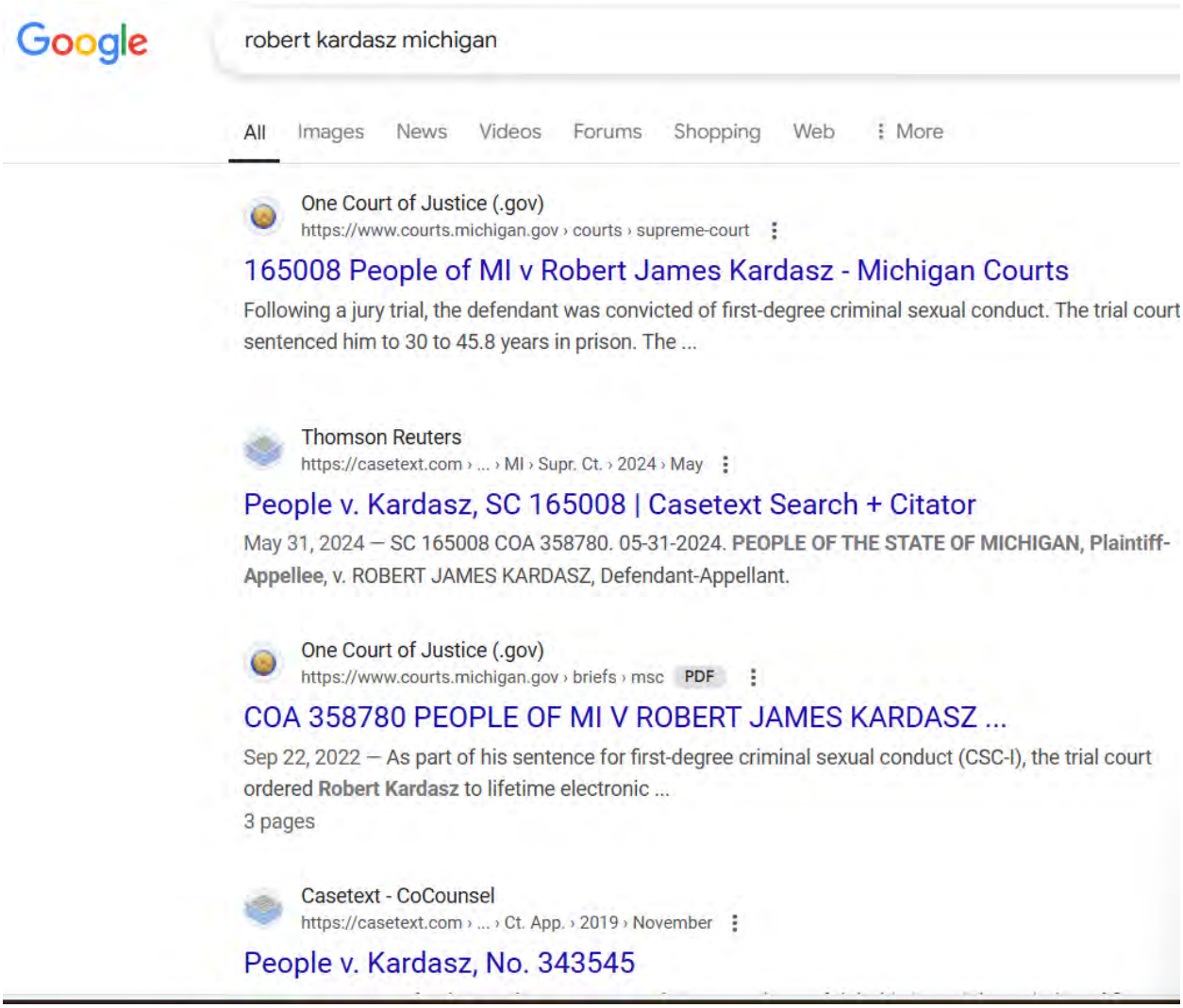
Even on these terms, this social science examining recidivism really brings this Court back to where it should begin, the declarations of the Michigan Legislature, MCL 28.721a, to which this Court should defer. Additionally, the focus of this analysis as framed by Kardasz fails to ask the right question: can a Michigan resident decrease the likelihood that the resident will be the target of a sexual crime if that resident does not bring a convicted sexual offender into that resident's orbit, i.e., the resident's family, or home. That is the registry's central feature. Only a study that definitively demonstrates that no significant part of the public relies on the registry in making such decisions – or that the decision to refrain from bringing a known sexual offender into one's family or home does not enhance one's safety – could it be shown that the registry is ineffective in one of its primary functions, i.e., providing information to the public so that members of the public may calibrate their own interests in protecting themselves from future sexual crime. Kardasz fails to address this essential feature of the Michigan SORA, which is one of its foundational principles.

C. The claim that the SORA "shames" its members is misbegotten, as any animus that arises from the publishing of this information arises from the crime, not the fact of publication, and in the new information age, the fact of the crime is already published.

The brief of Kardasz also emphasizes the character of the registry as "sham[ing]" the registrants on the Internet as the "new town square," which then limits their professional opportunities and reintegration into the community. Kardasz Br, p 25. But this is a fundamental error in two respects.

Regarding the Internet, Kardasz is exactly right, it is the new town square. But the brief of Kardasz overlooks the most obvious feature of this new reality. The Internet is awash with information of Kardasz's predatory crimes against his daughter entirely separate from his listing on the registry. The unstated premise underlying his assertion is that in the absence of Michigan registry there would be no information about his heinous crime. But this is demonstrably untrue.

Rather, a simple Google search of "Robert Kardasz Michigan" brings a significant number of entries that relate to his raping his daughter:



As this snapshot above provides, the real nature of publishing of his predatory conduct just comes from the nature of the Internet, not from the registry. In fact, a reference to his appearance on the registry does not fall within the first 20 entries of Google.[19] Instead, a person would have to search the registry and either enter his name or nearby address to pull up Robert Kardasz on the Michigan registry.

Regarding his "shame," it is not his listing on the registry in any event that is source of the community's response, but contrariwise, it is the conduct itself that draws the response. The rape of a child is the paradigm of things the community fears and seeks to prevent. Kardasz's crime is of the most serious nature, and the response it elicits is not due to his placement on the registry, but due to the nature of his actions, vaginally and orally raping his five-year old daughter.

In that way, the function the SORA registry performs is to give accurate and relevant information in a sea of often confusing, outdated, and inaccurate information about sexual offenders. For similar reasons, his argument that *Smith v Doe* is not "instructive" because the "internet was a very different place" misses the mark. Kardasz Br, p 16, n 2. The registry provides reliable information that the public can access and does so to protect itself. The changes in the Internet since 2003 make the SORA even more necessary, not less.

[19] Robert Kardasz Michigan - Google Search (last accessed February 12, 2025).

D. Apply the *Mendoza* factors, the 2021 SORA is not punitive, just as the federal SORNA and the 2003 Alaska law are not punitive.

The SORA as amended in 2021 is virtually the same as the federal SORNA is now. This is significant because every court, without exception, has found federal SORNA *not* to be punitive in rejecting either a federal ex post facto or Eighth Amendment challenge in reviewing SORNA before 2022. The federal case law should be persuasive to the Court in applying the *Mendoza* factors. In particular, the examination of the *Mendoza* factors by federal courts have determined that federal SORNA is not punitive, and that conclusion applies to Michigan's 2021 SORA. It is a regulatory law. Because SORNA is not punitive, so Michigan's 2021 SORA is also not punitive.

Moreover, Michigan's 2021 SORA is quite similar to the Alaska law found not to be punitive in *Smith v Doe*. Just as that law was found not to be punitive, Michigan's 2021 SORA is also not punitive.

1. The 2021 SORA in Michigan and the federal SORNA are almost identical in their requirements, and thus Michigan's 2021 SORA, like SORNA, is not punitive.

As an initial point, it is important to state again that the standard for determining whether a law is punitive for analysis under Michigan's protection against cruel or unusual punishment, see *Lymon*, ___ Mich ___, slip op, pp 10–30 (applying the *Mendoza* factors) is the same as the standard for determining whether a law is punitive under the Ex Post Facto Clause, see *Betts,* 507 Mich at 549–562 (applying the same *Mendoza* factors). While this Court is not bound to follow federal precedent, see *Betts,* 507 Mich at 541, this Court will examine it for its persuasive authority, *Johnson v Vanderkooi*, 502 Mich 751, 764 n 1 (2018).

And the federal courts have routinely rejected claims that the federal SORNA is punitive in its review of the federal SORNA before 2022, and these laws are virtually identical now in their requirements. See Ex B, Comparative Chart.[20] Thus, the analysis of the federal appellate courts should be relevant to this Court on the threshold question here if the two laws are pretty much the same. They are.

The federal SORNA and 2021 SORA may be digested into four components:

> (1) the duty to register based on the commission of certain criminal offenses, the vast majority of which are criminal sexual offenses, and the duty to report periodically depending on the nature or seriousness of the offense, known as tiering, including the duration that a person must appear on the registry;
>
> (2) the duty to update the registry based on different changes to the registrant's status, which may be further digested into two categories, i.e., significant changes and more minor changes, which also includes the time and method by which a registrant may update this information;
>
> (3) the severity of punishment for a violation; and
>
> (4) the information included on the public registry.

For all four categories, there are virtually no significant substantive distinctions between Michigan and federal law. A comparison between the Michigan 2021 SORA and the federal SORNA, consistent with the 2021 U.S. Attorney General guidelines, effective January 7, 2022, confirm their virtual identity in requirements. See Ex B, Comparative Chart.

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[20] As a caveat, the MSP note that the U.S. Attorney General issued supplemental guidelines effective January 7, 2022, which appeared for the first time to require under federal SORNA that sex offenders update the state registries with minor changes, such as changes to their vehicles. Thus, all the federal precedent that finds SORNA not to be punitive – all before 2022 – has not addressed this aspect of SORNA. Even so, this addition does not undermine the force of the analysis. In short, the weight of precedent remains overwhelming in support of Michigan law.

The duty to register and the duty to report

The primary focus of the Michigan 2021 SORA is sex offenses such as the four degrees of criminal sexual conduct, see MCL 28.722(v)(*iv*), (*v*), (*vi*), for which the comparable offenses under federal law are "aggravated sexual abuse," "sexual abuse," and "abusive sexual contact," see 34 USC 20911(4). See MCL 28.724 (registration procedure); 34 USC 20913 (registry procedure).

And they both identify three tiers, the most serious of which is tier III, and the least serious of which is tier I. MCL 28.722(r) through (v); 34 USC 20911(2), (3), (4). A tier I offender must register for 15 years, a tier II offender for 25 years, and a tier III offender must register for a lifetime. MCL 28.725(11), (12), and (13); 34 USC 20915(a)(1), (2), (3). The tier I offenders must report yearly, the tier II offenders biannually, and the tier III offenders quarterly. MCL 28.725a(3)(a), (b), (c); 34 USC 20918(1), (2), (3). The durations are also the same.

The duty to update the registry

For changes to a registrant's status, both SORNA and Michigan's 2021 SORA separate the more significant changes, i.e., residence, employer, student status, and changes to name, see MCL 28.725(1); 34 USC 20913(c), from other more minor changes, i.e., vehicle information, electronic email addresses and internet identifiers, telephone numbers, and temporary residence, see MCL 28.725(2); 28 CFR 72.7(e). The more serious changes require in-person reporting within three business days, see MCL 28.725(1), 34 USC 20913(c), while minor ones may be changed by some other means within three business days, see MCL 78.725(2), Ex A (by mail); 28 CFR 72.7(e) ("by

whatever means the jurisdiction allows"), as required by the U.S. Attorney General effective January 7, 2022.[21] In short, the duties here are pretty much the same too.

The severity of the punishment for a violation

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

The information included on the public website

Michigan's website includes the following information: name, date of birth, picture, home address, address of employer, school address, license number, vehicle description, summary of convictions, description, text of crime, and registration status. See MCL 28.728(2)(a) through (i). The federal SORNA maintains a "National Sex Offender Public Website" in requiring offenders to register in state jurisdictions, which includes "relevant information" that is obtained from the state websites. 34 USC 20920(a), 20922(a), (b). The federal website includes name, age, picture, aliases, home address, and employer's address, and it links to the State's registry. See, e.g., the federal registry's entry for Robert Kardasz.[22]

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[21] Regarding the federal SORNA's requirement that registrants update minor changes, i.e., changes to communication identifiers (Internet, email addresses, and telephones), temporary lodging, and vehicles, see 28 CFR 72.7(e), it appears that the SORNA itself only required registrants to update these changes within three business days based on supplemental guidelines that became effective January 7, 2022. See 86 Fed Reg 69856–69887, 69880 (Dec 8, 2021). But this does not change the analysis. See n 20 above.

[22] https://www.nsopw.gov/search-public-sex-offender-registries (last accessed February 21, 2025).

As noted above, the significant ways in which Michigan had imposed obligations under the old SORA that extended beyond federal SORNA were removed by the Legislature for the 2021 SORA, effective on March 24, 2021. The three removed components were inserted by the 2006 and 2011 amendments to SORA:

1. The in-person reporting requirements for temporary residence, electronic mail or instant messages, or regular use of a vehicle, see MCL 28.725(1)(e), (f), (g) (2011);

2. The public nature of the tiering, see MCL 28.728(2)(l) (2011); and

3. The student safety zones. See MCL 28.733, 28.734, 28.735, 28.736 (2006).

Among other changes to the old SORA, Public Act 295 of 2020 remedied all three of these areas, aligning the Michigan SORA with federal SORNA. See HB 5679,[23] passed by both houses on December 16, 2020 (redline version) (allowing for reporting "in the manner prescribed by the department [of state police]" for minor changes, p 19, removing the public nature of the tiering, p 36, and repealing the school safety zones, p 41). In doing so, the Michigan Legislature aligned the Michigan SORA with the federal SORNA. This is significant because the pre-2022 federal SORNA has been found not to be punitive in rebuffing challenges to its obligations for sexual offenders who committed their registrable crimes before SORNA was enacted in 2006. See, e.g., *Willman v Attorney General of United States,* 972 F3d 819, 825 (CA 6, 2020) (for an offender whose sexual offense was committed in 1993) ("SORNA is not a punishment for purposes of the Ex Post Facto Clause").

[23] Available at 2020-HEBS-5679.pdf (last accessed February 13, 2025).

The remaining differences between Michigan's 2021 SORA and the federal SORNA are minor in nature, and they do not merit a difference in substantive analysis on the issue of whether they constitute punishment. This Court in *Betts* identified those differences in its analysis of the old SORA in determining whether the unconstitutional elements could be severed from the law, identifying them as "deviations" in explaining that the conforming 2021 SORA to federal SORNA was not the "sole" desire of the Legislature. See *Betts*, 507 Mich at 570–571, n 27.[24] Nonetheless, these are all minor differences, which would not merit a difference in evaluation about whether the federal SORNA is punitive in contrast to Michigan SORA. In fact, this Court's listing of differences does not consider the significant ways in which the duties to comply with SORNA are *more* extensive than 2021 SORA, e.g.:

(1) SORNA's duty to register does not have a start date, see 28 CFR 72.3 ("sex offenders must comply with all requirements of that Act, regardless of when the conviction of the offense for which registration is required occurred"), whereas Michigan identifies October 1, 1995, as the control date, see MCL 28.722; and

(2) SORNA requires notification in 21 days in advance of any border crossing for international travel, see 34 USC 20914(a)(7), 28 CFR 72.7(f), while Michigan 2021 SORA only requires this notification if the stay is "more than 7 days." MCL 28.725(8).

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[24] This Court identified the fact that the 2021 SORA (1) imposes a $50 registration fee, (2) requires a registrant to maintain more specific information for a driver's license, (3) requires notification of a new residence before rather than after moving, and (4) requires the registry to include the original charge and not just the convicted charge. This Court further noted that the 2021 SORA imposed a maximum of punishment of 4, 7, or 10 years, while SORNA merely required a complying state registry to include a maximum punishment that "is greater than 1 year." *Id.* at 571, n 27, citing 34 USC 20913(e). But this analysis fails to account for the fact that the federal SORNA makes it a ten-year felony for failing to register or update the registry. See 18 USC 2250(a)(3). Also, while the Michigan 2021 SORA does provide for a subscription for notifications for members of the public, see MCL 28.730(3), federal SORNA does not.

Kardasz does not grapple with these differences. See Kardasz Br, p 16, n 2.

As outlined above, it is worth reiterating the fact that the federal SORNA has a dual character, both establishing its own requirements as an affirmative matter as well as creating minimum requirements for compliant state jurisdictions. See 38 Fed Reg 38034. See also *Carr v United States*, 560 US 438, 453 (2010). The duty under the federal SORNA to register requires the offender to register with the state registry. See 34 USC 20913(a).[25] In that sense, the federal government does not maintain its own public registry,[26] but the obligations it creates are built on the state registries, like Michigan's. Likewise, the SORNA's website of offenders is derived from the state websites. See 34 USC 20920(a) (requiring states to "include in the design of its Internet site all field search capabilities needed for full participation" in the national website).

The test under Michigan law for whether a sentence constitutes cruel or unusual punishment begins with (1) whether the Legislature intended the law to be "a criminal punishment or a civil remedy," and if intended as a civil remedy, (2) whether the law is "so punitive either in purpose or effect as to negate the State's intention to deem it civil." *People v Earl*, 495 Mich 33 (2014)(cleaned up). On the issue of its effect, the MSP emphasizes the federal case law and its review of SORNA, and by comparing Michigan 2021 SORA to the Alaska law evaluated by the U.S. Supreme Court in *Smith v Doe*.

[25] It is a defense to a failure to comply with SORNA if the offender cannot register under the state registry. See 18 USC 2250(c).

[26] But SORNA maintains a national registry for law enforcement. See 34 USC 20921.

As a starting point, other than a case addressing juveniles it is worth noting that the pre-2022 SORNA has unanimously been determined by the federal appellate courts not to be punishment under the Eighth Amendment and the Ex Post Facto Clause. See *U.S. v Felts*, 674 F3d 599, 606 (CA 6, 2012) ("[T]he *unanimous consensus* among the circuits [is] that SORNA does not violate the Ex Post Facto Clause. SORNA . . . *does not increase the punishment for the past conviction*.") (Emphasis added.) See also, e.g., *U.S. v Parks*, 698 F3d 1, 5–6 (CA 1, 2012); *U.S. v Wass*, 954 F3d 184, 193 (CA 4, 2020); *U.S. v Young*, 585 F3d 199, 204–205 (CA 5, 2009); *U.S. v Meadows*, 772 Fed App'x 368, 369–370 (CA 7, 2019); *U.S. v Elk Shoulder,* 738 F3d 948, 958 (CA 9, 2013); *U.S. v Lawrance*, 548 F3d 1329, 1333 (CA 10, 2008); *U.S. v WBH*, 664 F3d 848, 855–860 (CA 11, 2011).[27] This Court should rule likewise here.

In analyzing whether a regulatory law has the effect of being punitive, this Court considers whether: (1) it has been regarded in our history and traditions as a punishment; (2) it imposes an affirmative disability or restraint; (3) it promotes the traditional aims of punishment; (4) it has a rational connection to a non-punitive purpose; or (5) is excessive with respect to this purpose. *Betts,* 507 Mich at 545; *Smith*, 538 US at 97, citing *Kennedy v Mendoza-Martinez*, 372 US 144, 168–169 (1963). These factors are "neither exhaustive nor dispositive," but are "useful guideposts." *Smith*, 538 US at 97.

[27] The only contrary result, *U.S. v Juvenile Male,* 590 F3d 924, 942 (CA 9, 2009), addressing juvenile offenders, was vacated as lacking a case or controversy.

And it is worth noting that this Court ordinarily defers to the Legislature, and thus "*only the clearest proof* will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Earl*, 495 Mich at 44 (emphasis added). The party objecting bears the burden of proving it. *Id.*

a. Like SORNA, the 2021 SORA has not historically been regarded as punishment.

When first reviewed in 2003, the U.S. Supreme Court noted that SORA laws are " 'of fairly recent origin,' " which suggests they have not historically been regarded as punishment. *Smith*, 538 US at 98. In evaluating the federal SORNA under this first *Mendoza* factor, the Fourth Circuit quoted *Smith*, reasoning that "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *U.S. v Under Seal*, 709 F3d 257, 265 (CA 4, 2013). In other words, contrary to the finding of the court below that merely relied on *Lymon* in its review of SORA, see slip op, p 2, the federal courts have determined the first factor weighs in favor of the constitutionality of SORNA in that it is not designed to shame people and does not resemble probation or parole.

Not shaming

While offenders listed on a sex-offender registry may feel shame, the federal SORNA does not resemble the traditional punishment of shaming. "Like Hester Prynne with her scarlet 'A,' " the colonial chastisement of shaming "required criminals to stand in public or bear brands displaying their crimes for 'face-to-face' public shaming[.]" *WBH*, 664 F3d at 855, citing *Smith*, 538 US at 98.

Consequently, the federal SORNA "does not subject sex offenders to 'face-to-face' public shaming or banishment to any greater degree than the Alaska statute in [*Smith v Doe*]." *WBH,* 664 F3d at 856. "Sex offenders are not forced to stand in pillories in the middle of town to face a barrage of bad-mouthing from the town's browbeaters and blowhards." *Id.* The same is true of Michigan's 2021 SORA.

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

Indeed, if publication alone rendered SORA punitive, then having a public trial in any criminal case would be punitive, rather than part of a commitment to transparency in the criminal process. See *Smith*, 538 US at 99 ("[O]ur criminal law tradition insists on public indictment, public trial, and public imposition of sentence."). The same applies to this Court's publication of its opinions. See p 37 above (Google).

That is why the federal courts have held that the federal SORNA is not punitive in directing the state registry to disseminate truthful information about juvenile sex offenders. See, e.g., *Under Seal*, 709 F3d at 262, 265. And any sense of disgrace arises not from the website, but from the crime itself.

The 2021 SORA is also unlike shaming because it does not affirmatively publicize, like a public service announcement, who is on the registry and does not seek the public's ridicule. The MSP do not post information about a registrant's email addresses or internet identifiers. And the contrast to the federal SORNA is notable, as Michigan's 2021 SORA is more purely informative than SORNA. The 2021 SORA merely makes offender information available for the public to search. See MCL 28.728(6). By comparison, the federal SORNA provides that officials distribute notice of an offender's status to "each school and public housing agency" in the area where the offender resides. See 34 USC 20923(b)(2). Further, Michigan's registry allows the public to search by area and by non-compliant status, not just by name, consistent with its purpose of promoting public safety, as opposed to shaming individuals. It does not allow the public to post comments for public view.

Not resemble probation or parole

The Michigan 2021 SORA also is not akin to probation or parole. Indeed, the U.S. Supreme Court rejected this analogy in *Smith*. 538 US at 101. The same is true of Michigan offenders under the 2021 SORA, who must report information for a database but are not under supervision. See MCL 28.725(1), (2); MCL 28.725a(3)(c).

No specific officer was assigned to supervise Kardasz, nor did SORA subject him to the stringent requirements that would occur for probation or parole.

In summary, on the first factor the federal appellate courts support the conclusion that Michigan's 2021 SORA is not punishment.

b. Like SORNA, the 2021 SORA imposes no affirmative disabilities or restraints, but only requires registration and reporting.

Nor does Michigan's 2021 SORA impose a disability or restraint akin to punishment. The relevant inquiry when determining whether a law imposes an affirmative disability or restraint is "how the effects" of the Act "are felt by those subject to it." *Betts*, 507 Mich at 554, quoting *Smith*, 538 US at 99–100. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* Just like the federal SORNA, that is the case here.

With the elimination of the student safety zones, like SORNA the 2021 SORA imposes no restraints, strictly speaking. At the outset, SORA compliance does not resemble the "infamous punishment" of imprisonment, which is "the paradigmatic affirmative disability or restraint." See *Earl*, 495 Mich at 44–45. SORA's requirements of in-person or mail-in reporting does not impose a physical restraint as "ordinarily" "in-person reporting requirements are not considered punitive." *Shaw v Patton*, 823 F.3d 556, 568 (CA 10, 2016). As noted by the First Circuit in reviewing federal SORNA, it found that while reporting in person is "doubtless more inconvenient than doing so by telephone, mail or web entry," it "serves the remedial purpose of establishing that the individual is in the vicinity," "confirms identity by fingerprints," and "records the

individual's current appearance." *Parks*, 698 F3d at 6. In that way, the inconvenience of in-person reporting is minor "compared to the disadvantages of the underlying scheme in its consequences for renting housing, obtaining work and the like—consequences that were part of the package that *Smith* itself upheld." *Id.*

And while the *Smith* Court noted that Alaska's statute did not require in-person reporting, 538 US at 87, the Court's decision did not depend on that fact, as evidenced by the fact that the federal courts have determined that in-person reporting under SORNA are not punitive under *Smith*. See, e.g., *Parks*, 698 F3d at 5–6 (CA 1) (upholding quarterly in-person reporting). The same applies here.

c. Like SORNA, the 2021 SORA does not promote the traditional aims of punishment.

The next factor asks whether the law promotes the traditional goals of punishment: deterrence and retribution. *Smith*, 538 US at 102. Because SORA's deterrence and retributive effects are minimal and incidental to the goal of protecting the public from potentially dangerous offenders, see *Earl*, 495 Mich at 45–47, this factor does not favor a determination that 2021 SORA is punishment.

The federal courts have accorded this factor less emphasis in the intent-effects analysis under SORNA, given *Smith* opinion's admonition that "[a]ny number of governmental programs might deter crime without imposing punishment." *Id.* Nonetheless, in reviewing the *Mendoza* factors for whether SORNA is punitive, the federal appellate courts have weighed this factor in favor of the government. See, e.g., *WBH*, 664 F3d at 858–859 (CA 11) ("Regarding the traditional aims of punishment, SORNA is no different from the Alaska registration statute upheld in *Doe*.") The same applies here.

d. Like SORNA, the 2021 SORA rationally advances a non-punitive purpose.

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

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

Smith recognized that these non-punitive purposes are important. 538 US at 102–103. The Court cited "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class," describing it as "frightening and high," citing statistics from the U.S. Department of Justice. *Id.* at 103. Michigan's 2021 SORA requirements rationally advance those purposes. Registration enables the information to be updated so that residents may make informed decisions to protect themselves and their families. See *id.*

Regarding the danger presented by sexual offenders, as noted above, they are uniquely dangerous and their crimes deeply injurious. See II.B above. This factor weighs in favor of the government, consistent with the rulings of the federal courts. See, e.g., *Under Seal*, 709 F3d at 265 (CA 4) ("SORNA has a rational connection to a legitimate, non-punitive purpose—public safety—which is advanced by notifying the public to the risk of sex offenders in their community.").

The issue of recidivism and the most effective method of ensuring the safety of the community would appear to be the paradigm of an executive function, particularly where the actual recidivism rate of sexual offenders is difficult to measure. As noted, the federal courts have deferred to the judgment of Congress on the efficacy of the SORNA. See, e.g., *U.S. v Gould*, 568 F3d 459, 473 (CA 4, 2009) ("Congress could rationally perceive a need to create national standards for sex-offender registration and notification.").

It is also rational to classify offenders based on the severity of their offense of conviction, rather than conducting individualized risk determinations. Indeed, the U.S. Supreme Court has squarely held that the constitution "does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith*, 538 US at 103. The test is "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Id*. at 105. The federal appellate courts have upheld classification of offenders under SORNA based on offense in the absence of an individualized determination of dangerousness. See, e.g., *WBH*, 664 F3d at 859–860

(CA 11) ("Both statutory regimes [i.e., SORNA and Alaska's SORA] group the offenders in categories instead of making individual determinations of dangerousness. Because *Doe* held that the regulatory scheme of the Alaska statute is not excessive in relation to its non-punitive purpose, it necessarily follows that SORNA's is not either."). And Kardasz has not shown that SORA's non-punitive purpose is a "sham or mere pretext." See *Smith,* 538 US at 103. The Michigan Legislature's decision to provide information about this population is rational, and this important factor weighs in favor of Michigan's 2021 SORA.

e. Like SORNA, the 2021 SORA is not excessive in relation to its regulatory purpose.

Nor is SORA excessive in relation to its regulatory purpose. The requirements of the 2021 SORA help achieve the Legislature's important purpose of informing the public. The burdens of it are not excessive in light of this benefit, just as the federal courts have ruled in reviewing the federal SORNA.

The duration of registration – be it 15 years, 25 years, or for life as required by SORNA (see 34 USC 20915(a)) – is not excessive. As shown by the data cited in the Office of Justice Program's July 2015 report, "[s]tudies employing longer follow-up periods consistently report higher rates of recidivism." *Sex Offender Management and Assessment Initiative* (July 2015), p 4. See also *Smith*, 538 US at 104 ("most reoffenses do not occur within the first several years after release," but may occur "as late as 20 years following release"). In accordance with these statistics, the federal courts have upheld SORNA. See, e.g., *Parks*, 698 F3d at 5–6

(CA 1) (on issue of whether SORNA is excessive, the First Circuit ruled that "we join every circuit to consider the issue and reject the main claim made by Parks") (citing four other circuits). Consistent with the rulings of the federal courts, like SORNA the Michigan 2021 SORA requirements do not constitute punishment, and this Court should so rule.

* * *

One final point regarding *Willman*. The Sixth Circuit in 2020 reaffirmed the fact that the federal SORNA is not punitive in a challenge brought by a Michigan offender, convicted in 1993 of a listed offense. See *Willman,* 972 F3d at 825 (2020). Willman argued that he should not have to comply with federal SORNA where he was not required to register under Michigan SORA based on a 2019 judgment. *Id.* at 822. In reviewing the claim, the Sixth Circuit noted the independent nature of the federal SORNA obligations and that these duties were not punishment. *Id.* at 824–825.

In this analysis, the Sixth Circuit in its background analysis noted the decision of *Does 1–5 v Snyder,* 834 F3d 696, finding Michigan's old SORA unconstitutional, describing "its stringent restrictions (such as severe limits on where sex offenders were allowed to live and work)," *Willman,* 972 F3d at 822 n 1, which are not present in SORNA, nor in the Michigan 2021 SORA, i.e., the student safety zones. This effectively identified the core difference between the old Michigan SORA and SORNA.

Moreover, the duty to report minor changes such as changes to a vehicle appears to have been added by the Attorney General's supplemental guidelines effective on January 7, 2022, for SORNA. See 28 CFR 72.7(e) (see also n 21 on p 42). Therefore, this would not have factored into the analysis about its regulatory nature; even so, the SORNA already had required compliant state jurisdictions to include these obligations, see 73 Fed Reg at 38066 (2008) (stating that each jurisdiction "must require" the sex offender to report minor changes immediately). And the obligation to report this same information quarterly for Tier III offenders like Kardasz has apparently been in place since 2008. See 34 USC 20914(a)(6) (vehicles), (7) (intended travel), (8) (other information required by Attorney General); 73 Fed Reg at 38055 (2008) (requiring registries to collect Internet identifiers, which includes email addresses and telephone numbers, and temporary residence); 76 Fed Reg at 1637 (2011) (noting the registrants' duty to report Internet identifiers).

For that reason, the U.S. Department of Justice, in its 2021 guidelines, stated that the Attorney General "has adopted definite timing requirements for reporting changes to these types of information, *previously* in the guidelines for SORNA implementation, and now in § 72.7(e)–(f) in this rule." 86 Fed Reg at 69874 (2021) (emphasis added). And no court has identified this aspect of the SORNA in place now as a dispositive feature of the law that would require a different ex post facto analysis.

2. Michigan's 2021 SORA is very much like the Alaska registration law that the U.S. Supreme Court found not to be punitive.

While the comparison to SORNA makes clear that Michigan's 2021 SORA is not punitive, a comparison of the 2021 SORA to the Alaska law reviewed by the U.S. Supreme Court in *Smith* is similarly powerful in supporting the conclusion that it is not punishment. Like Alaska's law, Michigan's 2021 SORA is not punitive.[28]

A walk through the U.S. Supreme Court's description of the Alaska law at issue there in comparison to Michigan's 2021 demonstrates the parallel in requirements between the two laws:

Registration and notification

ALASKA	MICHIGAN
"The Alaska law . . . contains two components: a registration requirement and a notification system." *Smith*, 538 US at 90.	The Michigan 2021 SORA also requires a registration component, see MCL 28.724, and a notification component, see MCL 28.728(2).

Application to offenders whose crimes have already been committed

ALASKA	MICHIGAN
"Both [the registration requirement and notification system] are retro-active. 1994 Alaska Sess. Laws ch. 41, § 12(a). The Act requires any 'sex offender or child kidnapper who is physically present in the state' to register, either with the Department of Corrections (if the individual is incarcerated) or with the local law enforcement authorities (if the individual is at liberty). Alaska Stat. §§ 12.63.010(a), (b)." *Id.* at 90.	The Michigan 2021 SORA – in both its registration and notification duties – applies to an offender generally whose crime was committed on or after October 1, 1995, or otherwise was under the jurisdiction of the Department of Corrections for a listed offense on that date. See generally MCL 28.724(2), (3).

[28] The Alaska Supreme Court found the Alaska registry to be punitive under Alaska's Constitution. *Doe v State*, 189 P3d 999, 1007 (Alaska 2008).

Must register within short time-period

ALASKA	MICHIGAN
"Prompt registration is mandated. If still in prison, a covered sex offender must register within 30 days before release; otherwise he must do so within a working day of his conviction or of entering the State. § 12.63.010(a)." *Smith*, 538 US at 90.	Under the Michigan 2021 SORA, an offender is generally registered at sentencing or otherwise within three business days of arriving in Michigan. See MCL 28.724(5), (6).

Must provide similar kinds of information

ALASKA	MICHIGAN
"The sex offender must provide his name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver's license number, information about vehicles to which he has access, and postconviction treatment history. § 12.63.010(b)(1). He must permit the authorities to photograph and fingerprint him. § 12.63.010(b)(2)." *Smith*, 538 US at 90.	Under the Michigan 2021 SORA, the offender must provide the same information as listed for Alaska, except for "treatment history," but also requires the offender to provide his Social Security number, his place of "temporary lodging," the name and address of school attended, telephone numbers, electronic mail addresses, internet identifiers, passport and immigration documents, professional licensing information, and physical description. See MCL 28.727(1)(a) thru (1)(r).

Must register for either 15 years or life

ALASKA	MICHIGAN
"If the offender was convicted of a single, nonaggravated sex crime, he must provide annual verification of the submitted information for 15 years. §§ 12.63.010(d)(1), 12.63.020(a)(2). If he was convicted of an aggravated sex offense or of two or more sex offenses, he must register for life and verify the information quarterly. §§ 12.63.010(d)(2), 12.63.020(a)(1)." *Smith*, 538 US at 90.	Under the Michigan 2021 SORA, the time periods are 15 years (Tier I), 25 years (Tier II), or lifetime registration (Tier III). See MCL 28.725(11), (12), (13).

Must notify authorities of changes to address

ALASKA	MICHIGAN
"The offender must notify his local police department if he moves. § 12.63.010(c)." *Smith*, 538 US at 90.	Under Michigan 2021 SORA law, an offender must also notify the authorities of a new address, and that obligation also attaches to changes to employment, student status, change to name, as well as vehicle information, electronic mail addresses, internet identifiers, telephone numbers, or temporary residence. See MCL 28.725(1), (2).

Offender's registration information is made public on internet

ALASKA	MICHIGAN
"The information is forwarded to the Alaska Department of Public Safety, which maintains a central registry of sex offenders. § 18.65.087(a). . . . The following information is made available to the public: "the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description[,] license [and] identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with [the update] requirements . . . or cannot be located." § 18.65.087(b). The Act does not specify the means by which the registry information must be made public. Alaska has chosen to make most of the nonconfidential information available on the Internet." *Smith*, 538 US at 90–91.	Under Michigan 2021 SORA, the same basic information is collected by the law enforcement authorities and the following information is listed on the public website: name, date of birth, address, employer addresses, school address, license plate number and description of any vehicle, summary of convictions, physical description, photograph, text of registerable criminal offense, and registration status. See MCL 28.728(2)(a) thru (k).

Provides for criminal penalties for failure to comply

ALASKA	MICHIGAN
"A sex offender who knowingly fails to comply with the Act is subject to criminal prosecution. §§ 11.56.835, 11.56.840." *Smith*, 538 US at 90.	Under Michigan 2021 SORA, the willful failure to comply with the Act is subject to criminal prosecution, beginning as a four-year felony. See MCL 28.729(1)(a).

Thus, in summary for the eight characteristics of the two laws highlighted above, the Michigan law is similar in most respects in its requirements, except for the notifications of updates where the Alaska law only required updates for an address, while Michigan's 2021 SORA requires more reporting of updates, some of which is in person.

Nonetheless, a review of this Court's application of the *Mendoza* factors in *Betts* examining whether Michigan's old SORA was punitive in response to an ex post facto challenge confirms that the characteristics that made Michigan's old SORA law punitive have been purged, making the 2021 SORA much like Alaska's law, just as the original Michigan SORA was before the 2006 and 2011 amendments. See 507 Mich at 547 ("Michigan's SORA as initially enacted was similar to the Alaska sex-offender registry at issue in *Smith*"); *id.* at 564 ("[A] majority of the former SORA provisions underlying our conclusion that the 2011 SORA constitutes punishment were added by its 2006 and 2011 amendments.").

E. This Court's decision in *Lymon* does not require a different conclusion, as is true of the federal district court's decision in *Does III*.

With this Court's decision in *Lymon,* the central point of reference for this Court's jurisprudence is no longer *Betts* but *Lymon*. And the proper application of this Court's ruling in *Lymon* demonstrates that the 2021 SORA is *not* punitive when applied to sexual offenders. The features this Court found problematic in reviewing the *Mendoza* factors when applied to non-sexual offenders generally fall away when considered against a crime that is sexual in nature. The Court of Appeals' recent decision in *People v Kiczenski* applying this Court's decision in *Lymon* confirms the point.

Regarding the "**history and tradition**," this Court concluded in *Lymon* that "the 2021 SORA continues to resemble the traditional punishments of parole and shaming," slip op, p 14, in relation to the 2021 SORA's application to non-sex offenders. With respect to "parole," this Court noted the removal of the student safety zones and the ability to report by mail for certain changes and thus the analogy to parole had been "weakened," but found the "remaining similarities sufficient to find a persuasive resemblance between the two." See *id*. at 15. While the People believe as argued above that the analogy has been dispelled, this analysis would appear to apply the same to non-sexual offenders. But with respect to "shaming," the analysis changes. As this Court noted in *Lymon*, the 2021 SORA "imposes the label of 'sex offender' with its attendant consequences on non-sexual offenders and imposes various reporting and financial requirement." Slip op, p 17.

Not so with regard to sexual offenders. And, as noted, the Internet is filled with this information irrespective of the registry, which requires a member of the public to search out the offender or ask for information based on address. The fact that the crime, like Kardasz's, is sexual in nature, warrants then a different conclusion here.

Regarding the "**affirmative disability or restraint**," this Court found even if it "weighs less heavily" than before, the 2021 SORA "continues to impose significant obligations on registrants" due to the duties to disclose extensive personal information, make periodic visits, and the payment of fees. See slip op, p 20.[29]

But a significant part of the Court's analysis related to the lack of "individualized assessment of the risk." See slip op, p 19. Yet, the federal district court in *Does III* examined this element at length, casting some doubt on this Court's reliance on the point. In its decision, the federal court there explained the significant limitations of the approach, noting its "potentially towering" costs and risk of "poor predictions of dangerousness":

> Aside from ***potentially towering costs***, an individualized assessment scheme carries another risk: ***the risk of making poor predictions of dangerousness***. Whether the assessment is made at the outset of registration, or periodically throughout the term, there is an unknown risk that the evaluators will make a mistake about who should be required to register and for how long. A legislature might conclude that an offense-based system at least gives some certainty that those who commit serious offenses are monitored for significant periods, perhaps for life, and thereby mitigate the risk of an erroneous prediction. Making choices about whether to adopt bright-line rules or customized assessments of people, entities, or transactions subject to government regulation is the hallmark of the legislative function.

[29] The MSP notes that for an ex post facto challenge, the pre-2011 registrants do not have an obligation to update internet identifiers and email addresses, see MCL 28.725(2), and the duty to report either annually or quarterly arose in 1999. See PA 85 of 1999.

> "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963). There is nothing irrational in choosing a bright-line rule for a sex offender registration system.
>
> In sum, it is not clear what form of individualized review Plaintiffs envision, or what the associated costs would be. What is clear is that the legislature could reasonably conclude that individualized review carried risks not deemed worth taking. [*Does III,* slip op, p 42.]

While the district court in *Does III* relied heavily on *Lymon,* the court's reasoning on this point effectively pushed back on this Court's significant reliance on individualized risk assessment, providing more than twenty pages of analysis. See *Does III,* slip op, pp 38–64, *id.* at 41 (notes MSP's expert claim of "cost between $352 million and $880 million" to conduct individualized assessment for all registrants).

Moreover, this Court relied "specifically" on the duty to update information about internet identifiers, *Lymon,* slip op, p 19, but again the decision in *Does III* changes the calculus where it found this provision to be unconstitutional for all offenders. See *Does III,* slip op, p 107 ("internet-identifier reporting requirements do not withstand intermediate scrutiny"). In each of the parties' proposed final judgment for the federal district court, this provision for internet identifiers and email addresses would be struck for all offenders. See Ex G, Proposed Judgment in *Does III*, p 35 ("permanently enjoined from requiring . . . to report electronic mail addresses or internet identifiers"). As noted above, the federal district court in *Does III* indicated that it may issue a final judgment by the end of February. In this way, the facts on the ground have changed since *Lymon*, leading to the conclusion that this factor would now weigh in favor of a finding that the 2021 SORA is not punitive.

Regarding the "**traditional aims of punishment**," this Court in *Lymon* found "the 2021 SORA also supports the traditional penological goal of retribution." *Lymon,* slip op, p 22. But this point would be significantly lessened in relation to the value of providing accurate information to the public about *sex offenders* as against non-sex offenders.

Regarding the "**connection to nonpunitive purpose**," this Court in *Lymon* determined that even with respect to non-sexual offenders, the 2021 SORA "is rationally related to SORA's purpose of protecting the public." Slip op, p 24. This point applies with even more force when applied to dangerous sexual offenders, like Kardasz. And it bears repeating what the U.S. Supreme Court said about this factor: "The Act's rational connection to a nonpunitive purpose is ***a most significant factor*** in our determination that the statute's effects are not punitive." *Smith v Doe*, 538 US at 102 (cleaned up) (emphasis added). The suggestion is that it is the most important consideration. See *People v Kiczenski,* ___ Mich App ___, slip op, p 8 ("Factor 4 is considered to be the most important factor in the overall punishment evaluation"), citing among others, *McGuire v Marshall*, 50 F4th 986, 1013 (CA 11, 2022) (referring to the rational connection to a nonpunitive purpose inquiry as "a most—if not *the* most—significant factor") (emphasis in original); *Doe v Settle*, 24 F4th 932, 949 (CA 4, 2022) (calling this factor "the most important factor").

Regarding "**excessiveness**," this Court again in *Lymon* raised the issue of the "efficacy" of the 2021 SORA. See *Lymon,* slip op, p 25 ("The same and additional studies continued to support the uncertainty of SORA's general efficacy.").

Nonetheless, consistent with the arguments advanced by the MSP here, the federal district court flagged the point that one of the central features looks to giving information to the public so Michigan residents may change *their own conduct*, rather on whether it changes the conduct of the sexual offenders themselves: "SORN laws also serve the goal of providing the public with information they can use to protect themselves." *Does III,* slip op, p 37. This Court's analysis in *Lymon* does not appear to consider this aspect of the 2021 SORA.

Moreover, the analysis in *Lymon* was heavily dependent on the fact that Cora Lymon was not a sex offender, noting that "[s]uch offenders [as Lymon] are branded dangerous sex offenders even though their crimes contained no sexual component." Slip op, p 26. A Michigan resident does not need the registry to know that that Robert Kardasz is a dangerous sex offender. A simple Google search will suffice. See p 37.

Thus, in reviewing all the *Mendoza* factors under *Lymon* and applying it to a sex offender, the Court of Appeals in *Kiczenski* provided the correct reasoning, as illustrated by its analysis regarding the question whether 2021 SORA is excessive:

> As *Lymon* recognized, the answer to this question may well differ when dealing with a convicted sex offender, like defendant. Sexual offenders are still "branded dangerous sex offenders," and face the "demanding requirements and consequences" of the 2021 SORA. *Id*. at ___; slip op at 26–27. However, while denoting a non-sex offender as a "sex offender" is not accurate and contributes to it being excessive, the opposite is true for the individual who, like defendant, has committed a sex offense. *These less restrictive provisions under the 2021 SORA are a great deal less excessive when applied to sex offenders because they are precisely the offenders the Legislature established these regulations for in order to protect against future harm to victims, particularly the young and vulnerable.* [*Kiczenski*, slip op, p 11 (emphasis added).]

Consistent with this analysis, the Court of Appeals in a published opinion ruled that "we hold that the 2021 SORA does not constitute punishment as applied to CSC-I offenders." *Kiczenski,* slip op, p 12 (Murray, Rick, and Maldonado, JJ.).

The federal district court decision in *Does III* also does not require a different conclusion. Significantly, the decision in *Does III* relied heavily on this Court's analysis in *Lymon* on this question whether the 2021 SORA was punitive. See, e.g., *Does,* slip op, p 31 ("The Court agrees with *Lymon*'s characterization of SORA 2021" on whether it constitutes an affirmative restraint). But the federal district court was bound to follow federal law on the issue whether Michigan's 2021 SORA was punitive. Even so, just as here, the MSP there noted the basic identity of the 2021 SORA to federal SORNA, and thus the controlling nature of the *Willman* decision. The district court, however, did not address the MSP's argument about the same nature of the registries, *Does,* slip op, pp 19–20, because it went to *Willman* and found an untenable basis on which it did not have to follow its holding, i.e., "[*Willman*'s] terse discussion of the Ex Post Facto Clause in that case offers no explanation as to how it might be applicable here." *Id.* at 20; see *id.* at 21 ("offer[s] no guidance"), and 22 (*Willman* does not "contro[l] here").

Yet, the Sixth Circuit in *Willman* expressly addressed the issue whether federal SORNA was punitive under the Ex Post Facto Clause: "SORNA is not a punishment for purposes of the Ex Post Facto Clause." 972 F3d at 825. And its Ex Post Facto Clause analysis expressly relied on federal precedent that applied the *Mendoza* factors in rejecting an ex post facto claim against federal SORNA. See, e.g.,

U.S. v Wass, 954 F3d 184, 193 (CA 4, 2020) (identifying the five relevant factors under *Mendoza* and stating that "[w]e analyzed the registration requirements using the five factors that *Smith* had found to be the most relevant" and "this Court held in *Under Seal* that SORNA's registration requirements are nonpunitive"), citing *Under Seal*, 709 F3d at 265–266. See also *Parks*, 698 F.3d at 6 (citing the *Mendoza* factors); *WBH*, 664 F3d at 855–860, 860 (after applying the five factors then ruling that "that 'clearest proof' is lacking, as our application of the *Doe* guideposts makes clear").

In short, the federal district court in *Does III* failed to follow binding precedent based on its view that the guidance in *Willman* was insufficient because of the lack of the analysis in the opinion. The MSP shall be appealing the decision.

* * *

One final point on *Lymon* and *Does III*. In *Does III,* like *Lymon*, the federal district court appeared to provide clear guidance, directing the State defendants not to apply those provisions to the pre-2011 registrants that were introduced in 2011: "this holding means that the in-person reporting requirements and retroactive extension of registration terms ***originally introduced*** *in SORA 2011* cannot be applied to a registrant who committed an offense before SORA 2011 was enacted." Slip op, p 38, n 31 (emphasis added). While the meaning of this statement for the final judgment has been the subject of further briefing, the MSP contends that its meaning is plain. In a similar vein, this Court ruled that the non-sexual offenses, such as unlawful imprisonment, should not be the basis of the registry but should remain where those "offenses had a sexual component." *Lymon*, slip op, p 38, n 24.

Here, there has been no briefing on the issue of the import of a ruling that the SORA is both punitive and would be unconstitutionally cruel or unusual in its application to Robert Kardasz. The MSP does not believe that this latter issue is significantly at issue, but if it is, this would require additional briefing.

III. The 2021 SORA does not violate the Eighth Amendment's protection against cruel or unusual punishment, just as the SORNA.

Kardasz provides a short analysis on the claim that the 2021 SORA constitutes a violation of the federal Eighth Amendment as cruel or unusual punishment. See Kardasz Br, pp 73–76. The MSP provides a short response to this claim consistent with its earlier analysis. There are two points here.

First, if Michigan's 2021 SORA is not punitive for the purposes of the Michigan Constitution, the same analysis would govern here, as Michigan provides greater protection under its constitutional language. See *People v Bullock*, 440 Mich 15, 32 (1992). For the reasons advanced above, Michigan's 2021 SORA is not punitive and thus does not violate the Eighth Amendment.

Second, given the symmetry between the 2021 SORA and the federal SORNA, the Sixth Circuit's analysis on this issue should be persuasive. See *Willman*, 972 F3d at 825 ("SORNA is not punishment for purposes of the Eighth Amendment").[30] This is the correct answer here too. Kardasz fails to grapple with *Willman,* which is the most-immediate relevant precedent. This Court should reject his claim.

[30] As noted above, the 2022 SORNA has included some additional requirements, but that would not change the overall analysis. No court has called into question the constitutionality of SORNA on ex post facto grounds.

CONCLUSION AND RELIEF REQUESTED

This Court should decline to reach the threshold question and merely rule that the 2021 SORA is not unconstitutional as applied to the grave offender, Robert Kardasz. Otherwise, this Court should rule that 2021 SORA is not punitive.

Respectfully submitted,

/s/ B. Eric Restuccia

B. Eric Restuccia (P49550)
Deputy Solicitor General

Eric M. Jamison (P75721)
Assistant Attorney General

Attorneys for the Michigan State Police
Department of Attorney General
P.O. Box 30212
Lansing, MI 48909
(517) 335-7628
RestucciaE@michigan.gov

Dated: February 21, 2025

WORD COUNT STATEMENT

This amicus brief contains 19,250 words.

/s/ B. Eric Restuccia

B. Eric Restuccia (P49550)
Deputy Solicitor General
P.O. Box 30212
Lansing, MI 48909
(517) 335-7628
RestucciaE@michigan.gov

Dated: February 21, 2025