

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

ROBERT KARDASZ,

Defendant-Appellant.

Supreme Court No. 165008

COA Nos. 343545 & 358780

Macomb County Circuit Court
Case No. 17-2252-FC

**SCHOLARS' AMICUS CURIAE BRIEF
IN SUPPORT OF DEFENDANT-APPELLEE**

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STATEMENT OF QUESTION PRESENTED/ADDRESSED

Is SORA 2021 punishment for the same reasons that the Sixth Circuit in *Does #1-5 v Snyder*, 834 F3d 696 (6th Cir 2016), and this Court, in *People v Betts*, 507 Mich 527 (2021), found SORA 2011 to be punishment?

Mr. Kardasz says yes.

The Court of Appeals said no.

The trial court did not say.

Amici say yes.

AMICI AND THEIR INTEREST¹

Amici are nine scholars across multiple disciplines whose studies include the empirical effects of registry laws, how well the stated reasons for such laws align with the peer-reviewed scientific research, and what the policy and social costs are when SOR laws do not align with the social science. Amici summarize the *scientific evidence* that bears on the assumptions that underlie Michigan's SORA 2021, and its implications for the Court in evaluating the law's constitutionality. A list of the amici and a short biography of each is attached as Exhibit 1.

¹ This brief was not authored in whole or in part by counsel for a party, nor did such counsel, a party, or any other person or entity make a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

Michigan's Sex Offenders Registration Act (SORA), MCL 28.721a, states its purpose, the factual premise motivating its purpose, and its intended effect:

1. The law's purpose is "to better assist law enforcement and the people of the state...in preventing and protecting against...future criminal sexual acts by convicted sex offenders."
2. The law's factual premise is that anyone "who has been convicted of committing an offense covered by this act poses a serious potential menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state."
3. The law's intended effect is to create a registration system that will "provide law enforcement and the people...with an appropriate, comprehensive, and effective means to monitor" such offenders. *Id.*

The intuitions or assumptions underlying all three statements may have been plausible decades ago when the legislature expressed them. But in the years since, scientific studies published in peer-reviewed journals by dozens of scholars across a range of disciplines have made it clear that all three statements are simply wrong. We now know that Michigan's registry law does *not* "assist in preventing and protecting against future criminal acts by convicted sex offenders." We now know that the great majority of those whom the Michigan law targets do *not* over time "pose a serious potential menace and danger" to adults or to children. And thus we now know that reporting and online notification do *not* provide an appropriate or effective means of monitoring registrants, because most will never recidivate.

Four years ago this Court said that “studies demonstrate that, at a minimum, the 2011 SORA’s efficacy is unclear.” *People v Betts*, 507 Mich 527, 561 (2021). Last year the Court said that SORA’s efficacy is “uncertain.” *People v Lymon*, ___ Mich ___, 2024 WL 3573528, Slip Op, at 25 and n 19 (2024). But the ever-growing number of scientific studies has today eliminated uncertainty. Many repeated efforts have failed to find evidence that registry-and-notification laws like Michigan’s third-generation SORA reduce recidivism. Indeed, the effect of registries like Michigan’s is, if anything, to make the public *less* safe.

At the same time, there is now evidence that other registry laws, if they are non-public risk-based registries, *may* reduce sexual offending. These findings make it imperative to reexamine SORA in light of the science. We *must* do so because the key reason why SORA’s pervasive rules and public notification do not reduce recidivism is also why the law is unconstitutional: they target the wrong people for the wrong reasons. They punish to no purpose.

ARGUMENT

I. THE EFFECTIVENESS OF REGISTRY LAWS DEPEND UPON THEIR DESIGN; MICHIGAN’S SORA IS DESIGNED TO FAIL.

A. States vary in how they assign registrants to risk tiers. Some states use a scientific method to identify registrants’ risk of reoffending, but Michigan does not.

Michigan, like most states, assigns registrants to a risk tier that determines, among other things, the duration of their registration and whether they are included on a publicly accessible website listing “sexual offenders.”² In 2006 Congress sought to encourage more uniformity in state registry laws by adopting the Sex Offender Registration and Notification Act (SORNA).³ SORNA created a modest financial incentive for states to conform their registry laws to the federal SORNA standards. Almost two decades later, only 18 states have elected to be “substantially compliant” with SORNA.⁴ The reasons why most states opted out include disagreement with the substance of SORNA’s provisions, as well the exorbitant costs.⁵ One SORNA

² Andrew J. Harris, Jill S. Levenson & Alissa R. Ackerman, *Registered Sex Offenders in the United States: Behind the Numbers*, 60 CRIME DELINQUENCY 3 (2014).

³ Sex Offender Registration and Notification Act, also known as Title I of the 2006 Adam Walsh Child Protection and Safety Act, 34 U.S.C. § 20901 et. seq.

⁴ <https://smart.ojp.gov/sorna/substantially-implemented#:~:text=Current%20Law,the%20Rocky%20Boy's%20Indian%20Reservation.>

⁵ Andrew J. Harris & Christopher Lobanov-Rostovsky, *Implementing the Adam Walsh Act’s Sex Offender Registration and Notification Provisions: A Survey of the States*, 21 CRIM. JUSTICE POLICY REV. 202 (2010).

standard requires that registrants' risk tier be determined by the sexual offense that triggered their registration.⁶ While many states shifted to such "offense-based" tiering (even if they did not always place every offense in the same risk tier that SORNA required), other states continued to tier registrants by some form of individual assessment rather than by their offense of conviction.

There was good reason for states to resist offense-based risk tiering: it is an exceptionally poor predictor of sexual recidivism. A New York study conducted soon after SORNA's adoption followed sexual offenders for an average of 4.6 years after release from custody.⁷ The study found *no* correlation between registrants' SORNA tier and their rearrest rate (for sexual or nonsexual offenses). In contrast, predictors based on actuarial risk assessment tools⁸ *did* correlate with recidivism among these registrants. A later study by Zgoba et al. followed 1,789 randomly selected sexual offenders released from prison between 1990 and 2004, in each of

⁶ The Harris article reported a 2008 survey that found that about one-third of the states complied with SORNA's requirement for a conviction-based system to tier registrants. *Id.* at 212, Table 2.

⁷ Naomi J. Freeman & Jeffrey C. Sandler, *The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?*, 21 CRIM. JUSTICE POLICY REV. 31, 40 (2010).

⁸ Actuarial risk tools employ data to determine empirically the factors that most closely correlate with rearrest. Examples include previous arrests and imprisonment, previous non-sexual and sexual convictions, whether the victim was a stranger, etc. See R Karl Hanson & Kelly E Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCHOL. ASSESS. 1 (2009).

four states (New Jersey, Minnesota, Florida, and South Carolina).⁹ The researchers calculated the tier classification they would have been assigned by SORNA, based on their conviction, and the actual ten-year recidivism rate of registrants in each SORNA tier, calculated from data provided by the state's law enforcement agency. In three of these states, as in New York, there was no consistent difference in the ten-year recidivism rates in one SORNA tier as compared with another. In one state, Florida, there was – but the relationship was inverted: the higher the SORNA tier level, the *lower* the actual ten-year recidivism rate.¹⁰

The researchers in the Zgoba study also calculated each registrant's score on the Static-99R, the most widely used actuarial tool in the world for assessing sexual recidivism.¹¹ Such tools measure recidivism risk in the same way that insurance companies rely on carefully researched actuarial data – not on the judgments of experienced insurance agents – to assess the risk posed by their insureds, because actuarial tools are more accurate predictors than human judgments. It is well-established that the same is true for criminal reoffending. For example, the Federal Post

⁹ Kristin Zgoba et al., *The Adam Walsh Act: An Examination of Sex Offender Risk Classification Systems*, 28 SEX. ABUSE J. RES. TREAT. 722 (2016).

¹⁰ *Id.* at 731.

¹¹ Society for the Advancement of Actuarial Risk Needs Assessment, *Static-99R Users* <<https://saarna.org/static-99/>> (accessed November 29, 2023).

Conviction Risk Assessment, an actuarial tool similar to the Static-99R, but developed by the federal system for assessing the reoffense risk of federal probationers, was found to be more accurate than the judgments of experienced federal probation officers.¹² This general rule applies equally to predicting sexual reoffending,¹³ as the federal SMART office¹⁴ has also observed.¹⁵

The Static-99R was developed by the Canadian government; it is the actuarial tool of choice in Michigan. It has been validated for assessing the recidivism risk of adult males convicted of a contact sexual offense,¹⁶ but similar tools have been

¹² J.C. Oleson et al., *Training to See Risk: Measuring the Accuracy of Clinical and Actuarial Risk Assessments among Federal Probation Officers*, 75 FED. PROB. 53 (2011).

¹³ Hanson & Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCH. ASSESSMENT 1, 6-8 (2009)

¹⁴ SMART is the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, authorized by the federal Adam Walsh Act to provide guidance and technical assistance regarding implementation of SORNA, as well as to track legislative and legal developments related to sexual offenders, and to administer grant programs related to their registration, notification, and management.

¹⁵ See <https://smart.ojp.gov/> U.S. Dep't of Justice, Office of Justice Programs, *Sex Offender Management Assessment and Planning Initiative* (2017), pp 139-40, https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/somapi_full_report.pdf (concluding that research shows that actuarial tools like the Static-99R are more accurate predictors of sexual recidivism than either structured or unstructured professional judgments).

¹⁶ Helmus, et al., *Improving the Predictive Accuracy of Static-99 and Static-2002 with Older Sex Offenders: Revised Age Weights*, 24 SEXUAL ABUSE 64, 65 (2012). See also Hanson, et al., *The Field Validity of Static-99/R Sex Offender Risk Assessment Tool in California*, 1 J. THREAT ASSESSMENT & MGMT. 102, 104-105,

scientifically validated for other offender groups.¹⁷ The Zgoba study found that SORNA tiering consistently overestimated registrants' actual recidivism risk, as measured by the Static-99R. A majority of those in SORNA's high-risk Tier III fell into the lowest or second lowest of the (then) four risk levels assigned by their Static-99R score. The same is true in Michigan. In *Does III*, experts found that SORNA-defined Tier I registrants (the lowest-risk people based solely on their crime) had the highest recidivism rates, and the SORNA-defined Tier III registrants (the highest-risk people based only on their crime) had the lowest recidivism rates¹⁸

In sum, to assign registrants to risk tiers based on their offense is no better, and quite possibly worse, than classifying them randomly. Using randomly assigned

108 (2014) (validating the predictive accuracy of the Static-99R for adult males on the California registry).

¹⁷ See State Authorized Risk Assessment Tools for Sex Offenders (SARATSO), *Risk Assessment Instruments*, <https://saratso.org/index.cfm?pid=1360#jsii> (last visited November 27, 2023) (validating tool for use with juveniles); Eke, Helmus, & Seto, *A Validation Study of the Child Pornography Offender Risk Tool*, 31 *SEXUAL ABUSE* 456 (2019) (validating tool for men convicted of accessing sexual images of minors). No instruments exist for female offenders, but their low overall reoffense rate suggests the entire group is low-risk. Marshall et al., *The Static-99R Is Not Valid For Women: Predictive Validity in 739 Females Who Have Sexually Offended*, 33 *SEXUAL ABUSE* 631 (2021).

¹⁸ See *Does v. Whitmer (Does III)*, ED Mich No 2:22-cv-10209, Experts' Data Report, ECF No 123-6, PageID.3950, at 3981, ¶ 102 (finding an inverse relationship when using SORNA tiers to predict risk). The Data Report also used reconviction, not rearrest, to define recidivism, because that was the only data provided by the state. So these were people who were not just accused of or arrested for new sexual crimes but were convicted of them.

tier classifications to determine the duration of registration terms and whether registrants are placed on the online registry cannot serve any legitimate public purpose. That's emphatically so when accurate, inexpensive, and practical alternatives to assess registrants' reoffense risk are available and are used by other states. Oregon places registrants in one of three registration categories on the basis of their risk level as determined by their Static-99R score or (for female or juvenile offenders for whom the Static-99R is not validated) an equivalent actuarial tool.¹⁹ Washington state has a similar system, classifying registrants into one of three registration categories on the basis of a risk assessment that relies primarily on the Static-99R for

¹⁹ As explained in *Sohappy v. Board of Parole*, 540 P.3d 568, 575 et seq. (Or. App. 2023), Oregon law requires the Department of Corrections to adopt "a sex offender risk assessment tool" to classify sexual offenders based on their likelihood of committing another sex crime, and by regulation the ODOC adopted, for adult males, the Static-99R as its assessment tool. The issue in *Sohappy* was the proper construction of the Static-99R's official scoring rules. The Static-99R, by design, assesses reoffense risk as of the time the registrant is released from custody into the community. The risk at a later time must be adjusted downward periodically for those who have been at liberty in the community without having been arrested for a new sexual offense. The official Static-99R website provides a formula for making that adjustment, for any given number of arrest-free years, but the ODOC had declined to use it in setting the risk level of such registrants. The court held that Oregon law required it to make that adjustment. That conclusion was later reaffirmed in *Thomsen v. Board of Parole*, 554 P.3d 308 (Or. Ct. App) *rev den*, 373 Or. 81 (2024), which ruled that the ODOC's subsequently adopted regulation to the contrary was invalid under the statute.

adult males.²⁰ Minnesota developed its own actuarial tool using a similar methodology, and the registrants' score on this test is the principal basis upon which Minnesota registrants are placed into risk tiers.²¹ The Zgoba study found that Minnesota's tiers *did* correlate with ten-year recidivism rates – unlike SORNA's offense-based tiers but like those based on the Static-99R.

In sum, registries in states like Oregon, Washington, and Minnesota focus attention on those most likely to reoffend. The Michigan registry, in contrast, focuses attention on registrants selected by a criterion that has, at best, a random relationship with their likelihood of reoffending, and that in Michigan has been definitively shown to have an inverse relationship with reoffense risk.

²⁰ Jacqueline B Helfgott, et al., *Attitudes and Experiences of Registered Sex and Kidnapping Offenders in Washington State.*, 7 (2019), https://www.researchgate.net/publication/360261738_Attitudes_and_Experiences_of_Registered_Sex_and_Kidnapping_Offenders_in_Washington_State_Final_Report#fullTextFileContent.

²¹ See *In re Risk Level Determination of RBP*, 640 NW2d 351, 354 (Minn. Ct. App, 2002).

B. States vary in how they decide which registrants to place on their publicly accessible websites. Some include only the small group of registrants who pose the highest risk of reoffending. Michigan includes almost everyone.

Offense-based tiers are not only a poor measure of recidivism risk, they also skew risk ratings because they shift registrants as a whole to higher risk classifications. For example, before Ohio's adoption of SORNA's offense-based tiering, most of Ohio's registrants were in the lowest risk tier; afterward, most Ohio registrants were in the highest risk tier. Adopting SORNA caused Ohio to move 41% of its adult registrants, and 43% of its juveniles, from the lowest risk group to the highest.²² The experience in Oklahoma was similar.²³ It would be one thing if this shift improved the accuracy of a state's risk tiers, but we now know it did not. We do not know the accuracy of Ohio's risk assessment methods before this shift, but we do know it could not be worse than SORNA's.

Michigan did the same thing. Before the 2011 SORA amendments, about three-quarters of Michigan's registry comprised Tier I (15-year) and Tier II (25-year) registrants; only about one quarter were Tier III (lifetime) registrants. After those amendments (which were applied retroactively, and which remain unchanged

²² Andrew J. Harris, Christopher Lobanov-Rostovsky & Jill S. Levenson, *Widening the Net: The Effects of Transitioning to the Adam Walsh Act's Federally Mandated Sex Offender Classification System*, 37 CRIM. JUSTICE BEHAV. 503, 511-512 (2010).

²³ *Id.*

in SORA 2021), 73% of its registrants are Tier III, 20% are Tier II, and only 7% are Tier I. *Does III*, Data Report, ECF No. 123-6, PageID.3961, ¶ 42. Yet data from Michigan’s Department of Corrections, which administers the Static-99R for its own purposes, show that nearly 70% of Michigan’s registrants (at the time of their release from custody) score in the three lowest Static-99R risk levels, and only *c.* 30% score in the two higher-risk levels.²⁴

TABLE

Risk Level at Release, Measured by Static-99R	Percentage of Michigan Registrants in the Community
Very Low	7 %
Below Average	19 %
Average	43 %
Above Average	22 %
Well Above Average	9 %

In short, Michigan’s SORA doesn’t just ignore the scientific data on recidivism rates, it turns that data upside down: the percentages are the *opposite* of what the data show (and have shown for years).

The inflated risk levels assigned registrants under offense-based tiering also affect the proportion of registrants included on the state’s public website. If most

²⁴ The Corrections Department data allowed experts in *Does III* to estimate these numbers (see *Does III*, Data Report, ECF No. 123-6, PageID.3975).

registrants are placed in a higher risk tier, then most will be on the website. Michigan is once again an extreme example of this phenomenon. More than 90 % of all Michigan registrants living in the community appear on its public website.²⁵ That's in stark contrast to states like Oregon and Minnesota, which individually assess registrants' reoffense risk using scientifically validated actuarial tests. Both include all high-risk registrants on their publicly accessible website. But that is only 6% of Oregon registrants,²⁶ and 14% percent of Minnesota registrants.²⁷ Washington is similar.²⁸

Oregon and Minnesota focus their residents' attention on the registrants most likely to reoffend. Michigan doesn't focus residents' attention at all. It just puts nearly everyone who has ever committed a sexual offense on its website, regardless of

²⁵ *Does III*, Data Report, ECF No. 123-6, PageID.3962, ¶ 45.

²⁶ As of January 31, 2025, there were 31,905 individuals on Oregon's sexual offender registry, but only 1,772 were included on its public website.

<https://sexoffenders.oregon.gov/Map>.

²⁷ As of January 31, 2025, Minnesota had assigned a risk level to 8,882 individuals on its sexual offender registry, of which 1,287 were considered high risk.

<https://dps.mn.gov/divisions/bca/bca-divisions/investigative-services/specialized-investigative-services/predatory-crimes/por/por-data>. Only those placed in this high-risk group are shown on its website. Minn. Stat. § 244.052, subd. 4(b)(1)-(3).

²⁸ Washington's system, which also relies primarily on the Static 99R to tier registrants, is similar to Minnesota's in that it puts most registrants (59%) in its low-risk Tier I, with 25% in Tier II and just 16% in its high-risk Tier III. Presentation by Jacob Bezanson et al., at the 2018 Washington State Sex Offender Policy Board Conference.

https://sgc.wa.gov/sites/default/files/public/SOPB/conference2018/Bezanson_presentation.pdf, (Slide 12).

their reoffense risk. That may be one reason why no one can find any evidence that registries like Michigan's reduce recidivism. But there's a second reason as well, as we explain in the next section.

C. Peer-reviewed scientific studies consistently find that public websites like Michigan's do not reduce sexual recidivism. In contrast, the websites of states like Oregon and Minnesota, which publish only those in the science-based highest risk group, may reduce sexual recidivism.

Research to measure the real-world impacts of crime control measures present methodological challenges. Scholars employ a variety of methods to meet these challenges. Each has advantages and disadvantages, and different research strategies can yield different results. But when multiple sound studies, published in respected peer-reviewed scientific journals, by different researchers employing different methods, all reach the same result, that result is accepted and a scientific consensus forms. That is precisely what has happened here. The studies have been done and their conclusion is clear: registry-and-notification laws like Michigan's SORA that post public registry websites not limited to scientifically identified high-risk registrants *do not reduce recidivism* (sexual or otherwise). If such laws have any effect, it is to *increase* the recidivism rates, making the public *less* safe.

A comprehensive review of the social science research (published by Cambridge University Press) concluded:

Dozens of studies to date have sought to assess whether and how SORN [Sex Offender Registration and Notification] laws affect sex

offense recidivism. Multistate studies—some national in scope—using federal crime data and deploying panel data methods or time-series approaches have found no evidence that notification reduces recidivism and some evidence that it may increase recidivism. In single-state studies, using many different empirical research tools and data sources and examining different measures of sex offense recidivism in different jurisdictions..., researchers from different disciplines, working independently, have essentially failed to detect any evidence that notification reduces recidivism.^[29]

The following table provides just a sample of the dozens of studies that the Cambridge analysis considered. The third column (Findings) is the most relevant.

ARTICLE	NATURE OF STUDY	FINDINGS
<p>Agan, <i>Sex Offender Registries: Fear Without Function?</i>, 54 J. LAW & ECON 207 (2011)</p>	<p>Three separate studies: regression analysis of FBI data, 1985 to 2003; assessing registry effects with comparative analysis of reoffense rates in states with and without registries; comparing locations of registrants across DC with locations of sex crimes</p>	<p>Sexual offense rates do not decline after a state adopts registry or public notification law; sexual offenders do not recidivate less in states requiring their registration; census blocks with more offenders do not experience higher rates of sexual abuse</p>
<p>Bouffard & Askew, <i>Time-Series Analyses of the Impact of Sex Offender Registration and Notification Law Implementation and Subsequent Modifications on Rates of Sexual Offenses</i>, 65 CRIME & DELINQ. 1483 (2019)</p>	<p>Time-series analysis of sexual offending in large Texas city, 1977-2012, to determine impact of registration and later adoption of public notification</p>	<p>No effect of registration or notification on the number of sexual offenses committed by repeat offenders or first-time offenders</p>

²⁹ Agan & Prescott, *Offenders and SORN Laws*, in *SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS: AN EMPIRICAL EVALUATION* 120 (Logan & Prescott eds., 2021).

<p>Zgoba et al., <i>An Analysis of the Effectiveness of Community Notification and Registration: Do the Best Intentions Predict the Best Practices?</i>, 27 JUST. Q. 667 (2010)</p>	<p>Reoffending by NJ registrants prior to public sex offender websites, compared with reoffending by similar group of NJ registrants after the websites established</p>	<p>No sexual recidivism differences between the groups</p>
<p>Ackerman et al., <i>Legislation Targeting Sex Offenders: Are Recent Policies Effective in Reducing Rape?</i>, 29 JUST. Q. 858 (2012)</p>	<p>Comparing rate of forcible rape before and after state's adoption of public sex offender website, with controls for other influences on rape rates during these periods</p>	<p>No evidence public sex offender websites reduced the rate of rape offenses</p>
<p>Sandler et al., <i>Does a watched pot boil? A time-series analysis of New York State's sex offender registration and notification law</i>, 14 PSYCH. PUB. POL'Y & LAW 284 (2008)</p>	<p>Time-series analyses to uncover changes in sexual offense arrest rates before and after the enactment of NY's SORN law, using data from 1986 to 2006</p>	<p>Neither registration nor notification reduced registrant reoffending or first-time sexual offending</p>
<p>Prescott & Rockoff, <i>Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?</i>, 54 J. LAW & ECON. 161 (2011)</p>	<p>Uses data from National Incident Based Reporting System to model the effect of registration and notification including websites</p>	<p>Notification may cause <i>more</i> crime by thwarting rehabilitation</p>
<p>Tewksbury & Jennings, <i>Assessing the Impact of Sex Offender Registration and Community Notification on Sex-Offending Trajectories</i>, 37 CRIM. JUST. & BEHAV. 570 (2010)</p>	<p>Comparing 5-year re-offense rates of Iowa pre-SORN offenders with Iowa post-SORN offenders</p>	<p>Notification has no effect on overall recidivism rates or on recidivism rates of identifiable subgroups</p>

Letourneau et al., <i>Effects of South Carolina's Sex Offender Registration and Notification Policy on Adult Recidivism</i> , 21 CRIM. JUST. POL'Y REV. 435 (2010)	6,000 SC men convicted of sex crimes between 1990 and 2004 followed for average of 8.4 years after release	Registration and notification law adopted in 1995 had no effect on reoffending
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Out of the dozens of studies identified and reviewed in this comprehensive analysis, only *one* state's law was found to reduce sexual offense recidivism.³⁰ That was Minnesota, whose law, as we saw above, relies on a scientifically validated actuarial tool like the Static-99R to place registrants in risk levels, and only puts the 14% in the highest-risk level on its public website. The studies do not tell us why Minnesota's registry, alone among those examined, had its intended effect. But it is not difficult to imagine reasons why Minnesota's registrants, 86% of whom are *not* publicly identified, are less likely to reoffend than those on a registry like Michigan's.

Being labeled a "sex offender" on an official public website creates a different level of disability than a simple record of a criminal conviction. A criminal record memorializes a single event, a statement of something the individual *once did*. The conviction's visibility, for those who don't reoffend, fades over time, as does its

³⁰ Duwe & Donnay, *The Impact of Megan's Law On Sex Offender Recidivism: The Minnesota Experience*, 46 CRIMINOLOGY 411 (2008).

psychological impact on third parties who learn of it.³¹ Michigan’s SORA website, in contrast, is an official statement of who the individual *currently is*. That message is emphasized by the site’s constant updating of registrant photographs, addresses, employment, phone, and vehicle information, and is further confirmed by the “Compliant” or “Noncompliant” stamp on every SORA listing, which suggests registrants remain under continuing supervision and surveillance because they are still dangerous. And given the lengthy or lifetime duration of registration under Michigan’s law – at the opposite end of the spectrum from states like Oregon and Minnesota – Michigan’s public website transforms a single historical act into a 25-year or *permanent* (lifelong) personal identity for nearly all registrants.

Michigan also does what it can to disseminate that identity as widely as it can. Other states erect digital barriers to the use of their registrant database by private businesses, but Michigan allows all private parties’ search robots to scrape the listings.³² This, in turn, allows Google to link registrants’ names directly to their Michigan registry listing, bypassing the need to use the search function on the official

³¹ Some legal rules encourage this process. A 2015 book noted at least seven states, including California, Texas, and New York, that prohibit credit reporting agencies from including convictions whose sentences expired more than seven years earlier. Jacobs, *THE ETERNAL CRIMINAL RECORD*, at 78 (Harvard University Press, 2015).

³² A simple tactic to thwart such scraping is requiring users who search for individual registrants, or for lists of registrants meeting specified criteria (such as locale), to navigate past a “CAPTCHA” barrier. E.g., California Megan’s Law Website

website. Google’s algorithms rank search results in a way that typically puts a registrant’s SORA status among the top hits in any Google search using a Michigan registrant’s name.³³ In stark contrast, a California registrant’s listing on its state website, for example, does not appear at all in a Google search of the registrant’s name.³⁴

<https://www.meganslaw.ca.gov/Disclaimer.aspx> (accessed December 1, 2023). For more on CAPTCHA, see Wikipedia, *CAPTCHA*

<https://en.wikipedia.org/wiki/CAPTCHA> (accessed December 1, 2023).

Michigan’s website imposes no such CAPTCHA search requirement. Other digital barriers to data scraping are also available. See, e.g., Azad, Starov, and Laperdrix, *Web Runner 2049: Evaluating Third-Party Anti-bot Services*, in Bilge et al., eds, *Detection of Intrusions and Malware, and Vulnerability Assessment (DIMVA 2020 Lecture Notes on Computer Science)* (Springer, 2020), pp 135-159, available at

https://link.springer.com/chapter/10.1007/978-3-030-52683-2_7 (accessed December 1, 2023). See the account of a frustrated British reporter no longer able to scrape data from California’s site after the state adjusted its search tools in response to his sensational but completely erroneous accounts of offender reoffense risk. Boswell, *‘It’s frightening for society.’ Thousands of convicted pedophiles in California are being released from prison in less than a year for horrific acts, including rape, sodomy and sexual abuse of kids under 14, DailyMail.com investigation reveals*, DailyMail.com (November 28, 2022),

<https://www.dailymail.co.uk/news/article-11453859/Thousands-convicted-pedophiles-California-getting-year-prison-time.html> (accessed February 10, 2025) (“DailyMail.com was unable to conduct the analysis for offenders added to the database since 2019, because the California Department of Justice has added digital blocks on its website to prevent new data being gathered and analyzed.”).

³³ *Does III*, Expert Report of Dr. Sarah Lageson, ECF No 123-14, PageID.4482, at 4504, ¶¶ 66-67.

³⁴ This statement can be verified by going to the California Megan’s Law Website, *supra* note 32, completing the CAPTCHA, searching for registrants in a particular location, and then doing a Google search for any registrant name one finds. The resulting links do not include the registrant’s listing on the state’s website.

Because most Minnesota and Oregon registrants do not suffer the disabilities and restraints that flow from public notification, they are more likely to succeed in finding and keeping decent housing and employment, and in reestablishing themselves in the community, and thus are less likely to reoffend.³⁵ Most studies find that community notification limits employment opportunities for up to half of registrants.³⁶ Even nonprofit agencies whose very focus is to provide employment for released offenders sometimes exclude registrants.³⁷ Once again, Michigan, unlike other states like California, amplifies the harm by including the registrant's employment address on the SORA website. Even employers who believe in second chances

³⁵ It is well established that people with convictions are less likely to reoffend in an environment that provides them with better employment opportunities. See Schnepel, *Good Jobs and Recidivism*, 128 ECON J 447 (2016) (tracking nearly two million offenders released in California between 1993 and 2008 and finding significantly lower reoffense rates for those released from prison during periods with more employment opportunities in low-skill manufacturing and construction jobs); Apel & Horney, *How and Why Does Work Matter? Employment Conditions, Routine Activities, and Crime Among Adult Male Offenders*, 55 CRIMINOLOGY 307 (2017) (histories of offenders show lower offense rates during periods in which they had high-quality employment).

³⁶ Levenson & Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 AM. J. CRIM. JUST. 54, 55 (2009); *Does III*, Data Report, ECF No. 123-6, PageID.3983, ¶¶ 108 – 110 (45% of Michigan registrants living in the community reported they were unemployed when the unemployment rate was 4.5%).

³⁷ For example, the well-regarded Delancey Street Foundation serves former felons with “a personal history of violence,” but excludes “sex offenders.” Delancey Street Foundation, *To Seek Admission*,

<https://www.delanceystreetfoundation.org/admission.php> (last visited December 2, 2023).

may pause before hiring someone when doing so puts their business address on the public sex offender website. By piling on barriers to registrants' ability to find jobs, Michigan's SORA makes reoffending more likely, as it is well-established that reoffending declines with better employment opportunities.³⁸

Michigan's aggressive public notification for nearly all registrants also erects barriers to civic reintegration. Registrants know they might be "outed" at any time, in any social context, and many cope with the potential for public disparagement and humiliation by withdrawing from social interactions.³⁹ Such civic isolation reduces social capital, further compromising employment opportunities and other aspects of registrants' lives.

A public website focuses attention on those it lists. States like Minnesota and Oregon limit their websites to the small group most likely to reoffend. Michigan's expansive website does the opposite. And by calling attention to those less likely to reoffend, it increases the chance that they will. Any useful effect a narrowly tailored

³⁸ Schnepel, *Good Jobs and Recidivism*, 128 *ECON. J.* 447 (2016) (finding significantly lower reoffense rates for those released from prison during periods with more employment opportunities in low-skill manufacturing and construction jobs); Apel & Horney, *How and Why Does Work Matter? Employment Conditions, Routine Activities, And Crime Among Adult Male Offenders*, 55 *CRIMINOLOGY* 307 (2017) (finding lower offense rates during periods in which offenders had high-quality employment).

³⁹ Lageson, *Found Out and Opting Out: The Consequences of Online Criminal Records for Families*, 665 *ANN. AM. ACAD. POL. SOC. SCI.* 127 (2016).

website (like Minnesota's) may have in reducing reoffending by higher-risk registrants is likely buried by the contrary effect of Michigan's pervasive and lengthy online notification regime, which undermines the ability of 90% of its registrants to find and keep stable housing and jobs, and to form pro-social relationships, thus (if anything) increasing recidivism.

In *Betts* this Court recognized that the notification requirements in a SORNA-based sex offender registry “effectively increase[] the number of sex offenses by more than 1.57 percent,” likely “because of the social and financial costs associated with the public release of their criminal history and personal information” (citing Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J L & ECON 161, 192 (2011)). See *Betts*, 507 Mich at 561. Michigan's SORA 2021 continues to be an extreme example of that astute observation.

D. Following Years of Deliberation, the American Law Institute Recently Rejected SORNA Provisions Requiring Public Notification.

The scientific consensus that sexual offender websites are ineffective as well as harmful is the reason the American Law Institute (ALI) recently rejected them. The ALI's original Model Penal Code (MPC), dating back to 1962, was adopted in whole or part by more than half the states.⁴⁰ In 2022, the Institute updated the part of the MPC related to Sexual Assault and Related Offenses, and addressed the issues of sex offender registration and notification. The MPC Section 213.11H (attached as Exh. 2) reflects the Institute's conclusion that registry information should be accessible only by law enforcement personnel "to aid in the investigation of a specific criminal offense." *Id.*, § 213.11H (1)(a)(i)). Any unauthorized disclosure of registry content is a fourth-degree felony. Public listings of registrants, or of any information about them, is barred entirely.⁴¹

The new MPC provisions are the product of the ALI's nine-year deliberative process ensuring "every issue receives a full airing of viewpoints and that the final product will represent the considered scholarship, experience, and judgment of the

⁴⁰ *Kadish, Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 945, 949 (1999).

⁴¹ There are three provisions permitting disclosure of specified information about particular registrants to particular recipients for specific purposes, but under an obligation of confidentiality enforceable with criminal penalties.

ALI as a whole.”⁴² Dozens of expert advisors – judges, prosecutors, defense attorneys, and scholars – formed the official Advisers and Consultative Groups that regularly reviewed the serial MPC drafts.⁴³ Registry provisions were first discussed in March of 2013, nearly a decade before final adoption.⁴⁴ Section 213.11H received especially careful attention. Objections from the Department of Justice, some state Attorneys General, and the National Center for Missing and Exploited Children, led to special meetings between these groups and the Project’s Reporters. As explained in the official Reporters’ Memorandum:⁴⁵

None of the objections raised with us was more forcefully pressed than these groups’ support for a public website listing persons who have been convicted of sexual offense[s] and virtually unrestricted public access.... [T]hese discussions offered valuable insight into practical considerations worth taking into account. Yet in the end, the points raised ... did not persuade us to overturn the previous, considered judgment, based on extensive research and wide consultation with other experts by the Reporters, the Council, and the membership, which has led to our conclusion that

⁴² A.L.I., *Frequently Asked Questions*, <https://www.ali.org/faq> (click “Who works on ALI projects?”) (last visited February 8, 2025).

⁴³ Adoption of the final language of any ALI project requires the approval of the ALI Council. The Council debated amendments to Section 213.11H at several meetings during this process (see n. 44). The Council Members included Arizona, California, and Texas Supreme Court Justices, and many federal court judges. See Exhibit 3, List of ALI Council who approved the revised MLP in 2022.

⁴⁴ For an overview of the project’s history from 2015 on, see https://www.ali.org/project/sexual-assault-and-related-offenses?active-tab=tab_3 (last visited February 8, 2025).

⁴⁵ Schulhofer, Reporters’ Memorandum to Tentative Draft No. 6 (2022), at pg xiii. <https://www.thealiadviser.org/sexual-assault/reporters-memorandum-for-model-penal-code-sexual-assault-and-related-offenses-tentative-draft-no-6/> (last visited on February 8, 2025).

these public-access policies are unjust and counterproductive, even in terms of the public-safety goals they purport to serve.

The Commentary and Reporter's Notes set out the research and expert evidence that the ALI found persuasive, referencing many of the same studies discussed above in this brief.⁴⁶ The inability of Section 213.11H's opponents to offer contrary evidence was an important reason the Institute rejected their position. The same research also helps explain why "public access to registry information is virtually unheard of outside the United States."⁴⁷ While many other countries have registries to aid law enforcement, not only the Institute, but also the Department of Justice,⁴⁸ and scholars here and abroad,⁴⁹ agree that publicly accessible websites listing registrants are virtually nonexistent in other countries. They are rejected by all other

⁴⁶ American Law Institute, *Model Penal Code: Sexual Assault and Related Offenses*, *Tentative Draft No. 6*, at 69-72 (2022) (*Tentative Draft No. 6*); *Tentative Draft No. 5*, at 521-35, 574-80,

https://www.ali.org/system/files/migrate_project_files/872_mpc_sa_td5_-_booked2.pdf (last visited February 8, 2025).

⁴⁷ *Tentative Draft No. 5*, 575. See also *Tentative Draft No. 6*, 506-513.

⁴⁸ U.S. Dep't of Justice, *Global Survey of Sex Offender Registration and Notification Systems* 17-22 (2016), available at <https://smart.gov/pdfs/global-survey-2016-final.pdf>.

⁴⁹ Thomas, *The Registration and Monitoring of Sex Offenders: A Comparative Study* (2011); Jacobs & Larruri, *Are Criminal Convictions a Public Matter?: The USA and Spain*, 14 PUNISHMENT & SOC'Y 3, 12-14 (2012); Griffin & Blacker, *Megan's Law and Sarah's Law: A Comparative Study of Sex Offender Community Notification Schemes in the United States and the United Kingdom*, 46 CRIM. L. BULL. 987 (2011); Napier, et al., *What Impact Do Public Sex Offender Registries Have on Community Safety?* (2018), in AUSTL. INST. OF CRIMINOLOGY, *Trends &*

western democracies. Our closest neighbor, Canada, is an example. It considered but rejected public websites identifying sexual offenders. Instead it chose to follow evidence-based strategies for reducing recidivism that employ actuarial measures to identify higher-risk offenders and provide services that reduce their risk of reoffending.⁵⁰ Since adoption of this approach, Canada has experienced a 60% decline in recidivism.⁵¹

E. The Excessive Duration of Michigan’s Registration Terms Multiplies the Error of Its Reliance on Offense-Based Tiering.

The Static-99R measures rearrest risk as of the time the offender is released into the community. But the risk that any individual will reoffend changes over the years following release. Assume, for example, a group of 100 registrants whose Static-99R score at release predicts a 10% lifetime rearrest rate. We don’t know at release which ten registrants will be the ones who reoffend, but they soon begin to identify themselves by getting arrested again. Assume five are rearrested in the first

Issues in Crime and Criminal Justice (Issue 550, 2018), available at https://www.aic.gov.au/sites/default/files/2020-05/ti_what_impact_do_public_sex-offender_registries_have_on_community_safety_220518_0.pdf.

⁵⁰ Patrick Lussier, et al., *The Sexual Recidivism Drop in Canada: A Meta-analysis of Sex Offender Recidivism Rates over an 80-year Period*, CRIMINOL. PUBLIC POLICY 1745 (2022); Petrunik, *The Hare and the Tortoise: Dangerousness and Sex Offender Policy in the United States and Canada*, 45 CANADIAN JOURNAL OF CRIMINOLOGY & CRIMINAL JUSTICE 43 (2003).

⁵¹ Lussier, *supra*, n. 50.

five years after the group's release. We still expect five more to be arrested eventually from the remaining 95. That means the expected future rearrest rate, for this group of 95 who were still arrest-free five years after release, is 5.3% (5/95). Put another way, the recidivism risk has declined from 10% percent to 5.3% percent after five years, *for those who are still arrest-free*.

This decline in the likelihood of being rearrested, with each year arrest-free after release, has been described as the single most well-established finding in criminology.⁵² The finding applies to those convicted of a sexual offense just as much as to others, as shown by an important 2014 study. It combined data collected in 21 studies that together followed 7,740 adult males convicted of a sexual offense for up to 24 years post-release.⁵³ The study found that rearrest risk declined with arrest-free years at liberty *regardless* of whether the initial risk was low or high. A follow-up study using the same data calculated how much the rearrest risk declined for each

⁵² Blumstein & Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009); Kurlychek, et al., *Long-Term Crime Desistance and Recidivism Patterns—Evidence from the Essex County Convicted Felon Study*, 50 CRIMINOLOGY 71, 75 (2012).

⁵³ Hanson, et al., *High Risk Sex Offenders May Not Be High Risk Forever*, 29 J. INTERPERSONAL VIOLENCE 2792, 2794-95 (2014). Because 16 of the 21 studies providing the data for this paper followed individuals in western countries (most often, Canada) that do not have websites or other methods of public notification, the declining reoffense rates cannot be attributed to online registries.

succeeding year after release.⁵⁴ It classified all 7,740 into one of the five risk levels on the basis of their Static-99R score.

As those rearrested were removed from the sample, the study recalculated the rearrest risk of those still arrest-free up to that point, based on the follow-up data that showed how many of those rearrest-free at that point were in fact rearrested in the future. The authors performed this recalculation for each six-month interval following the initial release from custody. Figure A reproduced below shows how the rearrest risk (called the “hazard” level) declined over the 25 years following release, separately calculated for each of the initial Static-99R five risk levels (ranging from “very low” to “well above average”).

⁵⁴ Hanson, et al., *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 PSYCH. PUB. POL’Y & L. 48, 50 (2018).

FIGURE A

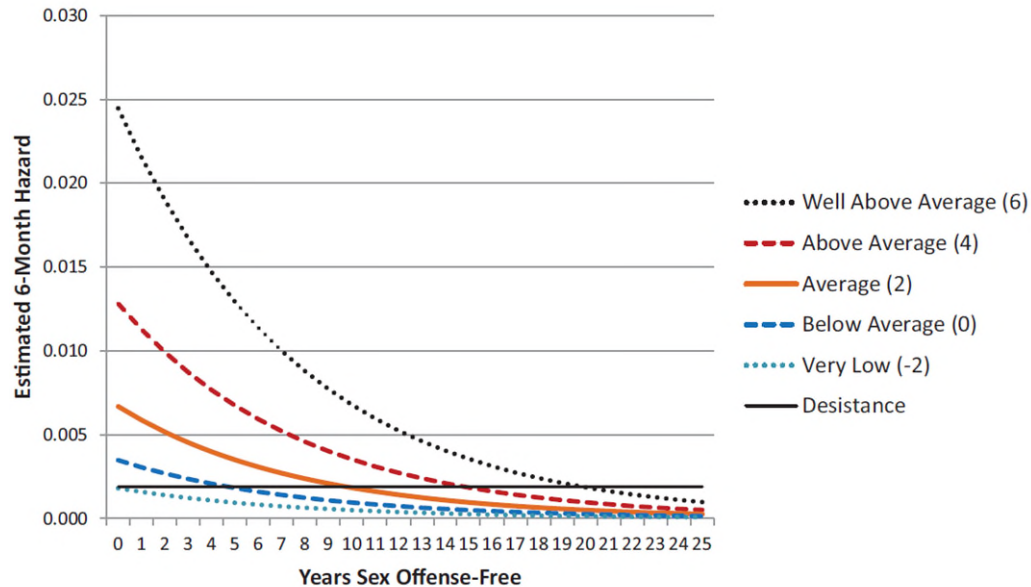


Figure A includes a darker horizontal line near the bottom which represents what the study called “desistance.” The lifetime chance that random males in the population with no felony conviction will, over their lifetime, be arrested for a sexual offense has been estimated at about 2%.⁵⁵ The lifetime chance of a sexual offense arrest for males after release from custody for a *nonsexual* offense, and who have no prior sexual offense record, is about 3.8%.⁵⁶ Nonsexual offenders, and obviously

⁵⁵ *Id.*, at 49. See also Hanson Expert Report, *Does III*, ECF No. 123-7, PageID. 4018-4020.

⁵⁶ From 1 to 2% of nonsexual offenders are convicted of a sexual offense within five years of their release from custody. Kahn, et al., *Release from the Sex Offender Label*, 46 ARCHIVES SEXUAL BEHAV. 861 (2017). A group with a five-year reoffense rate of 2% would be expected to have a 3.8% rate after 20 years – effectively, that group’s lifetime rate. Thornton, et al., *Estimating Lifetime and Residual Risk for Individuals Who Remain Sexual Offense Free in the Community: Practical Applications*, 33 SEXUAL ABUSE 3 (2021), available at <https://journals.sagepub.com/doi/epub/10.1177/1079063219871573>.

males with no criminal record, are not placed on any sexual offender registry. Either group thus provides a benchmark, because any other group that is at or below those sexual offense arrest rates cannot be a “special menace” to society justifying registration when their rate is no different from the rate of these *unregistered* males. The authors took a conservative approach and chose the lower 2% rate to use as the “baseline” for their study. That is the “desistance” line in Figure A. Any registrant group at or below this 2% desistance level is indistinguishable from unregistered males in the population.

It is clear from Figure A that Level I (very low risk) registrants are already *below* the “desistance” line on the day they are released from jail or prison. That is, on day one they pose less risk of being arrested for a new sexual offense than males in the general population. Level II (below average risk) registrants cross the desistance line in about five years, and Level III (average risk) registrants cross the desistance line in about 10 years. Level IVa (above average risk) and IVb (well above average risk) registrants cross the desistance line in 15 years and 20 years respectively. Thus, a registry that followed the empirical scientific data and removed people once their rearrest risk fell to desistance would have no registration terms longer than 20 years – and much shorter terms for lower-risk registrants (and none at all for the 7% lowest-risk registrants).

As noted in Part I (B) above, Michigan does not use the Static-99R to set

registrants' tiers, but the MDOC routinely administers it (for its own purposes) to registrants under its jurisdiction. MDOC Static-99R historical data tell us that about 70% of Michigan registrants living in the community are Level III (average risk) or below; they reach desistance at ten years. Yet Michigan's offense-based tiering places 93% of them on the registry for 25 years or for life – decades past the point at which they present no heightened risk of sexual offending.⁵⁷

The excessive duration of Michigan's registration terms ensures that *most* Michigan registrants, even if they once presented a heightened sexual offense risk, currently do not. Based on the Static-99R data, from 17,000 to 19,000 Michigan registrants remain on the registry even though they have passed the point of desistance.⁵⁸ At that point it is very hard to see how registration, reporting, and website notification can do any good for anyone once people pose the same (or lower) risk than unregistered males in the population. Surely this is punishment to no purpose.

⁵⁷ *Does III*, Data Report, ECF No. 123-6, PageID.3961.

⁵⁸ *Id.*, at PageID.3973, at ¶¶ 71-72.

II. THE STATE’S EFFORTS TO CONTEST THE CLEAR SCIENTIFIC CONSENSUS ARE BASED ON IRRELEVANT DATA AND SOURCES WITH NO SCIENTIFIC CREDIBILITY, AND THUS DESERVE NO WEIGHT.

A. The Scientific Consensus that Registry-and-Notification Laws Like Michigan’s Do Not Reduce Sexual Reoffending Is Unaffected by the Fact that Many Sexual Offenses Go Unreported.

The state latches on to the fact that many sexual offenses are unreported, as if that fact casts doubt on the overwhelming scientific consensus that registries like Michigan’s do not reduce sexual reoffending.⁵⁹ But scientists understand that many sexual crimes go unreported, of course. Scientists also understand that unreported crime is irrelevant to the analysis of the efficacy of registry laws, as shown below.

Studies examine the impact of sex offender registry-and-notification laws by comparing the recidivism rates between jurisdictions with different laws, or by comparing data before and after a jurisdiction changes its SORA to add a public registry website. Studies comparing the sexual reoffense rates of different jurisdictions, or at different times in one jurisdiction, necessarily use arrest or conviction data. There is, by definition, no data on *unreported* crimes.⁶⁰ But when the question is whether

⁵⁹ See e.g., *People v. Martin*, Mich Supreme Court Docket No. 166339, People’s Supplemental Brief, at 30 et seq. (filed 2/23/2025)

⁶⁰ Estimates of unreported crimes usually rely on the National Crime Victimization Survey conducted by the Department of Justice every six months. That survey asks those 12 or older about each victimization they experienced and whether they reported it to the police. It consistently finds that *most* violent crimes, including most rapes

the sexual reoffense rate in State A is higher or lower than in State B, or whether the sexual offense rate is higher or lower in State C before and after a new law takes effect, unreported crimes cannot matter unless the unreported crime rate of one group being studied is different from the comparison group being studied. If the reporting rates are the same, then the group's *relative* offense rates are the same whether or not someone counts unreported offenses.

Michigan has no evidence to show, and there is no reason to believe, that the proportion of sexual offenses that are *reported* suddenly changes when a jurisdiction establishes a publicly accessible website listing registrants, or that jurisdictions with such websites systematically experience higher or lower *reporting* levels than jurisdictions without them. So while it is certainly true that the sexual reoffense rates in all jurisdictions, and at all times, would be higher if we could somehow include unreported offenses, they would all be higher by the same proportion. That is why the consistent finding (across many studies by different scholars employing different methods) that a jurisdiction's adoption of a public online registry has zero effect on

and sexual assaults, are not reported. Morgan & Oudekerk, U.S. Dep't of Just., Bureau of Just. Stat., *Criminal Victimization*,

https://bjs.ojp.gov/library/publications/list?series_filter=Criminal%20Victimization
The figure for rape and sexual assault bounces around more than the violent crime figure because there's a smaller sample size for this narrower crime category. Sharon L. Lohr, *How Many Sexual Assaults are Reported to Police?*,

<https://www.sharonlohr.com/blog/2018/9/24/how-many-sexual-assaults-are-reported-to-police> [perma.cc/QLF4-R9UB] (last visited Aug. 20, 2020).

the rate of sexual recidivism, is not affected. Studies that find that websites do not reduce the rate of reported reoffending would reach the same conclusion, even if they included unreported reoffending, as we make even clearer below.

B. Unreported Offending Does Not Change the Rate of Decline of Reoffense Risk for Registrants Who Stay Arrest-Free in the Community.

The state focuses on the overall reoffense rate for all those convicted of a sexual offense, quoting a 10% figure.⁶¹ It then observes that given that many sexual offenses are not reported, the actual reoffense rate is undoubtedly higher, perhaps 20% rather than 10%. On this basis it concludes that Michigan may surely assume that all sexual offenders are dangerous and remain so for their lifetime (or at least for 25 years).

But that conclusion is a complete non sequitur. It starts with the false premise that the state can treat an individual as a dangerous threat to society because he is part of a group in which 80% are not.⁶² It continues with the demonstrably false

⁶¹ State's Supplemental Brief in *People v Martin*, Mich Sup Ct No. 166339, at 31, n 20.

⁶² In the state's own data, 90 percent of registrants did not reoffend. *Does III*, Data Report, ECF No. 123-6, PageID.3962 et seq. It would be 80 percent if one assumes half the offenses were not reported. The difficulty of establishing with confidence the number of crimes that are *not* reported is obvious. Estimates of unreported crimes usually rely on the National Crime Victimization Survey conducted by the Department of Justice every six months. NCVS asks respondents 12 or older about each victimization they experienced and whether they reported it to the police. NCSV consistently finds that most violent crimes, including most rapes and sexual assaults, are not reported. The *Martin* brief cites the 2018 report. The most recent report shows

assumption that one must treat all members of the group the same because there is no way to distinguish the small minority who pose a heightened risk of reoffending from the great majority who do not.⁶³ But we know (from Part 1 above) that easily available tools – which make just that distinction – are routinely used by other states.

Michigan continues further to defy the most well-established finding in criminology by assuming that reoffense risk never changes – that the life an individual leads in the years after release into the community tells us nothing about the chance he will reoffend later. It assumes that if at release he is part of a group in which 10% will reoffend, he poses that same 10% risk ten years later, even though he has not reoffended. But we know that ten years after release, most of those in the group who will ever reoffend already have, so that only about 2.5% of those who haven't reoffended after ten years will do so later.⁶⁴

that in 2023, nearly half (44.78%) of those who said they had been the victim of rape or sexual assault also said they had reported it to the police, a figure quite similar to the percentage for other violent crimes. Susannah N. Tapp, *Criminal Victimization*, 2023, at 6 (2024), <https://bjs.ojp.gov/document/cv23.pdf>.

⁶³ We have known for many years that sexual offenders are not homogeneous, but vary considerably in the likelihood of their reoffending. Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Different? An Examination of Rearrest Patterns*, 17 CRIM. JUSTICE POLICY REV. 83 (2006).

⁶⁴ The chance of a sexual offender's rearrest is cut approximately in half for every five years he is at liberty without having been rearrested for a sexual offense. Thornton, et al., *supra*, note 56.

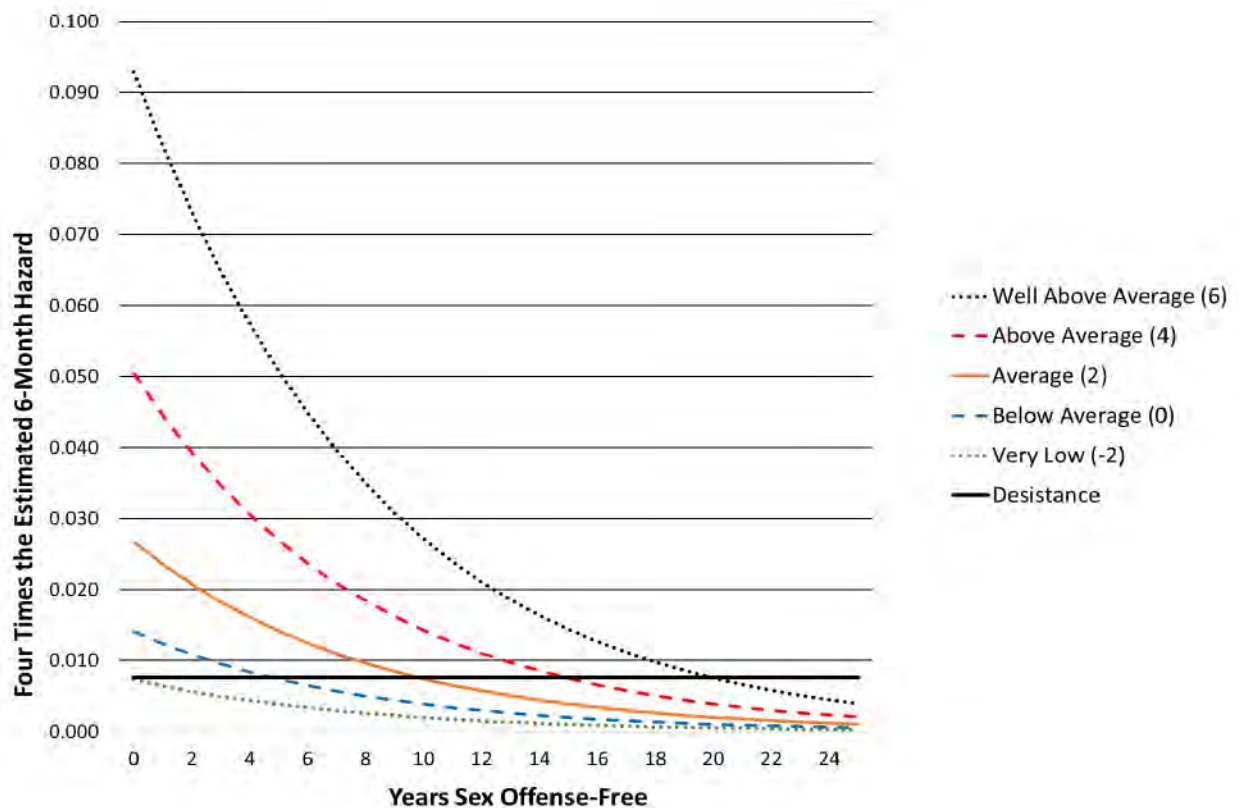
But the state’s final false assumption requires special attention. It argues that none of the errors (recited above) matter because many of *registrants’* sexual offenses go unreported. The state’s argument is that the registrants’ sexual offense rate thus only *seems* to reach the “desistance” level in Figure A (displayed in Part I (E), above). That’s an illusion, the state’s argument goes, because the studies are not counting registrants’ unreported offenses. But it makes no sense to assume that only *registrants’* offenses go unreported. *Whatever* the unreported sexual offense rate is, it is hardly plausible to think the sexual offenses committed by those with a prior sexual offense conviction are *less* likely to be reported than offenses committed by those with no such prior record. Indeed, the opposite is true: police are more likely to learn of, and prosecutors more likely to charge and arrest, in sexual offense cases committed by males *with* prior sexual convictions than in cases committed by males without such a prior sexual offense record.⁶⁵ Hence the “unreported” rate would be (if anything) *lower* for registrants.

Let’s give the state the benefit of the doubt and assume that sexual offenses committed by those never convicted of a sexual crime are reported at the same rate as sexual offenses committed by those with a prior sexual offense conviction. But

⁶⁵ See Ira Mark Ellman, *When Animus Matters and Sex Offense Underreporting Does Not: The Sex Offender Registry Regime*, 7 UNIV. PA. J. LAW PUBLIC AFF. 1 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817201 (last visited February 5, 2024).

then, in comparing the sexual offense risk posed by registrants to the risk posed by males in the general population (labelled “*desistance*” in Figure A), we must count unreported offenses for *both*. In that case the time it takes for registrants to reach desistance, shown in Figure A, does not change at all. Figure B below illustrates the point: it shows what happens to Figure A, if we assume (in this example) that only one in every four sexual offenses is reported.

Figure B



Does III, Hanson Rebuttal Report, ECF No. 123-8, PageID.4192.

If the reporting rate is 25%, then for every *reported* sexual crime there would be three unreported sexual crimes. The rates for each of the five Static-99R Level

groups is therefore quadrupled. But the black line showing the desistance level rate for men with no prior sexual offense conviction must *also* reflect a quadrupled rate – from 2% in Figure A to 8% in Figure B. The result, of course, is that each risk level group reaches desistance at precisely the same time in Figure B as it did in Figure A. The lowest risk people are still no more dangerous than general population males from the first day of their release, and even the highest risk people reach desistance in exactly the same 20 years. *Does III*, ECF No. 123-8, PageID.4192. Undetected offending cannot and does not have *any* effect on the number of arrest-free years required for a registrant to reach desistance.

C. The SMART Office Reports Do Not Contradict the Scientific Consensus that Registry Laws like Michigan’s SORA 2021 Fail to Reduce Recidivism and Make the Public Less Safe.

In earlier litigation the state claimed that a small section of a 2017 federal SMART office report⁶⁶ “determined that studies challenging the efficacy of registries are inconclusive.”⁶⁷ The section – just three pages in the SMART office report⁶⁸

⁶⁶ SMART Office, *Sex Offender Management Assessment and Planning Initiative*, (2017), available at:

https://smart.ojp.gov/somapi/chapter-5-adult-sex-offender-recidivism#recr_find.

⁶⁷ See *People v Lymon*, __ Mich __, MSC No. 164685 (2024), Joint Motion [and Brief] of the Prosecutor and Michigan State Police in Reply to Scholars’ Amicus Brief (12/19/2003), at 2-3; and *Does III*, Defs’ Motion [and Brief] in Response to Amicus Brief of Criminal Justice Scholars, ECF No 143, PageID.8536, at 8550-8553.

⁶⁸ The SMART office report’s entire discussion of this research is at pp 196-198.

– provides no new data or analysis itself. It purports instead to summarize the findings of others. But the brief summary is nothing like the kind of comprehensive literature review one would find in a peer-reviewed journal or university press, like the chapter discussed above (see Part I (C)) published by Cambridge University.⁶⁹ The 40-page Cambridge review analyzes 80 studies. The three-page section of the SMART office report mentions 15 studies, many of which are government reports that are not peer-reviewed. But none of them conflicts with the Cambridge analysis anyway.

One cited study examined the impact of the Minnesota registry. That study was noted in the Cambridge chapter (and was addressed at length above) because it is the only peer-reviewed study that found a registry effective in reducing recidivism. But of course, as previously mentioned, Minnesota relies on a scientifically validated actuarial test similar to the Static-99R to set its registrants' risk levels, and limits its website to the 14% of registrants it places in the highest risk group. The SMART office report section also mentions the Washington state agency's own examination of the impact of its registry,⁷⁰ also reviewed in the Cambridge analysis and noted

⁶⁹ Agan & Prescott, *Offenders and SORN Laws*, in *SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS: AN EMPIRICAL EVALUATION* 120 (Logan & Prescott eds., 2021)

⁷⁰ Wash. State Inst. for Pub. Policy, *Sex Offender Sentencing in Washington State: Failure to Register as a Sex Offender* (2006), p. 4, available at

above in Part I (C). It reached the mild conclusion that it “could not rule out” the possibility that public notification (along with the concurrent decline in crime rates generally and the concurrent increase in incarceration rates) contributed to the decline in recidivism rates. But of course Washington, as noted earlier, is like Minnesota: it relies on the Static-99R in placing registrants in risk levels, and also limits its website to the minority of registrants it places in its highest risk level. If a more sophisticated study of Washington’s registry were to confirm its efficacy, that would only *add* to the evidence favoring the Minnesota and Oregon approach to registry laws, namely basing them on actuarially validated risk tools and individual risk assessments, and limiting public notification and websites to the highest risk offenders.

Only seven of the other 13 publications mentioned in the SMART office three-page section were peer-reviewed, and *none* of the 13 found a registry or public sex offender website effective in reducing recidivism. Two are included in the Part I table above that sampled studies from the Cambridge analysis: one found that public notification does *not* reduce recidivism and may increase crime by thwarting rehabilitation;⁷¹ the second concluded that neither registration nor notification reduced

https://www.wsipp.wa.gov/ReportFile/926/Wsipp_Failure-to-Register-as-a-Sex-Offender-Revised_Report.pdf.

⁷¹ Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J. LAW ECON. 161 (2011).

sexual recidivism or first-time sexual offending in New York.⁷² The SMART office report itself describes eight⁷³ of the remaining 11 studies as finding that community notification (or the registry in toto, where the study did not focus just on notification) had *no effect* on sexual offending, and a ninth as finding it had *no effect* on registrant

⁷² Jeffrey C. Sandler, Naomi J. Freeman & Kelly M. Socia, *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law.*, 14 PSYCHOL. PUBLIC POLICY LAW 284 (2008).

⁷³ Only two of these eight are cited to a peer-reviewed publication: Freeman, *The Public Safety Impact of Community Notification Laws: Rearrest of Convicted Sex Offenders*, 58 CRIME & DELINQUENCY 539 (2012) and Zevitz, *Sex Offender Community Notification: Its Role in Recidivism and Offender Reintegration*, 19 CRIM. JUST. STUD. 193 (2006). Four are government reports that are not peer-reviewed. Zgoba, Witt, Dalessandro, & Veysey, *Megan's Law: Assessing the Practical and Monetary Efficacy* (2008)

<https://www.ojp.gov/ncjrs/virtual-library/abstracts/megans-law-assessing-practical-and-monetary-efficacy>; Donna D. Schram & Cheryl Darling Milloy, *Community Notification: A Study of Offender Characteristics and Recidivism*, (1995),

https://www.wsipp.wa.gov/ReportFile/1208/Wsipp_Community-Notification-A-Study-of-Offender-Characteristics-and-Recidivism_Full-Report.pdf; Naomi J. Freeman, *The Public Safety Impact of Community Notification Laws: Rearrest of Convicted Sex Offenders*, 58 CRIME DELINQUENCY 539 (2012); Richard G. Zevitz, *Sex Offender Community Notification: Its Role in Recidivism and Offender Reintegration*, 19 CRIM. JUSTICE STUD. 193 (2006).; Adkins, Huff, and Stageberg, *The Iowa Sex Offender Registry and Recidivism*, (2000),

<https://www.ojp.gov/ncjrs/virtual-library/abstracts/iowa-sex-offender-registry-and-recidivism>. A seventh, Walker, et al. (2006), was removed from the self-publishing website the report cites for it, but seems to be the study later published as Vásquez, et al., *The Influence of Sex Offender Registration and Notification Laws in the United States*, 54 CRIME & DELINQ. 175, 188 (2008). The eighth, Holmes, *An Empirical Analysis of Registration and Notification Laws for Juvenile Sex Offenders* (2009), is also cited to that self-publishing website and since withdrawn, but whether it was later published is not clear.

recidivism.⁷⁴ The SMART office summary describes the first of the remaining two publications it considered⁷⁵ as “suggesting the possibility that SORN was a deterrent to sex crimes”⁷⁶ without mentioning the study’s own conclusion that public notification had no such effect.⁷⁷ The final publication mentioned is perhaps the best example of the report’s casual approach. It is labeled a preliminary account,⁷⁸ but the same authors later published an updated analysis of the same data. Although that updated analysis was published seven years before the SMART office report was issued, the report’s authors apparently missed it. That updated analysis concluded that public notification had no effect on sexual offending.⁷⁹

⁷⁴ Letourneau et al., *Effects of South Carolina’s Sex Offender Registration and Notification Policy on Adult Recidivism*, 21 CRIM. JUST. POL’Y REV. 435 (2010).

⁷⁵ Letourneau et al., *Effects of South Carolina’s Sex Offender Registration and Notification Policy on Deterrence of Adult Sex Crimes*, 37 CRIM. JUST. BEHAV. 537 (2010).

⁷⁶ SMART office report at 197.

⁷⁷ “No results...suggested a general deterrent effect [from] Internet-based notification,” Letourneau et. al., *supra* note 75, at 548. The study did not investigate recidivism at all, but only general sex crime rates.

⁷⁸ Vehsey, Zgoba, & Dalessandro. *A Preliminary Step Towards Evaluating the Impact of Megan’s Law*, 10 JUST. RSCH. & POL’Y 1 (2008).

⁷⁹ Zgoba, Veysey, & Dalessandro, *An Analysis of the Effectiveness of Community Notification and Registration: Do Best Intentions Predict Best Practices*: 27 JUST. Q. 667 (2010). This study employed multivariate analysis to help separate the impact of confounding factors from the impact of notification. The final grant report for this project (while not peer-reviewed) concluded “there is little evidence to date, including this study, to support a claim that Megan’s Law is effective in reducing either new first-time sex offenses or sexual re-offenses.” Zgoba, et al., *Megan’s Law*, *supra* note 73, p 41.

The SMART office's report's quick-and-casual approach is perhaps not surprising. The SMART office is the principal government agency monitoring state compliance with the federal government's SORNA standards, including the requirement of public notification and the use of SORNA's offense-based tiering system.⁸⁰ One would not normally expect a government agency to seek out, assemble, and present research casting doubt on the efficacy of the laws its employees are charged with administering.

In the state's earlier briefs the state also cited a report that the SMART office paid the Library of Congress to prepare in 2022.⁸¹ Very little of this 2022 report is even on the subject of whether registration or notification reduces recidivism or sexual offending.⁸² The only empirical study it cites⁸³ on that question is one of the 15 also considered in the 2017 SMART office report. The other six articles the report's

⁸⁰ See <https://smart.ojp.gov/about>.

⁸¹ Fed. Rsch. Div., Library of Cong., *Sex Offender Registration and Notification Act—Summary and Assessment of Research* (2022), available at <https://www.ojp.gov/pdffiles1/smart/305231.pdf>

⁸² The topic is discussed on just five pages (18-20 and 62-63) of the 79-page report.

⁸³ Letourneau & Armstrong, *Recidivism Rates for Registered and Nonregistered Juvenile Sexual Offenders*, 20 SEX. ABUSE 393 (2008). This study had hoped to compare recidivism rates of matched groups of juvenile sex offenders before and after the law required their registration, but concluded no statistically valid comparison was possible because recidivism was so uncommon in both groups.

anonymous authors reference are either not empirical, address other questions altogether, or both.⁸⁴

In short, the SMART office reports add nothing. They do not undermine the scientific consensus, let alone tip the scales to allow the Court to conclude that the studies are “inconclusive.” Today the science is clear that registries like Michigan’s SORA 2021 do not reduce recidivism and if anything make the public less safe.

Conclusion

Michigan’s SORA 2021 takes an extreme position on every issue that the drafter of a registry law must resolve. It treats virtually every registrant as a high risk to reoffend, puts nearly all of them on the registry for decades or for life, and places nearly all of them on a public website that brands them as currently dangerous. It includes their employer’s address on the website, and allows private third parties to scrape and republish the online listings on their own commercial websites.

As we have shown, each one of these decisions conflicts with the scientific consensus about the causes of recidivism, and together they combine to ensure that Michigan’s registry fails in its stated purpose of “preventing and protecting against ...future criminal sexual acts by convicted sex offenders.” The only possible impact

⁸⁴ The table on page 19 of the report lists the seven studies the report’s anonymous authors consulted in researching this topic. It is a surprising list. Three of the articles have no original empirical content at all, two study whether the crime of conviction predicts recidivism, and the sixth describes interviews with juveniles on the registry. Only the seventh is on point.

of keeping registrants on the registry and public websites – for years after they have shown themselves to be no more likely to offend sexually than unregistered males – is to thwart their reintegration into civil society, making it *more* likely they will reoffend and making society *less* safe.

A registry law does not have to be designed this way. There are states (like Minnesota and Oregon) that assess registrants' reoffense risk with scientifically validated actuarial tools and limit the public website to the small proportion (14% for Minnesota, 6% for Oregon) at the highest risk levels. There are states (like California) that place technical barriers limiting the ability of private businesses to republish registry information, and that do not include registrants' employers on their public website. But Michigan, unlike these states, has chosen a registry design that maximizes the damage to the rehabilitative prospects of law-abiding registrants who have reached desistance and are highly unlikely *ever* to reoffend. Michigan has made these choices in the face of a clear scientific consensus that they thwart SORA's stated regulatory purpose.

As long as Michigan relies on its scientifically discredited offense-based risk classification system to set registration terms that stretch decades past the time when registrants pose a heightened risk of sexual offending – and then identifies these low-risk registrants on a public website as dangerous – the law will fail to serve its stated purpose of preventing sexual recidivism. But it certainly will punish, to no purpose.

The Court should hold that SORA 2021 is punishment and will remain so until the state adopts a law that limits the registry, and the public identification of those on it, to registrants who *currently* pose a heightened risk of sexual offending, based on scientifically validated risk assessment tools. Other states have done so. Michigan must join them.

Respectfully submitted,

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Dated: February 17, 2025

Certificate of Compliance

I hereby certify that the foregoing brief complies with the format and word limitations of MCR 7.212(B). The brief contains 11,256 countable words.

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Exhibit 1

List and Description of Amici

LIST AND DESCRIPTION OF AMICI

Alissa R. Ackerman, Ph.D., is Associate Professor of Criminal Justice at California State University, Fullerton, where her scholarly work focuses exclusively on topics related to sexual violence, including the failures of post-conviction sex crimes policies. She writes extensively on these topics in books, academic journals, articles, and Op-Eds, and has published over 20 peer reviewed journal articles on these topics.

Amanda Agan, Ph.D., is Associate Professor of Economics at Cornell University. She received her Ph.D. in Economics from the University of Chicago. Her research focuses on the economics of crime, and her studies spotlight the unintended consequences of policies such as sex offender registration and ban-the-box laws. Her studies on the consequences of sex offender registration include papers in the JOURNAL OF LAW AND ECONOMICS and the JOURNAL OF EMPIRICAL LEGAL STUDIES.

Ira Mark Ellman, M.A. (Psych), J.D., is Distinguished Affiliated Scholar, Center for the Study of Law and Society, University of California, Berkeley, and Emeritus Professor of Law and Psychology at Arizona State University. A former clerk for Justice William O. Douglas of the U.S. Supreme Court, he is a member of the Editorial Board of PSYCHOLOGY, PUBLIC POLICY, AND LAW, a research journal published by the American Psychological Association. His empirical studies with social psychologists focused on family policy and laid the groundwork for his 2023 book, WHEN LAWS SEEM FAIR: THE EXAMPLE OF FAMILY LAW. His 2015 article, *“Frightening and High”: The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, has been widely discussed in both legal publications and in key national media.

Emily Horowitz, Ph.D., is Professor of Sociology and Criminal Justice at St. Francis College. She received her Ph.D. in Sociology from Yale University. Her research focuses on the collateral consequences of conviction registries. She is the author of PROTECTING OUR KIDS? HOW SEX OFFENDER LAWS ARE FAILING US (2015), voted an Outstanding Academic Title by the American Library Association, and FROM RAGE TO REASON: WHY WE NEED SEX CRIME LAWS BASED ON FACTS, NOT FEAR (2023).

Chrysanthi Leon, J.D., Ph.D., is Professor of Sociology and Criminal Justice at the University of Delaware. She received her J.D. and Ph.D. from the University of California, Berkeley. She is the author of SEX FIENDS, PERVERTS, AND PEDOPHILES:

UNDERSTANDING SEX CRIME POLICY IN AMERICA, and coeditor of CHALLENGING PERSPECTIVES ON STREET-BASED SEX WORK.

Jill S. Levenson, Ph.D., is Professor of Social Work at Barry University in Miami, Florida. She studies the impact and effectiveness of laws, social policies, and therapeutic interventions designed to reduce sexual violence. She has published over 100 articles about sex offender management policies and clinical interventions, including projects funded by the National Institutes of Justice and the National Sexual Violence Resource Center.

John Monahan, Ph.D., is Shannon Distinguished Professor of Law and Professor of Psychology at the University of Virginia. He is a member of the National Academy of Medicine and of the American Academy of Arts and Sciences. He is the founding president of the American Psychological Association's Division of psychology and Law. He is the author or editor of 17 books and more than 300 articles and chapters. His work has been cited frequently by courts, including the California Supreme Court in the landmark case of *Tarasoff v. Regents*, and the United States Supreme Court in *Barefoot v. Estelle*, in which he was referred to as "the leading thinker on the issue" of violence risk assessment.

Michael H. Miner, Ph.D., L.P., is Professor Emeritus at the Eli Coleman Institute for Sexual and Gender Health within the Department of Family Medicine and Community Health, University of Minnesota. His research focuses on sex offender treatment, sexual abuse perpetration by adolescent males, risk assessment, and psychological and cognitive mechanisms underlying hypersexuality and sexual risk behavior. He is Past President of the Association for the Treatment of Sexual Abusers and Past Vice President of the International Association for the Treatment of Sexual Offenders.

Stephen J. Schulhofer, J.D., is Robert B. McKay Professor of Law Emeritus at New York University. He was the Reporter for the Model Penal Code's newly revised article on Sexual Assault and Related Offenses. He is the author of more than 50 articles and six books, including *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (2000), described in the *New York Times* as "one of the most important books on rape law published in the past 20 years."

Exhibit 2

**ALI MODEL PENAL CODE
ARTICLE 213**

OFFICIAL STATUTORY TEXT

(As Approved September 2022)

MODEL PENAL CODE ARTICLE 213

OFFICIAL STATUTORY TEXT

(As Approved September 2022)

SECTION 213.0. GENERAL PRINCIPLES OF LIABILITY; DEFINITIONS

(1) This Article is governed by Part I of the 1962 Model Penal Code, and the definitions given in Section 210.0, except that:

(a) Section 2.11 (the definition of “consent”) does not apply to this article.

(b) Subsection (2) of Section 2.08 (Intoxication) does not apply to this article.

Instead, the general provisions of the criminal law and rules of evidence of the jurisdiction govern the materiality of the actor’s intoxication in determining the actor’s culpability for an offense.

(2) Definitions

In this Article, unless a different definition is plainly required:

(a) “Sexual penetration” means an act involving penetration, however slight, of the anus or genitalia by an object or a body part, except when done for legitimate medical, hygienic, or law-enforcement purposes.

(b) “Oral sex” means a touching of the anus or genitalia of one person by the mouth or tongue of another person.

(c) “Sexual contact” means any of the following acts, when the actor’s purpose is the sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person:

(i) touching the clothed or unclothed genitalia, anus, groin, breast, buttocks, or inner thigh of any person with any body part or object; or

(ii) touching any body part of any person with the clothed or unclothed genitalia, anus, groin, breast, buttocks, or inner thigh of any person; or

(iii) touching any clothed or unclothed body part of any person with the ejaculate of any person.

The touching described in paragraph (c) includes the actor touching another person, another person touching the actor or a third party, or another person

touching that person's own body. It does not include the actor touching the actor's own body.

(d) "Fondling" means prolonged contact with or manipulation of the genitals, when the actor's purpose is the sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person. Fondling requires more than a transient grope or grab. "To fondle" means to engage in fondling.

(e) "Consent"

(i) "Consent" for purposes of Article 213 means a person's willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact.

() Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.

(i) Notwithstanding subsection (2)(e)(ii) of this Section, consent is ineffective when given by a person incompetent to consent or under circumstances precluding the free exercise of consent, as provided in Sections 213.1, 213.2, 213.3, 213.4, 213.5, 213.7, 213.8, and 213.9.

(ii) Consent may be revoked or withdrawn any time before or during the act of sexual penetration, oral sex, or sexual contact. A clear verbal refusal—such as "No," "Stop," or "Don't"—establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent given prior to the act of sexual penetration, oral sex, or sexual contact.

(f) Force.

(i) "Physical force or restraint" means a physical act or physical restraint that inflicts more than negligible physical harm, pain, or discomfort or that significantly restricts a person's ability to move freely. More than negligible physical harm includes but is not limited to a burn, black eye, or bloody nose, and more than negligible pain or discomfort includes but is not limited to the pain or discomfort resulting from a kick, punch, or slap on the face.

(ii) "Aggravated physical force or restraint" means a physical act or physical restraint that inflicts or is capable of inflicting death, serious bodily

injury, or extreme physical pain, or that confines another for a substantial period in a place of isolation other than under color of law.

(g) “Actor” means a person more than 12 years old, except that “actor” includes a person younger than 12 when the charge is Sexual Assault by Aggravated Physical Force or Restraint (Section 213.1). “Actor” includes, where relevant, a person guilty of an omission.

(h) “Registrable offense”

(i) “Registrable offense” means an offense that makes a convicted person eligible for or subject to any of the collateral consequences specified in Sections 213.11-213.11I.

(ii) No offense is a registrable offense under this Article unless it is specifically so designated in this Article or is committed in another jurisdiction, is a registrable offense in that jurisdiction, and would be a registrable offense under this Article in this jurisdiction if it had been committed in this jurisdiction.

SECTION 213.1. SEXUAL ASSAULT BY AGGRAVATED PHYSICAL FORCE OR RESTRAINT

(1) *Sexual Assault by Aggravated Physical Force or Restraint.* An actor is guilty of Sexual Assault by Aggravated Physical Force or Restraint when:

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because:

(i) the actor uses or explicitly or implicitly threatens to use aggravated physical force or restraint against anyone; and

(ii) the actor’s use of or threat to use aggravated physical force or restraint causes the other person to submit to or perform the act of sexual penetration or oral sex; and

(c) the actor acts knowingly with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).

(2) *Grading.* Sexual Assault by Aggravated Physical Force or Restraint is a registrable offense. It is a felony of the third degree [*10-year maximum*], except that (1) the

maximum term of imprisonment is five years greater than that otherwise applicable to a felony of the third degree; and (2) it is a felony of the second degree [20-year maximum] if the actor violates subsection (1) of this Section and in so doing:

(a) knowingly uses or explicitly or implicitly threatens to use a deadly weapon and knows that this act causes the other person to engage in, submit to, or perform the act of sexual penetration or oral sex; or

(b) knowingly acts with one or more persons who:

(i) also engage in an act or acts of sexual penetration or oral sex with the same victim at the same place at a time contemporaneous with the actor's violation of this Section; or

(iv) assist in the use of or threat to use aggravated physical force or restraint when the actor's act of sexual penetration or oral sex occurs; or

(c) recklessly causes serious bodily injury to any person.

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iii) when the other person engaged in, submitted to, or performed the act of sexual penetration or oral sex under the circumstances described in paragraph (1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in that subsection. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission according to the terms of Section 213.10.

SECTION 213.2. SEXUAL ASSAULT BY PHYSICAL FORCE OR RESTRAINT

(1) *Sexual Assault by Physical Force or Restraint.* An actor is guilty of Sexual Assault by Physical Force or Restraint when:

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because:

(i) the actor uses or explicitly or implicitly threatens to use physical force or restraint against anyone; and

(i) the actor's use of or threat to use physical force or restraint causes the other person to engage in, submit to, or perform the act of sexual penetration or oral sex; and

(c) the actor is reckless with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).

(2) *Grading*. Sexual Assault by Physical Force or Restraint is a felony of the third degree [*10-year maximum*] and a registrable offense.

(3) *Effective consent*. Consent is ineffective under Section 213.0(2)(e)(iii) when the other person engaged in, submitted to, or performed the act of sexual penetration or oral sex under the circumstances described in paragraph (1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in that subsection. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission according to the terms of Section 213.10.

SECTION 213.3. SEXUAL ASSAULT OF AN INCAPACITATED, VULNERABLE, OR LEGALLY RESTRICTED PERSON

(1) *Sexual Assault of an Incapacitated Person*. An actor is guilty of Sexual Assault of an Incapacitated Person when:

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act, the other person:

(i) is sleeping, unconscious, or physically unable to communicate lack of consent; or

(ii) lacks substantial capacity to appraise, control, or remember the person's own sexual conduct or that of anyone else because of a substance administered to that person, without that person's knowledge or consent; and the actor administered the incapacitating substance for the purpose of causing that incapacity or knows that it was surreptitiously administered by another for that purpose; and

(c) the actor is reckless with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).

Sexual Assault of an Incapacitated Person is a felony of the third degree [*10-year maximum*] and a registrable offense.

(2) *Sexual Assault of a Vulnerable Person.* An actor is guilty of Sexual Assault of a Vulnerable Person when:

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act, the other person:

(i) has an intellectual, developmental, or mental disability, or a mental illness, that makes the person substantially incapable of appraising the nature of the sexual activity involved, or of understanding the right to give or withhold consent in sexual encounters, and the actor has no similarly serious disability; or

(v) is passing in and out of consciousness; or

(vi) lacks substantial capacity to communicate lack of consent; or

(vii) is wholly or partly undressed, or in the process of undressing, for the purpose of receiving nonsexual professional or commercial services from the actor and has not given the actor explicit prior permission to engage in that act; and

(c) the actor is reckless with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).

Sexual Assault of a Vulnerable Person is a felony of the fourth degree [*five-year maximum*] and a registrable offense.

(3) *Sexual Assault of a Legally Restricted Person.* An actor is guilty of Sexual Assault of a Legally Restricted Person when:

(a) the actor, who did not have a consensual sexually intimate relationship with the legally restricted person at the time when that state-imposed restriction on that person's liberty began, engages with that person in, or causes that person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act, the other person is:

(i) in custody, incarcerated, on probation, on parole, under civil commitment, in a pretrial release or pretrial diversion or treatment program, or in any other status involving a state-imposed restriction on liberty; and

(ii) the actor is in a position of actual or apparent authority or supervision over the restriction on the other person's liberty; and

(c) the actor acts knowingly with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).

Sexual Assault of a Legally Restricted Person is a felony of the fourth degree [*five-year maximum*].

(4) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iii) when a condition or circumstance described in paragraphs (1)(b), (2)(b), or (3)(b) existed at the time the other person engaged in, submitted to, or performed the act of sexual penetration or oral sex. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a condition or circumstance described in these subsections.

SECTION 213.4. SEXUAL ASSAULT BY EXTORTION

(1) *Sexual Assault by Extortion.* An actor is guilty of Sexual Assault by Extortion when:

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because the actor explicitly or implicitly threatened:

(i) to accuse that person or anyone else of a criminal offense or of a failure to comply with immigration regulations; or

(ii) to take or withhold action as an official, or cause an official to take or withhold action, whether or not the purported official has actual authority to do so; or

(iii) to take any action or cause any consequence that would cause someone of ordinary resolution in that person's situation under all the

circumstances to engage in, submit to, or perform the act of sexual penetration or oral sex; and

(iv) the actor's threat causes the other person to engage in, submit to, or perform the act of sexual penetration or oral sex; and

(c) the actor is reckless with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).

(2) *Grading.* Sexual Assault by Extortion is a felony of the fourth degree [*five-year maximum*].

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iii) when the other person engaged in, submitted to, or performed the act of sexual penetration or oral sex because of a threat described in paragraph (1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in that paragraph. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission under Section 213.10.

SECTION 213.5. SEXUAL ASSAULT BY PROHIBITED DECEPTION

(1) An actor is guilty of Sexual Assault by Prohibited Deception when:

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex;

and (b) the act is without effective consent because:

(i) the actor caused the other person to believe falsely that the act had diagnostic, curative, or preventive medical properties; or

(viii) the actor caused the other person to believe falsely that the actor was someone else who was personally known to that person; and

(ix) the actor's deception causes the other person to engage in, submit to, or perform the act of sexual penetration or oral sex; and

(c) the actor acts knowingly with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).

(2) *Grading.* Sexual Assault by Prohibited Deception is a felony of the fifth degree [*three-year maximum*].

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iii) when the other person engaged in, submitted to, or performed the act of sexual penetration or oral sex because of a circumstance described in paragraph (1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in that paragraph.

SECTION 213.6. SEXUAL ASSAULT IN THE ABSENCE OF CONSENT

(1) An actor is guilty of Sexual Assault in the Absence of Consent when:

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the other person does not consent to that act; and

(c) the actor is reckless with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).

(2) *Grading.* Sexual Assault in the Absence of Consent is a felony of the fifth degree [*three-year maximum*], except that it is a felony of the fourth degree [*five-year maximum*] when:

(a) the other person has, by words or actions, expressly communicated unwillingness to submit to or perform the act, or the act is so sudden or unexpected that the other person has no adequate opportunity to express unwillingness before the act occurs; and

(b) the actor is reckless with respect to the attendant circumstance specified in paragraph (a).

(3) If applicable, the actor may raise an affirmative defense of Explicit Prior Permission under Section 213.10.

SECTION 213.7. AGGRAVATED OFFENSIVE SEXUAL CONTACT; OFFENSIVE SEXUAL CONTACT

(1) *Aggravated Offensive Sexual Contact.* An actor is guilty of Aggravated Offensive Sexual Contact when:

(a) the actor knowingly engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual contact; and

(b) the act is without effective consent because the act, had it been one of sexual penetration or oral sex, would be an offense as defined by:

- (i) Section 213.1 or 213.2;
- (ii) Section 213.3(1) or (2); or
- (x) Section 213.4.

Aggravated Offensive Sexual Contact is a felony of the fifth degree [*three-year maximum*]. It is a registrable offense when it involves a violation of subparagraph (1)(b)(i) or (ii).

(2) *Offensive Sexual Contact.* An actor is guilty of Offensive Sexual Contact when:

- (a) the actor knowingly engages in an act of sexual contact with another person or causes another person to submit to or perform an act of sexual contact; and
- (b) the other person did not consent to that act, and the actor is reckless with respect to the lack of consent; or
- (c) the act is without effective consent because the act, had it been one of sexual penetration or oral sex, would be an offense as defined by Section 213.3(3) or Section 213.5.

Offensive Sexual Contact is a petty misdemeanor [*six-month maximum*].

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iii) when the other person engaged in, submitted to, or performed the act of sexual contact in a circumstance described in paragraphs (1)(b) or (2)(c). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in those subsections. If applicable, an actor charged with a violation of subparagraphs (1)(b)(i) or (1)(b)(iii), or paragraph (2)(b), may raise an affirmative defense of Explicit Prior Permission under Section 213.10.

SECTION 213.8. SEXUAL OFFENSES INVOLVING MINORS

(1) *Sexual Assault of a Minor.* An actor is guilty of Sexual Assault of a Minor when:

- (a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and
- (b) the act is without effective consent because at the time of the act:
 - (i) the other person is younger than 16; and
 - (ii) the actor is more than five years older than the other person; and

(c) the actor is reckless with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).

Sexual Assault of a Minor is a felony of the fifth degree [*three-year maximum*] except that it is a felony of the fourth degree [*five-year maximum*] when at the time of the act the actor is 21 or older; it is a felony of the fourth degree [*five-year maximum*] and a registrable offense when at the time of the act the actor is more than 10 years older than the other person and the actor is reckless with respect to being more than 10 years older than the other person; and it is a felony of the third degree [*10-year maximum*] and a registrable offense when at the time of the act the actor is 18 or older, the other person is younger than 12, and the actor is reckless with respect to whether the other person is younger than 12.

(2) *Incestuous Sexual Assault of a Minor*. An actor is guilty of Incestuous Sexual Assault of a Minor when:

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) at the time of the act, the actor is 18 or older and the other person is younger than 18; and

(c) the act is without effective consent because at the time of the act the actor is:

(i) a parent or grandparent of the other person, including a biological, step, adoptive, or foster parent or grandparent; or

(xi) the legal spouse, domestic partner, or sexual partner of a person described by subparagraph (i); or

(xii) a legal guardian or de facto parent of the other person, who resides intermittently or permanently in the same dwelling as the other person; and

(d) the actor is reckless with respect to the conduct, attendant circumstances, and results specified in paragraphs (a), (b), and (c).

Incestuous Sexual Assault of a Minor is a felony of the third degree [*10-year maximum*]. It is a registrable offense when at the time of the act the other person is younger than 16 and the actor is reckless with respect to whether the other person is younger than 16.

(3) *Exploitative Sexual Assault of a Minor.* An actor is guilty of Exploitative Sexual Assault of a Minor when:

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 18; and

(ii) the actor is more than five years older than the other person; and

(iv) the actor holds over the other person a formal position of authority, such as a teacher, employer, religious leader, treatment provider, administrator, or coach; and

(c) the actor is reckless with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).

Exploitative Sexual Assault of a Minor is a felony of the fifth degree [*three-year maximum*] and a registrable offense. It is a defense to a prosecution under subsection (3) for the actor to prove by a preponderance of the evidence that the actor's position of authority over the other person did not impair the other person's ability to form an independent judgment about whether to consent to the act of sexual penetration or oral sex.

(4) *Fondling a Minor.* An actor is guilty of Fondling a Minor when:

(a) the actor knowingly fondles another person, or knowingly causes another person to submit to or perform an act of fondling; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 12 and the actor is more than five years older than the other person; or

(ii) the other person is younger than 16 and the actor is more than seven years older than the other person; and

(c) the actor is reckless with respect to the attendant circumstances described in subparagraph (b)(i) or (ii).

Fondling a Minor is a felony of the fifth degree [*three-year maximum*], except that it is a felony of the fourth degree [*five-year maximum*] when at the time of the act the actor is

21 or older; and it is a felony of the fourth degree [*five-year maximum*] and a registrable offense when at the time of the act:

(a) the actor is more than 10 years older than the other person and is reckless with respect to being more than 10 years older than the other person; or

(b) the actor is 18 or older, the other person is younger than 12, and the actor is reckless with respect to whether the other person is younger than 12.

(5) *Aggravated Offensive Sexual Contact with a Minor.* An actor is guilty of Aggravated Offensive Sexual Contact with a Minor when:

(a) the actor knowingly engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual contact; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 18; and

(ii) the actor is more than five years older than the other person; and

(xiii) the act, had it been an act of sexual penetration or oral sex, would be an offense as defined by Section 213.1, 213.2, 213.3, 213.4, 213.5, or 213.8(2) or (3); and

(c) the actor is reckless with respect to the attendant circumstances described in subparagraphs (b)(i) and (ii).

Aggravated Offensive Sexual Contact with a Minor is a felony of the fourth degree [*five-year maximum*] and a registrable offense.

(6) *Offensive Sexual Contact with a Minor.* An actor is guilty of Offensive Sexual Contact with a Minor when:

(a) the actor knowingly engages with another person in, or causes another person to engage in, submit to, or perform:

(i) an act of sexual contact; or

(xiv) an act involving the touching of the tongue of anyone to any body part or object, when that act is for the purpose of anyone's sexual arousal, sexual gratification, sexual humiliation, or sexual degradation; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 12, and the actor is more than five years older than the other person; or

(xv) the other person is younger than 16, and the actor is more than seven years older than the other person; and

(c) the actor is reckless with respect to the attendant circumstances described in subparagraph (b)(i) or (ii).

Offensive Sexual Contact with a Minor is a misdemeanor [*one-year maximum*], except that it is a felony of the fifth degree [*three-year maximum*] when at the time of the act the actor is 18 or older, the other person is younger than 12, and the actor is reckless with respect to whether the other person is younger than 12.

(7) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iii) when the circumstances described in any of the subsections (1) through (6) exist at the time of the act. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in the circumstances described in any of those subsections.

(8) *Calculation of ages.* The age of any person described in this Section is calculated according to the “days-and-month” approach, which determines age by the day, month, and year of that person’s birth, measured in whole numbers.

[(9) *Affirmative defense of marriage.* It is an affirmative defense to a charge under subsections (1), (3), (4), and (6)(b)(ii) of this Section, and to a charge under paragraph (5)(b) based on an act that would be a violation of subsection (3) had it been an act of sexual penetration or oral sex, that the actor was the legal spouse of the other person at the time of the act of sexual penetration, oral sex, fondling, or sexual contact.]

(10) In a Juvenile Court proceeding to adjudicate delinquency on the basis of conduct that would constitute an offense under this Section, an actor younger than 14 may be adjudicated delinquent only as a misdemeanor, regardless of the penalty authorized for that conduct when it constitutes an offense under this Section.

SECTION 213.9. SEX TRAFFICKING AND RELATED OFFENSES

(1) *Definitions.* For purposes of this Section:

(a) “Coercion” means:

(i) using or threatening to use physical force or restraint against anyone;

(ii) taking, destroying, or threatening to take or destroy the person’s money, credit or debit card, passport, driver’s license, immigration document,

or other government-issued identification document, including a document issued by a foreign government, or any travel document pertaining to the person;

(iii) restricting or threatening to restrict the person's access to a substance that is a controlled substance under the federal Controlled Substance Act, 21 U.S.C. § 801 et seq.;

() administering or withholding a controlled substance in circumstances that impair the person's physical or mental ability to avoid, evade, or flee from the actor;

(iv) using a scheme, plan, deception, misrepresentation, pattern of behavior, psychological pressure, or legal threat for the purpose of causing the person to believe that failing to submit to or perform a commercial sex act would result in physical, psychological, financial, or reputational harm to anyone that is sufficiently serious to cause someone of ordinary resolution who is of the same background, in the same circumstances, and in the same physical and mental condition as that person, to submit to or perform a commercial sex act in order to avoid incurring that harm; or

(v) any combination of these circumstances.

(b) "Commercial Sex Act" means any act of sexual penetration, oral sex, or sexual contact performed in exchange, or the expectation of exchange, for money, property, services, or any other thing of value given to or received by anyone.

(c) "Trafficking Victim" means a person who has been recruited, enticed, transported, transferred, harbored, provided, isolated, or maintained, as described in paragraph (2)(a), and is or will be coerced, as described in subparagraph (2)(a)(i), or is underage, as described in subparagraph (2)(a)(ii).

(2) Sex Trafficking.

(a) An actor is guilty of Sex Trafficking if the actor knowingly recruits, entices, transports, transfers, harbors, provides, isolates, or maintains a person by any means, with the purpose of facilitating a commercial sex act involving that person when:

(i) coercion is being, or will be, used to cause the person to submit to or perform a commercial sex act, which therefore will be without effective

consent; and the actor knows that coercion is being or will be used to cause the person to submit to or perform that commercial sex act; or

(ii) the person is younger than 18 and is being, or will be, caused to submit to or perform a commercial sex act; and the actor is reckless with respect to whether the person is younger than 18 and is being, or will be, caused to submit to or perform the commercial sex act.

(b) **Grading.** Sex Trafficking is a felony of the third degree [*10-year maximum*] and a registrable offense.

(c) **Effective consent.** Consent is ineffective under Section 213.0(2)(e)(iii) when a circumstance described in paragraph (2)(a) is present. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring under a circumstance described in that paragraph. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission under Section 213.10 when:

(i) a charge of Sex Trafficking is based on coercion under subparagraph (2)(a)(i); and

(iii) the person giving such permission does so before that person has been subjected to trafficking under paragraph (2)(a) and before that person has been subjected to coercion under subparagraph (2)(a)(i).

(3) **Promoting Sex with a Trafficking Victim.** An actor is guilty of Promoting Sex with a Trafficking Victim if the actor, by advertising or other means, knowingly encourages, induces, or otherwise solicits another person to engage in a commercial sex act with a trafficking victim. Promoting Sex with a Trafficking Victim is a felony of the third degree [*10-year maximum*].

(4) **Patronizing a Trafficking Victim.** An actor is guilty of Patronizing a Trafficking Victim if the actor knowingly engages in a commercial sex act with a trafficking victim. Patronizing a Trafficking Victim is a felony of the fourth degree [*five-year maximum*].

(5) **Complicity in Sex Trafficking.** An actor is guilty of Complicity in Sex Trafficking if the actor knowingly provides resources, services, or other means that facilitate the commission of an offense defined by subsections (2), (3), or (4). Complicity in Sex Trafficking is a felony of the fourth degree [*five-year maximum*].

SECTION 213.10. AFFIRMATIVE DEFENSE OF EXPLICIT PRIOR PERMISSION

(1) Except as provided in subsection (3), it is an affirmative defense to a charge under this Article that the actor reasonably believed that, in connection with the charged act of sexual penetration, oral sex, or sexual contact, the other party personally gave the actor explicit prior permission to use or threaten to use physical force or restraint, or to inflict or threaten to inflict any harm otherwise proscribed by Sections 213.1, 213.2, 213.4, 213.7, or 213.9, or to ignore the absence of consent otherwise proscribed by Section 213.6.

(2) Permission is “explicit” under subsection (1) only when it is given orally or by written agreement:

(a) specifying that the actor may ignore the other party’s expressions of unwillingness or other absence of consent;

(b) identifying the specific forms and extent of force, restraint, or threats that are permitted; and

(c) stipulating the specific words or gestures that will withdraw the permission.

Permission given by gestures or other nonverbal conduct signaling assent is not “explicit” under subsection (1).

(3) The defense provided by this Section is unavailable when:

(a) the act of sexual penetration, oral sex, or sexual contact occurs after the explicit permission was withdrawn, and the actor is reckless with respect to whether the permission was withdrawn;

(b) the actor relies on permission to use force or restraint or ignore the absence of consent at a time when the other party will be unconscious, asleep, or otherwise unable to withdraw that permission;

(c) the actor recklessly engages in conduct that causes or risks serious bodily injury; or

(d) at the time explicit permission is given, the other party is, and the actor is reckless with respect to whether the other party is:

(i) younger than 18;

(ii) giving that permission while subjected to physical force or restraint;

(iii) giving that permission because of the use of or threat to use physical force or restraint, or extortion as defined by Section 213.4, if that party does not give the permission;

(iv) lacking substantial capacity to appraise or control that party's conduct as a result of intoxication, whether voluntary or involuntary, and regardless of the identity of the person who administered the intoxicants;

(v) incapacitated, vulnerable, or legally restricted, as defined by Section 213.3;

(vi) subject to prohibited deception, as defined by Section 213.5; or

(vii) subject to Sex Trafficking, as defined by subsection 213.9(2).

SECTION 213.11. SENTENCING AND COLLATERAL CONSEQUENCES OF CONVICTION

(1) Definitions. For purposes of this Article:

(a) "sentencing consequences" are penalties, disabilities, or disadvantages that are part of the sentence imposed by the court or by an agency authorized to set the terms of parole or post-release supervision in connection with a conviction for an Article 213 offense; and

(b) "collateral consequences" are penalties, disabilities, or disadvantages, however denominated, that are authorized or required by federal, state, or local law as a direct result of an individual's conviction of an Article 213 offense but are not part of the sentence imposed by the court or by an agency authorized to set the terms of parole or post-release supervision in connection with that conviction.

(c) a "sexual offense" is any offense defined by this Article; any other offense that has an element involving sexual penetration, oral sex, or sexual contact; any offense against a minor that involves kidnapping or false imprisonment (unless committed by a parent or guardian), sexual performance, or solicitation to engage in prostitution; any offense that involves possessing, producing, or distributing child pornography; any other offense for which a conviction authorizes or requires the person convicted to register as a sex offender; and any attempt, solicitation, or conspiracy to commit any of these offenses.

(2) General Rule. Sentencing procedure, the authorized disposition of a person convicted of an Article 213 offense, sentencing consequences, and collateral consequences are specified in Articles 6 and 7 of this Code* and, when based on conviction for an Article 213 offense, are subject to the additional requirements of this Section.

(3) Additional Requirements for Sentencing Consequences. Notwithstanding any contrary provisions of law, the conditions of any suspended sentence under Section 6.02(2), any sentence to probation under Section 6.05, and any terms of parole or post-release supervision under Section 6.13, when based on conviction for an Article 213 offense, must be eligible for early relief under Section 213.11J and must not include:

(a) a condition that:

(i) imposes an obligation to register with law enforcement that carries requirements other than those authorized under Sections 213.11A-213.11G and Section 213.11J;

() permits access to the person's registry information, except as authorized under Section 213.11H; or

(i) authorizes or permits any government official to notify a public or private entity or individual, other than a government law-enforcement agency or individual, that the person is registered with law enforcement or resides, works, or studies in the locality, except as authorized under Section 213.11H.

(b) a condition that restricts the person's occupation or employment, except as required by state law or authorized under paragraph (d) of this subsection; or

(c) except as authorized under paragraph (d) of this subsection, a condition that:

(i) requires the person to submit to GPS monitoring; or

(ii) restricts the person's education, Internet access, or place of residence.

(d) The court, and any agency authorized to set the terms of parole or post-release supervision, may impose a condition, not required by state law, that restricts the person's occupation or employment, or a condition specified in paragraph (c) of

* **MODEL PENAL CODE: SENTENCING**, *Official Statutory Text* (May 24, 2017).

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this subsection, only if the court or agency determines that the condition is manifestly required in the interest of public safety. That determination must be:

(i) made after due consideration of the nature of the offense; all other circumstances of the case; the person’s prior record; and the potential negative impacts of the burden, restriction, requirement, or government action on the person, on the person’s family, and on the person’s prospects for rehabilitation and reintegration into society; and

(viii) accompanied by a written statement of the official setting the condition, explaining the need for it, the evidentiary basis for the finding of need, and the reasons why a more narrowly drawn condition would not adequately meet that need.

(e) Any condition imposed under paragraph (d) must be:

(i) drawn as narrowly as possible to achieve the goal of public safety; and

(ii) imposed only for a period not to exceed that permitted under Section 213.11F for the duties to register and keep the registration current. (4)

***Additional Requirements for Collateral Consequences Applicable Primarily to Persons Convicted of a Sexual Offense.* Notwithstanding any contrary provisions of law, collateral consequences that are based on conviction for an Article 213 offense and applicable primarily to persons convicted of a sexual offense are authorized and their scope and implementation are delineated as follows:**

(a) The person’s obligation to register for law-enforcement purposes is governed by Section 213.11A.

(b) Notification of the person’s obligation to register and associated duties is governed by Section 213.11B.

(c) The time of initial registration is governed by Section 213.11C.

(d) The information required upon registration is specified in Section 213.11D.

(e) The duty to keep registration current is specified in Section 213.11E.

(f) The duration of the registration requirements is specified in Section 213.11F.

(g) Penalties for failure to register are governed by Section 213.11G.

(h) Access to registry information is governed by Sections 213.11F(3) and 213.11H.

(i) Collateral consequences that are based on conviction for an Article 213 offense and applicable primarily to persons convicted of a sexual offense, other than the obligation to register for law-enforcement purposes and restrictions on occupation and employment required by state law, are governed by Section 213.11I.

(j) Standards and procedures for relief from the obligation to register, associated duties, and other collateral consequences applicable primarily to persons convicted of a sexual offense are governed by Section 213.11J.

(5) *Application to Sexual Offenses Not Defined by Article 213.* Notwithstanding any contrary provision of law, when a duty to register as a sex offender arises from a conviction for a sexual offense not defined by this Article:

(a) Notification of the person's obligation to register and associated duties is governed by Section 213.11B.

(b) The time and method of registration is governed by Sections 213.11A(1)((a) and (b), and Section 213.11C.

(c) The information required upon registration is specified in Section 213.11D.

(d) The duty to keep registration current is specified in Section 213.11E.

(e) The duration of the registration requirements is specified in Section 213.11F.

(f) Penalties for failure to register are governed by Section 213.11G.

(g) Access to registry information is governed by Sections 213.11F(3) and 213.11H.

(h) Standards and procedures for relief from the obligation to register, associated duties, and other sentencing consequences and collateral consequences that arise from the conviction of that non-Article 213 sexual offense are governed by Section 213.11J.

(6) *Retroactive Effect.* As of the effective date of this Article, all prior registration requirements and other collateral consequences, whether imposed by this or any other jurisdiction, are subject to the requirements and limits of this Section and Sections 213.11A-J if they are:

- (a)** applicable primarily to persons convicted of a sexual offense,
- (b)** based on conduct that would violate this Article if committed in this state after the effective date of this Article; provided that none of the requirements and limits of this Section and Sections 213.11A-J will impose on a person convicted prior to the effective date of this Article any duties, burdens, or restrictions more extensive than those that were applicable to that person at the time of that conviction.

SECTION 213.11A. REGISTRATION FOR LAW-ENFORCEMENT PURPOSES

(1) Convictions in This State

(a) Except as provided in subsection (3), every person who resides in this state and is convicted of an offense that is designated a registrable offense in this Article must, in addition to any other sanction imposed upon conviction, appear personally and register, at the time specified in Section 213.11C, with the law-enforcement authority designated by law in the [county] where the person resides. If the person convicted of that offense does not reside in this state, but works in this state, registration must be accomplished in the [county] where the person works; if the person convicted of that offense does not reside or work in this state but is enrolled in a program of study in this state, registration must be accomplished in the [county] where the person is enrolled in a program of study.

(b) If, after initially registering in the [county] where the person resides, works, or is enrolled in a program of study, as provided in paragraph (a), the person no longer has that connection with the [county] where the person was initially required to register, the person must appear personally and register, within seven days of leaving that [county], with the law-enforcement agency designated by law in the [county] where the person now resides, works, or is enrolled in a program of study.

(c) Notwithstanding any other provision of law, no conviction for an offense under this Article will require the person convicted to register with law enforcement

or other governmental agency in a registry regime applicable primarily to persons convicted of a sexual offense, unless this Article designates that offense as a registrable offense.

(d) The following are the only Article 213 offenses that trigger a duty to register under this Section:

(i) Sexual Assault by Aggravated Physical Force or Restraint, as defined by Section 213.1.

(ii) Sexual Assault by Physical Force or Restraint, as defined by Section 213.2.

(iii) Sexual Assault of an Incapacitated or Vulnerable Person, as defined by Section 213.3(1) and (2).

(iv) Aggravated Offensive Sexual Contact, as defined by Section 213.7(1), when it involves the use of physical force, physical restraint, or an incapacitated or vulnerable victim, as defined in Sections 213.1, 213.2, 213.3(1) or 213.3(2).

(iii) Sexual Assault of a Minor, as defined by Section 213.8(1), but only when the actor is more than 10 years older than the minor, or the actor is 18 or older and the minor is younger than 12.

(v) Incestuous Sexual Assault of a Minor, as defined by Section 213.8(2), but only when the minor is younger than 16.

(vi) Exploitative Sexual Assault of a Minor, as defined by Section 213.8(3).

(vii) Fondling a Minor, as defined by Section 213.8(4), but only when the actor is more than 10 years older than the other person, or the actor is 18 or older and the minor is younger than 12.

(iv) Aggravated Offensive Sexual Contact with a Minor, as defined by Section 213.8(5).

(v) Sex Trafficking, as defined by Section 213.9(2).

(e) Nothing in Article 213 precludes a duty to register as a sex offender based on a conviction for a sexual offense other than one defined by Article 213; provided, however, that any such duty to register, when based on a conviction for a sexual

offense other than one defined by Article 213, must be governed by the principles and limitations specified in Section 213.11(5).

(2) Convictions in Other Jurisdictions

(a) Duty to register and related duties. Every person currently obliged to register with law enforcement or other public authority in another jurisdiction, because of a conviction in that jurisdiction, who subsequently resides, works, or enrolls in a program of study in this state, must register with the law-enforcement agency designated by law in the [county] of this state where the person resides, works, or is enrolled in a program of study and comply with the requirements of Sections 213.11A-213.11G, provided that the offense of conviction in the other jurisdiction is comparable to an offense that would be registrable under this Article if committed in this state.

(b) Place of registration. If the person who is obliged to register under paragraph (a) resides in this state, registration must be accomplished in the [county] where the person resides. If the person who is obliged to register under paragraph (a) does not reside in this state, but works in this state, registration must be accomplished in the [county] where the person works; if the person does not reside or work in this state but is enrolled in a program of study in this state, registration must be accomplished in the [county] where the person is enrolled in a program of study.

() Determining the comparability of conviction offenses in other jurisdictions.

(i) Standard. A conviction offense in another jurisdiction is comparable to a registrable offense under this Article if and only if the elements of the other jurisdiction's offense are no broader than the elements of that registrable offense. When, regardless of the conduct underlying the other jurisdiction's conviction, the other jurisdiction's offense can be committed by conduct that is not sufficient to establish a registrable offense under this Article, the two offenses are not comparable.

(ii) Procedure. Before determining that a conviction offense in another jurisdiction is comparable to a registrable offense under this Article, the authority designated to make that determination must give the person

concerned notice and an opportunity to be heard on that question, either orally or in writing.

(d) Notwithstanding any other provision of law, no conviction in another jurisdiction will require the offender to register with law enforcement under this Section, unless that conviction:

(i) currently requires the offender to register with law enforcement or other governmental authority in that jurisdiction, or would currently require the offender to register in that jurisdiction if the offender resided, worked, or studied in that jurisdiction; and

(vi) is for an offense comparable to an offense that would be registrable under this Section if committed in this state.

(3) *Persons under the age of 18.* No person may be subject to the obligation to register under subsection (1) of this Section, to other obligations or restrictions under this Section, or to additional collateral consequences under Section 213.11I, on the basis of a criminal conviction for an offense committed when the person was under the age of 18, or on the basis of an adjudication of delinquency based on conduct when the person was under the age of 18; provided, however, that this subsection (3) does not apply to a person convicted of a criminal offense of Sexual Assault by Aggravated Physical Force or Restraint if the person was at least 16 years old at the time of that offense.

(4) *Prohibition on registration based on conviction of certain non-Article 213 offenses.* The registering authority designated by law must not register as a sex offender a person who is not required to register on the basis of a conviction of either:

(a) an offense under this Article,

(b) an offense under the law of another jurisdiction that is comparable to an offense under this Article, or

(c) a sexual offense not defined by this Article that is designated as a registrable offense under another law of this state.

SECTION 213.11B. NOTIFICATION OF THE OBLIGATION TO REGISTER AND ASSOCIATED DUTIES

(1) Before accepting a guilty plea, and at the time of sentencing after conviction on a guilty plea or at trial, the sentencing judge must:

(a) inform the person who is subject to registration of the registration requirement;

(b) explain the associated duties, including:

(i) the identity and location, or procedure for determining the identity and location, of the law-enforcement agency where the person must appear to register as required by Section 213.11A;

(iii) the duty to register with a law-enforcement agency in any [county] where the person subsequently resides, including the possible duty to register with a law-enforcement agency or other government authority in another state to which the person subsequently moves;

(iv) the duty to report to that office or agency periodically in person, as required by Section 213.11E(1); and

(v) the duty to promptly notify the relevant authority in the [county] where the person is required to register of any change in the registry information pertaining to that person, as required by Section 213.11E(2);

(c) notify the person of the right to petition for relief from those duties, as provided in Section 213.11J;

(d) confirm that defense counsel has explained to that person those duties and the right to petition for relief from those duties;

(e) confirm that the person understands those duties and that right;

(f) require the person to read and sign a form stating that defense counsel and the sentencing judge have explained the applicable duties and the right to petition for relief from those duties, and that the person understands those duties and that right;

(g) ensure that if the person convicted of a sexual offense cannot read or understand the language in which the form is written, the person will be informed of the pertinent information by other suitable means that the jurisdiction uses to communicate with such persons; and

(h) satisfy all other notification requirements applicable under Model Penal Code: Sentencing, Section 7.04(1).

(2) At the time of sentencing, the convicted person must receive a copy of the form signed pursuant to paragraph (1)(f) of this Section.

(3) If the convicted person is sentenced to a custodial sanction, an appropriate official must, shortly before the person's release from custody, again inform the person of the registration requirement, explain the associated rights and duties, including the right to petition for relief from those duties, and require the person to read and sign a form stating that those rights and duties have been explained and that the person understands those rights and duties. At the time of release from custody, the person concerned shall receive a copy of that form.

SECTION 213.11C. TIME OF INITIAL REGISTRATION

A person subject to registration must initially register:

(a) if incarcerated after sentence is imposed, then within three business days after release; or

(b) if not incarcerated after sentence is imposed, then not later than five business days after being sentenced for the offense giving rise to the duty of registration.

SECTION 213.11D. INFORMATION REQUIRED IN REGISTRATION

(1) A person subject to registration under Section 213.11A or under a law of this state that defines a sexual offense not defined by this Article must provide the following information to the appropriate official for inclusion in the law-enforcement registry:

(a) the name and date of birth of the person (including any alias used by the person);

(b) the Social Security number, if any, of the person;

(c) the address of each place where the person resides or expects to reside;

(d) the name and address of any place where the person works or expects to work;

(e) the name and address of any place where the person is a student or expects to be a student;

(f) the license-plate number and a description of any vehicle owned or regularly operated by the person;

(g) the document number of each passport held by the person and, if the person is not a United States citizen, the document type and document number for each document that establishes the person's current immigration status in the United States.

(2) *Supplementary Information.* The local jurisdiction in which a person registers must ensure that the following information is included in the registry for that person and kept up to date:

(a) the text of the provision of law defining the sexual offense for which the person is registered;

(b) the person's criminal history, including the date and offense designation of all convictions; and the person's parole, probation, or supervised-release status;

(c) any other information required by law.

(3) *Registrants Who Lack a Stable Residential Address.* If a person required to register lacks a stable residential address, the person must, at the time of registration, report with as much specificity as possible the principal place where the person sleeps, instead of the information required under paragraph (1)(c).

(4) *Registrants Who Lack a Fixed Place of Employment.* If a person required to register is or will be employed but lacks a fixed place of employment, the person must, at the time of registration, report with as much specificity as possible the location or locations where the person works or will work, instead of the information required under subsection (1)(d).

(5) *No additional information to be accepted or recorded.* The registering authority designated by law shall accept all information that this Section requires a person subject to registration to provide, but it must not accept or record information from the registrant that this Section does not require the registrant to provide.

(6) The [county] where a person registers must promptly provide the information specified in subsections (1) - (4) of this Section to the appropriate law enforcement agency in every other [county] of this state where the registrant works or expects to work or is enrolled or expects to enroll in a program of study. If the person is also registered in another jurisdiction, the [county] of this state where the person registers must promptly provide the

information specified in subsections (1) - (4) of this Section to each law enforcement agency with which the person is registered in the other jurisdiction.

(7) *Correction of Errors.* Each [county] where a person registers and each [county] that receives information about a registrant pursuant to subsection (6) of this Section must provide efficacious, reasonably accessible procedures for correcting erroneous registry information. The [county] where a person registers must, at the time of registration, provide the registrant instructions on how to use those procedures to seek correction of registry information that the registrant believes to be erroneous.

SECTION 213.11E. DUTY TO KEEP REGISTRATION CURRENT

(1) *Annual Updates.*

(a) A person who is required to register under Section 213.11A or under a law of this state that defines a sexual offense not defined by this Article must, not less frequently than once every year, appear in person in the [county] where the person currently resides, verify the current accuracy of the information that the registrant provided in compliance with Section 213.11D, allow the jurisdiction to take a current photograph, and report any change in the identity of other jurisdictions in which the person is required to register or in which the person resides, works, or is enrolled in a program of study. If the person who is required to register does not reside in this state, but works in this state, the annual update specified in this paragraph must be accomplished in the [county] where the person works; if the person does not reside or work in this state but is enrolled in a program of study in this state, the annual update specified in this paragraph must be accomplished in the [county] where the person is enrolled in a program of study.

(b) Not less than 30 nor more than 45 days before the person's annual registration date, the authority where the person is registered under Section 213.11A must send written notice to the person's residential address, alerting the registrant to the requirements of this Section.

(c) In the case of registrants who lack a stable residential address, and therefore report instead the principal place or places where they sleep, as provided in Section 213.11D(3), the authority where the person is registered under Section

213.11A must make a good-faith effort to provide this written notice to the person at the location the person has reported as the principal place where the person sleeps.

(2) Change of Circumstances

(a) Except as provided in paragraph (b) of this subsection, a person subject to registration under Section 213.11A or under a law of this state that defines a sexual offense not defined by this Article must, not later than five business days after each change of name and each change in the information that the person is required to provide under Section 213.11D, notify the [county] specified in Section 213.11A of:

(i) all changes in the information that the person is required to provide under Section 213.11D, and

(vii) the identity of all other jurisdictions in which the person resides, works, or is enrolled in a program of study.

(b) Registrants who lack a stable residential address or place of employment, and therefore report instead the principal place or places where they sleep or work, as provided in Section 213.11D(3) and (4), must confirm or update those locations once every 90 days but need not do so more often.

(c) Each [county] that maintains a registry of persons who are required to register under section 213.11A or under a law of this state that defines a sexual offense not defined by this Article must permit registrants to notify the law enforcement agency with which the person is registered, by one or more reliable, readily accessible methods of communication of the jurisdiction's choosing, such as U.S. mail, submission of an appropriate form online, or otherwise, of any change in the information the person is required to provide under Section 213.11D, and any change in the identity of all other jurisdictions in which the person resides, works, or is enrolled in a program of study.

(d) Each [county] where a person registers pursuant to Section 213.11A must advise the registrant, at the time of registration, of the registrant's option to use one of the means of communication established under subsection (2)(c), rather than appearing personally for that purpose, if the registrant so chooses, other than for the annual in-person meeting requirement of subsection (1).

(3) The [county] notified of any changes pursuant to subsections (1) and (2) must promptly provide the registrant a written receipt confirming that the updated information has been provided, and must provide that information to the appropriate authority in all other [counties] where the person resides, works, or is enrolled in a program of study.

SECTION 213.11F. DURATION OF REGISTRATION REQUIREMENT

(1) *Ordinary Termination.*

(a) Subject to the provisions of subsection (2) of this Section and Section 213.11J, a person required to register under Section 213.11A or under a law of this state that defines a sexual offense not defined by this Article must keep the registration current for a period of 15 years, beginning on the date when the registrant is released from custody after conviction for the offense giving rise to the registration requirement; or if the registrant is not sentenced to a term of incarceration, beginning on the date when the registrant was sentenced for that offense.

(b) At the expiration of that 15-year period, the duty to keep that registration current will terminate, and the person who had been registered will not be subject to any further duties under this Article on the basis of that registration requirement. The person will remain subject to any registration requirement under this Article that arises from conviction of any other Article 213 offense.

(c) In determining whether the 15-year period has been completed, that period shall include any time in which the person was registered in this state or any other jurisdiction, prior to the effective date of Sections 213.11 and 213.11A-J, for the offense giving rise to that registration requirement.

(2) *Early Termination.* If, during the first 10 years of the period during which a person is required to keep registration information current under Section 213.11E, the person:

- (a) successfully completes any period of supervised release, probation, or parole, and satisfies any financial obligation that arises from the conviction for the registrable offense, such as a fine or restitution, other than a financial obligation that the person, despite good-faith effort, has been unable to pay; and

(b) successfully completes any required sexual-offense treatment program;
and

(c) is not convicted of, or facing pending charges for, any subsequent offense under this Article, or any subsequent sexual offense in this state or any other jurisdiction; then:

the duty to keep that registry information current will terminate; the person who had been registered will not be subject to any further duties associated with that registration requirement; and subsequent access to registry information will be governed by subsection (3).

(3) *Access to Registry Information After Termination.* When the person's obligation to register and to keep registry information current terminates under subsection (1) or (2), subsequent access to registry information is limited as follows:

(a) Registry information recorded as of the date when termination takes effect must remain available to any government law-enforcement agency seeking disclosure of that information in compliance with Section 213.11H(1)(a).

(b) Except as provided in paragraph (a), no public or private agency may thereafter be permitted access to registry information associated with a registration requirement that has terminated.

(4) *Notice of Termination.* When a person's duty to register terminates under subsection (1) or (2), the law enforcement agency in the [county] where the person's duty to register arises on the basis of residence, work, or study must:

(a) include in its registry a notice that the person's duty to register and all duties associated with that registration requirement have terminated; and

(b) upon the person's request, notify each law enforcement agency and other authority that has received information about the registrant pursuant to Section 213.11D(5) that the person's duty to register and all duties associated with that registration requirement have terminated and that no public or private agency other than a government law enforcement agency shall thereafter be permitted to have access to that registry information.

(c) upon the person's request, provide the person a certificate attesting that the person's duty to register and all duties associated with that registration requirement have terminated.

SECTION 213.11G. FAILURE TO REGISTER

(1) *Offense of Failure to Register.* A person required to register under Section 213.11A or under a law of this state that defines a sexual offense not defined by this Article is guilty of Failure to Register, a misdemeanor, if that person knowingly fails to register as required by Sections 213.11A, 213.11C, and 213.11D, or by that non-Article 213 offense, or knowingly fails to update a registration as required by Section 213.11E.

(2) *Affirmative Defense.* In a prosecution for Failure to Register under subsection (1) of this Section, it is an affirmative defense that:

(a) circumstances beyond the control of the accused prevented the accused from complying;

(b) the accused did not contribute to the creation of those circumstances in reckless disregard of the impact of those circumstances on the ability to meet registration requirements; and

(c) after those circumstances ceased to exist, the accused complied as soon as reasonably feasible.

(3) *Other Consequences of Not Meeting Registration Requirements.* Failing to register or to meet other registration requirements may not be a basis for revoking bail, probation, parole, or other conditions of release from custody, unless the person who failed to do so has been convicted under this Section of the offense of Failure to Register.

SECTION 213.11H. ACCESS TO REGISTRY INFORMATION

(1) *Confidentiality*

(a) Each law-enforcement agency that receives information from a registrant pursuant to Section 213.11D(5) must exercise due diligence to ensure that this registrant-supplied information remains confidential, except that relevant information about a specific registrant, including but not limited to registrant-supplied information, must be disclosed:

(i) to any government law enforcement agency that requests information to aid in the investigation of a specific criminal offense;

(ii) to any adult victim of the offense that gives rise to the registrant's duty to register and to any parent or guardian of a minor victim of that offense, if the either the victim or that parent or guardian resides, works, or is enrolled in a program of study in the [county] where the registrant resides, works, or studies; provided that such disclosure must be limited to the fact that the registrant resides, works, or is enrolled in a program of study in that [county];

(i) to the United States Marshal's Service as required by International Megan's Law, Pub. L. No. 114-119, 130 Stat. 15 (2016), when that information involves the international travel plans of a registrant who has been convicted of a sexual offense involving a minor; and

(iii) to the [Department of Public Safety] as appropriate to enable the Department to provide the criminal history background check authorized by [Section xx/yy] of the [Code of Criminal Procedure] to any public or private agency, organization, or individual qualified to receive such a background check on the basis of serving, having access to, or screening others to serve or have access to minors, the elderly, or persons who are disabled or otherwise vulnerable; provided that any disclosure to the Department under this subparagraph must comply with the terms of [Section xx/yy] of the [Code of Criminal Procedure]. See Annex, pp. 82-90, *infra*.

(b) Any disclosure pursuant to paragraph (a) must include a warning that:

(i) the agency, organization, or individual receiving the information must exercise due diligence to ensure that the information remains confidential, except as provided in paragraph (a);

(ii) such information may be disclosed and used for the purposes specified in subparagraphs (a)(i)-(iv), but otherwise must not be disclosed to any person or public or private agency, except that any victim or parent or guardian of a victim who receives information pursuant to subparagraph

(1)(a)(ii) may lawfully disclose such information to other persons living in the same household;

(iii) such information may not be used to injure, harass, or commit a crime against the registrant or anyone else; and

(iv) any failure to comply with the confidentiality and use-limitation requirements of this Section could result in civil or criminal penalties.

(2) *Unauthorized Disclosure of Registry Information.* An actor is guilty of Unauthorized Disclosure of Registry Information if:

(a) the actor, having received registry information as provided in subsection (1), knowingly or recklessly discloses that information, or permits that information to be disclosed, to any person not authorized to receive it; or

(b) the actor obtains access to registry information by computer trespassing or otherwise in violation of law and subsequently knowingly or recklessly discloses that information, or permits that information to be disclosed, to any other person.

Unauthorized Disclosure of Registry Information is a felony of the fourth degree [*five-year maximum*].

SECTION 213.11I. ADDITIONAL COLLATERAL CONSEQUENCES OF CONVICTION

(1) *Definitions.* For purposes of this Section,

(a) the term “Article 213 offense” includes an offense under the law of another jurisdiction that is comparable to an Article 213 offense under Section 213.11A(2)(c);

(b) the term “additional collateral consequence” means any collateral consequence, as defined in Section 213.11(1)(b), that is:

(i) authorized or required as a direct result of a person’s conviction for an Article 213 offense, and

(v) applicable primarily to persons convicted of a sexual offense, other than the obligation to register with law enforcement specified in Section 213.11A, the associated duties and restrictions specified in Sections 213.11C-213.11G, and any restriction on occupation or employment required by state law.

(c) An additional collateral consequence under this Section includes any collateral consequence that restricts the convicted person's occupation or employment except as required by state law; limits the convicted person's education, Internet access, or place of residence; uses methods such as GPS monitoring to track the person's movements; notifies a community organization or entity or a private party that the person resides, works, or is enrolled in a program of study in the locality; or permits a public or private agency, organization, or person to access registry information, except as authorized by Section 213.11H; but only if this collateral consequence results from a conviction for an Article 213 offense and is not a sentencing consequence as defined in Section 213.11(1)(a).

(d) An additional collateral consequence under this Section does not include a sentencing consequence, as defined in Section 213.11(1)(a), and does not include a collateral consequence that is:

(i) authorized or required as a direct result of an individual's conviction of an offense other than an Article 213 offense, or

(iii) applicable to persons convicted of many different offenses, such as any government-imposed limits on jury service, access to public benefits, and other government-imposed penalties, disabilities, and disadvantages that result from conviction of a wide variety of offenses, including but not limited to sexual offenses.

(2) *Additional collateral consequences precluded for persons not required to register.*

Notwithstanding any other provision of law, no person shall be subject to an additional collateral consequence, as defined in this Section, unless:

(a) that additional collateral consequence is based on a conviction for a registrable Article 213 offense, and

(b) that person is currently required to register with law enforcement under Section 213.11A.

(3) *Additional collateral consequences for persons required to register.*

Notwithstanding any other provision of law:

(a) a person currently required to register with law enforcement under Section 213.11A must not be subject to any government action notifying a community

organization or entity or a private party that the person resides, works, or is enrolled in a program of study in the locality, except as authorized by Section 213.11H, and must not be subject to any government action permitting a public or private agency, organization, or person to access registry information, except as authorized by Section 213.11H; and

(b) a person required to register with law enforcement under Section 213.11A may be subject to an additional collateral consequence not specified in paragraph (3)(a), but only if an official designated by law, after affording the person notice and an opportunity to respond concerning the proposed additional collateral consequence, determines that the additional collateral consequence is manifestly required in the interest of public safety, after due consideration of:

(i) the nature of the offense;

(iv) all other circumstances of the case;

(vi) the person's prior record; and

(ii) the potential negative impacts of the burden, restriction, requirement, or government action on the person, on the person's family, and on the person's prospects for rehabilitation and reintegration into society.

(4) *Limitations.* The designated official who approves any additional collateral consequence pursuant to paragraph (3)(b) of this Section must determine that the additional collateral consequence:

(a) satisfies all applicable notification requirements set forth in Section 213.11B;

(b) is authorized by law;

(c) is drawn as narrowly as possible to achieve the goal of public safety;

(d) is accompanied by a written statement of the official approving the additional collateral consequence, explaining the need for it, the evidentiary basis for the finding of need, and the reasons why a more narrowly drawn restriction, disability, or government action would not adequately meet that need; and

(e) is imposed only for a period not to exceed that permitted under Section 213.11F for the duties to register and keep the registration current.

(5) *Confidentiality*. In any proceeding under paragraph (3)(b) to consider whether to impose an additional collateral consequence, the official responsible for making the determination must insure that the identity of the registrant concerned remains confidential.

(6) *Judicial Review*. A person on whom an additional collateral consequence has been imposed under paragraph (3)(b) is entitled to judicial review in an appropriate court, within the time and in accordance with the procedures provided by law for review of decisions of administrative agencies in this jurisdiction.

SECTION 213.11J. DISCRETIONARY RELIEF FROM REGISTRATION AND FROM OTHER SENTENCING CONSEQUENCES AND COLLATERAL CONSEQUENCES

(1) *Petition for Discretionary Relief*. At any time prior to the expiration of any sentencing consequence imposed under Section 213.11(3) or any collateral consequence imposed under Section 213.11(4), including any additional collateral consequence imposed under Section 213.11(4)(i) and Section 213.11I(3), the registrant may petition the sentencing court, or other authority authorized by law, to order relief from all or part of those consequences. If the obligation to register or other consequences arose from an out-of-state conviction, the petition may be addressed to a court of general jurisdiction or other authority of this state in the place where the person concerned is registered.

(2) *Proceedings on Petition for Discretionary Relief*. The authority to which the petition is addressed may either dismiss the petition summarily, in whole or in part, or institute proceedings to rule on the merits of the petition. If that authority chooses to entertain submissions, hear argument, or take evidence prior to ruling on the merits of the petition, it must give notice of the proceeding and an opportunity to participate in it to the prosecuting attorney for the offense out of which the obligation to register or other consequence arose. If the obligation to register or other consequence arose from an out-of-state conviction, notice of the proceeding and an opportunity to participate in it must be addressed to the principal prosecuting attorney in the jurisdiction of this state where the authority to which the petition is addressed is located.

(3) *Judgment on Proceedings for Discretionary Relief*. Following proceedings for discretionary relief under subsection (2), the authority to which the petition is addressed may grant or deny relief, in whole or in part, from the obligation to register, any associated duties,

and any of the sentencing consequences or collateral consequences in question. When that order terminates the registrant's obligation to register and to keep registry information current, subsequent disclosure of registry information is governed by subsection (5) of this Section. An order granting or denying relief following those proceedings must explain in writing the reasons for granting or denying relief.

(4) *Standard for Discretionary Relief.* The authority to which the petition is addressed must grant relief if it finds, after proceedings to rule on the merits pursuant to subsection (2), that the sentencing consequence or collateral consequence in question is likely to impose a substantial burden on the registrant's ability to reintegrate into law-abiding society, and that public-safety considerations do not require continued imposition of the obligation, duty, or consequence after due consideration of:

- (a) the nature of the offense;
- (b) all other circumstances of the case;
- (c) the registrant's prior and subsequent record of criminal convictions, if any; and
- (d) the potential negative impacts of the burden, restriction, or government action on the registrant, on the registrant's family, and on the registrant's prospects for rehabilitation and reintegration into society.

Relief must not be denied arbitrarily or for any punitive purpose.

(5) *Access to registry information after discretionary relief.* When an order of discretionary relief terminates the person's obligation to register and to keep registry information current, all limits on access to registry information under Section 213.11H shall remain in effect. Registry information recorded as of the date when discretionary relief takes effect must remain available to any government law-enforcement agency seeking disclosure of that information in compliance with Section 213.11H(1)(a) but must not otherwise be disclosed.

(6) *Notice to other jurisdictions concerning discretionary relief.*

(a) When discretionary relief is granted to a person under this Section, the authority granting the order of relief must, upon the person's request, give notice of that order to any other jurisdiction where the person concerned is registered or where information about the person has been provided pursuant to Section 213.11D(5).

(b) When the other jurisdiction notified is a jurisdiction of this state, the notice must specify that the other jurisdiction must extend the same relief from registration-related duties and any other sentencing consequences or collateral consequences. When that order terminates the registrant's obligation to register and to keep registry information current, that notice must also specify the limits on subsequent disclosure of registry information applicable under subsection (5).

(7) *Proceedings subsequent to discretionary relief.* An order of discretionary relief granted under this Section does not preclude the authority to which the petition was addressed from later revoking that order if, on the basis of the registrant's subsequent conduct or any other substantial change in circumstances, the authority finds by a preponderance of the evidence that public-safety considerations, weighed against the burden on the registrant's ability to reintegrate into law-abiding society, no longer justify the order of relief.

(8) *Confidentiality.* In any proceedings under this Section to consider whether to grant or deny discretionary relief, the official responsible for making the determination must insure that the identity of the registrant concerned remains confidential.

ANNEX
MODEL PROCEDURES FOR
CRIMINAL HISTORY BACKGROUND CHECKS
[ALTERNATIVE A]

SECTION [XX]. BACKGROUND CHECKS

(1) *Criminal History Certificate for prospective employees and volunteers.* Subject to all applicable provisions of federal employment and non-discrimination law, including Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e, et seq., and all applicable provisions of the employment and non-discrimination laws of this state, any public or private organization or entity and any individual that hires or screens employees or volunteers for a position involving contact with or access to minors, the elderly, or persons who are disabled or otherwise vulnerable, is authorized to require the applicant for such a position to submit a Criminal History Certificate issued by the [Department of Public Safety] under the procedures prescribed by this Section.

(2) *Application for a Criminal History Certificate.* Any person who seeks a position involving contact with or access to minors, the elderly, or persons who are disabled or otherwise vulnerable is authorized to apply to the [Department of Public Safety] for a Criminal History Certificate. The application must be submitted on a form approved by the Department, and must be accompanied by a full set of fingerprints, a signed waiver from the applicant allowing the release to the applicant of the information specified in subsection (3), and payment of an appropriate fee, as set by regulations issued by the Department.

(3) *Procedure for issuing a Criminal History Certificate.* After verifying the applicant's identity, the Department shall consult the records of the [Department of Public Safety] and the [Department of Children and Family Services], and compile the information identified in paragraphs (a) and (b). The Department or its authorized agent shall submit the applicant's fingerprints to the Federal Bureau of Investigation and obtain a record of the information identified in paragraph (c). The Department shall then issue to the applicant a Criminal History Certificate that contains the following information:

(a) a report from the [Department of Public Safety] of criminal-history record information pertaining to the applicant that includes any criminal convictions of the applicant for an offense or offenses specified in subsection (4), or a statement from

the Department that its records contain no such information pertaining to the applicant.

(b) A report from the [*Department of Children and Family Services*] as to whether the applicant is named in its records as the alleged perpetrator in a pending child-abuse investigation or as the perpetrator of a founded report of child abuse within the five-year period immediately preceding verification pursuant to this section.

(c) A report of federal criminal-history record information that identifies any criminal convictions of the applicant for an offense or offenses specified in subsection (4), or a statement that federal criminal-history records contain no such information pertaining to the applicant.

(4) *Offenses to be reported.* The reports of criminal-history record information to be issued pursuant to paragraphs (3)(a) and (3)(c) shall indicate only whether the applicant has been convicted of criminal conduct constituting one or more of the following offenses or equivalent offenses under federal law or the law of this or any other state:

- (a) criminal homicide;
- (b) aggravated assault;
- (c) stalking;
- (d) kidnapping;
- (e) unlawful restraint;
- (f) rape or sexual assault;
- (g) abuse, neglect, or exploitation of an elderly or disabled person;
- (h) domestic violence;
- (i) violation of an order of protection;
- (j) endangering the welfare of a child;
- (k) child abuse;
- (l) corruption of minors;
- (m) manufacture, distribution, or possession of child pornography;
- (n) a felony offense involving the manufacture, distribution, use, or possession of a controlled substance committed within the five-year period immediately

preceding the applicant's request for a Certificate of Criminal History under this Section; or

(o) attempt, solicitation, or conspiracy to commit any of the offenses set forth in this subsection.

(5) *Updates.* If an individual who has obtained a Certificate of Criminal History from the Department is subsequently convicted of an offense listed in subsection (4) or is named as a perpetrator in a founded report of child abuse with the [*Department of Children and Family Services*], the individual shall provide the Department with written notice to that effect not later than 72 hours after the conviction or notification that the individual was named as a perpetrator in a founded report of child abuse.

(6) *Time limit for certification.* The Department shall comply with certification requests no later than [14] days from the receipt of the request.

(7) *Accuracy.* The Department must in writing notify persons who apply for a Criminal History Certificate of their right to challenge the accuracy and completeness of any information to be included in the Certificate, to obtain a determination as to the validity of such challenge, and to obtain a corrected Certificate to the extent that any such challenge is determined to have merit. That notice must also explain the procedures provided for doing so.

(8) *Confidentiality.* The information provided and compiled under this Section, including, but not limited to, the names, addresses and telephone numbers of applicants, shall not be subject to disclosure under the [*Freedom of Information Act*] [*Right-to-Know Law*]. This information shall not be released to any person other than the applicant, except as authorized by the Department pursuant to its regulations.

(9) *Regulations.* The Department shall promulgate the regulations necessary to implement this Section.

MODEL PROCEDURES FOR
CRIMINAL HISTORY BACKGROUND CHECKS
[ALTERNATIVE B]

SECTION [YY]. BACKGROUND CHECKS.

(1) *Definitions.* As used in this Section, the term:

(a) “Care” means the provision of care, treatment, education, training, instruction, supervision, or recreation to minors, the elderly, or persons who are disabled or otherwise vulnerable.

(b) “Care entity” means any public or private organization or agency that provides care or care-placement services, including an organization or entity that licenses or certifies others to provide care or care-placement services.

(c) “Qualified care entity” means a care entity that has applied to the [Department of Public Safety] for certification as a qualified care entity and has been certified as such by the Department. As a part of the application for certification, the applicant care entity must submit a signed agreement, on a form approved by the Department, agreeing to comply with all applicable provisions of state and federal law. The Department may periodically audit qualified care entities to ensure compliance with state and federal law and this Section. The Department must by regulation promulgate standards and procedures for making such determinations, including standards and procedures for applicants to challenge adverse determinations.

(2) *Requests for screening.*

(a) A qualified care entity may submit to the Department a request for screening of a current or prospective employee or volunteer for a position involving contact with or access to minors, the elderly, or persons who are disabled or otherwise vulnerable.

(b) Each such request must be accompanied by a full set of fingerprints of the person to be screened, a signed waiver from the person to be screened allowing the release to the applicant of the information specified in subsection (4), and payment of an appropriate fee, as set by regulations issued by the Department.

(c) Any current or prospective employee or volunteer who is subject to a request for screening must indicate to the qualified care entity submitting the request the name and address of each qualified care entity that has submitted a previous request for screening regarding that current or prospective employee or volunteer.

(3) *Screening procedure.* After verifying the identity of the person to be screened, the Department shall consult its records and those of the [*Department of Children and Family Services*] and compile the information identified in paragraphs (4)(a) and (b). The Department or its authorized agent shall submit the fingerprints of the person to be screened to the Federal Bureau of Investigation and obtain a record of the information identified in paragraph (4)(c).

(4) After obtaining the information specified in subsection (3), the Department shall then issue to the qualified care entity a Screening Report that contains the following information:

(a) The state criminal-history records pertaining to the person to be screened that identify any criminal convictions of the person to be screened for an offense or offenses specified in subsection (5), or a statement that its records contain no such information pertaining to the person to be screened.

(b) A report from the [*Department of Children and Family Services*] as to whether the person to be screened is named in its records as the alleged perpetrator in a pending child-abuse investigation or as the perpetrator of a founded report of child abuse within the five-year period immediately preceding verification pursuant to this section.

(c) Federal criminal-history record information pertaining to the person to be screened that identifies any criminal convictions of the applicant for an offense or offenses specified in subsection (5), or a statement that federal criminal-history records contain no such information pertaining to the applicant.

(5) *Offenses to be reported.* The reports of criminal-history record information to be issued pursuant to paragraphs (4)(a) and (4)(b) shall indicate only whether the applicant has been convicted of criminal conduct constituting one or more of the following offenses or equivalent offenses under federal law or the law of this or any other state:

(a) criminal homicide;

- (b) aggravated assault;**
- (c) stalking;**
- (d) kidnapping;**
- (e) unlawful restraint;**
- (f) rape or sexual assault;**
- (g) abuse, neglect, or exploitation of an elderly or disabled person;**
- (h) domestic violence;**
- (i) violation of an order of protection;**
- (j) endangering the welfare of a child;**
- (k) child abuse;**
- (l) corruption of minors;**
- (m) manufacture, distribution, or possession of child pornography;**
- (n) a felony offense involving the manufacture, distribution, use, or possession of a controlled substance committed within the five-year period immediately preceding the applicant's request for a Certificate of Criminal History under this Section; or**
- (o) attempt, solicitation, or conspiracy to commit any of the offenses set forth in this subsection.**

(6) *Time limit for issuing a Screening Report.* The Department shall comply with requests for a Screening Report no later than [14] days from the receipt of the request.

(7) *Confidentiality.* The criminal history information provided in the screening report is available to qualified care entities to use only for the purpose of screening current or prospective employees and volunteers for a position with or certification from a qualified care entity. It must not be revealed to any person or entity other than a person or entity with responsibility for screening the current or prospective employee or volunteer in question, and it must not be used for any other purpose.

(8) *Determination of fitness.* The determination whether the criminal history record of the person screened bears upon the fitness of that person to serve in a position involving contact with or access to minors, the elderly, or persons who are disabled or otherwise vulnerable shall be made solely by the qualified care entity. The Department is neither required nor authorized to make such a determination on behalf of any qualified care entity.

(9) Accuracy. The qualified care entity must in writing notify persons screened of their right to obtain a copy of any background screening report, to challenge the accuracy and completeness of any information contained in any such report, and to obtain a determination as to the validity of such challenge before a final determination regarding the person is made by the qualified care entity reviewing the criminal history information. That notice must also explain the procedures provided for doing so.

(0) Regulations. The Department shall promulgate the regulations necessary to implement this Section.

Exhibit 3

**LIST OF THE
AMERICAN LAW INSTITUTE COUNCIL**

**AT THE TIME OF ITS APPROVAL IN 2022
OF THE REVISIONS TO THE
ALI MODEL PENAL CODE**

ALI COUNCIL AT THE TIME OF ITS APPROVAL OF THE MPC IN 2022

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