

STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
REDFORD, P.J. AND RIORDAN AND FEENEY, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court
No. 166766

-vs-

JAMES ELLIS, JR.,

Defendant-Appellant.

Court of Appeals No. 363845
Berrien County CC No. 2021-016148-FH

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN
AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF
MICHIGAN

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COUNTERSTATEMENT OF JURISDICTION

Amicus Curiae adopts Plaintiff-Appellee's statements of jurisdiction.

CONSTITUTIONAL AND PERTINENT STATUTORY PROVISIONS INVOLVED

Article I, section 9, clause 3 of the United States Constitution provides, “No Bill of Attainder or ex post facto Law shall be passed.” US Const, art I, §9, cl 3. Article I, section 10, clause 1 of the United States Constitution provides: “No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . .” US Const, art I, §10, cl 1.

The Eighth Amendment of the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article I, section 10 of the 1963 Michigan Constitution provides: “No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted.” Const 1963, art 1, §10.

Article I, section 16 of the 1963 Michigan Constitution provides:

Excessive bail shall not be required, excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained.

MCL 28.723 states in pertinent part:

(1) Subject to subsection (2), the following individuals who are domiciled or temporarily reside in this state or who work with or without compensation or are students in this state are required to be registered under this act:

(e) An individual who was previously convicted of a listed offense for which he or she was not required to register under this act, but who is convicted of any other felony on or after July 1, 2011.

(3) A nonresident who is convicted in this state on or after July 1, 2011 of committing a listed offense who is not otherwise described in subsection (1) shall nevertheless register under this act. However, the continued reporting requirements of this act do not apply to the individual while he or she remains a nonresident and is not otherwise required to report under this act. The individual shall have his or her photograph taken under section 5a.

MCL 28.725 states in pertinent part:

(15) For an individual who was previously convicted of a listed offense for which he or she was not required to register under this act but who is convicted of any felony on or after July 1, 2011, any period of time that he or she was not incarcerated for that listed offense or that other felony and was not civilly committed counts toward satisfying the registration period for that listed offense as described in this section. If those periods equal or exceed the registration period described in this section, the individual has satisfied his or her registration period for the listed offense and is not required to register under this act. If those periods are less than the registration period described in this section for that listed offense, the individual shall comply with this section for the period of time remaining.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the defendant's out-of-state residency and the conditional application of the SORA while the defendant remains an out-of-state resident renders the constitutional issues here not ripe for review? [III in the MOAA order]

The sentencing judge: was not asked to answer the question.

The Court of Appeals: did not address this question but found defendant did not have to register in Michigan.

Defendant-Appellant: answers the question, “Yes.”

Plaintiff-Appellee: answers the question, “No.”

Amicus-PAAM: answers the question, “No.”

II. Whether MCL 28.723(1)(e), the “recapture” provision of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, as amended by 2020 PA 295, effective March 24, 2021, constitutes *ex post facto* punishment under the United States or Michigan Constitutions, US Const, art I, § 9; Const 1963, art 1, § 10, see *People v Betts*, 507 Mich 527 (2021)? [I in the MOAA order]

The sentencing judge: answered the question, “No.”

The Court of Appeals: answered the question, “No.”

Defendant-Appellant: answers the question, “Yes.”

Plaintiff-Appellee: answers the question, “No.”

Amicus-PAAM: answers the question, “No.”

III. For ex post facto purposes, whether it is the later, nonsexual offense that triggers SORA registration rather than the earlier sexual offense, see *People v Klinesmith*, 342 Mich App 39 (2022)? [IV in the MOAA order]

The sentencing judge:	answered the question, “Yes.”
The Court of Appeals:	answered the question, “Yes.”
Defendant-Appellant:	answers the question, “No.”
Plaintiff-Appellee:	answers the question, “Yes.”
Amicus-PAAM:	answers the question, “Yes.”

IV. How, if at all, the sexual nature of the prior unregistered sex offense affects the determination whether recapture is cruel or unusual punishment, or punishment at all? [Issue V in the MOAA order]

The sentencing judge:	found defendant would have to register his listed offense (if he was a Michigan resident) which was sexual in nature.
The Court of Appeals:	found defendant would have to his listed offenses (if he was a Michigan resident) which was sexual in nature.
Defendant-Appellant:	focuses on the felony committed after 2011.
Plaintiff-Appellee:	asserts that lifetime registration for Tier III offenses which concern the most severe sexual offenses in Michigan, is not punishment much less cruel and/or unusual punishment.

Amicus-PAAM: assert that lifetime registration for Tier III offenses which concern the most severe sexual offenses in Michigan, is not punishment much less cruel and/or unusual punishment.

V. Assuming arguendo that the focus of the recapture inquiry is properly on the earlier sex offense whether the defendant's entitlement to relief on ex post facto grounds depends on this Court's decision in *Kardasz*? [Issue VI in the MOAA order].

The sentencing judge: did not answer the question.

The Court of Appeals: did not answer the question.

Defendant-Appellant: answers the question “No.”

Plaintiff-Appellee: answers the question, “Yes” if *People v Kardasz* finds that registration for Tier III offenders does not constitute punishment.

Amicus-PAAM: answers the question “No” since defendant doesn’t have to register at all, but amicus notes that if defendant had to register and if *People v Kardasz* finds that registration for Tier III offenders does not constitute punishment, the Court in this case should decide similarly.

VI. Whether requiring the defendant to register as a sex offender under MCL 28.723(1)(e) and MCL 28.721 *et seq.*, constitutes cruel or unusual punishment under Const 1963, art 1, § 16, or US Const, Am VIII, see *People v Lymon*, 514 Mich (July 29, 2024) (Docket No. 164685), and *People v Kardasz*, 513 Mich 1118 (2024) (ordering oral argument on the application for leave to appeal in Docket No. 165008)? [Issue II in the MOAA order]

The sentencing judge: answered the question, “No.”

The Court of Appeals: answered the question, “No.”

Defendant-Appellant: answered the question, “Yes.”

Plaintiff-Appellee: answered the question, “No.”

Amicus-PAAM: answers the question, “No.”

INTRODUCTION

Defendant's case is not ripe since he doesn't have to register either in Michigan or his home state. And there could be no ex post facto violation at all since defendant did not commit his crime until *after* the law had been passed. And his listed offense was sexual in nature which distinguishes his case from *People v Lymon*, ___ Mich ___; ___ NW2d ___ (2024).

But most importantly, though amicus suggests that this question be answered in a case such as *People v Johnson*, MSC No. 165814, where the issue of punishment is squarely posed, the 2021 SORA is not punitive. Nor does it result in cruel or unusual punishment for the States' worst sex offenders, who have additionally demonstrated a recent tendency to recidivate by committing a new felony, to register for life. Over the years, Michigan made changes to its registry both to enhance public safety as well as to comply with the federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act enacted in 1994 and the Adam Walsh Child Protection and Safety Act (AWA) which included the Sex Offender Registration and Notification Act (SORNA) enacted in 2006. These federal acts were also designed to protect the public from violent sexual offenders and sex offenders with minor victims and to make more uniform what had remained a patchwork of federal and 40 individual state registration systems. *Reynolds v United States*, 565 US 432, 435; 132 S Ct 975; 181 L Ed 2d 935 (2012). All states as well as SORNA have sexual offender registration systems that include mandatory lifetime registration for at least some offenders. SORNA requires retroactive registration of sex offenders (34 USC §20912(b); 28 CFR 72.3; See also <https://www.smart.gov/sorna.htm#AGGuidelines>). A state is in substantial compliance with SORNA, if it enacts a recapture provision, in lieu of requiring full retroactivity. 76 Fed Reg 1630. Most states require retroactivity to some extent, but three states, including Michigan, have adopted the recapture provision which allow offenders to stay off the registry even if they committed a listed offense, if they do not demonstrate that they are recidivists. If Michigan fails to comply with the

standards set by SORNA and makes it easier for sex offenders to prey upon future victims, it will become conducive for offenders to move to Michigan.¹

The State's conclusion that providing extensive information regarding the offender, keeps the public aware of his or her address and law enforcement aware of where the offender is living and working which is reasonably geared to ensure public safety. Registration assists authorities in keeping track of offenders, alerts the public to their presence, and helps parents make informed decisions regarding child-care and victimization prevention. Our own sex offender registry supports the high rate of recidivism by sex offenders. And studies from similar federal agencies relied upon by *Smith v Doe*, 538 US 84, 103; 123 S Ct 1140; 115 L Ed 2d 164 (2003), not only confirm a high rate of recidivism but show that recidivism increases significantly over time. There is also a consensus that sex offenses are extraordinarily underreported. There is also data that there is a very low rate of conviction for sex offenses, and, therefore, the rate of re-offense is much higher than the rates of recidivism. Reasonably the decision whether Tier III sex offenders should register for life should be a decision for the legislature.

The ramifications of sexual assault are devastating. Rape victims are at risk for sexually transmitted diseases, pregnancy, posttraumatic stress disorder, depression, substance abuse, suicidal ideation, and repeated sexual victimization. One study estimated the lifetime cost of rape at \$122,461 per victim including medical costs, reduced performance at work, job loss, and inability to find work. And those children who have experienced sexual assault are at increased risk of experiencing poorer mental health outcomes such as low self-esteem, depression,

¹ See National Center for Missing and Exploited Children, 5/27/21 Letter to the American Law Institute when the ALI advocated watering down the standards of SORN (indicating that by adopting those standards "the intent of the Sex Offender Registration and Notification Act (SORNA) to set minimum consistent standards relating to sex offender registration and notification requirements would be undermined, once against allowing for 'sex offender state shopping' and putting the public at risk.")

[https://www.missingkids.org/content/dam/missingkids/pdfs/NCMEC-Letter-to-ALI-\(5-27-21\).pdf](https://www.missingkids.org/content/dam/missingkids/pdfs/NCMEC-Letter-to-ALI-(5-27-21).pdf) (accessed March 10, 2025).

dissociation, and a history of suicide attempts as well as problems with their physical health. These children are also at increased risk of engaging in detrimental behavior such as alcohol and substance abuse and risky sexual conduct. The public should have access to information to identify the registrants, so they can take steps to protect themselves and their children against potential harm. By passing the 2021 SORA, the Michigan Legislature has made a legitimate choice to enable Michigan residents to protect themselves against future sexual assaults.

COUNTERSTATEMENT OF FACTS

Amicus Curiae relies on the statement of facts as set forth by the Plaintiff-Appellee. The key facts, however, are that on October 24, 1983, defendant pled to attempted rape and robbery which occurred in DuPage County Illinois. Defendant had been at a house party and attempted to sexually assault a female guest at knifepoint. He also threatened to “send his friends in and they would take care of her good” if she didn’t comply. 55a. After pinning her down and pulling her pants off, she screamed for help and another guest rescued her. As defendant was leaving the bedroom, he stole money from her purse. 54a-55a. He was sentenced on February 7, 1985, to two years of probation with six months in the county jail. 59a.

Following his release, over the next forty years, defendant committed multiple theft-related offenses. 7b-18b.

In October of 1995, Michigan’s SORA was passed and July 1, 2011, the recapture provision was added to Michigan’s SORA.

Then on November 4, 2021, defendant punched an employee of Walmart in the face while he was stealing merchandize. 3b. After being charged with unarmed robbery, defendant pled on December 8, 2021, to a crime of attempted unarmed robbery contrary to MCL 750.530 and MCL 750.92(2). As a result of the conviction, he was ordered to register as a Tier III sex offender. See MCL 28.722(v)(iv),(viii),(ix); MCL 28.723(1)(e).

Defendant moved for resentencing in the lower court objecting to lifetime registration as cruel or unusual punishment and as impermissible ex post facto punishment. The lower court denied his motion relying on *People v Klinesmith*, 342 Mich App 39, 44; 993 NW2d 24 (2022). The court also found that defendant failed to show, even if registration amounted to punishment, that it would amount to cruel and/or unusual punishment in defendant’s case particularly since he would not have to register as an out-of-state resident. 90a.

Defendant appealed by leave granted to the Court of Appeals raising the following claims:

Defendant appeals by leave granted, arguing that defendant's lifetime registration under SORA: (1) violates the plain language of the statute because defendant does not reside in Michigan; (2) is unconstitutional ex post facto punishment; and (3) constitutes cruel or unusual punishment under the Michigan Constitution.

In defendant's pleadings in the Court of Appeals he stated that because he resided in Indiana and was not a temporary resident of Michigan, he did not have to register in Michigan. The Court of Appeals agreed that he did not have to register unless at some point he returned to reside in Michigan or became a temporary resident. *People v Ellis*, unpublished per curiam decision of the Court of Appeals issued January 18, 2024 (Docket No. 363845). The Court of Appeals disagreed that registration amounted to impermissible ex post facto punishment, however. The Court of Appeals stated that its previous decision in *People v Klinesmith*, 342 Mich App 39; 993 NW2d 21 (2022) was controlling. Like in *Klinesmith*, "the recapture provision of SORA attached legal consequences to defendant's 2022—attempted unarmed robbery—conviction, not his original 1983 sex-offense conviction, and 'had defendant not committed a new felony, he would remain free from the requirements of SORA.' *Id.* at 44." *Id.* at 4. 70a.

The Court of Appeals, also relying on the Court's previous decision of *People v Lymon*, 342 Mich App 46; 993 NW2d 24 (2022), (before this portion was vacated in part by this Court), determined that registration did amount to punishment, but did not amount to cruel or unusual punishment under the Michigan Constitution. The Court found that unlike *Lymon* where Lymon's crime did not have a sexual component, "the facts in this case are different from *Lymon* because defendant was convicted of a sexual offense in 1983. Therefore, there are facts to suggest that defendant may commit a sexual offense in the future." *Id.* at 5. 71a.

The Court also found that the registration requirement was not unduly harsh considering the gravity of defendant's crime compared with the severity of the statutory punishment for the offense. The Court also relied on the previous case of

People v Jarrell, 344 Mich App 464, 467; 1 NW3d 359 (2022) and concluded that the defendant's mandatory lifetime sex offender registration was not unduly harsh as compared to penalties imposed for other offenses in Michigan, and mandatory lifetime sex offender registration was not unique to Michigan. The Court relying on *Jarrell* also concluded that, though lifetime registration under SORA may not advance the goal of rehabilitation, the three other factors strongly support that the punishment is neither cruel nor unusual as applied to defendant. *Id.* at 6-7. 72a-73a.

Defendant then filed an application for leave to appeal with this Court. After requesting the prosecution to respond, this Court granted a MOAA on December 6, 2024 on the following issues:

By order of September 20, 2024, the plaintiff-appellee was directed to answer the application for leave to appeal the January 18, 2024 judgment of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing: (1) whether MCL 28.723(1)(e), the "recapture" provision of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, as amended by 2020 PA 295, effective March 24, 2021, constitutes ex post facto punishment under the United States or Michigan Constitutions, US Const, art I, § 9; Const 1963, art 1, § 10, see *People v Betts*, 507 Mich 527 (2021); (2) whether requiring the defendant to register as a sex offender under MCL 28.723(1)(e) and MCL 28.721 *et seq.*, constitutes cruel or unusual punishment under Const 1963, art 1, § 16, or US Const, Am VIII, see *People v Lymon*, 514 Mich (July 29, 2024) (Docket No. 164685), and *People v Kardasz*, 513 Mich 1118 (2024) (ordering oral argument on the application for leave to appeal in Docket No. 165008); (3) whether the defendant's out-of-state residency and the conditional application of SORA while the defendant remains an out-of-state resident renders the constitutional issues here not ripe for review; (4) for ex post facto purposes, whether it is the later, nonsexual offense that triggers SORA registration rather than the

earlier sexual offense, see *People v Klinesmith*, 342 Mich App 39 (2022); (5) how, if at all, the sexual nature of the prior unregistered sex offense affects the determination whether recapture is cruel or unusual punishment, or punishment at all; and (6) assuming arguendo that the focus of the recapture inquiry is properly on the earlier sex offense, whether the defendant's entitlement to relief on ex post facto grounds depends on this Court's decision in *Kardasz*.

People v Ellis, ___ Mich ___; 13 NW3d 642 (2024).

SUMMARY OF THE ARGUMENTS

- I. Whether the defendant's out-of-state residency and the conditional application of SORA while the defendant remains an out-of-state resident renders the constitutional issues here not ripe for review?² [III in the MOAA order]**

Defendant does not have to register in Michigan (or in his home state of Indiana). MCL 28.723 (3). He has said that he is an out-of-state resident and there is no indication that he intends to become a permanent or temporary resident. Since he does not have to register on Michigan's sex offender registry, nor his home state, his claims are not ripe for review.

- II. Whether MCL 28.723(1)(e), the "recapture" provision of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, as amended by 2020 PA 295, effective March 24, 2021, constitutes ex post facto punishment under the United States or Michigan Constitutions, US Const, art I, § 9; Const 1963, art 1, § 10, see *People v Betts*, 507 Mich 527 (2021)? [I in the MOAA order]**
- III. For ex post facto purposes, whether it is the later, nonsexual offense that triggers SORA registration rather than the earlier sexual offense, see *People v Klinesmith*, 342 Mich App 39 (2022)? [IV in the MOAA order]**

Though amicus agrees that SORA registration doesn't amount to punishment at all, even setting aside that question, defendant's conviction violated neither the federal nor state constitutions' Ex Post Facto Clause. The SORA was passed before defendant violated its provisions. There is no ex post facto violation when the defendant committed the crime *after* the law requiring registration was enacted. Though commission of an attempted unarmed robbery by defendant alone would not have triggered sex offender registration but for his 1983 attempted rape conviction

² This question should be answered first, since, if answered in the affirmative, it renders the rest of the questions moot.

and, it was his post-2011 crime which caused him to be required to register. His prior criminal record simply increased the consequences of his 2021 conviction.

IV. How, if at all, the sexual nature of the prior unregistered sex offense affects the determination whether recapture is cruel or unusual punishment, or punishment at all? [Issue V in the MOAA order].

The later nonsexual offense triggers SORA registration, but the fact that defendant committed a prior sex offense, which is an essential component of the recapture provision, distinguishes this case from *People v Lymon*, 514 Mich___;___NW3d___ (2024). It is his listed offenses which would appear on the sex offender registry (if he were an in-state resident).

V. Assuming arguendo that the focus of the recapture inquiry is properly on the earlier sex offense whether the defendant's entitlement to relief on ex post facto grounds depends on this Court's decision in *Kardasz*? [Issue VI in the MOAA order].

Amicus notes that if this Court determines that any “punishment” would not be of an ex post facto nature, the Court will still have to determine whether registration amounts to punishment, unless this Court assumes for the sake of argument that registration amounted to punishment but concludes that any punishment would not constitute cruel and/or unusual punishment.

Whether the SORA is punitive has been extensively briefed and may be resolved in *People v Kardasz*—but should be resolved in a case where the issue is squarely presented such as *People v Johnson*, MSC No. 165814. And if this Court determines that the SORA generally is not punitive in *Kardasz*, registration for those required to register under the recapture provision should also not be punitive since *Kardasz* and *Ellis* are Tier III offenders who must register for life. Amicus also agrees with the People in both *Kardasz* and *Ellis* that the SORA is not punitive. The legislature has clearly pronounced that the SORA was not intended to constitute punishment. In *Smith v Doe*, 538 US 84, 103; 123 S Ct 1140; 155 L Edd 164 (2003), the United States Supreme Court found that creating a law that alerts the public to the risk of sex offenders in their community is legitimate and

nonpunitive in nature. All federal circuits have held that the registries and notification provisions of SORNA which is now almost identical to SORA are *not* punitive. Michigan applies the same test as the United States Supreme Court, and the result in this case should be no different.

Defendant has failed to overcome the presumption of constitutionality accorded the statute, nor shown that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil. Defendant has not met his burden to establish by the clearest proof that the 2021 SORA was not a reasonable means of enabling the public to protect themselves from sexual offenders.

And, particularly in the case of defendant when he does not have to register either in Michigan or in Indiana (his home state), if this Court considers defendant's claim on an as-applied basis, like this Court considered the claim in *People v Lymon*, the decision is not contingent on the opinion in *People v Kardasz*. Since defendant has no realistic responsibility to register, he is not exposed to any obligation at all much less an obligation so stringent it must be labelled as "punishment."

VI. Whether requiring the defendant to register as a sex offender under MCL 28.723(1)(e) and MCL 28.721 *et seq.*, constitutes cruel or unusual punishment under Const 1963, art 1, § 16, or US Const, Am VIII, see *People v Lymon*, 514 Mich (July 29, 2024) (Docket No. 164685), and *People v Kardasz*, 513 Mich 1118 (2024) (ordering oral argument on the application for leave to appeal in Docket No. 165008)? [Issue II in the MOAA order]

But, even if this Court would determine that registration equates to punishment (but was not ex post facto punishment), requiring defendants convicted of Tier III offenses, such as the case of Defendant who attempted to rape a woman at knifepoint to register does not result in cruel and/or unusual punishment.

Argument

- I. When Defendant is not required to register on Michigan’s sex offender registry, (nor does he have to register in his home state of Indiana) his claim is not ripe.³ [Issue III in the MOAA order.]**

Standard of Review and Issue Preservation:

An issue of standing and ripeness may be raised at any time, even sua sponte by an appellate court. *Kallman v Sunseekers Prop Owners Ass’n, LLC*, 480 Mich 1099; 745 NW2d 122 (2008). See also *Reno v Catholic Soc. Servs.*, 509 US 43, 57 n 18; 113 S Ct 2485; 125 L Ed 2d 38 (1993).

Discussion:

This case is not ripe for this Court to decide when defendant is not required to register on Michigan’s sex offender registry because he committed his listed offense prior to 2011, and he is an out-of-state resident and neither does he have to register in his home state of Indiana.

Prior to addressing the merits of defendant’s asserted constitutional challenges, this Court must determine whether he presents a justiciable controversy. A justiciable controversy exists where the plaintiff has a legally protectable interest at stake, a substantial controversy exists between parties with genuinely adverse interests, and that controversy is ripe for judicial determination. The first two elements of justiciability are encompassed jointly by the concept of standing. Standing is a prerequisite to a court's authority to address substantive issues. If there is no standing, the court should dismiss the action. Even if a party can demonstrate standing, the merits of the case will not be reached unless the issues are ripe.

The Michigan Constitution provides that this Court exercises “the judicial power of the state” Const 1963, art 6, § 1. This Court has described that power as “the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.” *People v Richmond*, 486 Mich 29,

³ This question should be answered first, since, if answered in the affirmative, it renders the rest of the questions moot.

34; 782 NW2d 187 (2010), quoting *Anway v Grand Rapids R Co*, 211 Mich 592, 616; 179___NW___350 (1920). This Court is also limited to exercising *only* judicial power. Const 1963, art 3, § 2. Out of respect for that limitation, this Court has long taken the position that courts do not “decide or declare abstract questions of right for the future guidance of suitors.” *Street R Co of E Saginaw v Wildman*, 58 Mich 286, 287; 25 NW 193 (1885). This Court does not, “declare principles or rules of law that have no practical legal effect in the case before it.” *Richmond*, 486 Mich at 34 (citation omitted).

A litigant has standing whenever there is a legal cause of action and may have standing if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large, or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. *Lansing School Education Association v Lansing Board of Education*, 487 Mich 349, 372; 792 NW2d 686 (2010). However, “[e]mbedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.” *Andary v USAA Cas. Ins. Co.*, 512 Mich 207, 260; 1 NW3d 186 (2023).

Even if a party can demonstrate standing, the merits of the case will not be reached unless the issues are ripe. As stated by Justice Corrigan, “At common law, the ripeness doctrine is one of several justiciability doctrines developed ‘to ensure that cases before the courts are appropriate for judicial action.’ Generally, ‘[a] claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Hendee v Putnam Twp.*, 486 Mich 556, 586; 786 NW2d 521 (2010)(citations omitted)(CORRIGAN, J, concurring). See also *Texas v United States*, 523 US 296, 300; 118 S Ct 1257; 140 L Ed 2d 406 (1998)(indicating, A “claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”) “[Ripeness] is peculiarly a question of timing. [Its] basic rationale is to prevent the

courts, through premature adjudication, from entangling themselves in abstract disagreements.” *Thomas v Union Carbide Agric Prods Co*, 473 US 568, 580-581; 105 S Ct 3325; 87 L Ed 2d 409 (1985)(citation). “Ripeness doctrine exists ‘to ensure that courts decide only existing, substantial controversies, not hypothetical questions or possibilities.’” *Norton v Ashcroft*, 298 F3d 547, 554 (CA 6, 2002)(citations omitted). The ripeness doctrine prevents courts from becoming entangled in abstract disagreements when they adjudicate controversies that have not yet matured. Ripeness is an issue when the case or controversy hinges on future events that may or may not occur. *Thomas v Union Carbide*, 473 US at 580-581; *Davis v Indep. Citizens Redistricting Comm’n*, 508 Mich 935, 936 (2021)(ZAHRA, J., concurring).

In the case of sex offender registration, courts have found that the controversies were not sufficiently ripe when it was not certain that sex offenders would have to register in the future. In *In re Registrant J.R.*, 478 NJ Super 1; 310 A3d 11 (App. Div. 2024), for instance, the Court found that the challenge by an out-of-state registrant to the requirement that he register on the New Jersey sex offender registry if he had remained in New Jersey should be dismissed. The Court found that J.R. lacked standing and his motion was not ripe for adjudication.

J.R. had committed a registrable offense in New Jersey and then he later moved to Montana. Once J.R. moved to Montana, he no longer had to register in New Jersey but had to register in Montana because he had been convicted of an offense for which registration was required in another state. The Court found that J.R.’s claim was not justiciable in New Jersey because his registration obligation in Montana depended on his New Jersey *conviction*. The Court found:

. . . J.R. had no stake in the outcome of the matter because his registration obligation in Montana was dependent on his prior conviction of an offense requiring registration, which would remain so regardless of the outcome of his motion. He could not show that he would suffer harm in the court's denying the motion, as it did not impact his Montana registration obligation; conversely, he could not show he would benefit in the court's granting the motion, as again, a favorable decision would not terminate his registration obligation in

Montana. Because J.R. was not facing or suffering harm that a New Jersey court could address, he lacked standing to have a New Jersey court decide his motion. For these reasons, J.R.'s motion was also moot and not ripe for adjudication and was correctly dismissed for failing to present a justiciable controversy.

In re Registrant JR, 478 NJ Super at 9. The Court also found J.R.'s claim that he suffered negative effects because he was subject to SORNA unavailing because "any federal registration or reporting requirements arise from J.R.'s conviction, not an intangible 'status in New Jersey. . . ." *Id.* at 10.

In *Olsen v State*, 998 NW2d 883 (Iowa App, 2023), the Court also concluded that defendant's challenge to registration was not ripe. Olsen was convicted of a sex offense in Wisconsin where he did not have to register and eventually moved to Illinois. He then asserted he wanted to move to Iowa where he would have to register on the Iowa sex offender registry due to his Wisconsin conviction. He then filed a petition to modify registration requirements in Iowa, raising constitutional challenges to the registry. The Court in *Olsen* stated that his claim was not ripe. The Court stated, "[h]is application seeks to modify a hypothetical requirement based on an anticipated future move to this state. To be ripe for adjudication, an action must involve 'an actual present controversy, as opposed to one that is merely hypothetical or speculative.' 'If a claim is not ripe for adjudication, a court is without jurisdiction to hear the claim and must dismiss it.'" *Id.* (citations omitted). In *State v Hall*, 881 NW2d 470 (Iowa App, 2016), defendant challenged his requirement to register on the sex offender registry for acts he committed as a juvenile. He was required to register for life if he were sentenced to lifetime parole, or in no case fewer than ten years. The Court held that because the length of his parole would not be determined until he was released from prison his constitutional challenge to the sex offender registry was not ripe. *Id.* In accord: *State v Worm*, 268 Neb 74, 81; 680 NW2d 151 (2004).

In *Thompson v State*, 415 SC 560; 785 SE2d 189 (2016), the South Carolina Supreme Court found that defendant's challenge to the requirement that he register on the sex offender registry was not ripe since he did not have to register until he

was paroled, and the court could not prognosticate the status of its sex offender registration statute at that time. The Court concluded the following:

In *Hazel v State*, we held that a person convicted of kidnapping could not challenge whether he was required to register as a sex offender until the date of his release from prison, because that issue is entirely dependent on the sex offender registry statute in existence at that time. 377 SC 60, 64; 659 SE 2d 137, 139 (2008) (detailing the history of the sex offender registry as it related to kidnapping offenses). Here, Thompson will not be released from prison until 2020. Because there is no way to determine whether the General Assembly will amend section 23-3-430(C)(15) prior to 2020, a declaration that Thompson is not required to register as a sex offender in the future would be purely advisory.

Id. at 566-567 In accord *United States v Veal*, 322 F3d 1275, 1279 (CA 11, 2003)(indicating that defendant's challenge to the constitutionality of Florida's registry was not ripe because "whether Florida's sexual offender registration statutes will remain in effect in their current form throughout Veal's incarceration is a matter of speculation."); *Rodriguez v State*, 71 SW3d 800, 803-804 (Tex Crim App, 2002).⁴

Defendant does not have to register in Michigan. Defendant is an out-of-state resident and there was no indication that he intended to become either a Michigan permanent or temporary resident.⁵ As stated by the Court of Appeals, "At defendant's arraignment, defense counsel explained that defendant had been living

⁴ See also *Melnick v Camper*, 487 F Supp 3d 1039, 1049 n 3 (D. Colo, 2020)(rejecting defendant's claim that would suffer harassment from being on the sex offender registry independent from registering as part of his parole, because that issue was not ripe for review since defendant was still on parole and the decision necessarily "involves uncertain or contingent future events that may not occur as anticipated or indeed may not occur at all.")(citation omitted); *Lockhart v State*, 38 NE 215 (Ind App, 2015)(the court dismissing his claim because though the Department of Corrections required defendant to provide information that he be registered on the registry, his name wasn't on the registry nor was it likely that the registration requirement would be imposed in the immediate future due to a Supreme Court decision concerning the registry)

⁵ Defendant's parole was transferred to Indiana before he was discharged from parole. [Offender Tracking Information System]1c-3c (Amicus will use "c" for the designation of Amicus's Appendix).

in South Bend, Indiana, for 15 years. In his motion to correct an invalid sentence, defendant further clarified that he ‘is not, nor was he upon the commission of the crime, temporarily residing in Michigan.’” *People v Ellis*, unpub op at 2; 68a. At sentencing, his attorney said he would waive extradition to go back to Indiana. 40a-44a. His Presentence Report lists him as a resident of South Bend, Indiana since 2011 (and he was serving his two sentences out of the State of Indiana at the time of the sentence in this case and had another active warrant out of St. Joseph County Indiana). 1b. He stated that his continued residence would be with his mother in South Bend. 6b, 18b. And his list of prior offenses (22 prior felonies and 14 prior misdemeanors) do not include any other crimes in Michigan except for a crime in 1998. 1b, 7b-17b.

Defendant’s listed conviction, attempted rape committed in Illinois, occurred prior to July of 2011. MCL 28.723 (3) states:

(3) A nonresident who is convicted in this state on or after July 1, 2011 of committing a listed offense⁶ who is not otherwise described in subsection (1)⁷ shall nevertheless register under this act. However, the continued reporting requirements of this act do not apply to the individual while he or she remains a nonresident and is not otherwise required to report under this act. The individual shall have his or her photograph taken under section 5a.

Defendant also does not have to register in his home state of Indiana. See Ind Code Ann §11-8-8-4.5(a)(which doesn’t include attempts) and *Wallace v State*, 905 NE2d 371, 384 (Ind, 2009)(determining that individuals do not have to register if they were convicted and served their sentences for their sexual offenses before 1994).⁸

⁶ “(i) “Listed offense” means a tier I, tier II, or tier III offense.” MCL 28.722. Defendant committed his listed offense in 1983.

⁷ MCL 28.723 (1) applies to “individuals who are domiciled or temporarily reside in this state or who work with or without compensation or are students in this state.”

⁸ Defendant is also not without a remedy in the unlikely event that his situation would ever change. See: *People v Spencer*, 493 Mich 989 (2013)(indicating that a defendant could obtain relief in a civil action for declaratory judgment)

This case is not ripe for this Court to decide when defendant is not required to register on Michigan's sex offender registry because he committed his listed offense prior to 2011 and is an out-of-state resident and neither does he have to register in his home state of Indiana.

Argument

II, III. There is no ex post facto violation when, after the sex offender registration act was passed, defendant violated its requirements. [Issue I & IV in the MOAA Order].

Standard of Review and Issue Preservation:

Issues of constitutional law are subject to review de novo. *Dep't of Health & Human Servs v Rasmer*, 501 Mich 18, 30; 903 NW2d 800 (2017). Defendant raised this claim in a timely motion to correct an invalid sentence in the lower court.

Discussion:

Defendant's registration requirements violated neither the federal nor state constitutions' Ex Post Facto Clause. Defendant committed attempted rape on March 12, 1983, and pled to that charge on October 24, 1983. 55a. Michigan's sex offender registry was effective in October of 1995. Michigan's sex offender registry did not originally require that defendants register on the sex offender registry unless they were on probation or parole or had another relationship with the justice system on October 1, 1995 (MCL 28.723 (1), but in 2011, the recapture provision was passed requiring registration for a listed offense,⁹ *if* a defendant committed another felony after July 1 of 2011. Ten years after this requirement was imposed, Defendant committed another felony in Michigan which would, if he resided in Michigan, require registration. MCL 28.723(1)(e) was not applied retroactively, but prospectively. There is no ex post facto violation when defendants committed the crimes *after* the law requiring registration was enacted.¹⁰

Ex post facto laws are prohibited by both the United States Constitution, US

⁹ This statute was passed to comply with SORNA. 76 Fed Reg 1630.

¹⁰ See *infra* for the reasons that sex offender registration also does not constitute punishment.

Const, art I, §9, cl 3 (“No Bill of Attainder or ex post facto Law shall be passed.”) and US Const, art I, § 10 (“no state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts”) and the Michigan Constitution, Const 1963, art 1, § 10 (“no bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted”). Michigan has not interpreted its constitutional provision more expansively than its federal counterpart¹¹ and the language contained in our state constitution is virtually identical to that used in the federal constitution.¹² *In re Certified Question*, 447 Mich 765, 776-777; 527 NW2d 468 (1994). Defendant does not argue that Michigan construes its constitutional provision any differently.

An ex post facto law is a term of art which possessed an established meaning at the time of the framing of the United States Constitution:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. ***Every law that aggravates a crime, or makes it greater than it was, when committed.*** 3d. ***Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.*** 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. (emphasis added) [*Calder v Bull*, 3 US 386, 390; 1 L Ed 648 (1798)¹³]

¹¹ See *Lohrstorfer v Lohrstorfer*, 140 Mich 551, 560; 104 NW 142 (1905); *People v Potts*, 436 Mich 295, 300; 461 NW2d 647 (1990); *People v Russo*, 439 Mich 584, 592-593; 487 NW2d 698 (1991); *People v Earl*, 495 Mich 33, 37; 845 NW2d 721 (2014).

¹² Except for an improvement in phraseology, this provision remained unchanged since 1835, and mirrors restrictions passed on state government in the federal constitution. Susan Fino, *The Michigan Constitution* (Oxford University Press, 2011), Part II, pp 44. There was no substantive discussion in the debates of the 1850, 1907-1908 or 1963 constitutional conventions regarding the Ex Post Facto Clause. See Constitutional Convention 1850, p 67, 118; Address to the People, Constitutional Convention 1908, p 1416; Address to the People, 2 Official Record, Constitutional Convention 1961, p 3364.

¹³ In accord *Peugh v United States*, 569 US 530, 538; 133 S Ct 2072; 186 L Ed 2d 84 (2013); *Collins v Youngblood*, 497 US 37, 41-42; 110 S Ct 2715; 111 L Ed 2d 30 (1990).

This Court has adopted Justice Chase's definition of ex post facto laws he expressed in *Calder v Bull*, 3 US 386, 390; 1 L Ed 648; 3 Dall 386 (1798). See *People v Stevenson*, 416 Mich 383, 396; 331 NW2d 143 (1982), citing *In re Hoffman*, 382 Mich 66, 71 n 1; 168 NW2d 229 (1969). The Ex Post Facto Clause is designed to ensure fair notice that conduct is criminal and to secure substantial personal rights against arbitrary and oppressive legislation. *Weaver v Graham*, 450 US 24, 28-29; 101 S Ct 960; 67 L Ed 2d 17 (1981); *Dobbert v Florida*, 432 US 282, 293; 97 S Ct 2290; 53 L Ed 2d 344 (1977); *People v Russo*, 439 Mich 584, 592; 487 NW2d 698 (1992).

Amicus agrees with the People, that there was no punishment at all. However, even setting aside the issue of punishment, there could be no violation of the Ex Post Facto Clause. To violate the Ex Post Facto Clause, "[t]he critical question is whether the law changes the legal consequences of acts **completed** before its effective date." *Carmell v Texas*, 529 US 513, 520; 120 S Ct 1620; 146 L Ed 2d 577 (2000) (citation omitted).¹⁴ Justice Thomas may have said it most succinctly when discussing *Calder v Bull*, "Under this view, courts must compare the punishment affixed to the crime at the time of the offense, with the punishment affixed at the time of the sentence. If the latter is harsher than the former, the court must apply the punishment in effect at the time of the offense." *Peugh v United States*, 569 US 530, 561; 133 S Ct 2072; 186 L Ed 2d 84 (2013)(THOMAS, J., dissenting).

MCL 28.723 states:

(1) Subject to subsection (2), the following individuals who are domiciled or temporarily reside in this state or who work with or without compensation or are students in this state are required to be registered under this act:

(e) An individual who was previously convicted of a listed offense for which he or she was not required to register under this act, but who is convicted of any other felony on or after July 1, 2011.

¹⁴ See also *Weaver v Graham*, 450 US at 28; *Dobbert v Florida*, 432 US at 299; *Hopt v Utah*, 110 US 574, 589; 4 S Ct 202; 28 L Ed 262 (1884).

This statute was passed in 2011. 2011 PA 17. At that time and currently, Defendant's attempted rape conviction qualified as a Tier III offense. See MCL 28.722 (v)(iv),(viii),(ix). In 2021, Defendant committed the felony of attempted unarmed robbery in Michigan. MCL 750.530; MCL 750.92.

Because the requirement that defendant violated was in effect ten years before defendant committed his current felony, he had ample notice of his obligations, and this statute was applied prospectively. He did not commit the crime until *after* the law had been passed. See *In re Miller*, 110 Mich 676, 677; 68 NW 990 (1896)(indicating, "The penalty he is now serving is imposed for the offense committed by the prisoner after the act of 1893 took effect. Under such circumstances, the act cannot be regarded as *ex post facto*. . . The act of 1893 was in force before the second conviction of the petitioner occurred. He is presumed to have known its provisions when he committed the offense for which he is now serving time. He served the penalty of his first conviction, and, if he had not again violated the criminal law, he would not now be an inmate of prison.")

Defendant argues that the SORA is an *ex post facto* law because the statute imposes retroactive legal consequences for conduct committed before its enactment. Defendant's argument must fail. The "punishment" affixed to the crime at the time defendant committed the felony was the same as the "punishment" affixed at the time of his sentence. Defendant did not complete his offense until after the SORA registration requirements were passed into law.

The Court of Appeals in both *People v Tucker*, 312 Mich App 645; 879 NW2d 906 (2015) and *People v Klinesmith*, 342 Mich App 39; 993 NW2d 21 (2022), found that Michigan's recapture provision did not violate the Ex Post Facto Clause. In *Tucker* the defendant was convicted in 1990 of assault with intent to commit criminal sexual conduct involving penetration, but did not have to register. In October 1995, SORA was originally passed. In 2011 Michigan passed the recapture provision and then in 2013, Tucker was convicted of felonious assault which required registration due to his previous conviction of a listed offense. *Tucker*, 312 Mich App at 649. Though defendant claimed that the registration requirement

violated the Ex Post Facto Clause, the Court compared the recapture provision to recidivist statutes which both this Court and the United States Supreme Court found “do not change the penalty imposed for the earlier provision.” *Id.* at 652 (citation omitted). The Court found that though the recapture provision was not a traditional recidivist statute, the reasoning was the same. The *Tucker* Court found that defendant’s registration was not required until he committed another felony in 2013 and that his 1990 conviction was used to enhance the consequences of his 2013 felony which was committed after the effective date of the statute. *Id.* at 653. The Court noted, “This would be a different case if on July 1, 2011, the effective date of MCL 28.723 (1)(e), defendant had been immediately required to register as a sex offender because of his 1990 conviction alone. Rather defendant is required to register in connection with the 2013 felony.” *Id.*

The Court of Appeals in *People v Klinesmith*, 342 Mich App 39, 43; 993 NW2d 21 (2022) agreed that the reasoning of *Tucker* remained valid even after this Court’s decision in *People v Betts*, 507 Mich 527; 968 NW2d 497 (2021). The Court determined that nothing in *Betts* disturbed “the conclusion in *Tucker* that the recapture provision of SORA attached legal consequences to defendant’s subsequent conviction, not to his original conviction.” *Id.* at 44.

Even “uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct. . . [A] statute ‘is not made retroactive merely because it draws upon antecedent facts for its operation.’” *Landgraf v Usi Film Prods.*, 511 US 244, 269 n 24; 114 S Ct 1483; 128 L Ed 2d 229 (1994)(citation omitted). The recapture provision is akin to a recidivist statute in which the consequences flow from the last felony committed, not the earlier one. Both this Court and the United States Supreme Court have repeatedly found that “Recidivist statutes . . . do not change the penalty imposed for the earlier conviction.” *People v Reichenbach*, 459 Mich 109, 124-125; 587 NW2d 1 (1998), quoting *Nichols v United States*, 511 US 738, 747; 114 S Ct 1921; 128 L Ed 2d 745 (1994). As stated by the United States Supreme Court:

When a defendant is given a higher sentence under a recidivism

statute . . . 100% of the punishment is for the offense of conviction. None is for the prior convictions of the defendant's "status as a recidivist." The sentence "is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one." [*United States v Rodriguez*, 553 US 377, 386; 128 S Ct 1783; 170 L Ed 2d 719 (2008)(citations omitted)¹⁵]

As one court discussed the purpose of a recapture provision, "[T]he legislature could have reasonably determined that where a defendant commits a sex offense in the past for which he was not required to register and has shown a recent, general tendency to recidivate by committing a new felony offense since the amendment of the Act in 2011, he poses a potential threat of committing a new sex offense in the future." *People v Bingham*, 2018 IL 122008 P 24; 115 NE2d 166, 169 (2018). As the *Bingham* Court stated, it was a defendant's recidivism by committing a new felony, not his past sex offense, that caused the current requirement to register. Even

¹⁵ See also *Gryger v Burke*, 334 US 728, 732; 68 S Ct 1256; 92 L Ed 1683 (1948); *Ex parte Brazel*, 293 Mich 632, 637-638; 292 NW 664 (1940); *People v Palm*, 245 Mich 396, 402-403; 223 NW 67 (1929)(upholding enhancement as habitual offenders even though prior convictions occurred before the act was passed); *People v Miller*, 357 Mich 400, 410; 98 NW2d 524 (1959); *People v Sadows*, 283 Mich App 65, 68; 768 NW2d 93 (2009); *People v Perkins*, 280 Mich App 244, 251-252; 760 NW2d 669 (2008); *People v Callon*, 256 Mich App 312, 318; 662 NW2d 502 (2003)(upholding conviction as recidivist drunk driver though the prior convictions occurred before the statute was passed); *People v Swint*, 225 Mich App 353, 375; 572 NW2d 666 (1997); *People v Tice*, 220 Mich App 47, 50-51; 558 NW2d 245 (1996)(rejecting defendant's argument that his felon-in-possession of a firearm conviction was invalid because the felon-in-possession of a firearm statute was passed after he committed the crime which led to his original conviction); *People v Harvey*, 174 Mich App 58, 60-61; 435 NW2d 456 (1989) (no ex post facto violation occurred by applying the parental kidnapping statute, MCL 750.350a, to the defendant's retention of a child in violation of a divorce decree for more than twenty-four hours after the effective date of the new statute) The Court also, albeit in an unpublished opinion, has rejected an ex post facto challenge to the super habitual offender law, MCL 769.12(1)(a). *People v Hayes*, unpublished per curiam decision of the Court of Appeals issued January 15, 2019 (Docket No. 339563), p 9-10. 12c-13c (The People cite this unpublished case because no published case has evaluated this claim. MCR 7.215(C)(1)).

though a requirement of defendant's conviction was that he had to have previously been convicted of an offense which would currently require registration, his offense was not committed until *after* the 2011 Public Act was passed.

The Seventh Circuit also rejected a similar challenge to a recapture provision like the statute passed in Michigan. The plaintiff in *Johnson v Madigan*, 880 F3d 371 (CA 7, 2018) sued state officials who enforced an Illinois version of SORA. Johnson had been convicted in 1983 of a sex offense, had to register for a period, but eventually came off the registry. However, Illinois later passed its version of the recapture provision requiring registration of sex offenders if they committed new crimes after 2011. Defendant committed a theft offense after 2011 and was required to register for life as a sexual predator. In his suit, he claimed that the statute violated the Ex Post Facto Clause. The Seventh Circuit, however, found that the statute was not retroactive. The Court concluded, "A statute is retroactive for purposes of the *ex post facto* clause if it redefines or changes the penalty for a crime committed before the law went into effect. The 2012 version of Illinois' Sex Offender Registration Act didn't redefine or change the penalty for crimes committed in 1983. It didn't apply to Mr. Johnson when it took effect. Mr. Johnson only fell within its ambit when he committed, and was convicted of, a felony in 2013 . . . Mr. Johnson is right that his 2013 theft conviction wouldn't have triggered sexual predator status but for the 1983 rape conviction. But . . . it was Mr. Johnson's post-Act felony that caused today's problems; his prior criminal record simply increased the consequences of the 2013 conviction—'a stiffened penalty for the latest crime.' *Gryger v Burke*, 334 US [728,] 732[; 68 S Ct 1256; 92 L Ed 1683 (1948)]." *Id.* at 376. In accord: *Kitterman v City of Belleville*, 66 F4th 1084, 1093 (CA 7, 2023)(again rejecting an ex post facto challenge to recapture provision on the same grounds).

In this case as well, defendant is solely appealing the consequences of his post-2011 felony as violating the Ex Post Facto Clause. His appeal is not from his sex crime conviction, and he committed his felony after the recapture provision was passed. Defendant's conviction which required registration violated neither the federal nor state constitutions' Ex Post Facto Clause. There is no Ex Post Facto

Clause violation when defendant committed the crime *after* the law requiring registration was enacted.

And as stated previously, the 2011 amendment made the consequences of defendant's current offense which occurred after 2011 more severe because of defendant's prior conviction for a sex offense. As stated by the Seventh Circuit:

But Mr. Johnson isn't here because of his 1983 sentence; that sentence, including the requirement of registration, expired long ago. He became a sexual predator as a collateral consequence of his 2013 sentence, not through enforcement or modification of his 1983 sentence.

Mr. Johnson is right that his 2013 theft conviction wouldn't have triggered sexual predator status but for the 1983 rape conviction. But just as the defendant Justice Jackson discussed, it was Mr. Johnson's post-Act felony that caused today's problems; his prior criminal record simply increased the consequences of the 2013 conviction—"a stiffened penalty for the latest crime."

Johnson v Madigan, 880 F3d at 376. In accord: *Kitterman v City of Belleville*, 66 F4th at 1093. See also: *People v Sadows*, 283 Mich App 65, 68; 768 NW2d 93 (2009); *People v Perkins*, 280 Mich App 244, 251; 760 NW2d 669 (2008) (indicating, "the amendment made the consequences of their current offenses, which occurred after January 3, 2007, more severe on the basis of defendants' prior convictions."); *People v Callon*, 256 Mich App 312, 318; 662 NW2d 501 (2003) (indicating, "Here, the amended statute did not attach legal consequences to defendant's prior impaired-driving conviction, but attached legal consequences to defendant's future conduct of driving under the influence or with an unlawful blood alcohol level."); *People v Tice*, 220 Mich App 47, 51; 558 NW2d 245 (1996)(While tied to defendant's status as a convicted felon, the punishment was not imposed for the prior crime, but for his recent act of possessing a firearm.).

There is no ex post facto violation when, after the sex offender registration act was passed, defendants violated its requirements.

- IV. Though the later nonsexual offense triggers SORA registration, the fact that defendant committed a prior sex offense, which increases the consequences of his current conviction, distinguishes this case from *People v Lymon*, ___Mich___; ___NW2d___ (2024). [Issue V in the MOAA Order.]

Standard of Review and Issue Preservation:

Issues of constitutional law are subject to review de novo. *Dep't of Health & Human Servs v Rasmer*, 501 Mich at 30. This issue was not raised below since *People v Lymon* had not yet been decided.

Discussion:

The later nonsexual offense triggers SORA registration, but the fact that defendant committed a prior sex offense, which increase the consequences of his current conviction, distinguishes this case from *People v Lymon*.

This Court in *People v Lymon* determined that “the application of SORA to non-sexual offenders like defendant is cruel or unusual punishment in violation of the Michigan Constitution.” *Lymon*, ___Mich at ___; slip op at 1-2. This Court reiterated this limitation throughout its opinion. This Court later stated, “our analysis and decision concerns only whether the application of the 2021 SORA to non-sexual offenders like defendant constitutes cruel or unusual punishment.” *Id.* at ___; slip op at 8, n 6. This Court noted that for nonsexual offenders, the registry imposed “the label of ‘sex offender’ with its attendant consequences on non-sexual offenders and imposes various reporting and financial requirements.” *Id.* at __, slip op at 17. This Court also determined that “the restraints [the SORA] imposes on non-sexual offenders are excessive.” *Id.* at ___; slip op at 26. This Court concluded by stating, “Although the 2021 SORA bears a rational relation to its nonpunitive purpose and the Legislature has continued to express its intention that SORA constitutes a civil regulation, SORA resembles traditional methods of punishment, promotes the traditional aims of punishment, and imposes affirmative restraints that are excessive as applied to non-sexual offender registrants. Accordingly, we

conclude that the 2021 SORA constitutes punishment as applied to non-sexual offenders.” *Id.* at ____; slip op at 30. This Court went on to indicate that, “Our opinion does not reach the question whether the 2021 SORA constitutes punishment as to sexual offenders—and, in fact explicitly vacates the portion of the Court of Appeals opinion that so concluded.” *Id.* at __; slip op at 30, n 20.

As stated *supra*, the commission by defendant of the post-2011 felony alone would not require SORA registration, the consequences of his current conviction became more severe since he had previously committed a listed offense. That listed offense is an essential component of the requirement that defendant registers. This case is distinguishable from *Lymon* which applies solely to “non-sexual offender registrants” and *Lymon* does not control the conclusion in this case. Defendant indisputably committed a sexual offense—and it was that listed “sexual” offense which would appear on the registry.

The Court of Appeals recently distinguished *Lymon* and determined that the 2021 SORA did **not** amount to punishment for sexual offenders, specifically for a defendant convicted of criminal sexual conduct in the first degree in 1980 who was a Tier III offender. *People v Kiczenski*, __Mich App__; __NW2d__ (2024)(Docket No. 364957). The Court particularly noted that courts from across the nation had held that the state interest in alerting the public to sex offenders’ locations is paramount. *Id.* at ____; slip op at 9. The Court found that the restrictions imposed by the SORA were not excessive when applied to the public safety concerns that sex offenders pose. *Id.* at ____; slip op at 11. The Court ultimately found that Kiczenski did not demonstrate by the clearest proof that the 2021 SORA is so punitive either in purpose or effect as to negate the State’s intention to deem it civil. *Id.* at ____; slip op at 12-13. See also *In re Harder*, __Mich App__; __NW2d__ (2025)(Docket No. 368645), slip op at 10-11. The same is true in these cases.

- V. Defendant has failed to show by the clearest proof that the SORA amounts to punishment for sexual offenders required to register because of the recapture provision. [Issue V in the MOAA order].

Standard of Review and Issue Preservation:

Issues of constitutional law are subject to review de novo. *Dep't of Health & Human Servs v Rasmer*, 501 Mich at 30. Defendant raised this claim in a timely motion to correct an invalid sentence in the lower court.

Discussion:

Amicus also acknowledges that the issue of the punitive nature of the SORA generally has been extensively briefed and may be resolved in *People v Kardasz* and should be resolved in a case such as *People v Johnson* where the issue of punishment is squarely posed. While the factors to determine whether an obligation is punishment for ex post facto purposes and cruel and unusual punishment purposes is the same, the legal test is different. And, for ex post facto purposes the case law from the federal courts should be directly persuasive while only analogously so for a challenge under Michigan's cruel or unusual punishment amendment. A decision concerning cruel or unusual punishment would also not be directly binding on ex post facto claims, so the Court would have to resolve an ex post facto case to definitively resolve the issue of punishment.¹⁶

Also, for ex post facto purposes, defendant can only argue that the new obligations added after their conviction date would be severe enough to amount to punishment, while cruel and unusual punishment claims look to all the obligations in the 2021 SORA. The potential remedies if this Court found a violation, differ.

¹⁶ And, if this Court would determine that regardless of whether registration amounts to punishment (but not of an ex post facto nature), any punishment for Tier III offenders, the most serious sex offenders in the State of Michigan, does not amount to cruel and/or unusual punishment, this Court would not have to reach the issue of punishment at all.

However, amicus will add a few points to support the position that registration does not amount to punishment for sexual offenders particularly because of the recapture provision.

In *Lymon*, this Court held the application of SORA to non-sexual offenders like Lymon amounted to cruel or unusual punishment in violation of the Constitution. This Court noted that statutes are presumed to be constitutional, and the party challenging the statute has the burden of showing to the contrary. *Id.* at ____; slip op at 9. This Court found that the legislature did not intend that the 2021 SORA be considered punishment. *Id.* at ____; slip op at 13. This Court noted that if the legislature intended that the statute serve as civil regulation, that “the Legislature’s intent will be rejected only when ‘a party challenging the statute provides the *clearest proof* that the statutory scheme is so punitive either in purpose or effect as to negate the States’s intention to deem it civil.” *Id.* at ____; slip op at 10 citing *Kansas v Hendricks*, 521 US 346, 361; 117 S Ct 2072; 138 L Ed 2d 501 (1997) (emphasis original) See also *People v Neilly*, ____Mich____; 15 NW2d 561 (2024); slip op at 6-7.

In *Lymon*, this Court found that the 2021 SORA no longer resembled banishment but continued to resemble the traditional punishments of parole and shaming, though due to the 2021 changes in the legislation, the analogy between the registry and parole had been weakened. *Lymon*, ____Mich at ____; slip op at 14, 16. This Court found, however, that the 2021 SORA resembled shaming for individuals whose crimes did **not** contain a sexual component since these individuals were still listed on the Michigan “Sex Offender” Registry. *Id.* at ____; slip op at 16-17.

In *Lymon*, this Court also found that the registry continued to impose significant obligations on registrants including the fees paid, in-person visits, and the obligation to update certain requirements as well as having the registrant’s registration publicly available on-line. *Id.* at ____; slip op at 18-20. This Court noted, however, that this “weighs less heavily in that regard than the 2011 SORA.” *Id.* at ____; slip op at 20.

This Court found that, though the statute did promote some of the traditional aims of punishment (*Id.* at ____; slip op at 21-22), there was a rational connection to a nonpunitive purpose even for non-sexual offenders. *Id.* at ____; slip op at 24. This Court found that “the inclusion of non-sexual offenses in SORA is rationally related to SORA’s purpose of protecting the public against persons who pose a ‘potential serious menace and danger’ to the community.” *Id.* However, this Court ultimately concluded that the 2021 SORA was excessive in comparison to its nonpunitive purpose for offenders whose offenses did not have a sexual component. *Id.* at ____; slip op at 24-25. This Court found that the 2021 SORA was not a reasonable means of protecting the public from the “commission of future criminal sexual acts” by non-sexual offenders like Lymon.¹⁷ *Id.* at ____; slip op at 24.

In this case, unlike *Lymon*, defendant like all offenders who are required to register under the recapture provision, was a sexual offender and therefore the concerns raised in *Lymon* are not present in this case. Defendant cannot overcome the presumption of constitutionality accorded the statute nor show by the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the States’s intention to deem it civil.

Since the purpose of the SORA is not to impose punishment, this Court must determine “whether the statutory scheme is so punitive [] in . . . effect as to negate the State’s intention to deem it civil.” *Betts*, 507 Mich at 549. The seven factors considered in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-69; 83 S Ct 554; 9 L Ed 2d 644 (1963), used to assist in determining whether a statute has a punitive effect are:

- [1] Whether the sanction involves an affirmative disability or restraint,
- [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies

¹⁷ This Court stated that it did “not endorse either position regarding the efficacy of sex-offender registries or the recidivism rates of registrants. Instead, we acknowledge the existence of a robust scientific debate and no universally accepted conclusion on the matters.” *Id.* at ____; slip op at 26, n 18.

is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned. [*Earl*, 495 Mich at 44, citing *Mendoza-Martinez*, 372 US at 168-169.]

The *Mendoza-Martinez* factors are “neither exhaustive nor dispositive,” but are “useful guideposts.” *Smith*, 538 US at 97. Because the Court will “ordinarily defer to the legislature’s stated intent . . . **only the clearest proof** will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.” *Id.* at 92 (internal citations and quotation marks omitted) (emphasis added). This Court in *Earl*, 495 Mich at 43-44 as well as *Betts*, 507 Mich at 544 applied the *Mendoza-Martinez* factors to determine whether a statutory scheme was so punitive as to negate the intent of a civil remedy.

The Supreme Court in *Smith v Doe*, 538 US at 97, stated that five of the factors were relevant to its analysis “whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.”

A. Michigan’s SORA has similar features to Alaska’s statute deemed nonpunitive by the United States Supreme Court and to SORNA which has been consistently upheld as nonpunitive and is not distinguishable from the circumstances of Kardasz.

If this Court determines that SORA generally is not punitive in *People v Kardasz*, registration for those required to register under the recapture provision should also not be punitive. Because the gap in time between 1994 and 2011 is vast, most individuals who must register under the recapture provision are Tier III sex offenders, the offenders who commit the most severe sex offenses in the state of Michigan. Kardasz also is a Tier III sex offender, so this case should be decided no differently on that basis.

The difference between this case and *Kardasz* is that the recapture provision would apply to offenses which occurred before the passage date of SORA. However,

since Tier III offenders must register for life, reasonably, that should not be a factor which should make a difference.

Smith v Doe, examined Alaska's SORA and found it nonpunitive. In Alaska certain offenders had to register quarterly for life and the act required retroactivity.¹⁸ *Smith*, 538 US at 90, 105-106. Also, after the 2021 amendments to SORA, Michigan's statute is almost identical to SORNA.¹⁹ In Michigan like the

¹⁸ In 1994 the Alaska statute required the following:

Sec. 12. APPLICABILITY. (a) A sex offender with only one conviction for a sex offense who has been unconditionally discharged from that sex offense before July 1, 1984, is not required to register under AS 12.63.010, added by sec. 4 of this Act. A sex offender who has been unconditionally discharged from a sex offense on or after July 1, 1984, but before the effective date of this Act, shall register under AS 12.63.010, added by sec. 4 of this Act, by July 1, 1994. A sex offender with two or more convictions for a sex offense before the effective date of this Act, regardless of whether the sex offender was unconditionally released from the sex offense before, on, or after July 1, 1984, shall register under AS 12.63.010, added by sec. 4 of this Act, by July 1, 1994.

1994 AK ALS 41.

¹⁹ SORNA requires periodic in-person appearances to verify registration information as well as to provide a photograph and further requires an offender to appear in person to update a registration within three business days after any change of name, residence, employment, or student status. 34 USC §20913(c). While not required by SORNA, Michigan's SORA had required an offender to appear in person to update when the offender temporarily resided at a new residence for more than seven days, established a new email address, and regularly operated a new vehicle. Compare former MCL 28.725(1)(e)-(g,) (2011 PA 17) with 34 USC §20913(c); §34 USC 20914(a). The new statute no longer requires in-person updates for this information but indicates that the Department may allow another means of updating information. MCL 28.725(1)(2). The statute also indicates that only individuals required to be registered after July 1, 2011, had to update their electronic identifiers (MCL 28.725(2)(a)) and the new statute does not require in-person reporting for a change in vehicle information or temporary residences. MCL 28.725(2)(a)(b).

SORNA requires that the sex offense for which an offender is registered is on the public registry (34 USC §20914(b)(2); 73 Fed Reg 38,030 at 38.059 (July 2, 2008), but the tier classification did not need to be viewable on the public website.

(FOOTNOTE CONT'D NEXT PAGE)

federal Sex Offender Registration and Notification Act (SORNA), Tier III offenders must register for life. Compare: 34 USC §20915(a)(3) & MCL 28.725(13). Though in Michigan SORA is *not* fully retroactive since most offenders who committed sex crimes before SORA was passed do not have to register except for those who commit a new felony after 2011 (MCL 28.723), SORNA is fully retroactive.²⁰ 34 USC §20912(b); 28 CFR 72.3; 75 Fed Reg 81849. And, the Sixth Circuit like all other federal courts to consider the pre-2022 SORNA,²¹ (except for an opinion concerning juveniles which has now been vacated²²), has found the federal Sex Offender

(FOOTNOTE CONT'D FROM PREVIOUS PAGE)

Michigan's former law did make this public. Former MCL 28.728(2)(l). The new statute indicates that the tier classification should not be on the public registry. MCL 28.728(3)(e).

SORNA does not require any geographic exclusion or "school safety" zones. Michigan's SORA had imposed these requirements. *See* Former MCL 28.733-MCL 28.738. The new Public Act repealed these provisions. (The post-2021 SORA also addressed other issues raised in the federal opinion independent of the claim of impermissible retroactive punishment; these issues are not raised in this case.)

²⁰ For jurisdictions which did not require full retroactivity consistent with SORNA, states could instead, adopt a recapture provision which would meet the substantial compliance requirement with SORNA necessary for federal funding. "These supplemental guidelines accordingly are modifying the requirements for substantial implementation of SORNA in relation to sex offenders who have fully exited the justice system, i.e., those who are no longer prisoners, supervisees, or registrants. It will be sufficient if a jurisdiction registers such offenders who reenter the system through a subsequent criminal conviction in cases in which the subsequent criminal conviction is for a felony, i.e., for an offense for which the statutory maximum penalty exceeds a year of imprisonment. This allowance is limited to cases in which the subsequent conviction is for a non-sex offense." 76 Fed Reg 1630.

²¹ *See United States v Parks*, 698 F3d 1, 5-6 (CA 1, 2012); *United States v Diaz*, 967 F3d 107, 110-111 (CA 2, 2020); *United States v Wass*, 954 F3d 184, 192-193 (CA 4, 2020); *United States v Johnson*, 632 F3d 912, 917-918 (CA 5, 2011); *United States v Leach*, 639 F3d 769, 773 (CA 7, 2011); *Droney v Fitch*, 423 Fed Appx 669, 669-670 (CA 8, 2011); *United States v Elk Shoulder*, 738 F3d 948, 953-954 (CA 9, 2013); *United States v White*, 782 F3d 1118, 1127-1128 (CA 10, 2015); *United States v Sewell*, 712 Fed Appx 917, 920 (CA 11, 2017); *United States v W.B.H.* 664 F3d 848, 853-860 (CA 11, 2011).

²² *U.S. v Juvenile Male*, 590 F3d 924, 942 (CA 9, 2009), addressing juvenile offenders. was vacated as lacking a case and controversy. 564 US 932, 933; 131 S Ct

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Registration and Notification Act (hereinafter “SORNA”) constitutional and determined that the requirements in SORNA, do not violate the Ex Post Facto Clause.²³ See *M.S. Willman v AG of the United States*, 972 F3d 819, 823, 824 (CA 6, 2020). And, if a statute is found to be nonpunitive, it doesn’t make a difference whether full retroactivity as opposed to partial retroactivity is allowed for in the state statute; if it is nonpunitive, it can be applied with full retroactivity. See *Smith v Doe*, 538 US 84, 105-106; 12 S Ct 1140; 155 L Ed 2d 164 (2003)(indicating that “the Act is nonpunitive and its retroactive application does not violate the Ex Post Facto Clause.”)

Therefore, Michigan has similar features to Alaska’s statute deemed nonpunitive by the United States Supreme Court and to SORNA which has been consistently upheld as nonpunitive and is not distinguishable from the circumstances of *Kardasz*.

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2860; 180 L Ed 2d 811 (2011). The 2021 SORA no longer requires juveniles who are adjudicated post-January 1, 2021, in probate court to register. MCL 28.722(a)(iii); MCL 712A.28(3).

²³ Amicus acknowledges that the federal district court in *Does v Whitmer (Does III)*, opinion of the United States District Court of the Eastern District of Michigan, Southern Division, issued September 27, 2024 (Case No. 22-10209), granted plaintiffs’ motion for summary disposition in part, finding that the 2021 SORA amounts to punishment and therefore cannot be applied retroactively. An injunction was ordered on March 26, 2025, to take effect in 90 days. *Does III*, opinion and judgment issued March 26, 2025. However, the opinion is not binding on this Court. *Abela v GMC*, 469 Mich 603, 606; 677 NW2d 325 (2004). The district court inexplicably rejected the Sixth Circuit opinions of *United States v Felts*, 674 F3d 599, 605-606 (CA 6, 2012)(finding SORNA does *not* amount to punishment and noting “the unanimous consensus among the circuits that SORNA does not violate the Ex Post Facto Clause.”) and *M.S. Willman v AG of the United States*, 972 F3d 819, 824-825 (CA 6, 2020)(finding SORNA does *not* amount to punishment). *Does III*, p 19-23. And the Sixth Circuit in *Does v Whitmer*, 69 F4th 300, 309 (CA 6, 2023), had previously noted that “*Does II* which had already granted class-wide relief, became final ***only after the Michigan legislature had already removed the offending parts of SORA.***” And stated, “***This new SORA removed or modified the provisions that Does II had declared unconstitutional.***” *Id.* at 303 (emphasis supplied). The Attorney General has indicated that it is appealing this decision and has requested that the effect of the opinion and order be stayed.

B. Like SORNA and ASORA considered by Smith v Doe, Michigan's 2021 SORA does not equate to shaming nor an excessive affirmative disability or restraint because the conviction itself would cause similar effects.

Two of the factors referenced in *Lymon* and as well as *Kennedy v Mendoza-Martinez*, 372 US at 168-169 are whether SORA has been regarded in our history and traditions as a form of punishment and whether the SORA amounts to an affirmative disability or restraint. When considering those required to register under the recapture provision, the evaluation should not change from this Court's analysis in *People v Kardasz*.

1. The fact that the Legislature relies on the offense for the length of registration does not amount to affirmative disability or restraint and does not resemble historical punishment.

Michigan's SORA (consistent with SORNA²⁴), categorizes offenses into tiers based on the severity of the offense. MCL 28.722(r)-(v). The mere fact that the crimes are categorized into tiers, however, doesn't amount to any affirmative disability or restraint upon defendant. The Alaska statute examined by the United States Supreme Court also established different periods of registration depending on the type of crime and included lifetime registration for aggravated sex offenses, yet the Supreme Court did not find that those provisions converted the Act into one that is punitive. *Smith*, 538 US at 90. The Court found that instead "[t]he broad categories, however, and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism and this is consistent with the regulatory objective." *Smith*, 538 US at 102. And the legislature has prohibited the tiers of the offense from being listed on the public registry. MCL 28.728(3)(e).

As stated by the Eleventh Circuit, grouping the offenses as SORNA did into tiers was not materially different from the Alaska scheme at issue in *Smith*. "Both statutory regimes group the offenders in categories instead of making individual determinations of dangerousness. Because *Doe* held that the regulatory scheme of

²⁴ 34 USC §20911.

the Alaska statute is not excessive in relation to its non-punitive purpose, it necessarily follows that SORNA's is not either." *United States v W.B.H.*, 664 F3d 848, 859-860 (CA 11, 2011).

The legislature has categorized offenses into tiers, with those which are the most dangerous requiring longer registration terms. This three-tier system reasonably serves to keep the public safe. And the efficacy of the statute is a matter for the legislature. Even if the SORA is not perfect in achieving its aims, "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 US at 103. It is "most significant" that while registration may have some punitive aspects, it serves "important nonpunitive goals." *Earl*, 495 Mich at 46, quoting *United States v Ursery*, 518 US 267, 290; 116 S Ct 2135; 135 L Ed 2d 549 (1996).

Judge Goldsmith, when evaluating the claim that the SORA should include individualized assessments, noted "potentially towering costs" and "the risk of making poor predictions of dangerousness." *Does v Whitmer (Does III)*, opinion of the United States District Court of the Eastern District of Michigan, Southern Division, issued September 24, 2023 (Case No. 22-10209), p 42. ***The court noted the report submitted by the defendants which estimated "that an individualized risk assessment costs between \$8,000 to \$20,000 and takes between eight and 26 hours to complete" and that "[b]ased on this estimate, conducting an individualized risk assessment for all current SORA registrants, roughly 44,000 people—would cost between \$352 million and \$880 million and take between 352,000 and 1.1 million hours."*** *Id.*, p 41 (emphasis supplied). And this doesn't even count the cases where there would be battles of the experts concerning the risk of re-offense. The court also noted the risk of poor predictions discussing the debate about the utility of the Static-99R since it measures actual reconviction as opposed to re-offense,²⁵ finding that "[a] legislature

²⁵ As stated by one court when discussing problems with the use of the Static-99R a risk assessment suggested by some advocates, "In the words of the psychologist,
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might conclude that an offense-based system at least gives some certainty that those who commit serious offenses are monitored for significant periods, perhaps for life, and thereby mitigate the risk of erroneous prediction.” *Id.* at p 42. The court noted:

Making choices about whether to adopt bright-line rules or customized assessments of people, entities, or transactions subject to government regulation is the hallmark of the legislative function. “Under the system of government created by our Constitution, it is up to the legislatures, not the courts to decide on the wisdom and utility of legislature.” *Feguson v Skrupa*, 372 US 726, 729 (1963).

Id.

2. Any shaming would be due to defendant’s conviction, not the registry and the revelation of truthful information is not consistent with “punishment.”

In this case, like in *Kardasz* and unlike the case of *Lymon*, any “shaming” would not be due to the registry but due to defendant’s conviction of attempted rape which is based on public information. Michigan sex offender registry includes the defendant’s listed offense and date of conviction. <https://mspsor.com/Home/Search> (accessed March 6, 2025).

The United States Supreme Court, noting that sex offender registration was of recent origin, concluded it did not resemble a traditional means of punishment. The United States Supreme Court found that past punishments such as whipping, pillory and branding “inflicted physical pain and staged a direct confrontation between the offender and the public.” *Smith*, 538 US at 98. The Court also noted that public shaming, humiliation, and banishment, “involved more than the

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‘actuarial scales ... underestimate the risk an offender will commit an offense over [his] lifetime.’ Gregory DeClue & Denis L. Zavodny, “Forensic Use of the Static-99R: Part 4. Risk Communication,” 1 *Journal of Threat Assessment & Management* 145, 149 (2014).” *Belleau v Wall*, 811 F3d 929, 933 (CA 7, 2016). Defendant has also noted no state which uses this risk assessment tool to determine that registrants should be released from SORA.

dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community.” *Id.*

The federal courts have found similarly to the statement in *Smith v Doe*. See *Parks*, 698 F3d 1, 6 (CA 1, 2012); *Shaw v Patton*, 823 F3d 556, 563 n 11 (CA 10, 2016); *Anderson v Holder*, 396 US App DC 281; 647 F3d 1165, 1172-1173 (2011). See also: *United States v Hinckley*, 550 F3d 926, 937-938 (CA 10, 2008)(indicating, “Furthermore, SORNA, just as the *Smith* scheme, merely provides for the ‘dissemination of accurate information about a criminal record, most of which is already public.’ While the public display of this information could result in shame for Mr. Hinckley, this is not ‘an integral part of the objective of the regulatory scheme.’ *Id.* at 99. SORNA aims to ‘inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.”)(citations omitted); *United States v W.B.H.*, 664 F3d at 855-856 (rejecting a similar argument based on *Smith*, “Under *Doe* disseminating that truthful information would not be considered punishment, and it would be permitted. Any embarrassment or scorn resulting from dissemination of the truthful information about W.B.H.’s youthful offender conviction is a collateral consequence of a legitimate regulation.”); *United States v Under Seal*, 709 F3d 257, 265 (CA 4, 2013)(indicating, “Appellant attempts to distinguish *Smith*, arguing that records involving criminal offenses committed by juveniles are not made public, such that disseminating information about them must be punitive. . . . the Supreme Court has held that ‘[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.’ *Smith*, 538 US at 98.”).

Defendant asserts that due to the ubiquity of the internet, the level of shaming has increased from when the time *Smith v Doe* was decided. Instead, due to the amount of information now available on the internet, the public nature of the conviction itself is more prominent than at the time of *Smith v Doe*. The defendant’s

conviction can many times be discovered through a simple internet search.²⁶ And the benefit of the information on Michigan's SORA, unlike information found on the internet, is that it is verified as accurate.

3. The purpose of parole and the registry are fundamentally different.

Lymon also pointed to periodic reporting to law enforcement required by SORA as indicating that this was akin to parole, a traditional type of punishment. However, in this case it should not weigh heavily against the finding that the statute is a civil regulatory one. The ultimate purpose of the registry is not to control the registrants, but to allow members of the public to change their behavior so they or their family members will not become future victims.

Offenders in Michigan must report in person four times a year for a Tier III offense. MCL 28.725a(3)(c). Offenders are also required to report in person only when they change their names, residences, or places of employment, or discontinue employment, or enroll as a student with institutions of higher education or discontinue such enrollment. Not all information supplied by the offender is provided to the public, but solely to law enforcement. MCL 28.728. These provisions clearly effectuate the purpose of the registry "to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger." MCL 28.721a.

When *Betts* found that the 2011 SORA was like banishment and was like parole, it relied primarily on the student safety zones, which it referred to as exclusion zones, (*Betts*, 507 Mich at 550, 552-553) which have since been repealed. *Betts* also referred to the periodic in-person trips to law enforcement, but this requirement has been substantially changed by the 2021 amendments allowing

²⁶ Defendant argues the fact that now email addresses could be on the public registry supports his conclusion that the information provided equates to shaming. However, email addresses and internet identifiers are not on the public registry. Federal law also prohibits email addresses from being included on a public registry (34 USC §20916(c); §20920(b)(4)) and SORNA links to local SORAs. And "[e]ach jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this title" (34 USC 20912(a)) or risks losing federal funds.

many more updates by means other than in-person appearances. MCL 28.725.

Doe v Smith rejected the argument that registration was like probation or parole because offenders did not have to ask for permission to engage in certain activities, they merely had to report that they did them. *Smith*, 538 US at 101. The Court noted that, unlike violations of probation or parole, for any violation of ASORA offenders must be exposed to future charges, with due process for those charges, before they face any loss of liberty. *Id.* at 102.

Also, unlike supervised release, registration is not imposed either in lieu of incarceration or fines—our society’s preferred modes of punishment. While parole may have “reporting” in common in the abstract, this is only one aspect of many conditions attached to these punishments. Individuals on parole can be placed on a specialized alternative incarceration unit (MCL 791.234a), must provide a DNA sample (MCL 791.233d(1)), may be housed in a community corrections center or residential home (MCL 791.236(11)), may be subject to electronic monitoring (MCL 791.236(15)(18)), may be required to stay away from certain people (MCL 791.236(16)), and must consent to searches upon demand by an officer or parole officer. MCL 791.236(19).

These provisions distinguish parole from a registration system. Also, unlike parole, probation, or the length of imprisonment, the requirement to register as a sex offender is beyond the control of the trial court, instead it is a legal obligation, predetermined by the legislature, placed on those convicted of particular crimes, and is an automatic operation of statute intended to act not as a criminal punishment but as a prophylactic civil remedy. Registrants do not need to obtain consent before making changes in their lives, they just must report them, and for many changes, not in-person.

4. Active notice of truthful information does not render registration punitive.

The federal SORNA has not been deemed punitive even when, unlike in Michigan, SORNA provides that officials distribute notice of an offender’s status to “each school and public housing agency” in the area where the offender resides. See

34 USC 20923(b)(2). See also *Anderson v Holder*, 647 F3d at 1173 (indicating, “Although we do not doubt that active notification makes SORA more burdensome to sex offenders than the passive notification scheme in *Smith*, ‘[t]he excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy.’ *Id.* at 105. Rather, we ask ‘whether the regulatory means chosen are reasonable in light of the nonpunitive objective.’ *Id.* The effectiveness of registration depends on making vulnerable people aware of the presence of sex offenders in their communities. Empowering the police to engage in active notification where they think appropriate is not excessive in view of this legitimate regulatory goal.”)

5. Inability to find housing or employment is due to a registrant’s conviction.

Any inability to find housing or employment is due to a registrant’s conviction. As stated by the Eleventh Circuit when responding to the claim that difficulty finding housing or employment amounted to an affirmative disability:

The Supreme Court in *Doe* recognized that requiring sex offenders to register could make it more difficult for them to obtain housing or employment, but the Court rejected the idea that those difficulties were due primarily to registration. “Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act’s registration and dissemination provisions, but from the fact of conviction, already a matter of public record.” *Id.* at 101, 123 S Ct at 1151. Landlords and employers conducting background checks could discover sex offense convictions even without a registry. *Id.* at 100, 123 S Ct at 1151. For those reasons, the Court found Alaska’s registry to impose only a minor and indirect disability or restraint on adult sex offenders. See *id.* at 102, 123 S.Ct. at 1152.

United States v W.B.H., 664 F3d at 857.

6. The mere fact that SORA, like SORNA and ASORA, imposes penalties for failure to comply doesn’t equate SORA to a traditional type of punishment.

Defendant alludes to the fact that there are criminal penalties within the Act

as a factor which defendant asserts converts Michigan's SORA to a punitive statute. However, the Alaska statute analyzed by the United States Supreme Court in *Smith*, also contained criminal penalties, including prosecution for a felony, for noncompliance (1998 AK ALS 106) and this did not convert the statute into one with a punitive effect. For the federal SORNA, the failure to register is a ten-year felony. 18 USC §2250(a)(3). And regulatory systems generally include criminal penalties for the failure to comply with the scheme. As stated by *Smith*, "When a State sets up a regulatory scheme, it is logical to provide those persons subject to it with clear and unambiguous notice of the requirements and the penalties for noncompliance." *Smith*, 538 US at 96.

C. Recent statistics bear out the United States Supreme Court's conclusions concerning re-offense—and if the best defendant can do is point to a dispute among statisticians, he has not met his burden by the clearest proof.

Whether the 2021 SORA has a rational connection to a nonpunitive purpose is the most important factor in the overall punishment evaluation. *Smith v Doe*, 538 US at 103; *Does 1-7 v Abbott*, 945 F3d 307, 314 (CA 5, 2019); *McGuire v Marshall*, 50 F4th 986, 1013 (CA 11, 2022); *Doe v Settle*, 24 F4th 932, 949 (CA 4, 2022). This Court in *Lymon* found that "the inclusion of non-sexual offenders in SORA is rationally related to SORA's purpose of protecting the public against persons who pose a 'potential serious menace and danger' to the community." *Lymon*, ___Mich at ___; slip op at 24 (indicating, "legislatures around the country (including our federal Congress) have recognized a nexus between certain non-sexual offenses like unlawful imprisonment of a minor and sexual assault.")

And the 2021 SORA is not excessive with respect to this nonpunitive purpose. The analysis in this case which deals with Tier III sexual offenders who must register for life should not be different from the analysis in *Kardasz*. if the best defendant can do is point to a dispute amongst statisticians, he has failed to demonstrate *by the clearest proof*, that the legislative judgment should be disregarded. See *Doe v Settle*, 24 F4th at 949 ("This inquiry is reminiscent of the rational basis test we have already considered; the Virginia legislature is due our

deference, and we may only question their work in rare circumstances.”) It cannot be forgotten that the Michigan Legislature, in passing the 2021 legislation, considered the criticisms by the federal court, some of the same arguments as currently made by defendant. Senate Legislative Analysis, HB 5679 (December 9, 2020) 20c-21c. If there is a dispute, it is the legislature which is in the unique position to resolve of it. *Doe v Dep’t of Social Servs*, 439 Mich 650, 681; 487 NW2d 166 (1992); *People v Kelly*, 440 Mich 485, 493-495; 487 NW2d 404 (1992); Cf *United States v Kebodeaux*, 570 US 387, 396; 133 S Ct 2496; 186 L Ed 2d 540 (2013).

The regulatory means chosen by Michigan are also reasonable considering the non-punitive objective. *Smith* 538 US at 105. As stated by *Smith*, the legislature could reasonably conclude that “[t]he risk of recidivism posed by sex offenders is ‘frightening and high.’” *Smith*, 538 US at 103, quoting *McKune v Lile*, 536 US 24, 34; 122 S Ct 2017; 153 L Ed 2d 47 (2002). However, as stated by this Court in *People v Betts*, the Legislature doesn’t even have to justify this standard, “. . .the Michigan Legislature did not depend on this pronouncement of the United States Supreme Court in enacting SORA, and its statement regarding sex offenders’ risk of recidivism is appreciably different. See MCL 28.721a (stating that sex offenders ‘pose [] a *potential serious* menace and danger to the health, safety, moral and welfare of the people.’” *Betts*, 507 Mich at 559 n 19 (emphasis original). Michigan’s SORA requirements rationally advance those purposes. Registration assists authorities in keeping track of offenders, alerts the public to their presence and helps parents make informed decisions regarding child-care and victimization prevention.

Our own sex offender registry supports the high rate of recidivism by sex offenders. As seen by an affidavit filed in *People v Kardasz* in this Court, by the amicus, Michigan State Police—there were 43,995 registrants on the public and nonpublic registry in 2023. 83% of the registrants committed sexual offenses against children under the age of 18. 38% were against children under the age of 13. And of the approximate 43,995 registrants, ***almost 12% or 5,268 not only were accused and re-arrested but also were convicted of a subsequent registrable***

offense.²⁷ *Id.* 24c-25c. Many of the statistics which measure recidivism—which means that an individual must have been reconvicted—reveal only the tip of the iceberg, since there are so many more re-offenses than re-convictions.

The United States Supreme Court in *Smith v Doe* cited studies conducted by the United States Department of Justice’s Bureau of Justice Statistics concerning sex offenders and recidivism of prisoners finding that “[w]hen convicted sex offenders re-enter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.” *Smith*, 538 US at 103. *Smith* found that the duration of the reporting requirements was not excessive noting “[e]mpirical research on child molesters, for instance, has shown that, ‘contrary to conventional wisdom, most re-offenses do not occur within the first several years after release,’ but may occur ‘as late as 20 years following release.’ R. Prentky, R. Knight, and A. Lee, U.S. Dep’t of Justice, National Institute of Justice, Child Sexual Molestation: Research Issues 14 (1997).” *Smith*, 538 US at 104. See also *Kebodeaux*, 570 US at 395-396 (indicating, even when noting conflicting studies, “There is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals. See Dep’t. of Justice, Bureau of Justice Statistics, P. Langan, E. Schmitt, & M. Durose, *Recidivism of Sex Offenders Released in 1994*, p 1 (Nov. 2003)(reporting that compared to non-sex offenders released sex offenders were four times more likely to be rearrested for a sex crime. . . .)”; *Conn Dep’t of Pub Safety v Doe*, 538 US 1, 4; 123 S Ct 1160; 155 L Ed 2d 98 (2003)(indicating, “Sex offenders are a serious threat in this Nation . . . when convicted sex offenders reenter society, they are much more likely than any other type of offender to be arrested for a new rape or sex assault.”)(citation omitted).

Though this Court in *Lymon* noted that the studies indicate that the 2021’s SORA’s efficacy is unclear, it is defendant’s obligation to establish his case by the

²⁷ As Judge Goldsmith even noted, “there is undisputed evidence showing that SORN laws promote the goal of public safety, at least by deterring first-time offenders, although there is also mixed evidence regarding whether they reduce recidivism. SORN laws also serve the goal of providing the public with information they can use to protect themselves.” *Does III*, p 37.

clearest proof. And *Smith's* conclusions are confirmed by similar sources relied on by the United States Supreme Court in *Smith*. These studies show that sexual recidivism—which again requires actual reconviction—increases significantly over time. The Department of Justice's SMART office noted a study which found that sexual recidivism rates range from 14 percent after 5 years, 20 percent at 10 years, and 24 percent after 15 years. R. Przybylski, Dep't. of Justice, Office of Justice Programs, Sex Offender Management Assessment and Planning Initiative, *Recidivism of Adult Offenders*, (July, 2015), smart.ojp.gov/SOMAPI-brief-recidivism (accessed February 3, 2024) p 2.²⁸ Another study noted that “some rapists remained at risk to offend long after their discharge.” Based on the 25-year follow-up period, “the researchers found a sexual recidivism rate of 39 percent and a recidivism rate for any charge of 75 percent” for rapists. p 2-3. For child sex offenders, “[b]ased on a 25-year followup period, the researchers found a sexual recidivism rate of 52 percent.” p 3. One of the interpretations of the data was that “first-time recidivism may occur for some child molesters 20 or more years after criminal justice intervention, and that recidivism estimates based on shorter followup periods are likely to underestimate the lifetime risk of child molester reoffending.” SOMA, *Recidivism of Adult Sexual Offenders*, p 3. And as stated by the declaration of Dr. Goodman-Williams, filed in support of the Amicus-Michigan State Police in *People v Kardasz*, whose study revolved around sexual assault victimization and perpetration, the rates of serial sexual offending based solely on criminal history records substantially underrepresent the frequency serial sexual offending, and that research that includes DNA linkages has found serial offending rates of 35% to 39%. p 5-6. 28c-29c.

The Justice Department report also noted that “there is widespread recognition that the officially recorded recidivism rates of sexual offenders are a diluted measure of reoffending.” SORA, *Recidivism of Adult Sexual Offenders* p 1. Another United States Department of Justice Report found that only 21.4% of rapes

²⁸ The entire assessment is available on the website.

or sexual assaults of victims were reported. Dep't. of Justice, Bureau of Statistics, A. Thompson, S. Tapp, *Criminal Victimization-2022* p 6. www.bjs.ojp.gov (accessed March 3, 2024). This can be compared to offenses like murder which are reported. Other studies have found that 70% of *child* sexual assaults are not reported to the police and 86% of sex crimes against adolescents go unreported to the police or any other authority. *Belleau v Wall*, 811 F3d 929, 933 (CA 7, 2016), citing David Finkelhor, Heather Hammer, & Andrea J. Sedlak, "Sexually Assaulted Children: National Estimates & Characteristics," *Juvenile Justice Bulletin* 8 (August 2008); U.S. Dep't. of Justice, Office of Justice Programs, "Youth Victimization: Prevalence and Implications" 6 (April 2003); and Candace Kruttschnitt, William D. Kalsbeek & Carol C. House (eds.), National Research Council, *Estimating the Incidence of Rape and Sexual Assault* 36-38 (2014).

As stated by the Seventh Circuit, after noting that these numbers didn't take account of the very high rate of underreporting of sex offenses, "If only 20 percent of child molestations result in an arrest, the 3 percent recidivism figure implies that as many as 15 percent of child molesters released from prison molest again. That's a high rate when one considers the heavy punishment they face if caught recidivating, and thus is further evidence of the compulsive nature of their criminal activity." *Belleau v Wall*, 811 F3d at 934. And as stated by the declaration of Dr. Goodman-Williams, filed in support of the Amicus-Michigan State Police in *People v Kardasz*, that not only do the vast majority of victims (between 75% and 85%) not report their sexual assaults to the police (p 4) but attrition throughout the criminal legal system meant that few reported sexual assaults (approximately 6.5% to 14%) result in a conviction, many as a result of plea agreements which may not reflect the sexual nature of the crime. p 5. 27c-28c.

The Eleventh Circuit rejected the claim that older individuals are not a risk particularly when the victims are minors:

- For example, *United States v Seljan*, 547 F.3d 993 (9th Cir. 2008) (en banc), involved a man in his mid-80s who was arrested on his way to the Philippines to "sexually educate" some children by engaging in sexual relations with them. *Id.* at 997-

98. He had been to the Philippines 43 times during the previous 11 years, when he was between the ages of approximately 74 and 85, in order to have sex with children there. *See id.* He told agents after he was arrested that he had been “sexually educating” children ages 8 to 13 for about 20 years, which means that he started when he was around 65 years old. *See id.* at 998. He had bragged about doing it and had a scrapbook and video collection of child pornography. *Id.* at 997.

- *see also* [*United States v*] *Zastrow*, 534 F3d [854] 855-57 [(CA 8, 2008)] (affirming conviction and 20-year sentence of a 73-year-old man who enticed or coerced an 8-year-old girl into sexually explicit conduct which he photographed);
- *United States v MacEwan*, 445 F3d 237, 240 (3d Cir. 2006) (defendant had repeatedly violated federal laws prohibiting the possession, distribution, and receipt of child pornography when he was between the ages of approximately 66 and 70);
- *Weiler v Purkett*, 104 F3d 149, 152 (8th Cir. 1997) (plaintiff, a state prison inmate, had sodomized and sexually abused a female child for 3 years, beginning when the girl was 7 and the defendant was approximately 70).
- The facts of those cases show that the risk of a male sex offender sexually abusing children after he reaches the age of 65 is anything but “academic.”
- Studies and reports in this field are consistent with what judicial decisions show: pedophiles who have sexually abused children are a threat to continue doing so, and age does not remove the threat. *See* Mark Motivans & Tracey Kyckelhahn, *Federal Prosecution of Child Sex Exploitation Offenders 2006*, Bureau Just. Stat. Bull., Dec. 2007, at 1, 5 tbl.6 (reporting that 7.3% of offenders arrested for sexual exploitation of children, including sex abuse, child pornography, and sex transportation, are over the age of 60);
- *see also* [Ryan C.W.] Hall & [Richard C.W.] Hall, [*A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 May Clinic Proc, 457] 457-58 [(2007)]
- “The course of pedophilia is usually long term. In a study that

examined the relationship between age and types of sexual crimes, Dickey et al found that up to 44% of pedophiles in their sample of 168 sex offenders were in the older adult age range (age 40-70 years). When compared with rapists and sexual sadists, pedophiles comprise 60% of all older offenders, indicating that pedophiles offend in their later years at a greater rate than other sexual offenders.” (footnotes omitted)). Moreover, as the government points out, the photos and videos show that some of the worst of Irey's acts do not require sexual potency. All of this is consistent with Dr. Shaw's testimony that: “You can't be cured” of pedophilia, and “Cures, you can forget about it.”

United States v Irey, 612 F3d 1160, 1213-1214 (CA 11, 2010).²⁹ See also Hall, “‘Hockey doc’ sentenced to at least next decade in prison for sexually assaulting players” Detroit Free Press (April 29, 2025)(indicating that Dr. Zvi Levran, 68, pleaded no contest to multiple sex charges involving multiple victims, many of which were teenage boys, whom Levran met while providing medical assistance when he served youth hockey teams over the last 20 years.) The Eleventh Circuit, indicated that the threat of sexual recidivism is “appalling.” *Irey*, 612 F3d at 1214-1215. Accord *United States v Pabon*, 819 F3d 26, 31 (CA 1, 2016); see also *State v Eighth Judicial District Court*, 129 Nev 492, 517-518; 306 P3d 369 (2013) (upholding registration noting studies regarding recidivism rates of sex offenders at 13%). This underreporting was also noted by Justice Zahra in *Lymon*.³⁰ And even if

²⁹ When you put in a simple LEXIS search, “grandfather” and “criminal sexual conduct,” 130 cases are listed.

³⁰ As stated by Justice Zahra:

Despite the trauma and serious long-term impact of sexual abuse, it is extraordinarily underreported. See, e.g., U.S. Department of Justice, *Criminal Victimization*, 2022, NCJ 307089 (September 2023), p 6 (explaining that between 2021 and 2022, around 22% of rapes and sexual assaults were reported to police, the lowest of any category of violent crime and lower than the average for violent crime at 42% to 45%), available at <<https://bjs.ojp.gov/document/cv22.pdf> > (accessed June 14, 2023) [<https://perma.cc/7U2N-ARUK>]; U.S. Department of Justice, *Criminal Victimization*, 2018, NCJ 253043 (September 2019), (FOOTNOTE CONT'D NEXT PAGE)

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p 8 (finding the same results for 2017 and 2018, with a reporting rate of 25% to 40% for rapes and sexual assaults, which was below all other categories of violent crime, and the average for violent crime was 43% to 45%), available at <<https://bjs.ojp.gov/content/pub/pdf/cv18.pdf> > (accessed June 14, 2023) [<https://perma.cc/Z4BF-YCHD>]. Given the highly personal nature of sexual assault, the fact that most perpetrators are known to or family of the victim, and the low rates of prosecutorial success, many victims choose not to come forward, relive their trauma, and testify in a public trial against their assailant. See The Centers for Disease Control and Prevention, *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011* (September 5, 2014), p 7 (finding that the vast majority of sexual assailants are sexual partners, family, or friends; only 11% to 15% of rapists are strangers), available at <<https://www.cdc.gov/mmwr/pdf/ss/ss6308.pdf> > (accessed June 14, 2024) [<https://perma.cc/A5CR-9PVA>]. Even when sexual abuse is reported to the police, the percentage of cases brought forward that lead to arrests and charges is very low. See, e.g., U.S. Department of Justice, *Uniform Crime Report: Crime in the United States, 2018—Offenses Cleared* (2019), p 2 (stating that reported sexual crimes, including rape and sexual assault, have some of the lowest rates of clearance to charge, sitting at 33% and below the 46% average for violent crimes), available at <<https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/clearances.pdf> > (accessed June 14, 2024) [<https://perma.cc/297C-XF3J>]. And when reporting is made and charges are actually brought, the conviction rates are very low. See U.S. Department of Justice, *Felony Defendants in Large Urban Counties, 2009—Statistical Tables*, NCJ 243777 (December 2013), p 22 (“The probability that a defendant would eventually be convicted of the original felony charge” was the “lowest . . . for those charged with rape (35%) and assault (33%).”), available at <<https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf> > (accessed June 14, 2024) [<https://perma.cc/9RBM-VWYW>]. Very similar statistics exist for child abuse and child sexual abuse. Gilbert et al, *Burden and Consequences of Child Maltreatment in High-Income Countries*, 373 *Lancet* 68, 68 (January 2009) (indicating that “less than a tenth” of child abuse is reported); U.S. Department of Justice, *Youth Victimization: Prevalence and Implications*, NCJ 194972 (April 2003), p ii (finding that 65% of physical abuse and 86% of sexual abuse of

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there is a conflict in the studies, the unique injury imposed by sexual offenses is different in kind from many other offenses. As cogently stated by the Seventh Circuit, “Readers of this opinion who are parents of young children should ask themselves whether they should worry that there are people in their community who have ‘only’ a 16 percent or an 8 percent probability of molesting young children—bearing in mind the lifelong psychological scars that such molestation frequently inflicts.” *Belleau v Wall*, 811 F 3d at 933-934. The dissent in *Lymon* also noted the high rate of recidivism of sex offenders.³¹

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children is not reported), available at <<https://www.ojp.gov/pdffiles1/nij/194972.pdf>> (accessed June 14, 2024) [<https://perma.cc/V25N-BR4W>].

Given the high likelihood that offenders will not be held accountable and the lifelong damage resulting from sexual and child abuse, it is apparent that the government has extraordinary interests in administering systems to ensure that the public has the information and ability to take precautions so as to prevent those offenses from occurring.

Lymon, ___ Mich at ___ (ZAHRA, J., dissenting); slip op at 4, n 4.

³¹ As listed by the dissent:

U.S. Department of Justice, *Sex Offender Management Assessment and Planning Initiative* (March 2017), p 122 (concluding that upward of four times as many registerable offenders committed forms of sexual abuse than the general offender population) (collecting sources), available at <https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/so_mapi_full_report.pdf> (accessed June 21, 2024) [<https://perma.cc/MFM8-4MFJ>]; see, e.g., Solicitor General, Government of Canada, *Research Summary: Corrections Research and Development—Child Molester Recidivism* (July 1996), p 1 (“[C]hild molesters had much higher rates of sexual recidivism (35%) than did the nonsexual criminal group (1.5%).”), available at <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/chld-mlstr/chld-mlstr-eng.pdf>> (accessed June 21, 2024) [<https://perma.cc/54DT-D6MK>].

The recidivism rate of committing other registrable offenses such as
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As to studies not conducted by the government that question the efficacy of the registries themselves, the U.S. Department of Justice and other federal agencies have noted the limited nature of research in this arena. See U.S. DOJ, “Sex Offender Management Assessment and Planning Initiative,” March 2017, p. 202 (“research on the effectiveness of SORN [sex offender registration and notification] remains relatively limited and findings from the studies are somewhat *inconclusive*. . . . An arguable *lack of sufficient scientific rigor* may further cloud the import of studies in this area.”) (emphasis added);³² Office of Justice Programs, “Sex Offender Registration and Notification Act—Summary and Assessment of Research,” April 2022, p 23 (“as discussed throughout this report, the studies reviewed all contained *serious methodological shortcomings* in their research designs and data analyses.”) (emphasis added).³³ The studies relied upon by *Smith* and cited in support of the People arise from disinterested federal authorities.³⁴ And again, many studies

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sexual abuse often ranges from around 12% to 20%. *Sex Offender Management Assessment and Planning Initiative*, pp 118-119 (collecting sources). The rate of re-perpetration of child abuse is very similar. See, e.g., Potter et al, *Rates and Predictors of Child Maltreatment Re-Perpetration against New Victims and Prior Victims*, 123 Child Abuse & Neglect, Article No. 105419 (2022), pp 7 n 6, 9 (finding a re-perpetration rate of 20%, which is likely a “considerable underestimate”).

Id. at 25, n 84 (ZAHRA, J., dissenting).

³² <https://smart.ojp.gov/somapi/initiative-home> (last accessed March 3, 2025)

³³ <https://www.ojp.gov/pdffiles1/smart/305231.pdf> (last accessed March 3, 2025.)

³⁴ Though defendant claims that registries not only do not affect recidivism, but that there is a scientific consensus on this premise, this is hardly true. As stated by the Library of Congress in their study in conjunction with the SMART office, “Research discussed financial costs associated with these laws and asserted that SORN laws have a low likelihood of impacting recidivism. However, all identified studies within this category contained several methodological shortcomings, including small sample sizes and attempts to draw conclusions from those limited samples in an environment where SORN laws vary across jurisdictions.” See fn 33, p 2. This included a study conducted by one of the authors, Elizabeth Letourneau, an expert heavily relied upon by the ACLU brief as well as the Scholars’ Brief filed

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evaluate recidivism—which requires a conviction, which is a small percentage of actual re-offense levels.

There are unique ramifications of sexual assault. “Rape victims are at risk for sexually transmitted diseases (STDs), pregnancy, posttraumatic stress disorder (PTSD), depression, substance abuse, suicidal ideation, repeated sexual victimization, and physical injury” Allen, *Article: Rape Messaging*, 87 Fordham L Rev, 1033, 1040-1042 (2018) (citation omitted). The risk of PTSD is exceedingly high for survivors of sex crimes. See also Purdue and Vars, *Articles: Time to Heal: Trauma’s Impact on Rape and Sexual Assault Statutes of Limitations*, 11 Tex A&M L Rev, 125, 137 (2023)(indicating, “Survivors of sexual assault are very likely to develop posttraumatic stress disorder (PTSD), and at rates much higher than survivors of other traumas. Research shows that a breathtaking 94% of women who are raped experience symptoms of PTSD during the two weeks following the rape, and 30% of women report PTSD symptoms nine months after the rape. The National Women's Study found the lifetime prevalence of PTSD in rape and sexual assault survivors to be 32% and 30.8%, as compared to 9.4% in victims of trauma

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in *People v Kardasz*. The Library of Congress assessment gave her study a “1 out of 5” rating for integrity of its findings. The Scholars’ Brief filed in *Kardasz* also heavily relied on studies by Kristen Zgoba, Richard Tewksbury, and Jill Levenson. The Library of Congress rated some of their studies, 1 out of 5, for integrity of their findings. p 10. Also the Center for Missing and Exploited Children, vigorously disputed the conclusions that led to the proposed ALI Model Penal Code, Article 213 and noted its opposition was based on “more than 90 million reports of child sexual exploitation, 103,000 reports of child sex trafficking and 3,432 reports of children abducted by non-familial members that we have worked on since 1984.” May 21, 2021 Letter, NCMEC, p 3-4 [https://www.missingkids.org/content/dam/missingkids/pdfs/NCMEC-Letter-to-ALI-\(5-27-21\).pdf](https://www.missingkids.org/content/dam/missingkids/pdfs/NCMEC-Letter-to-ALI-(5-27-21).pdf) (accessed March 10, 2025). And the plaintiffs in *Doe III* acknowledged that these claims concerning the efficacy of the registries had been presented to the legislature before the 2021 SORA was passed. *Doe III*, p 25. Therefore, it should be ultimately a question for the legislature to resolve. (Amicus notes that the ACLU, also amici in *People v Kardasz*, previously expressed an opinion of neutrality on the 2011 amendments to SORA which included the recapture provision. House Legislative Analysis, SB 188 & 189 (March 22, 2011)). 56c.

not related to crime (e.g., victims of natural disasters or car accidents).) The PTSD Alliance estimated the risk of developing PTSD after a traumatic event was 49% for rape, 31% for severe beating or physical assault, 23.7% for other sexual assault, 15.4% for shooting or stabbing, and 7.3% for witnessing a murder or assault.”); Dworkin, Memon, Bystrynski, and Allen, *Sexual Assault Victimization and Psychopathology: A Review and Meta-Analysis*, *Clinical Psychological Review*, 1, 2, 27 (2017) <https://www.sciencedirect.com/science/article/abs/pii/S0272735817300880?via%3Dihub> (accessed March 4, 2025)(indicating that after 40 years of research, “S[exual] A[ssault] was associated with increased risk for all forms of psychopathology assessed, and stronger associations were observed for posttraumatic stress and suicidality. . .Indeed S[exual] A[ssault] appears to have a more significant impact on mental health than other forms of trauma.”)

A 2022 study found that the relationship between sexual violence and suicide created an approximately ten times higher rate of suicide attempt for victims of these types of crimes. See Carlssos, Owen and Rajan, *Sexual Violence, Mental Health, and Suicidality—Results from a Survey in Cooperation with Idea-Driven Organizations and their Social Media Platform Followers*. *Health Science Reports* (2022 Dec 2; 6(1);e973) onlinelibrary.wiley.com/doi/epdf/10.1002/hsr2.973 (accessed March 4, 2025) (“Of the participants exposed to penetrating sexual violence, 49% states that they had or had been diagnosed with depression, compared with 16% in the group not exposed to sexual violence. Similar findings were found for anxiety.”) And “people who have been sexually assaulted are more likely to use drugs than the general public” (Rape, Abuse & Incest National Network (RAINN), *Victims of Sexual Violence: Statistics*, <https://rainn.org/statistics/victims-sexual-violence> (accessed March 4, 2025), and “[s]exual violence [] affects victims’ relationship with their family, friends, and co-workers.” *Id.* See also Peterson, Cora et al *Lifetime Economic Burden of Rape Among U.S. Adults*, *American Journal of Preventive Medicine*, Volume 52, Issue 6, 691-701 <https://pmc.ncbi.nlm.nih.gov/articles/PMC5438753/> (accessed March 4,

2025)(indicating that sexual assault survivors are 3.4 times more likely to use marihuana, six times more likely to use cocaine, and 10 times more likely to use other major drugs.)

Though defense counsel discusses the economic ramifications to registrants, the economic ramifications of rape to victims—the innocent party as opposed to the party who caused the harm—are severe. As one author stated, “The estimated lifetime cost of rape [i]s \$122,461 per victim” per survivor or a population economic burden of nearly \$3.1 trillion over survivors’ lifetimes based on data indicating that greater than 25 million U.S. have been raped. Allen, 87 Fordham L Rev, at 1040-1042; Peterson, American Journal of Preventive Medicine, 691-701

- In addition to medical costs, rape victims take time off from work, report diminished performance, job loss, and inability to obtain work. Thus, rape disrupts employment prospects for victims. Researchers have linked the employment disruption to the toll that rape takes on mental health. Rape victims report diminished performance at work because of trouble concentrating due to anxiety, PTSD, and dissociation. The combination of taking time off from work and diminished performance often leads to job loss.
- After losing their job, rape victims are often unable to find another job. One rape advocate explained that many rape victims have “been so traumatized that they just can't function well at work.” She continued, “There is fear, there is embarrassment, there is shame, there's all these negative things that you can think of, that they can't mentally go back to work.” Thus, the experience of rape will often cause a permanent trajectory shift that negatively impacts income, occupation, and economic stability over the course of the victim's life. Unsurprisingly, studies have found that rape victims were more than twice as likely to be unemployed than women who had not experienced a sexual assault.
- Thus, experiencing rape has long-term health and economic consequences for the victim that persist long after the rape has occurred.

Rape Messaging, 87 Fordham L Rev, at 1040-1042.

These ramifications don’t even encompass the negative ramifications of

sexual assault and molestation on children. And the high percentage of Tier III offenses are sexual offenses against child victims under the age of 13. “C[hildhood] S[exual] A[ssault] significantly increases the likelihood of depression in adulthood.” Akinyemi et al, *The Long-Term Impact of Childhood Sexual Assault on Depression and Self-Reported Mental and Physical Health*, *Frontiers in Psychology*, (January 25, 2025) p 1. <https://www.frontiersin.org/journals/psychiatry/articles/10.3389/fpsyt.2024.1528914/full> (accessed March 4, 2025). Also “children who experience CSA are at increased risk of experiencing poorer mental health outcomes such as low self esteem . . . depression . . . dissociation . . . and a history of suicide attempted. . . Children who experience CSA are also at increased risk of engaging in risky health behaviors such as alcohol and substance abuse. . . and risky sexual behaviors.” Ports, Ford and Merrick, *Adverse Childhood Experiences and Sexual Victimization in Adulthood*, *Child Abuse and Neglect*, Vol 51, p 313-322 (January 2016) <https://www.sciencedirect.com/science/article/abs/pii/S0145213415003154?via%3Dihub> (accessed March 4, 2025) There are also long-term physical health consequences of Childhood Sexual Assault. Irish, Kobayashi, Delahanty, *Long-term Physical Health Consequences of Childhood Sexual Abuse: A Meta-Analytic Review*, *Journal of Pediatric Psychology*, Vol 35, Issue 5, p 45-461 (June 2010) <https://academic.oup.com/jpepsy/article-abstract/35/5/450/892172?redirectedFrom=fulltext> (accessed March 4, 2025).

And, if the risk of recidivism is frightening and high or risk of re-offense even potentially serious, it is reasonable for the State to determine that providing extensive information regarding the offender, keeps the public aware of his or her address and law enforcement aware of where the offender is living and working which is reasonably geared to ensure public safety.³⁵ It is also reasonable to classify

³⁵ While the numbers of searches that occur for Michigan’s registry is not tabulated, for the federal registry that number is maintained, for which there were more than
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offenders based on the severity of their offense of conviction, rather than conducting individualized risk assessments. As stated *supra*, the United States Supreme Court has squarely held that the constitution, “does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences.” *Smith*, 538 US at 103. See also *WBH*, 664 F3d at 859-860.

Whether the effect of the SORA is excessive is “not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable considering the nonpunitive objective.” *Smith*, 538 US at 105. Even though there may be conflicting evidence concerning the rate of re-offense, the legislature has the power to weigh the evidence and to reach a rational conclusion, for example, that safety needs justify the registration requirements. *Doe v Dep’t of Social Servs*, 439 Mich at 681; *Kirby*, 440 Mich at 493-495. Cf *Kebodeaux*, 570 US at 396. And, a regulatory regime is not punitive, “simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.” *Smith*, 538 US at 102-103. And the legislature recently re-evaluated SORA and made changes after reviewing the same concerns made by defendant in this case. Defendant has failed to show by the clearest proof that the legislature’s means were not reasonable.

If this court finds that the 2021 SORA amounts to punishment on cruel and unusual punishment grounds in this case (unless this Court limited its ruling to an as-applied challenge to the recapture provision) then this conclusion would assuredly lay the groundwork for a future challenge for defendants on ex post facto grounds. If an ex post facto challenge were decided adversely to the People, this could result in more than 30,000 offenders coming off the registry, about two-thirds

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115 million searches that occurred for the entire country in 2024, an almost tenfold increase since 2009. <https://www.nsopw.gov/about-nsopw/historical-search-data> (last accessed March 4, 2025.)

of the registry.³⁶

Defendant has consequently failed to show by the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the States' intention to deem it civil.

D. Defendant cannot prevail on an as-applied challenge since he doesn't have to register at all—or if he would, the likelihood of registration is so remote that this potential cannot be sufficiently onerous to amount to punishment.

However, if this Court considers defendant's as-applied challenge, the result in this case is not dependent on *People v Kardasz*. As stated in Argument I, defendant does not have to register in his home state, and he has indicated that he does not intend to become a temporary much less permanent resident of Michigan. If this is true, defendant will never have to register and the likelihood he would have to do so, is so remote that this potential cannot be sufficiently onerous to be considered punishment. Even if he would have to register, which would most likely be as a temporary resident, registration would only include minimal requirements. Defendant's case can be resolved on as-applied grounds and especially in defendant's case, he could not show by the clearest proof that the speculative potential of registration could be considered punishment.

VI. Lifetime registration for a Tier III sex offender is not cruel and/or unusual punishment.

Standard of Review and Issue Preservation:

Issues of constitutional law are subject to review de novo. *Dep't of Health & Human Servs v Rasmer*, 501 Mich at 30. Defendant raised this claim in a timely motion to correct an invalid sentence in the lower court.

³⁶ Amicus acknowledges that the federal district court will enter an injunction in July 2025 to this effect, but order will be appealed by the Michigan Attorney General, in part as inconsistent with Sixth Circuit precedent, and the attorney general is requesting a stay. (Amicus notes that the Michigan Attorney General is also appealing the aspect of opinion and order which enjoined the requirement concerning registration for out-of-state offenses, which is not being challenged in this case on appeal.)

Discussion:

However, even if this Court determined that registration did equate to punishment (but not ex post facto punishment since defendant was placed on notice of the consequences of his actions before he committed the crime), lifetime registration for a violent sex offender who attempted to rape his victim at knifepoint was not cruel or unusual.

Because *Smith v Doe* determined that registration was not punishment at all and all federal circuits that have found the same when considering SORNA, and this Court has determined that the Michigan Constitution provides more protection than the United States Constitution (*Lymon*, ___ Mich at ___; slip op at 9, n 7), it seems reasonable that the question in this case concerns whether lifetime registration amounts to cruel or unusual punishment under the Michigan Constitution.³⁷

Defendant seems to intermix facial and as-applied challenges. To support a facial challenge defendant must establish that “no set of circumstances exists under which the Act would be valid.” *United States v Rahimi*, 602 US at 680, 693; 144 S Ct 1889; 219 L Ed 2d 351 (2024); *Bonner v City of Brighton*, 495 Mich 209, 223; 848 NW2d 380 (2014). An as-applied constitutional challenge is based upon the particular facts surrounding defendant's conviction and sentence. *Rahimi*, 602 US at 713; *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11 n 20; 740 NW2d 444 (2007)

Most if not all individuals who must register due to the recapture provision are Tier III offenders, individuals who commit the most serious sex offenses in the state of Michigan including recidivist sex offenders, offenders whose victims are under the age of 13, or violent sex offenders like defendant. See MCL 28.722u,v. Tier I offenders who committed their listed offenses prior to 1994 normally would not have to register under the recapture provision because the registration period is

³⁷ Michigan's Constitution precludes cruel *or* unusual punishment (Const 1963 art 1 §16) as opposed to the Eighth Amendment (US Const, Am VIII) which prevents cruel *and* unusual punishment.

only 15 years. MCL 28.725(11). Tier II offenders who committed their listed offenses before 1994 ordinarily either would not have to register under the recapture provision or may have to register solely for a couple years since the total registration time could only be twenty-five years (though the time runs after release from incarceration). (MCL 28.725(12)). MCL 28.725(15) states:

(15) For an individual who was previously convicted of a listed offense for which he or she was not required to register under this act but who is convicted of any felony on or after July 1, 2011, any period of time that he or she was not incarcerated for that listed offense or that other felony and was not civilly committed counts toward satisfying the registration period for that listed offense as described in this section. If those periods equal or exceed the registration period described in this section, the individual has satisfied his or her registration period for the listed offense and is not required to register under this act. If those periods are less than the registration period described in this section for that listed offense, the individual shall comply with this section for the period of time remaining.

In this case defendant was a Tier III offender. Defendant's as-applied challenge is not particularly compelling since most likely he will not have to register at all. See Issue I.

A. The offense is egregious-attempted rape at knifepoint.

To determine whether a punishment is cruel or unusual, courts assess whether it is "grossly disproportionate" to the offense committed by considering four factors:

(1) the harshness of the penalty compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed for other offenses in Michigan, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the goal of rehabilitation.

People v Lymon, ___ Mich at ___; slip op at 31; *People v Bullock*, 440 Mich 15, 30, 33-34; 485 NW2d 866 (1992).

In *Lymon* this Court found that the harshness of the penalty compared to the gravity of the offense weighed in favor of gross disproportionality when Lymon did

not commit a sexual offense but was treated like he had. That is not the case when defendant's listed offense in this case would be attempted rape.

In this case regarding the severity of the sentence compared with the gravity of the offense, Defendant was convicted of attempted rape at knifepoint, an egregious circumstance. In Illinois currently a similar offense (attempted aggravated criminal sexual assault) would warrant a sentence of up to 15 years. Ill Rev Stat ch 720 §5/8-4(c)(2); ch 720 §5/11-1/30(a)(1); 730 §5/5-4.5-30(1). And generally, the registrants who are exposed to the recapture provision are those individuals who have committed one of the most severe sexual offenses in Michigan *and* demonstrated that they are recidivists. As one court stated discussing the rationale of the recapture provision (though the opinion was later vacated on procedural grounds):

- [T]he legislature could have reasonably determined that where a defendant commits a sex offense in the past for which he was not required to register and has shown a recent, general tendency to recidivate by committing a new felony offense since the amendment of the Act in 2011, he poses a potential threat of committing a new sex offense in the future. *Id.* ¶ 24
- Moreover, the appellate court noted, “[s]uch a threat is magnified in the instant case, where defendant has committed no less than 11 crimes (6 felonies and 5 misdemeanors), in addition to the 2014 felony theft at issue here, since his attempted criminal sexual assault in 1983.” *Id.*
- The appellate court concluded that the Act's requirement that defendant register as a sex offender for committing the 2014 felony theft after having committed the 1983 attempted criminal sexual assault is a reasonable method for accomplishing the desired legislative objective of protecting the public from sex offenders, and therefore it found the Act as applied to defendant satisfies the rational basis test and is constitutional. *Id.*

People v Bingham, 2018 IL 122008 P 11; 115 NE3d 166, 169 (2018). Like Bingham, Defendant also had an extensive criminal record—22 prior felonies and 14 prior misdemeanors. (1b) This shows that defendant was willing to violate the norms of society, and the mere prospect of re-arrest and re-conviction and SORA registration

has not been enough to curb his criminal conduct.

Under SORA, defendant is required, because of his offense, to register as sex offenders for the rest of his life (if he was a Michigan resident which defendant is not). Although potentially longer in duration than the maximum term of imprisonment, sex offender registration imposes significantly less loss of liberty than confinement in prison. And the court can be assured that offenders will be monitored which could impact the judges' decision concerning the length of incarceration imposed. Lifetime registration, while a legitimate regulatory action, even if this Court disagrees and believes it is punitive, it is not *unduly* harsh considering the gravity of defendant's crimes and as compared with the severity of the statutory punishment for this offense. Those who are on the sex offender registry (which defendant is not) are free to travel, work, or otherwise enjoy the ability to legally move about as they wish, they only must notify law enforcement where they are living or working. Defendant has cited no cases from other states which have found that that lifetime registration amounts to cruel and/or unusual punishment.

The unique ramifications of sexual offenses also preclude a purely qualitative comparison of sentences for other offenses to assess whether mandatory registration is unduly harsh. Compare: *People v Benton*, 294 Mich App 191, 206; 817 NW2d 599 (2011). Indeed, sexual offenses violate "deeply ingrained social values" of protecting victims from violent sexual invasion. Even when there is no palpable physical injury or overtly coercive act, as mentioned *supra* "sexual abuse causes substantial long-term psychological effects, with implications of far-reaching social consequences." *Id.* And this Court has acknowledged that the youth of victims can lead to increased vulnerability. *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008). Thus, the grave nature of sexual offenses justifies lifetime SORA registration. Lifetime registration is proportionate to the long-term, if not life-long, negative impact which such sex offenses cause to survivors and society and therefore it is not an unsuitable punishment.

Though defendant asserts that because it was only his non-sexual offense

which triggered registration, this case is akin to *People v Lymon*, where this Court found that registration on the sex offender registry for non-sexual offenders amounted to cruel or unusual punishment, this is incorrect. It is only his new offense which triggered the necessity for defendant to register his listed offense, which is a sex offense.

B. This penalty of registration is much less severe than the sentence of incarceration imposed by other crimes in Michigan.

In *Lymon* this Court concluded that “comparison of defendant’s non-sexual offenses to more-severe sexual offenses that result in a similar penalty and to similar non-sexual offenses resulting in less-severe penalties supports a conclusion that the punishment imposed by the application of SORA to a non-sexual offender is grossly disproportionate.” *Lymon*, ___Mich at __; slip op at 34. In this case, the registration is much less onerous of a requirement than incarceration.

Many other offenses have statutorily mandated penalties. Lifetime registration, however, is not the only mandatory penalty imposed in Michigan. Mandatory lifetime imprisonment is the penalty imposed for first-degree murder, MCL 750.316(1). Two years’ imprisonment is the mandatory punishment for the possession of a firearm during the commission of a felony, MCL 750.227b(1). A second conviction results in the mandatory punishment of five years’ imprisonment, and a third conviction is subject to a mandatory 10-year period. MCL 750.227b(2). Additionally, certain CSC-I convictions may impose a mandatory 25-year minimum sentence, MCL 750.520b(2)(b), or a mandatory life sentence, MCL 750.520b(2)(c). No Michigan court has found lengthy term-of-years sentences for those who commit violent sexual assault or those whose victims are minors under the age of thirteen (as well as defendants who are demonstrated recidivists) to be cruel or unusual punishment—therefore it cannot be true that defendant’s registration would be “grossly disproportionate.”

A sentence mandated by the Legislature is presumptively proportional and presumptively valid. *People v Brown*, 294 Mich App 377, 390; 811 NW2d 531 (2011). A proportionate sentence is not a cruel or unusual punishment. See *People v*

Bowling, 299 Mich App 552, 558; 830 NW2d 800 (2013). The legislature has determined offenses for which mandatory punishments are warranted, including murder, weapon, and sex offenses. These mandates are presumptively proportional and valid. SORA, which requires defendant to register as a sex offender, is a lesser punishment than life imprisonment. Defendant is not incarcerated at all. Thus, the penalty is not unduly harsh considering the gravity of defendant's crimes.

C. Michigan is not an outlier in requiring lifetime registration.

Each of our sister states, the District of Columbia, and the federal system (as of October 2022) all have sex offender registration systems that include mandatory lifetime registration for at least some offenders. Collateral Consequences Resource Center, *50-State Comparison: Relief from Sex Offense Registration Obligations* <<https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations/>> (accessed March 5, 2025). And SMART, the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking reports that 48 states require retroactivity for the State's SORA's. [smart/ojp.gov/sorna/progress-check](https://smart.ojp.gov/sorna/progress-check) (accessed January 31, 2025).³⁸

In *Lymon*, this Court found that by requiring registration for certain non-sexual offenses, Michigan was consistent with the majority of states and therefore this factor supported that defendant's punishment was not grossly disproportionate.

³⁸ The states do vary exceedingly concerning whether the state's SORA allows for full retroactivity or partial retroactivity. Some require full retroactivity (Ala Code §15-20A-3(a); Cal Penal Code §290.023; Del Code Ann tit 11, §4122(a); W. Va Code §15-12-2(a)), others set dates such as 1956 (Nev Rev Stat §179D.095), 1970 (Tex Crim Proc Code §62.002(a)), 1978 (Ariz Rev Stat §13-3821(A)), 1979 (Mo Rev Stat §589.400(1)), 1980 (Va Code Ann §9.1-923(C)), 1981 (Mass Gen Laws ch 6, §178C), 1982 (Me Rev Stat Ann tit, 34-A, §11202), 1985 (ND Cent Code §12.1-32-15(3); Wyo Stat Ann §7-19-302(c)(iii)), 1988 (Conn Gen Stat §54-252(a)), and 1989 (Oka Stat tit 57 §582(F)) for some or all listed offenses and some set the date around the effective date of the state's SORA's. Michigan, Illinois (730 ILCS 150/2(E)(7); 730 ILCS 150/3(c)(2.1) and Maryland (Md Criminal Procedure Code § 11-702.1(a)(3)) have recapture provisions in their statutes. (Maryland does not appear to have considered the specific question of the constitutionality of the state's recapture provision.)

Michigan is also hardly unique in requiring lifetime SORA registration for crimes which occurred before the passage of SORA when SORNA, which requires full retroactivity (34 USC §20912(b), 28 CFR 72.3; 75 Fed Reg 81849), requires lifetime registration for Tier III offenses and independently of SORA, defendant must comply with the requirements of the federal act, SORNA. 34 USC §20911(1),(5); 34 USC §20913(a) 34 USC §20915(a)(3). *See M.S. Willman v AG of the United States*, 972 F3d at 821. Also “159 jurisdictions (18 states, 137 tribes and 4 territories) have substantially implemented SORNA’s requirements.” <https://smart.ojp.gov/sorna/substantially-implemented> (accessed March 5, 2025).

D. Though defendant asserts that registration doesn’t contribute to rehabilitation, these negative effects could be attributed to defendant’s public conviction itself.

While it is plausible that defendant's presence on the registry will complicate aspects of his future life circumstances, those negative effects could be attributed to defendant having engaged in conduct resulting in conviction of offenses that happen to fall under SORA's ambit, rather than to the registry itself.

When discussing rehabilitation this Court noted that other policies underlying sentencing could not be forgotten:

This test looks to a consideration of the modern policy factors underlying criminal penalties -- rehabilitation of the individual offender, society's need to deter similar proscribed behavior in others, and the need to prevent the individual offender from causing further injury to society.

Lorentzen, 387 Mich at 180

The need to prevent the individual offender from causing further injury to society is an equally important consideration. Requiring Tier III offenders to register on the sex offender list for life will prevent them from being able to exploit other victims for the rest of their lives. Members of the public can take steps to protect themselves and their children. For some offenders it is unclear whether their exploitative behavior would have ever ceased if their victims did not finally speak out against them. Thus, being placed on the sex offender registry for life may

serve as a deterrent against recidivating. As noted previously, over a longer period, studies show that sexual re-offense increases significantly and doesn't stop with age. And the other three factors strongly support that such punishment is neither cruel nor unusual.

Lifetime registration for a violent Tier III sex offender is not cruel and/or unusual punishment.

RELIEF

WHEREFORE, Amicus respectfully requests that this Honorable Court either deny leave or affirm the Court of Appeal's opinion.

Amicus would also like to point out the ramifications of an adverse ruling. If this Court determines that the 2021 SORA is punishment as a facial matter for all offenders, regardless of whether the duty to register was triggered by the recapture provision, for either ex post facto or cruel and/or unusual purposes, this decision would give rise to the question what obligations remain for the pre-2011 offenders – approximately 30,000 registrants – for which Ellis is effectively asking them to be removed from the registry. This decision should be made in a case such as *People v Johnson*, MSC No. 165814, where the issue is squarely posed and issues concerning severance can be briefed. Instead, if this Court were to rule adversely to the People, Amicus would advocate that similarly to this Court's decision in *People v Lymon*, this Court should decide this case on an as-applied basis, limited to the recapture provision which requires offenders to register listed offenses that occurred prior to the enactment of the registry due to commission of non-sexual offenses.

But ultimately, this Court should either deny leave or affirm the lower courts' decisions.

Respectfully submitted,

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Word Count

I certify that this document contains 26,555 countable words and is set in 12-point Century Schoolbook type with one-inch margins and 1.5-line-spaced text, except quotations and footnotes are single-spaced. Amicus has filed a motion to exceed the word count.

/s/ Danielle Walton
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