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IN THE
SUPREME COURT OF PENNSYLVANIA,
MIDDLE DISTRICT

97 MAP 2022

COMMONWEALTH OF PENNSYLVANIA,
Appellant,
v.

GEORGE J. TORSILIERI,
Appellee.

COMMONWEALTH'S REPLY BRIEF FOR APPELLANT

Appeal from the August 22, 2022, Order of the Honorable Allison Bell Royer of the Chester County Court of Common Pleas at Docket Number CP-15-CR-1570-2016, Granting Torsilieri's *Nunc Pro Tunc Post-Sentence Motion to Bar the Application of SORNA* and Declaring Act 29, Subchapter H, 42 Pa.C.S. §9799.10 *et seq*., Unconstitutional.

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SUMMARY OF ARGUMENT

This Court remanded with clear instructions as to what defendant had to prove to succeed on his due process challenge: a consensus of scientific evidence that debunked the legislative findings underpinning Act 29. Instead of doing that, he presented a cadre of "experts" who think the Pennsylvania Legislature made a bad policy choice. That is not what this Court instructed, and it is not a consensus.

Consensus occurs when there is no further debate, because the factual premises in question "could not reasonably be conceived to be true." There was a consensus here, it was just not the one defendant wanted. The evidence proved decisively that convicted sex offenders, as a group, recidivate sexually three to four times more than convicted non-sex offenders. That should be the end of the discussion.

But unwilling to abandon his cause, defendant has had to pivot. He argues now that whether sexual offenders commit more sexual crimes than other groups is not the question after all, even though that is precisely what this Court instructed. He claims instead that individual variation within the cohort is the real issue and the Act is invalid as long as it fails to account for individualized recidivism risk. But that is not how the General Assembly chose to effectuate its goals. The Legislature chose a class-based scheme, which is constitutionally permissible.

A statutory classification does not, *ipso facto*, constitute a judgment about each individual within the class. This is true even where reputation is involved. As this Court has held, as long as the classification has "some fair relationship to a legitimate public purpose," it need not be true of every individual member of the class. He has not, and cannot, prove otherwise.

Nor did he prove Act 29 unconstitutionally punitive. As discussed in the Commonwealth's principal brief, the statute was significantly modified following *Muniz* to comport with this Court's concerns. But even if Act 29 were punishment, that would not render it unconstitutional under the separation of powers doctrine or under *Alleyne*. Defendant's arguments to the contrary rest on the false premise that *any* fact, such as whether a statute applies to an offender at all, must be adjudicated by a jury beyond a reasonable doubt. But that is not true. Courts have authority to make such decisions without running afoul of the constitution at every stop on the way to sentencing.

Finally, defendant's argument that Act 29 is cruel and unusual punishment is a nonstarter. As he admits, the national consensus rebuts his claim, and his experts' opinions that the statute is excessive cannot invalidate the Legislature's policy judgment. For all these reasons, his arguments fail.

ARGUMENT

Defendant disregards the very specific, and very demanding, requirements this Court imposed on remand.

Defendant proceeds in this Court, as he did in the lower court, as if he were here for the first time. He essentially repeats the evidence and arguments he presented in *Torsilieri I*. He claims, *inter alia*, that it was the Commonwealth's burden to disprove his academicians' opinions, that the statute is unconstitutional because many sex offenders are not a high risk to reoffend, and that the statute does not fulfill what he, and his experts, say is its purpose. These claims demonstrate a profound mischaracterization of the task of overturning legislative judgments. If it were as easy as calling "experts" to the stand, it could be done for almost any statute, and repeated almost any time new experts produced new studies.

This Court made clear in *Torsilieri I* that the process is not nearly so facile. Defendant has evaded and ignored the strict limits the Court imposed for challenging the constitutionality of a statute. Instead, he merely presented experts who disagree with its premises.

A. It was defendant's "heavy burden" to prove *by consensus* that the legislative findings are untenable.

Defendant suggests that the Commonwealth had the burden of proof below. *E.g*. Appellee's Brief, 1 (arguing that the Commonwealth failed to counter his evidence); 6 (arguing that it was the Commonwealth's obligation to challenge his

evidence). That is incorrect. In remanding this case, the Court explicitly stated that the burden remained on the defense, and that it was a "heavy" one. As the United States Supreme Court has observed, "appellees seem to believe that appellants had to have current empirical proof" to justify the legislature's policy choices. *Vance v. Bradley*, 440 U.S. 93, 110 (1979). In reality, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based *could not reasonably be conceived to be true* by the governmental decisionmaker." *Id.* at 111 (emphasis supplied).

That is why this Court required defendant to demonstrate a *consensus*. "Consensus" does not mean that a court is convinced the legislature was wrong. Consensus means that the matter is beyond further debate, because the factual premises in question "could not reasonably be conceived to be true."

This demanding standard cannot be met simply by "finding" facts in defendant's favor. Legislative findings are not the same as judicial findings. "The District Court's responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion…. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." *Id.* at 111-12.

Defendant nonetheless contends that a consensus exists in his favor because a common pleas judge "credited" his witnesses over the Commonwealth's. But this assertion actually proves the opposite. Consensus is not a credibility contest. It is not "won." Consensus is reached when there *is* no real contest. Courts cannot declare statutes unconstitutional by "arbitrat[ing] … contrariety."

Yet defendant further confirms his failure through his heavy reliance on policy proclamations, such as the proposal of the American Law Institute for revisions to the Model Penal Code. In a similar vein, he has secured several *amici curiae* who also advocate that sex offender registration is bad policy. But the reason the Model Penal Code is called a "code" is that it is a *legislative* proposal. Defendant's experts and *amici* may of course testify at legislative hearings. His open resort to policy arguments, however, is exactly what this Court told him not to do in remanding this case.

As Justice Wecht has recently observed, "policy-based arguments are for the policy-making branches. They are not for the judiciary." *Keystone RX LLC v. Bureau of Workers' Compensation Fee Review Hearing Office*, 265 A.3d 322, 334 (Pa. 2021) (Wecht, J., concurring). Experts opposed to statutory policy choices "are free to petition the legislature for redress." *Id.* But legislatures are not confined to expert opinion. They may rely on the collective observations and experiences of their members, and of their members' constituents. The fact that experts (or even common

pleas judges) may disagree with the legislature's conclusions is not proof that those conclusions "*could not reasonably be conceived to be true*."

B. There is no consensus that sexual offenders commit no more sexual offenses than other groups; the consensus, as defendant admits, is just the opposite.

Defendant further attempts to escape the remand requirements by recharacterizing the threshold inquiry he was directed to address. This Court stated explicitly that "the relevant question" underlying the statute was *not* the overall level of sex offender recidivism, but "whether sexual offenders commit more sexual crimes than other groups not subject to similar registration laws." *Commonwealth v. Torsilieri* (*Torsilieri I*), 232 A.3d 567, 606 (Pa. 2020). Defendant nevertheless pretends that the question is exactly the other way around. He proclaims that he met the threshold by presenting evidence that the overall level of recidivism within the sex offender group is "actually quite low," and that [m]ost people convicted of a sex crime do not tend to reoffend sexually." Appellee's Brief, 10-11.

But that, as this Court stated clearly, was not the issue. The question was a *relative* one: the level of sex offense recidivism by convicted sex offenders as a group *as opposed to* the level of sex offense recidivism by other groups. On that question, the real question, defendant is suspiciously grudging. But he eventually admits – just as the Commonwealth pointed out in its main brief – that "it is true that, as a group, people with a history of sexual crimes are 'three times' more likely

to commit a future sexual offense than those without a history of sexual crime." Appellee's Brief, 13.

That is a stunning admission, and it should end this case. As both the Court and the dissent in *Torsilieri I* agreed, that relative question is the fundamental premise on which the statute lies. If sex offenders as a cohort are more likely to commit new sexual crimes than non-sex offenders as a cohort, then the legislature reasonably chose to create classifications based on a proven history of committing sexual crimes. As defendant now admits, sex offenders are indeed more likely to recidivate sexually – at least *three times* more likely. This is the *only* point on which the record shows true consensus. The Commonwealth and defendant are in complete agreement.

Yet defendant once again attempts to dodge the real issue. He insists that group comparisons are irrelevant because not all members of the group are the same. Convicted sex offenders, he self-evidently asserts, "are not all equally likely to reoffend." Appellee's Brief, 12. "Some registrants are high risk … some are not." Appellee's Brief, 13.

Yes, of course. No one has ever suggested that the General Assembly was daft enough to believe that all convicted sex offenders are exactly the same. But this Court explicitly instructed defendant to address relative sex recidivism rates as between sex offenders as a group and "other groups not subject to similar registration

laws." That group approach is hardly surprising; it is exactly what this Court did in *In re J.B.*, 107 A.3d 1 (Pa. 2014). The Court considered juveniles, as a class, relative to adults, as a class. And in *J.B.*, as in this case, there was consensus on this relative class question, albeit the other way around. The Commonwealth there did not contest that juvenile sex offenders as a group have much lower recidivism rates than adult sex offenders as a group – just as defendant does not now contest that convicted sex offenders as a group have much higher recidivism rates than other groups.

Nevertheless, defendant insists that reliance on group "averages" is forbidden, because some individuals within the group are higher than the average, and many are lower. Again, of course. That is what "average" means. Defendant's own experts repeatedly relied on the concept of averaging in justifying their opinions,[1] just as this Court did in *J.B.* and *Torsilieri I* in discussing relative group rates.

In the face of this precedent, which is the law of the case, defendant maintains that group assessment is improper because – according to his witnesses – it is unnecessary. We can just analyze each offender's risk of recidivism individually, he says. But there is no blood test to measure an individual offender's likelihood of

[1] *See, e.g.*, N.T. 6/28/21, 67-68; R.205a-R.206a (Dr. Hanson discussing risk levels relative to recidivism risk averages); 90, R.228a (Dr. Hanson testifying that "average recidivism rates" for sexual offense were 15-20% after ten years); *see also* N.T. 6/29/21, 16-17, R. 374a-375a (Dr. LeTourneau discussing her support of Dr. McCleary's work involving ARIMA, a model utilizing averages that is used in longitudinal studies.).

reoffending. Defendant proposes we use actuarial assessments, but these are by definition not individual. Actuarial analysis works precisely because it is applied to large groups. Insurance companies may lose money on any number of customers who do not live their expected lifespans. But they will profit in the long run because, *on average*, their predictions will be true for large groups of people. The odds are with the house.

The General Assembly was not constitutionally required to play such odds. As defendant's own experts acknowledged, actuarial assessment is highly imprecise in individual cases.[2] Nor are offenders likely to be open and honest when interviewed

[2] Dr. LeTourneau testified that recidivism rates vary broadly, as did Dr. Hanson, who stated they may be as high as 60%. N.T. 6/29/21, 130, R.488a; 6/28/21, 70 R.208a. Further, as Dr. Hanson admitted, actuarial tools merely distinguish between relative risk levels among offenders; they do not accurately predict whether a particular offender has a 30% chance of reoffending as opposed to a 60% chance. *Id.*, 66, 68-69, 82-83, 141-147; R.204a, R.206a-R.207a, R.220a-R.221a, R.279a-R.285a. *See also* L. Maaike Helmus et al., *Static-99r: Strengths, Limitations, Predictive Accuracy Meta-Analysis, and Legal Admissibility Review*, 28 Psychol. Pub. Pol'y & L. 307, 310 (2022) ("absolute recidivism estimates are the least robust risk metric provided by Static-99R and other actuarial scales, and should be reported with care"); *id*., 327 (absolute recidivism rates are difficult to estimate and their limits should not be "glossed over").

The Pennsylvania Sexual Offenders Assessment Board makes the same point: risk assessment tools do not "specifically measure an individual's level of risk." *See* Sex Offender Containment Model (Containment Model), Chapter 5.19, "Actuarial or Pragmatic-based Classification Approaches." https://www.soab.pa.gov/AboutSOAB/ResourcesandStatistics/Sex%20Offender%20Containment%20Model/Documents/pa%20sex%20offender%20containment%20model.pdf (last visited 3/21/23).

Moreover, as Dr. Hanson further conceded, his own assessment model (the "Static-99," the only model on which defendant presented any evidence) disadvantages certain populations, for whom its results are inaccurate. N.T. 6/28/21, 101, 155-57, 160; R.239a, R.293a-R.295a, R.298a. Indeed, the use of such risk assessment tools in setting bail and sentencing is currently under fierce attack because of such discriminatory effects. *E.g.* Pretrial Justice Institute (PJI), "The

about their prospects for committing more offenses. The best predictor of future behavior is past behavior, and the best indicator of past behavior is a criminal conviction based on the highest standard of proof in the law. It was surely within the legislature's discretion to choose this most reliable form of evidence rather than rely on untested, inexact, statistical calculations.

Yet defendant insists that the legislature itself has proven the efficacy of individual assessment, because that is what is done to identify sexually violent predators. If they do it there, says defendant, they have no choice but to do it here.

But, yet again, the point goes exactly the other way. The legislature was obviously aware of the possibility of individual assessment, but exercised its judgment to employ it in one arena and not the other. As the legislature was entitled to conclude, SVPs are different in kind and are therefore treated differently in the statute. An SVP is a convicted sex offender with a mental abnormality or personality disorder that makes him particularly likely to engage in predatory sexually violent

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Case Against Risk Assessment," November, 2020, 1 https://static1.squarespace.com/static/61d1eb9e51ae915258ce573f/t/61df300e0218357bb223d689/1642017935113/The+Case+Against+Pretrial+Risk+Assessment+Instruments--PJI+2020.pdf (last visited 3/24/23) (recommending against use of pretrial risk assessment instruments because of racial bias; explaining that after initially advocating for their use, PJI determined that "these tools are not able to do what they claim to do" and that they merely add "a veneer of scientific objectivity and mathematical precision to what are really very weak guesses about the future"); https://www.propublica.org/article/bias-in-criminal-risk-scores-is-mathematically-inevitable-researchers-say, December 30, 2016 (last visited 3/24/23).

offenses. 42 Pa.C.S. §9799.12. Evaluation turns on several statutory criteria; likelihood of reoffense is just one of them. 42 Pa.C.S. §9799.24. If the offender is deemed an SVP, he is placed into a fourth "tier" which, unlike Tiers I, II and III, requires monthly counseling. 42 Pa.C.S. §9799.36. This added monthly counseling requirement, distinct to SVPs, is necessary because SVPs pose a different and particular kind of threat of harm to the public due to their mental abnormality or personality disorder. The legislature, having created this unique category, was not required to treat SVPs and non-SVP offenders as if they were the same.

Thus defendant cannot escape the fact that the inquiry here is about sexual offenders as a cohort, regardless of the possibility of individual variation within the cohort. On that question – the question that this Court expressly mandated for the remand – there is indeed a consensus: convicted sex offenders are several times more likely than other groups to commit new sexual offenses. Defendant has failed to prove that the legislative judgment "could not reasonably be conceived to be true." Instead he helped prove just the opposite. That fact is fatal to his claim.

C. The purpose of the statute, as this Court has recognized, is avoidance, not deterrence.

Defendant attempts to sidestep the questions before this Court in yet another way. In an effort to shoehorn his experts' opinions into a cognizable statutory challenge, he fundamentally misrepresents the purpose of Act 29. Appellee's Brief,

55-58. He insists that the statute is meant to reduce recidivistic behavior. Quoting Dr. LeTourneau's affidavit, he proclaims "the primary purpose of Act 29" is to "reduce sexual reoffending by convicted sex offenders." *id*., 55; *see also id*., 46 (claiming that the purpose of "SORNA" is to prevent reoffending by those subject to it); 60 (stating "the reduction of recidivist sexual offending is the obvious and clearly intended end of Act 29") (internal quotations omitted). He declares that the statute's stated purpose – avoidance – must not be its real purpose, because avoidance is just a "means" to an "end," and the end must be to change the behavior of sex offenders. *Id*., 57. But such an argument is just a mechanism for recasting the statute into a form that he and his academic allies believe is more easily attacked. It is and has always been the statute's purpose to enable potential victims to change their *own* behavior by avoiding potential harm – *whether or not* there is an aggregate decrease in the total amount of criminal behavior by offenders.

This Court itself has explicitly recognized exactly this point. Recidivism reduction is not the purpose of Megan's Law in Pennsylvania; rather, "[a]lthough registration and notification may curtail opportunities to commit future sex offenses, these measures primarily protect innocent persons from victimization by permitting such persons to alter their own behavior according to the risks posed." *Commonwealth v. Williams*, 832 A.2d 962, 978 (Pa. 2003) (citing *Roe v. Office of Adult Probation*, 125 F.3d 47, 55 (2d Cir. 1997)).

And avoiding sexual predation is precisely what the Legislature said was its goal in passing Megan's law and its subsequent iterations, including Act 29. This is obvious from the plain language of the Legislative Findings, which state, in pertinent part:

> 7) Knowledge of whether a person is a sexual offender could be a significant factor in protecting oneself and one's family members, or those in care of a group or community organization, from recidivist acts by such offenders.
>
> (8) The technology afforded by the Internet and other modern electronic communication methods makes this information readily accessible to parents, minors and private entities, enabling them to undertake appropriate remedial precautions to prevent or avoid placing potential victims at risk.

42 Pa.C.S. §9799.11.

It is also clear in the statute's legislative history. As Congressman Kevin Blaum explained:

> "What [Megan's Law] does is provide notification to the people of Pennsylvania that in their midst is a sexual predator who has been released from prison and that they have a right to know…I think we can dramatically strengthen this legislation to make families and people of Pennsylvania aware so they can best protect their children when a sexual predator is released and takes up residence in their neighborhood."

House Legislative Journal, 9/20/95, 388, https://www.legis.state.pa.us/WU01/LI/HJ/1995/1/19950920.pdf#page=7 (last visited 3/24/23).

This purpose was echoed in the Pennsylvania Senate several weeks later when the law was passed unanimously by bipartisan vote. Senator Stewart John Greenleaf, Sr., explained that Megan's Law "let[s] parents know when a person has been

involved in sexually-assaulting children resides in their neighborhood in order for them to protect themselves and their family from such an occurrence in the future." Pennsylvania Senate Legislative Journal 10/3/95, 279, https://www.legis.state.pa.us/WU01/LI/SJ/1995/1/Sj19951003.pdf#page=2 (last visited 3/24/23). Senator Michael O'Pake added that Megan's Law "counters at least one horrible risk that children face, by providing their parents or guardians the means to know when proven sexual predators live in their communities." *id*., 280.[3]

Defendant's "falling rocks" analogy only underscores the point. Appellee's Brief, 57-58. A road sign warning of "falling rocks" aims to protect motorists by making them aware of a potential danger so they can take steps avoid it, like slowing down or changing lanes. The sign does not stop rocks from falling, the way, for example, a net would. Nor does it shore up the rocks so they fall less often. It isn't meant to. The total number of fallen rocks will be the same. Those who must pass that way, and who choose to be wary, may avoid them.

Defendant says either way, though, the goal is still to "reduce harm." But "harm reduction" is just a *reductio ad absurdum*. Pretty much every statute hopes to

[3] Of course, as the law continued to evolve, the statute also aimed to comply with the federal Adam Walsh Act. Senate Legislative Journal, 11/15/11, 1203-04, https://www.legis.state.pa.us/WU01/LI/SJ/2011/0/Sj20111115.pdf#page=5 (last visited 3/24/23) (Senator Orie and others discussing the statute's purpose of community protection, protecting vulnerable children, and bringing Pennsylvania into compliance with the Adam Walsh Act. There is no discussion of reducing offender recidivism rates and the bill passes unanimously.)

avoid or reduce harm in one way or another. What matters for present purposes is the manner in which the Legislature chose to address this particular harm. Criminal sex offense statutes seek to deter through punishment; the Pennsylvania sex offender statute, in contrast, provides an avoidance measure for those members of the public who seek it.

Regardless of whether avoidance may be called the "means" or the "end," therefore, a correct understanding of what Act 29 seeks to do, and how it seeks to do it, was critical to addressing this Court's concerns on remand. Defendant failed to do so. He never presented any evidence, scholarly or scientific, that the statute failed to accomplish its *actual* purpose. His experts opined about the wrong issues. Act 29 could not be ineffective for failing to achieve a result it never sought to achieve in the first place.

D. Under whatever label, defendant's due process constructs fail: classification is not "presumption."

Having failed in the first half of his brief to establish any of the factual prerequisites mandated by this Court for annulling a duly passed statute, defendant spends the second half of his brief proffering variations on a due process theme. But none of these, whether dubbed "irrebuttable presumption," or "strict scrutiny," or "fundamental right," are capable of compensating for his inability to demonstrate the kind of consensus necessary to negate legislative findings. And all these

arguments share the same flawed premise: that by classifying sex offenders as a group, the legislature was compelling a judgment about the future risk of each member of the group as an individual.

As this Court has recognized, however, that is not how due process analysis works. Under Act 29, individual risk is not presumed; it is instead irrelevant. A defendant is not entitled to manufacture a conclusive presumption claim by attributing to a classification a meaning that it simply does not possess. Thus, in *Commonwealth v. Duda*, 923 A.2d 1138 (Pa. 2007), the defendant challenged a statute that made it a crime to drive having imbibed enough alcohol to test above a prescribed blood alcohol concentration (BAC) within two hours after operating the vehicle. The defendant alleged that the statute violated due process by creating a conclusive presumption that he had been driving with a BAC above the legal limit. *Id.* at 1145.

This Court rejected the claim. The Court acknowledged that a prior version of the statute did indeed create an unconstitutional presumption. *Id.* at 1146. Under the amended version, however, BAC at the time of driving was no longer relevant. All that mattered was whether the amount of alcohol ingested before driving was sufficient to rise to the required BAC level thereafter, even though the defendant was no longer driving. *Id.* at 1147. The Court acknowledged that the new statutory approach was arguably both over- and under-inclusive, because some drivers would

be under the level at the time of driving, and some would be over, but would fall under the limit before they were tested. Nonetheless, held the Court, the legislature was entitled to address the potential harm categorically, even by imposing a criminal penalty putting liberty at stake.

This case is similar. Some convicted sex offenders will commit more sex crimes in the future, and some will not. But the legislature's determination to address the problem categorically, by creating a registration system based on prior offenses, does not entitle offenders to an individualized review of future dangerousness, because individualized risk is simply not material under the statutory scheme.

This is the same reasoning that the United States Supreme Court has employed in rejecting due process challenges to a sex offender registration scheme. "Here, however, the fact that respondent seeks to prove – that he is not currently dangerous – is of no consequence under Connecticut's Megan's Law…. [T]he law's requirements turn on an offender's conviction alone – a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest…. No other fact is relevant." *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 7 (2003).

Defendant suggests that *Doe* does not matter because this Court, in the *J.B.* case, held that application of registration requirements to juveniles amounted to an unconstitutional presumption. But in *Doe* the necessary predicate for requiring registration was conviction of a crime. In *J.B.* no such premise existed, and the Court

did not mention *Doe*. Unlike an adult conviction, a juvenile adjudication is not an assessment of culpability; it is an assessment of amenability. We do not punish juveniles; we treat them. Thus the *J.B.* Court held that juveniles are categorically and constitutionally different than adults, and juvenile adjudications therefore could not supply the basis for inclusion in the sex offense registry. [4]

Like defendant, the dissent in *Torsilieri I* also attempts to downplay *Doe*. The dissent argues that the Pennsylvania Constitution, unlike the federal constitution, makes reputation a fundamental right, and classification as a sex offender automatically infringes on that right. *Torsilieri I*, 232 A.3d at 603-04. But almost any classification can be characterized as affecting reputation. A minimum age for voting, or drinking, or hunting, or smoking, arguably implies that all those below that age are too immature to handle the responsibility, even though many under the applicable age are more than capable, and some above it are not.

That is exactly the argument that was made by judges challenging Pennsylvania's mandatory judicial retirement age. They asserted that forced retirement branded them as mentally incompetent, even though most were perfectly qualified to continue in their duties. They protested that, without individualized review, mandatory retirement was "degrading." *Gondelman v. Commonwealth*, 554

[4] Of course, *J.B.* is not only legally distinguishable but factually distinguishable: in that case, as noted above, there was a consensus, while here there is none.

A.2d 896, 902 (Pa. 1989). And indeed, there is little that would more deeply affect the reputation of a dedicated, well respected jurist than the implication that, despite years of service, he or she is now too senile to remain on the bench.

Yet this Court rejected its brethren's claim. The Court held that a statutory classification does not, *ipso facto*, constitute a judgment about each individual within the class. The concerns expressed by the retiring judges were therefore "not … relevant to the constitutional analysis." As long as "the classification at issue bears some fair relationship to a legitimate public purpose," it need not be true of every individual member of the class. *Id.*

Defendant, presumably, would argue that sex offender status is even more degrading than aspersions of senility. But it is not the registry that makes someone a sex offender; it is a conviction after full due process in a court of criminal law. A convicted sex offender is plainly not in the same position as an individual who has been publicly accused of misconduct in a government report, but never charged and given the opportunity to defend himself. *See In Re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560 (Pa. 2018). And in any case, defendant's theory is not confined only to the most uncomfortable effects on reputation. His premise is that any classification necessarily implicates each individual member of the class, and therefore constitutes a conclusive, and unconstitutional, presumption.

Nor could his rule be limited to the right to reputation, as opposed to other rights. Reputation is just easier to allege. But it is not a "super" fundamental right, more fundamental than other provisions of our Constitution. If any right would qualify, it would be the right to bear arms. That right is older than the reputation right, is ensconced in its own separate section of Article I's Declaration of Rights, and is phrased in language that could hardly be more emphatic: "[t]he right of the citizens to bear arms in defense of themselves and the State shall not be questioned." PA. CONST. Art. I, §21.

On defendant's rationale, therefore, any statutory classification relating to gun possession would infringe on a fundamental right, and so would violate due process absent an individualized proceeding for every member of the class. That would be important news for a provision such as 18 Pa.C.S. §6105, which makes it a felony to possess a firearm if the possessor has previously been convicted of any of a long list of crimes. These qualifying offenses are not limited to prior gun crimes; many others are on the list, including various sex offenses, receiving stolen property, and impersonating a public servant. In most cases, the prohibition is for life, and there is no procedure for relief except elimination of the prior qualifying offense, as by pardon.

Courts around the country have rejected due process and equal protection challenges to similar statutes. *See, e.g.*, *Missouri v. Merritt*, 467 S.W. 3d 808, 814

(Mo. 2015) (collecting cases) ("The felon in possession law, which bans felons from possessing firearms, with no exception other than possessing an antique firearm, is sufficiently narrowly tailored to achieve the compelling interest of protecting the public from firearm related crime"); *see also Missouri v. McCoy*, 468 S.W. 3d 892 (Mo. 2015) ("prohibiting felons from possessing firearms is narrowly tailored . . . because 'it is well established that felons are more likely to commit violent crimes than are other law abiding citizens'") (quoting *United States v. Barton*, 633 F.3d 168, 175 (3d Cir. 2011)); *State v. Eberhardt*, 145 So. 3d 377, 385 (La. 2014) ("We find 'a long history, a substantial consensus, and simple common sense' to be sufficient evidence for even a strict scrutiny review." (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992)). But if defendant's understanding of due process were correct, no such statute could stand in this Commonwealth.

Of course his understanding is not correct. A statutory classification does not automatically create a conclusive presumption as to every individual member of the class. If the statute operates solely on a class-wide basis, then it is not relevant whether each class member would satisfy the legislature's general concerns in establishing the class. A statute that imposes a requirement based on prior conviction of a crime, as do Act 29 and §6105, does not violate due process on the ground that individual class members may not be sufficiently "dangerous."

E. The statute is not unconstitutional punishment.

Defendant argues that the statute is "punitive" and therefore violates various constitutional requirements for the imposition of criminal punishment. The Commonwealth has addressed the relevant factors at great length in its principal brief, at 35-59. Defendant's primary response is that he must prevail because he presented testimony from his witnesses, who opined, *e.g*, that the statute does not fulfill its purpose because it does not reduce recidivism. Appellee's Brief, 87.

Once again, defendant has fundamentally misconstrued the terms of the remand. This Court demanded "clearest proof" to invalidate the legislative findings on punishment. That surely does not mean that a handful of experts can substitute their judgments for those of the legislature. Nor can a single common pleas judge do so. There are other experts, and other judges. They are free to make different judgments. That path leads only to judicial turmoil.

The problem is, in part, that the "findings" in question are not really binary questions of true fact. Indeed if they were, the findings would be binding on this Court. And if two common pleas judges, in two different hearings, with two different sets of witnesses, came to two directly opposing conclusions, then *both*, somehow, would be binding on this Court. But the issue in this case is not a simple issue of fact, or even a complicated issue of fact, like whether COVID-19 originated in a lab, or whether there is life on other planets. Those questions are challenging, but they

may be capable of factual resolution, if not sooner than later. Whether Act 29 sufficiently achieves its purpose, on the other hand, is ultimately a policy judgment. It would take considerably more than a study, or a group of studies, to constitute "clearest proof" that the legislature could not reasonably believe that sex offender registration helps protect members of the public who wish to avoid convicted sex offenders. Defendant's evidence has not satisfied his heavy burden.

Even assuming defendant had factually "proven" that the statute is punitive, however, it would still not be unconstitutional. Defendant argues that Act 29 violates the separation of powers because its application in a particular case depends on facts such as the existence of an enumerated prior offense and the date of the defendant's crime. Judges must be allowed to make such determinations, says defendant. But they can and do. It is entirely within the court's authority to determine whether the statute applies, just as the court determines whether a defendant has a prior *crimen falsi*, or whether he has been brought to trial within the speedy trial deadline.

At the same time, defendant argues that all such facts must be found *not* by a judge, but by a jury, because registration is punishment, punishment is a sentence, and any fact that would expose a defendant to an increase in the legally available sentence must be found by a jury beyond a reasonable doubt. *See Alleyne v. United States*, 570 U.S. 99 (2013). But not every fact that may be adjudicated on the way to punishment must thereby be treated as an element of the offense and tried to the jury.

A criminal offense created after the date of the defendant's crime cannot be applied to him. Yet the date of the offense for *ex post facto* purposes is not a jury question, even though the defendant cannot be sentenced, or even tried for that offense, unless a court has determined that the conduct predated the enactment. *See, e.g.*, *Oregon v. Ice*, 555 U.S. 160 (2009) (even some facts found for purposes of sentencing are not *Alleyne* facts and may be determined by judge rather than jury).

Finally, defendant claims that lifetime registration is, categorically, cruel and unusual punishment. He concedes that a national consensus rebuts that claim, but asserts (on the basis of two cases from across the nation) that this is "beginning to change." Appellee's Brief, 99. If and when it does change, he can attempt to renew his claim. In the meantime, it is without merit.

Meanwhile, defendant asserts that registration is cruel and unusual even despite the national consensus, because his experts have opined that the process is "excessive" in relation to the crime. But this argument suffers from the same defect as all of defendant's arguments in this case. The constitutionality of a legislative policy judgment is not invalidated by the contrary policy judgments of a defense expert, or experts, any more than a statute is "proven" constitutional if prosecution experts testify that they find the statute to be perfectly effective. Any exception to that rule, as this Court spelled out in *Torsilieri I*, requires a genuine consensus, beyond reasonable debate. Those will be few and far between. This is not one.

CONCLUSION

For the foregoing reasons, and those set forth in the Commonwealth's principal brief, the Commonwealth respectfully requests this Honorable Court reverse the order of the common pleas court declaring Act 29 unconstitutional.

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CERTIFICATION OF WORD COUNT

I, Tracy S. Piatkowski, hereby certify the foregoing brief was prepared using Microsoft Word, Times New Roman font style, and 14-pt. typeface. Exclusive of the title page, tables of contents and authorities, and the instant certification, the brief contains 6068 words and is therefore in compliance with PA.R.A.P 2135(a)(1).

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