Received 2/23/2023 1:54:38 PM Supreme Court Middle District

Filed 2/23/2023 1:54:00 PM Supreme Court Middle District
97 MAP 2022

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

97 MAP 2022

COMMONWEALTH OF PENNSYLVANIA,
Appellant

V.

GEORGE J. TORSILIERI,
Appellee

BRIEF FOR APPELLEE

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-0001570-2016, 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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February, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

Other Authorities

I. INTRODUCTION

This Court remanded this case to give the Commonwealth a chance to counter the evidence Appellee, Mr. Torsilieri, presented undermining

> the legislative determinations *underpinning* Revised Subchapter H, specifically (1) that *all* sexual offenders pose a high risk of recidivation and (2) that the tier-based registration system of Revised Subchapter H protects the public from the alleged danger of recidivist sexual offenders.[1]

It failed to do so. Appellee proved the fallacy of the legislative presumptions underpinning Act 29 and the failure of Pennsylvania's registration and community notification to reduce sexual offending. The consensus is established, and the conclusions are clear. Act 29 of 2018, P.L. 140 (H.B. 1952), the current version of SORNA, like its nearly identical predecessor, clearly, plainly, and palpably violates Pennsylvania's Constitution in numerous ways. The law unreasonably and unnecessarily deprives thousands of people who pose no elevated risk of danger to the

[1] *Commonwealth v. Torsilieri*, 232 A.3d 567, 596 (Pa. 2020) (*Torsilieri I*) (emphasis added).

public of their right to reputation, creating a false irrebuttable presumption that everyone on the registry is dangerous and serves no real purpose other than to punish. The trial court agreed, *twice*.[2]

This Court should rightly defer to the facts found by the trial court and proven by Mr. Torsilieri. It should affirm the order below declaring Act 29 unconstitutional under Pennsylvania law.

II. COUNTER-STATEMENT OF JURISDICTION

Appellee agrees with the Appellant that this Court has proper and exclusive jurisdiction under 42 Pa.C.S. § 722(7).

III. COUNTER-ORDER IN QUESTION

Appellee agrees with Appellant as to what order is being appealed.[3]

IV. COUNTER-STATEMENT OF SCOPE AND STANDARD OF REVIEW

This Court, in this case, has already stated the scope and standard of review:

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[2] The opinions below were written by two different judges. The Honorable Anthony Sarcione, and the Honorable Allison Bell Royer.

[3] Tr. Ct. Opinion and Order attached at Exhibit A.

> The constitutional issues before this Court raise questions of law for which our standard of review is *de novo* and our scope of review is plenary. *Commonwealth v. Muniz*, 164 A.3d 1189, 1195 (Pa. 1997). In addressing constitutional challenges to legislative enactments, we are ever cognizant that "the General Assembly may enact laws which impinge on constitutional rights to protect the health, safety, and welfare of society," but also that "any restriction is subject to judicial review to protect the constitutional rights of all citizens." *In re J.B.*, 107 A.3d 1, 14 (Pa. 2014). We emphasize that "a party challenging a statute must meet the high burden of demonstrating that the statute clearly, palpably, and plainly violates the Constitution." *Id.* (internal quotation marks and citation omitted).

Commonwealth v. Torsilieri, 232 A.3d 567, 575 (Pa. 2020) (cleaned up) (*Torsilieri I*).

V. COUNTER-STATEMENT OF QUESTIONS PRESENTED

A. Does lifetime registration under Act 29, Subch. H, violate Article 11 of the Pennsylvania Constitution because it deprives individuals of the fundamental right to reputation and fails to satisfy strict scrutiny?

B. Does Act 29, Subch. H, violate due process under Articles 1 and 11 of the Pennsylvania Constitution because it creates a false irrebuttable presumption that all those convicted of enumerated offenses "pose a high risk of committing additional sexual

offenses," depriving those individuals of their fundamental right to reputation?

C. Does lifetime registration under Act 29, Subch. H, deny procedural due process under the Pennsylvania and Federal Constitutions because it unlawfully impinges the right to reputation without notice and an opportunity to be heard?[4]

D. Does lifetime registration under Act 29, Subch. H, constitute criminal punishment and therefore violate the separation of powers doctrine because it usurps exclusive judicial adjudicatory and sentencing authority?

E. If lifetime registration under Act 29 is punishment, does the imposition of mandatory lifetime sex offender registration for the instant offense constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 13 of the Pennsylvania Constitution?

F. If lifetime registration under Act 29 is punishment, does it contravene the 5th, 6th, and 14th Amendments of the United States Constitution and the corresponding protections of the Pennsylvania Constitution because not every fact necessary to support the imposition of a mandatory minimum sentence must be found by a jury beyond a reasonable doubt?

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[4] Appellee raised this claim below, and believes it meritorious. However, because the trial court did not address it, that Appellee should succeed on his other due process claims, and that many of the arguments connected with this claim are duplicative, Appellee does not address it in his argument section here as it has been explored fully in his other filings.

VI. COUNTER-STATEMENT OF THE CASE

A. A Brief Overview Of Pennsylvania's SORNA.

This Court has previously relayed Pennsylvania's history of registration in *Torsilieri I*,[5] and we do not repeat it here.

B. The Procedural History Of Mr. Torsilieri's Case Since This Court's Remand.

In *Torsilieri I*, the Commonwealth asked this Court to reverse Judge Sarcione's determination that Subchapter H was unconstitutional.[6] The Commonwealth asserted then, as it does now, that the trial court had no power to second-guess legislative policy judgments. That argument failed the first time, and it should also fail now. "We respectfully reject the Commonwealth parties' categorical contention that the trial court lacked the authority … to question the validity of the General Assembly's … legislative findings." *Torsilieri I*, 232 A.3d at 584. *Torsilieri I* held that legislative judgments could be struck down when the challenger demonstrates "a consensus of scientific evidence" that the facts

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[5] *See Torsilieri*, 232 A.3d at 575-82 (detailing this history); *Commonwealth v. Muniz*, 164 A.3d 1189, 196-97 (Pa. 2017) (quoting *Commonwealth v. Williams*, 832 A.2d 962, 965-68 (Pa 2003) (*Williams II*) (relaying the history)).

[6] Sarcione Opinion, R59a-R139a.

underlying the policy judgment are wrong and result in violating constitutional rights. *Id.*

Although the majority concluded that stipulated testimony was an improper basis to justify overturning a duly enacted law, *Torsilieri I* nonetheless addressed most of Appellee's claims and identified which facts and what policy judgments were to be evaluated upon remand. It then remanded the matter for an evidentiary hearing to allow the Commonwealth to challenge the detailed evidence Appellee presented if it could. *Id.* at 596-97.

C. *Torsilieri I* Outlined The Factual And Legal Questions To Be Addressed And Decided On Remand.

In "framing the remand," this Court identified what factual findings were important to deciding each of Appellee's legal challenges. *Torsilieri I*, 232 A.3d at 585. Because the legal and factual issues are distinct, each question of law does not necessarily require a resolution of each factual dispute, if any, to determine whether the claim succeeds. As a general due process matter, *Torsilieri I* held that whether Act 29 satisfies due process rests in part on the accuracy of two "critical legislative determinations":

(1) that all sexual offenders pose a high risk of recidivation; and

(2) that the tier-based registration system of Revised Subchapter H protects the public from the alleged danger of recidivist sexual offenders.

Id. (formatted for clarity).

Torsilieri I did not find that answering these two factual questions resolves all of Appellee's claims. This Court instead looked at each claim and explained what facts were important to address the specific elements of each, concluding that at least three other factual questions were relevant:

(3) whether "the label of sexual recidivist stigmatized offenders and subjected them to difficulty finding housing, employment, and education as well as erected barriers to the establishment of pro-social relationships with others."[7]

(4) "whether sexual offenders commit more sexual crimes than other groups not subject to similar registration laws"[8]; and

(5) are there other reasonably available less restrictive means to identify those who pose a high risk of recidivating and may reduce sexual recidivism?[9]

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[7] *Torsilieri*, 232 A.3d at 586 (internal quotations omitted).

[8] *Torsilieri*, 232 A.3d at 594. This question is related to the more general "high risk" question (1), but it is a distinct sub question, and is discussed as such below.

[9] *Id.* at 586-87.

D. The Trial Court's Findings

The trial court held a three-day evidentiary hearing after this Court's remand. Appellee presented expert testimony, detailed in the following sections, from world-leading[10] and "well-respected" researchers and academics "in the field"[11] of sexual offending and recidivism, registration, and notification, and the response and prevention of sexual violence (Drs. Karl Hanson, Elizabeth Letourneau, and James Prescott).[12, 13] The Commonwealth presented a single expert (Dr. Richard McCleary) who is not an expert in this field, but in criminology more generally,[14]

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[10] R.404a (Letourneau) (Dr. Hanson is "widely regarded as the leading expert on sex offender recidivism and sex offender risk assessments perhaps in the world.").

[11] Tr. Ct. Opinion at 7.

[12] *See* Testimony of Elizabeth Letourneau R.361a-R.496a; Affidavit of Dr. Elizabeth Letourneau, Director, Moore Center for the Prevention of Child Sexual Abuse, Johns Hopkins University at ¶¶6-7 ("Letourneau Aff."), Tr. Ct. Exhibits D-6 & D-7; Testimony of Dr. Karl Hanson R.161a-R.356a; Declaration of R. Karl Hanson, Ph.D., Carlton University, Department of Psychology, at ¶2, ("Hanson Dec.") Tr. Ct. Exhibits D-1 & D-2; Testimony of James J. Prescott, R.496a-R.644a; Expert Report of James J. Prescott, J.D., Ph.D. ("Prescott Rep."), Tr. Ct. Exhibits D-8 & D-9.

[13] *See also* Jill Levenson, Ph.D., Barry University, School of Social Work, P.2 (hereinafter "Levenson Dec.") (available in the Supplemental Record, at pp. 583-618). Appellee occasionally references Dr. Levenson's stipulated declaration, as it was in part relied upon by Appellee's other experts, was accepted as her testimony by the Commonwealth, admitted into evidence in this case, and Professor McCleary reported that "he read and continue[s] to rely upon her earlier declaration." Expert Report of Richard McCleary, at P.4 ("McCleary Rep.").

[14] R.670a-674a (McCleary).

who "in large part attacked the methodology of all the research" and conclusions proffered and proven by Appellee."[15]

The trial court credited the testimony, reports, and research of Appellee's experts[16] and rejected as incredible the facts and conclusions posited by Dr. McCleary's "blanket denunciation of all research contrary to the Commonwealth's position."[17] It held, "we are not persuaded by Dr. McCleary's opinion that the pitfalls endemic to the human component of science render all of the research critical of SORNA unreliable and untrustworthy."[18]

The court then held that Act 29 violates the irrebuttable presumption doctrine because (1) it "unduly stigmatizes persons convicted of committing sexual offenses [...] creating difficulty in finding housing, employment/education, and establishing pro-social relationships with others";[19] (2) SORNA's presumption "that all sex offenders pose a high risk of sexual recidivism is not universally true"; and (3) and that alternative

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15 Tr. Ct. Opinion at 7.
16 Tr. Ct. Opinion at 6-12, 22-26.
17 Tr. Ct. Opinion at 7.
18 Tr. Ct. Opinion at 7.
19 Tr. Ct. Opinion at 3.

more effective means are "available to the criminal justice system" to identify "high-risk recidivists and reduc[e] sexual offending."[20]

The court also found Act 29 punitive. It held that the reasoning employed in *Muniz* applies here, but that "based on the evidence of scientific and expert consensus presented, SORN laws do not have the effect on recidivism and public safety anticipated by the legislature," and therefore Act 29 is not rationally related to the desired legislative purpose and is excessive in scope.[21]

E. The Evidence Presented At the Hearing.

1. The Evidence Convincingly Demonstrated a Consensus That Most Sexual Offenders Do Not Pose A "High Risk" Of Recidivism And Do Not Commit More Sexual Crimes Than Other Groups Not Subject To SORN Laws.

a. Most people on the registry pose minimal recidivism risk and are not all alike.

There is a "common misunderstanding that people who commit one sexual offense are at high risk to commit a second sexual offense,"[22] "and

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20 Tr. Ct. Opinion at 12.
21 Tr. Ct. Opinion at 26.
22 Letourneau Aff., ¶9.

that they are impervious to change."[23] This view is "not based on strong research evidence [but rather] on highly publicized cases of serious new offenses (sexual murders)" and misreading a few select studies of very high risk people.[24]

Conversely, "the general scholarly view has long been that sex offense recidivism rates (and thus the risks of sexual reoffense) are among the lowest there are, excluding homicide. Most people convicted of a sex crime do not tend to reoffend sexually."[25] "[N]early all methodologically rigorous research studies find that 80% to 95% of adult male sex offenders are never reconvicted for a new sexual crime."[26] This is true "even if they were followed for 10 years."[27] Overall, "the recidivism risk of most of these individuals is actually quite low, and they are even less likely to commit another crime the longer they remain offense-free."[28]

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[23] R.392a (Letourneau) ("Registry laws in general are based on the myth that all sex offenders represent a high risk of recidivism").

[24] *See* Hanson Dec. ¶7; R.225a-R.233a (Hanson) (discussing the exceptional high-risk cohort of individuals examined in early recidivism studies).

[25] Prescott Rep. P. 2; R.537a (Prescott) ("the consensus in the field is that really the only other crime that has a lower recidivism rate is homicide.").

[26] Letourneau Aff. ¶9; Hanson Dec. ¶10 ("10% to 15% range after 5 years and between 15% and 20% after 10 years.").

[27] Hanson Dec. ¶10.

[28] Hanson Dec. ¶8.

The trial court adopted these findings: "[t]he bottom line, as the defense experts have demonstrated, is that 80% to 95% of all sex offenders will not reoffend."[29] The High Court's contrary declaration in *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)) ("frightening and high"), has been soundly debunked.[30]

In line with the trial court's finding on overall rates, people with sex crime convictions are not all "equally likely to reoffend."[31] Only a small group of highly recidivistic people occupy this "high risk" sphere. In contrast, a majority reoffend at rates similar to or lower than people never before convicted of sexual crimes.[32] "There are, of course, high risk offenders who remain high risk and who will go on to reoffend, but the majority of people with sex crime convictions will not."[33] This result has "been replicated again and again by researchers in and outside of the United States"[34] and "is accepted … universally by both the applied people working in corrections and forensic mental health as well as by the

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29 Tr. Ct. Opinion, p. 10.

30 *See Torsilieri I*, 232 A.3d 584-85 (previewing the evidence proved by Appellee at the hearing).

31 Hanson Dec. ¶11; R.197a (Hanson).

32 *See* R.192a-R.199a (Hanson).

33 R.393a (Letourneau).

34 R.393a (Letourneau).

research community."[35] In other words, "[s]ome [registrants] are high [risk]…[s]ome are not. And…the evidence is available to…differentiate" between them.[36]

While 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,[37] this statistic is unhelpful and highly misleading when considered in a vacuum.[38] This "three times" statistic, which comes from a Bureau of Justice Statistics (BJS) report finding "somewhere between 2 and 3 percent sexual recidivism rate [for those with a non-sexual criminal history and]… a 6 percent sexual recidivism rate"[39] for those with prior sexual convictions, reflects an "*average*" of the recidivism rate across sexual offenders as a whole.[40] The statistic takes the "majority of lower risk offenders … [and] the smaller percentage of highest risk and you're putting them all together."[41] The risk and

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35 R.193a (Hanson).

36 R.192a-R192a (Hanson); *see also* Levenson Dec. P.8 ("people who commit sexually related crimes represent a diverse population with varying degrees of risk"). *See also* Hanson Dec. ¶¶11-13 (each individual offender varies in their degree of risk).

37 R.341a (Hanson); R.441a (Letourneau); R.632a (Prescott).

38 R.342a (Hanson); R.489a (Letourneau); R.632a (Prescott) (discussing low base rates).

39 R.490a-491a (Letourneau).

40 R.490a-491a (Letourneau) (emphasis added).

41 R.490a (Letourneau).

reoffense variances across individual offenders were not considered.[42] Nonetheless, the BJS report found that "94 percent" of those with sexual convictions did *not* reoffend and did not discuss that only an identifiable small number of high-risk offenders largely account for this "three times" number when factored into the group average.[43]

Relatedly, "one of most well-established findings in criminology" is that there generally exists a "decline in criminal recidivism risk for individuals who remain offense-free in the community,"[44] and that "risk of sexual recidivism generally declines with advanced age."[45]

> We see desistance from this type of offending as the norm for most people. There are, of course, high risk offenders who remain high risk and who will go on to reoffend, but the majority of people with sex crime convictions will not go on to reoffend sexually…. [T]hat's been replicated again and again by researchers in and out of the United States.[46]

b. Most people on the registry commit no more sexual crimes than others not subject to similar registration laws.

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42 R.490a (Letourneau).

43 R.490a-R.491a (Letourneau).

44 Hanson Dec. ¶17; R.568a; R.574a (Prescott) (explaining that "lots of evidence" demonstrates this effect); R.445a (Letourneau) ("As people remain offense free in the community it becomes even less likely they will reoffend in the future.").

45 R.202a (Hanson); Hanson Dec. ¶20.

46 R.393a-R.394a (Letourneau).

This Court remanded for the trial court to explore the evidence regarding relative risks between registered and non-registered offenders.[47] A clear consensus emerged. All the experts agree that every person convicted of any crime poses some risk of committing a future sexual offense, even if they have never committed one before.[48] That risk is "not zero."[49] As Dr. Hanson explained, it is the "desistance" point—"the observed [or detected] rate [of sexual offending] for people without a sex offense history but a general criminal conviction"[50] that matters.

In other words, "individuals with a history of sexual crime who remain free of arrests for a sex offense will eventually become less likely to reoffend than a non-sexual offender is to commit an 'out of the blue' sexual offense."[51] Dr. McCleary agreed that, at least generally, some people will reach a desistance level.[52]

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47 *Torsilieri I*, 232 A.3d at 594 n.22 (the relevant question is "whether sexual offenders commit more sexual crimes than other groups not subject to similar registration laws.").

48 *See* R.790a-R.791a (McCleary) (because the practical effect is no offending, the assuming mathematically that every person will eventually reoffend, but may not do so within 500 years, "doesn't really have any substantive import").

49 R.314a (Hanson).

50 R.313a-R.314a (Hanson); Hanson Dec. ¶20.

51 Hanson Dec. ¶51; R.198a-199a (Hanson). *See also* Levenson Dec. ¶¶III.z-bb (discussing desistance research).

52 R.681a (McCleary).

Numerous studies demonstrate that roughly 2% of people who have committed a prior non-sexual crime will nonetheless be identified as committing a sexual crime after three to five years from release to the community."[53] "There have been other studies that have come to substantially the same conclusion."[54] Dr. McCleary did not present contrary evidence or suggest that there remains debate about these general conclusions.[55]

When comparing people who have a prior sexual offense conviction with the non-sexual offense group, while "time to desistence varie[s] ... the lowest risk people [are] already below this threshold ... [and] most people [close to 60 percent] cross[] it between 10 to 15 years" after release from incarceration.[56] More colloquially, Dr. Prescott stated, "lots of evidence on [sexual offender desistance]—suggests that these curves approach the horizontal very quickly...."[57]

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[53] Hanson Dec. ¶55 (citing research and explaining the number is "based on 11 studies involving 543,204 individuals) (emphasis added); Letourneau Aff. ¶9.a. (demonstrating in her own research a 2% rate after 3 years).

[54] R.314a (Hanson).

[55] R.692a (McCleary) (noting his only criticism is that some registrants may never desist—a conclusion upon which all experts agree).

[56] R.217a-219a (Hanson); Hanson Dec. ¶55;

[57] R.568a (Prescott) (discussing how long follow-up studies are not necessarily better as desistance from sexual offending hits baseline relatively quickly).

This does not mean that the remaining people will reoffend. The measure is *risk* for reoffense, not actual reoffense. For example, the minority of people who still show a risk above desistance (2%) after 10 years but have not reoffended, will only have a 4% to 8% chance of doing so.[58]

With respect to Pennsylvania, Dr. Hanson elaborated:

> Pennsylvania is not that different from other jurisdictions I have looked at .... There may be some differences, but I've looked at a large number of different jurisdictions including New Jersey and New York. So I expect that distribution of risk levels will be similar to those other jurisdictions.... Overall, the risk level would be about, I would say, between 5 and 10 percent overall. So with 20,000 [people on the registry] you will get, you know, several hundred recidivists after five years."[59]

While a small number of people could pose risks of 40% chance or higher at the time of their release, it is "not very many," and easily applied assessments can identify who they are and who they are not.[60]

Further, there is agreement that even people who are "high risk" at the time of their release from custody do not remain that way for the periods of time reflected by Subchapter H Tier II and Tier III categories.

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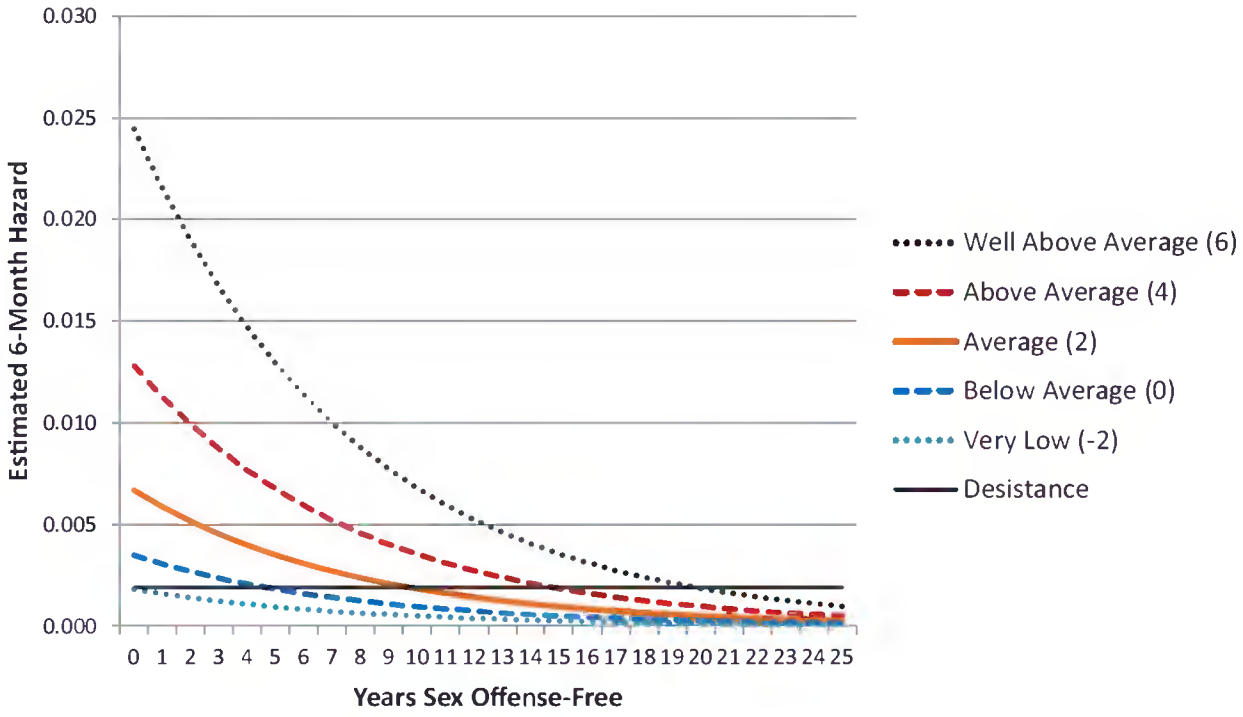
58 Hanson Dec. ¶56, Figure 2.
59 R.307a (Hanson).
60 R.307a (Hanson).

> "*most individuals with a history of sexual offending will no longer present any significant risk of sexual recidivism after 10 years,* and only a small proportion will remain at risk after 15 years sexual offense free.[61]

As recently as 2021, Dr. Hanson found "[m]ost individuals moved below the desistance threshold [2% risk] between 10 years and 15 years sexual offense free."[62] The following chart reflects this conclusion:



Hanson Dec. ¶56 (Figure 2).

More than half of the people currently registered in Pennsylvania under Subchapter H are nonetheless required to register for at least 25

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61 Hanson Dec. ¶61.

62 Hanson Dec. ¶64.

years or longer[63] despite that most will be at a 5% risk to reoffend after 3 years and under a 2% risk by 10. *Everyone* will be under a 2% risk by year 20 if they have not been arrested for a new crime.[64] The effect is that law enforcement will catch most of the small portion of re-offenders in each risk group within the first few years of their release, making extended registration periods for the overwhelming majority of registrants useless.

c. The "dark figure" of sexual offending is irrelevant to the key question of relative risk and desistance.

Dr. McCleary did not challenge the consensus to the *observed* risk of reoffense rates, nor that it varies by individual. Instead, as the trial court stated, "the Commonwealth's main opposition to the defense experts' opinions regarding sexual offenders' low rate of sexual recidivism is the 'dark figure' of sexual crimes.[65] Appellee's experts agreed that the relatively low rates of reoffending outlined above do not reflect the abso-

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[63] *See* Pennsylvania Megan's Law Website, Active Offenders Current Report, https://www.meganslaw.psp.pa.gov/MegansPublicReports.aspx.

[64] Hanson Dec. ¶¶54-64.

[65] Tr. Ct. Opinion at 8. *See e.g.*, R.723a-R.724a (McCleary).

lute rate of sexual offending (the "dark figure") because not all post-conviction sexual offending is "detected."[66] Although Dr. McCleary took "strong exception" to Appellee's experts' framing of this underreporting as "irrelevant," his exception did not discern relevance concerning the question before this Court or expert agreement on the matter.[67]

The trial court accepted Appellee's experts' opinions that while relevant for general public policy,[68] the "dark figure" is irrelevant to comparing those who are registered and those who are not. "[C]omparisons [between groups of offenders]…are not influenced by the undetected rates because the undetected rates should be equivalent for people with or without a sexual offense history."[69]

Even Dr. McCleary *agreed* that there is no reason to treat underreporting (the dark figure) differently for people convicted of sex crimes and those never convicted of sex crimes—"the principles that underlie the bias [for underreporting of sex crimes] would apply to both groups."[70]

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66 R.199a; R.233a-R.234a (Hanson); Letourneau Aff. ¶9.d; R.556a-R.557a (Prescott).

67 R.690a (McCleary).

68 *See, e.g.*, R.234a (Hanson) ("I would not say it's irrelevant. I would say that it's not relevant to the desistance threshold because that is a comparison between people . . . .").

69 R.199a , 344a (Hanson).

70 R.774a (McCleary).

d. Even though irrelevant here, Appellee proved agreement that the amount of underreporting of recidivist sexual offending is not likely significantly higher than the reported rate.

Even though the "dark figure" of crime plays little role in this litigation, there was significant discussion about the "dark figure" of sexual offending, specifically concerning the suggested rates of reoffense posited by Scurich, N. & John, R.S., *The Dark Figure of Sexual Recidivism*, 37 Behavioral Sciences and the Law, 158-175 (2019).[71] The trial court concluded, as stated by Dr. Hanson, "'[t]here are no findings in that study. It is a statistical model based on certain assumptions, [and those assumptions] are not supported by the data.'"[72] Dr. McCleary agreed: "[t]hey built a simulation model that allowed them to get a handle on the size of the dark figure *under certain circumstances, certain assumptions.*"[73]

While the statistical models they used in that study are generally accepted (McCleary is correct that the statistical models are sound), the assumptions they used are not.[74] These "assumptions [such as constant

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71 *See, e.g.,* R.725a-R.727a (McCleary).

72 Tr. Ct. Opinion, at 8, (quoting R.236a (Hanson)).

73 R.725a (McCleary) (emphasis added).

74 Prescott Rep. PP.19-20 (discussing the unaccepted assumptions and the numerous flaws used); Prescott Rep. Appendix B (critical article); R.561a-R.564a (Prescott); R.235a-R.237a (Hanson) (explaining assumption errors); Hanson Dec. ¶¶16-17; Hanson Dec. Exhibit 2 (Abbott, BR. *Illuminating the dark figure of sexual recidivism*.

offense rates and high numbers of infrequent offenders]… virtually guarantee that their estimates of the true recidivism rates will be very high."[75]

"Nonetheless, the few people who make the "implication that the recidivism rates are very, very high … would not be generally accepted in the professional community,"[76] and "are at odds with the much more common scholarly view on sex offense recidivism … [that it] is very low relative to other crimes, and that the risk is not notably higher than that posed by many others who have a criminal record."[77]

Further, "dark figure" data "reveals there is little to no research that measures sex offense *recidivism* as opposed to unreported sex offenses generally."[78] Considering the "convincing" evidence that "the vast majority of reported sex offenses are committed by individuals with no prior record of a sex offense,"[79]—roughly "95 percent"[80]—"it is risky to

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38 Behavioral Sciences and the Law, 543-558 (2020) (also discussing the lack of acceptance of these assumptions)).

75 Hanson Dec. ¶7.

76 R.237a (Hanson).

77 Prescott Rep. P.17.

78 Prescott Rep. P.17.

79 Prescott Rep. P.17.

80 R.408a (Letourneau).

assume that once a person is convicted and sentenced, that it has no specific deterrent effect on reoffending."[81] Otherwise, the entire premise of punishment and probation and court-ordered treatment is called into question.[82]

> [W]ith adequate follow-up periods, [] studies do capture the number of sexual **re-offenders**. Having been caught and convicted once, it is unlikely that a known sex offender would evade detection for decades while continuing to sexually assault children and/or adults. While there are sensational examples of known offenders continuing to abuse others, the evidence indicates that the vast majority of previously incarcerated sex offenders desist from further sex crime.... [83]

2. The Trial Court Found No Counternarrative Exists To The Expert Consensus That Act 29 Fails To Protect The Public From The Alleged "Danger" Of Recidivist Sexual Offenders.

"Based on the evidence of scientific and academic consensus presented, we find that SORN laws do not have the effect on recidivism and public safety anticipated by the Legislature."[84] "There are now many

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[81] Prescott Rep. P.17. *See also* Levenson Dec. P.4 ("there is a difference between abusers with many victims *before* an arrest, and *recidivists* who are re-arrested for a new sex crime after being caught, sanctioned, and supervised."); Letourneau Aff. ¶9.d. (the same); Hanson Dec. ¶65 (the same).

[82] Prescott Rep. P.18.

[83] Letourneau Aff. ¶9.d.

[84] Tr. Ct. Opinion at 26.

studies that simply fail to find a relationship between registration and sexual recidivism ...."[85] As Professor Prescott testified: of "more than 50" studies," "with a few minor exceptions, ... all point[] in the same direction that these notification laws do not reduce recidivism."[86] "[P]articularly with respect to notification, I really can't think of anybody who thinks that the policy is effective or ... effective in the way that it operates in states like Pennsylvania."[87] Even Dr. Letourneau, whose vast majority of [work] has been focused on preventing children from being sexually harmed"[88] declared:

> I've collaborated with I don't know how many other experts -- the leading experts in the field of sex crime prevention, sex crime treatment -- or sex offense treatment. I collaborate with many of the leaders who focus more of their work on victimization and survivors. *And nobody believes that registration notification is an effective strategy to prevent subsequent sex crimes.*[89]

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85 R.411a (Letourneau); Letourneau Aff. ¶7.

86 R.521a (Prescott); *see also* Prescott Rep., Appendix A (with Wayne Logan) ("In sum, the chapter comprehensively engages with the pressing question of whether SORN laws protect the public and concludes that they do not."). *See also* Levenson Dec. P.4-5.

87 R.521a-R522a (Prescott).

88 R.393a (Letourneau).

89 R.393a (Letourneau) (emphasis added).

"[I]nstead, these policies are costly and have unintended effects that may imperil community safety by reducing the likelihood of conviction and increasing the likelihood of recidivism by" failing to reintegrate people into society.[90] Or, as Dr. Prescott called them—"anti-re-entry policies."[91]

The Commonwealth's only witness did not disagree. He did not claim evidence demonstrates SORNA reduces victimization. Nor did he claim that there is no consensus among the academics and researchers in the field.[92] He only opined, based on his personal, never-published opinion, that "[w]e don't know whether they work or not or whether some work and some don't .... [T]he bottom line is we really don't know."[93] The trial court did not find that rebuttal convincing.

Appellee's experts countered that there is a consensus that registration and notification combined do not prevent recidivism.[94] "There are

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90 Letourneau Aff. ¶16; *see also* Hanson Dec. ¶69; R.222a (Hanson) (SORN laws serve "no public safety benefit.").

91 R.543a (Prescott).

92 R.794a (McCleary) (saying the evidence supporting the academic consensus is "ambiguous").

93 R.742a-R.743a (McCleary).

94 R.614a (Prescott)

at least 17 studies that evaluated registration and notification policy effects on deterrence of first-time sex crimes by non-offenders and/or on recidivistic sex crimes by registered offenders. All but three fail to find a positive effect on sexual or violent re-offense rates,"[95] and those that do examine laws and populations radically different than Act 29.

SORN laws may, however, have the unintended effect of general deterrence on first-time offenders by threatening registration and notification as a consequence of committing a sex crime. "There are now at least a handful of studies that have shown deterrence of first-time offenders as a result of SORN type laws," although there is no consensus on that.[96] At least one of Dr. Letourneau's studies found a small general deterrent effect on first-time offending.[97]

General deterrence, however, is accomplished by *punishing* someone else.[98] "If you find something that operates well on general deterrence but terribly on specific deterrence or recidivism reduction, it doesn't seem

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95 Letourneau Aff. ¶7 (examining the studies and relaying their conclusions); *see also* Prescott Rep. P.7-8 (discussing studies finding no positive effect in numerous and diverse sates including Pennsylvania).

96 R.541a (Prescott).

97 R.410a-R.411a (Letourneau).

98 R.538a (Prescott) (discussing general deterrence).

like you … ought to stick with that kind of policy because there are other ways to generate general deterrence."[99]

In concluding that SORN laws do not prevent recidivism, Appellee's experts explained there is no counter-narrative. The two studies that demonstrate a reduction in recidivism (which Dr. McCleary relied on heavily) were from Washington and Minnesota. Both used empirically derived risk assessment instruments or small high-risk offender samples to classify offenders, unlike Act 29.[100] The first, by Duwe and Donnay, was not peer reviewed and looked at "a small sample of potential recidivists, in a jurisdiction with an atypical, narrow, individual risk-based approach that looks nothing like Pennsylvania's."[101] The other used Minnesota's empirically classified highest risk tier, which subjected them "to more notification, more intensive surveillance, and much, much, much, more intensive supervision" than Act 29, such as reporting to parole agents.[102]

Nonetheless, Minnesota's (now defunct) narrow program might be "the kind of structured, thoughtful increased surveillance that we want

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99 R.538a-R.540a (Prescott).
100 Letourneau Aff. ¶¶7-8; Prescott Rep. Appendix A at 16; Levenson Dec. P.4.
101 Prescott Rep. P.8 n.7.
102 R.471a (Letourneau).

to see of people who have been identified through empirically rigorous measures as high risk to kind of put the resources on that smaller group of individuals."[103] A "more targeted" approach may be more likely to work.[104] Dr. McCleary conceded that the studies examined only select groups of more serious or repeat offenders, and that he had no idea whether Act 29 was similar to the governing law in those studies.[105]

Dr. McCleary's primary challenge was to "the methodology of all of the research showing a low rate of sexual reoffending ... [and] the inefficacy of SORNA's registration and notification requirements."[106] Appellee's experts countered that the body of research and its methods fully support their views. [107]

> The point of science is to build a body of evidence around a specific question. And if you have something that is supposed to reduce sexual recidivism and most of the research fails to find that it reduces sexual recidivism, then that is a body of evidence. It is not nothing, which I think is what Dr. McCleary is arguing.... Again, if it was a single study or two or even a small handful that found

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103 R.472a (Letourneau).

104 R.393a-R.394a (Letourneau).

105 R.795a-R.796a (McCleary).

106 Tr, Ct. Opinion at 7; *see* generally McCleary Dec.; R.742a-R.743a (McCleary).

107 R.553a (Prescott); R.423a-R.427a (Letourneau); R.245a-246a (Hanson) (Stating McCleary's assessment is "not the most common way of looking at data among contemporary practice").

> null results,[108] we might be able to argue, well, maybe a different kind of schema would have a different effect. But we've seen multiple studies from multiple states with different policies come up with the same finding, which is that it's not related to sexual recidivism.
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> [I]t just wouldn't make sense to look at a policy or a practice or a drug or anything that consistently fails to be associated with its intended outcome and to somehow interpret that that doesn't mean anything. It means that it's not working.[109]

In any "single study" when the result is zero effect or close to zero (no effect), it does not mean "I'm showing you evidence of no effect. It's that there is no evidence of any effect."[110] But, "once you have multiple studies that consistently find [no effect] you . . . have more and more statistical power, … [s]lowly with the accretion of evidence you can feel more and more confident."[111]

As published in his recent book, Professor Prescott declared, "we aim to present an overarching perspective and the *consensus* view of the experts in the field. We note, where it exists, any evidence running counter to these views, and we catalog the reasons to feel confident in the *body*

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[108] A null result is a finding of an effect that is not statistically significant to attribute it as causal. R.730a (McCleary).

[109] R.424a-R.425a (Letourneau).

[110] R.553a (Prescott).

[111] R.553a-R.554a (Prescott).

of work standing behind the consensus."[112] "[T]he accumulated evidence largely rejects the claim that SORN laws have achieved their goal of increasing public safety."[113]

3. A Consensus Exists That Empirical Risk-Assessment Is More Accurate Than SORNA's Tier Structure.

Empirically validated risk assessments that standardize risk levels for sexual offenders are "much more accurate" at measuring risk than SORNA's tier structure.[114] Dr. Letourneau explained, "[t]he findings suggest that Adam Walsh Act (AWA) tiers did a poor job of identifying high-risk offenders, and thus may not meaningfully guide sex offender management practices."[115] "Indeed, several studies [] highlight the inability of federal and state registration schemes to correctly classify the minority of sex offenders who will go on to reoffend."[116] Dr. Hanson concurs: "I've conducted a number of studies … [and] it is hard to find relationships between the names of the offenses and the recidivism rates. They are generally unrelated."[117]

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112 Prescott Rep., Exhibit A, at 7.

113 *Id.* at 33-34.

114 R.349a (Hanson); Hanson Dec. ¶¶21-22 ("offense based levels have little relationship to the likelihood of sexual recidivism"); Levenson Dec. pp.1-2, 8.

115 Letourneau Aff. ¶7.e., j.; *see also* Levenson Dec. P.2 ("AWA tiers did a poor job of identifying high risk offenders and recidivists.").

116 Letourneau Aff. ¶10.

117 R.203a (Hanson).

While Dr. McCleary was silent on whether SORNA's tier-based structure is or is not related to risk, he agreed that empirical assessments are more accurate than the crime of conviction:

> Q. If the Sexual Offender Assessment Board, for example, were comprised of ... psychologists and psychiatrists who have training and experience in not only using ... risk assessment instruments but doing qualitative risk assessments not just using tools but looking at the entire history of an individual, empirically speaking, making predictions about that person's likelihood to reoffend . . . would that be more reliable than, ... offense of conviction? A. *It would be.*[118]

4. There Is Consensus That SORNA Uniquely Stigmatizes Registrants, And Can Threaten Public Safety.

The trial court accepted Appellee's experts' testimony that a "special stigma" exists associated with registration.[119] Dr. Prescott explained that "notification policies ... are essentially anti re-entry policies ...."[120] "Community notification laws make registrants' lives very difficult ... and are well-documented to be important to explaining recidivism pat-

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[118] R.786a (McCleary) (emphasis added).

[119] Tr. Ct. Opinion at 5; Letourneau Aff. ¶13 (stating the unique challenges associated with registration).

[120] R.543a (Prescott).

terns. Essentially, returning to 'normal' life for individuals on public registries is nearly impossible,"[121] and "have unintended effects that may imperil community safety ...."[122]

> Research has clearly documented that the collateral consequences of registration extend beyond the registrant to his family and household members, who are also impacted by financial, social, and psychological stressors when a loved one is placed on a registry (Farkas & Miller, 2007; Levenson & Tewksbury, 2009; Tewksbury & Levenson, 2009). The RSO designation vicariously stigmatizes the spouses, children, and family members of registrants. The publicly accessible RSO designation has the potential to damage family members' business reputations or expose relatives to vigilantism.[123]

Dr. Letourneau provided several examples comparing people with sex convictions who were and were not on the registry that found that people on the registry fare much worse than other comparison groups; for example, veterans on the registry had three times the degree of housing instability than non-registrants.[124] Her research and that of others led

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121 Prescott Rep. P.2. *See also* Levenson Dec. P.6.

122 Letourneau Aff. ¶16

123 Levenson Dec. P.6.

124 Letourneau Aff. ¶13; R.454a-R.455a (Letourneau).

her to conclude that SORN laws have "a strong impact on a person's reputation that extends beyond what we would see in a background check."[125]

There is agreement that "policies and practices that systematically block the attainment of normal, prosocial goals are likely to increase the recidivism risk of individuals who sexual[ly] offended in their past."[126] This is especially true where states impose "higher levels of treatment and supervision than is warranted given their risk level."[127]

> [SORN laws] have strong unintended consequences on factors associated with ex-offenders' successful reintegration into society. *There is scientific and academic consensus* that people subjected to registration and notification requirements have difficulty finding and maintaining stable housing, employment, and prosocial relationships.[128]

The trial court agreed.[129] Dr. Letourneau elaborated: "[f]inding and maintaining employment, finding and maintaining stable housing, and find-

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125 R.395a-R.403a; R. R.454a-R.455a (Letourneau).

126 Hanson Dec. ¶68.

127 Hanson Dec. ¶69; *see also* Levenson Dec. P.5.

128 Letourneau Aff. ¶10 (emphasis added). For additional discussion on the point, *see* Hanson Dec. ¶59; Letourneau Aff. ¶¶6, 12; Levenson Dec. pp. 2; 6-7; Prescott Rep. Levenson Dec. P.2.

129 *See* Tr. Ct. Opinion at 3.

ing and maintaining prosocial relationships" are the "hallmarks of effective reintegration...."[130] As "currently constructed in Pennsylvania," the "public stigma of widespread" [r]egistration and notification policies disrupts each...."[131]

Dr. McCleary suggested, citing only one publication, that there may be no difference between a conviction's effect and registration and notification's effect on a person's life or their family's. "[Dr. Letourneau's] opinion may be correct, but it may be incorrect. The research just doesn't point easily in one direction or another.... [because t]he research methods generally in this field are exceptionally weak."[132] The trial court rejected this suggestion.[133]

When questioned about this, Dr. Letourneau responded: "I would not stipulate to that at all." "[T]he research that informs that conclusion [that there is a difference] is the research that shows the strong impact of online registration on the experiences of people who are registrants and also on family members of those individuals."[134] And the research in

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130 R.403a (Letourneau).

131 R.403a (Letourneau); *see also* Levenson Dec. P.4.

132 R.684a-R.685a; R. 740a (McCleary) (citing one federal probation note that criticizes the method).

133 Tr. Ct. Opinion at 4-5, 7.

134 R.452a-R453a (Letourneau).

this area is robust. Dr. Prescott concurred. His report highlights the "very large [amount of] literature on SORN's negative collateral consequences."[135]

For example, Act 29 restricts registrants' housing options. "[M]ore than five" registered offenders cannot collectively live in facilities providing social services which otherwise help prevent re-offending, 42 Pa.C.S. § 9799.25(f), including "[a]ny nonprofit or for-profit entity that maintains a facility that provides housing to individuals on probation or parole or other individuals previously convicted of crimes." 61 Pa.C.S. § 6124(c).

Registrants also "face additional non-obvious obligations in other states should they travel for work or to visit family, especially in a state like Pennsylvania where distances are relatively short from the most populated parts of the state."[136] "It is essentially impossible for a Pennsylvania registrant to travel to other states without risk of being found out of compliance." This is not the case with convictions alone.[137]

Relatedly, SORNA uniquely harms public safety by increasing litigation, reducing the likelihood of conviction, and resulting in convictions

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135 Prescott Rep., Appendix A, 27-33; n. 47 (citing numerous studies).
136 Prescott Rep. P.15.
137 Prescot. Re. PP.15-16 (providing detailed examples).

that do not accurately reflect the crimes committed.[138] Registration is associated with a "substantial increase in cases being pled from sexual to nonsexual offense charges."[139] This effect means that sexual violence conviction rates will be unreasonably skewed, which can dangerously alter our understanding and response to the problems of sexual violence.[140]

SORN law's failure to reduce offending, coupled with the law's real negative consequences, results in diverting limited resources from other, more effective methods of crime control.[141] "Rather than considering all individuals with a history of sexual crime as continuous, lifelong threats, society will be better served when legislation and policies consider the cost/benefit break point after which resources spent tracking and supervising low-risk individuals are better re-directed toward the management of high-risk individuals, crime prevention, and victim services."[142]

Dr. McCleary countered by discussing the economic cost of victimization.[143] Notably, only one witness was qualified as an expert on the

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138 Letourneau Aff. ¶12.a.-b.

139 Letourneau Aff. ¶12.a

140 R.408a-R.409a (Letourneau).

141 R.408a (Letourneau) ("To the extent that [SORNA]… doesn't work, it keeps us from resourcing policies and practices that could work.").

142 Hanson Dec. ¶48.

143 R.702a-R.705a (McCleary).

costs of sexual victimization—Elizabeth Letourneau.[144] And she agreed that victimization is quite costly (in the billions).[145] That is not in dispute. But, while victimization costs are important, they only matter if the money expended has the intended effect. As Dr. Letourneau testified:

> I think we should all be absolutely as vigilant as possible to prevent child sexual abuse. It's certainly what I have devoted my career to. But that involves using effective strategies and not relying on ineffective strategies that waste resources and time and pull attention away from where it should be targeted.[146]

"[A]s a consequence [of the sex offender label, registrants] are essentially experiencing the opposite of everything that we're trying to do with our policies when people leave prison normally."[147]

5. Experts Agree That There Are More Effective Ways To Manage Risk Of Sexual Reoffense And Reduce Recidivism.

Appellee's experts all agreed that legislatures should employ narrow, empirically targeted approaches that supervise and treat only those

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144 R.389a (Letourneau). Dr. McCleary was not qualified in this area. R.675a (McCleary).

145 R.377a (Letourneau).

146 R.426a-R.427a (Letourneau).

147 R.543a (Prescott).

who pose some real risk to the public and should use "the best available tools to identify people more likely to reoffend and surrounding them with the kind of surveillance and treatment strategies that either we know work or at least show some promise."[148] The trial court concurred: "it is beyond peradventure"[149] that a consensus exists that other more effective and less restrictive means can reduce offending and identify risky people.

Dr. Hanson testified that sexual recidivism could be reliably predicted by "simple"[150] widely-used risk assessment tools, such as the Static-99R, which classify individuals into various risk levels.[151] "The Static-99 and Static-99R are the most widely used sex offense risk assessment instruments in the world and are extensively used in the United States, Canada, and other nations."[152] This tool, or ones like it, would be a much more accurate way of identifying which few people re-

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148 R.427a (Letourneau).
149 Tr. Ct. Opinion at 11.
150 R.274a (Hanson).
151 Hanson Dec. ¶1.e.
152 Hanson Dec. ¶25; R.203a-R.207a; R.295a (Hanson).

quire supervision and have been validated for roughly 95% of those subject to registry laws.[153] There are other tools too, some of which are employed for specific jurisdictions.[154]

No expert suggests that a single tool alone should be used for a "high stakes" sexual offense management strategy.[155] Instead, as Dr. Hanson describes,

> appropriately trained and conscientious criminal justice officials could give a reasonable estimate of what the recidivism risk would be using Static-99 alone. They could do better if they had more information and more training. And in high stakes evaluation I would encourage more than Static-99. I would assume that the decision would be based on more information than just the Static-99 score.[156]

In other words, "risk assessment should be *a component* of effective and rational ... public policy for managing the risk of sexual offending ... [because] [s]pending a lot of time and effort on people who don't have a

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153 *Id.*
154 R.237a (Hanson) (discussing other tools).
155 R.300 (Hanson).
156 *Id.*

perceptible risk of sexual reoffending serves no ... public safety benefit."[157] There is near universal agreement on this account.[158]

As the trial court concluded, the framework for this system *already exists* in Pennsylvania.[159] Once informed how Pennsylvania's SOAB works and who staffs it, Dr. McCleary conceded that when used with clinical judgments and information possessed by the SOAB, these assessment tools would be much more accurate than Act 29's use of the crime of conviction alone to determine risk.[160] Additionally, consistent with the consensus regarding desistance, risk assessment tools can be employed at routine points throughout registration to remove people who no longer demonstrate elevated risk.[161]

Dr. Prescott discussed another more tailored method: the model suggested by the American Law Institute's revised Draft No. 5 of the

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157 R.222a (Hanson).

158 R.472a (Letourneau) (discussing how programs that use "empirically rigorous measures" to "put the resources on that smaller group" of high-risk people makes sense).

159 Tr. Ct. Opinion at 11-12 (discussing SVP evaluations).

160 R.786a (McCleary).

161 *See* R.392a-R.394a (Letourneau) (discussing desistance and the need for targets approaches); *See* Section VI.E.1.b, *supra* pp.10-19 (showing the evidence presented regarding desistance). *See also* R.392a-R.394a (Letourneau).

Model Penal Code (MPC) as passed by its membership in 2021.[162] The proposal, which advocates for a *private registry only,* reduces eligibility for registration (this is expanded some in draft 6) and limits registration to a maximum of 15 years for all people.[163] This proposal is more consistent with the empirical consensus than Pennsylvania's offense-based, lengthy, tier approach.[164] In addition, the MPC proposal permits early termination after 10 years or upon completion of various requirements—also generally more consistent with the empirical literature.[165] The "shift[] from a public notification approach [to] prohibiting public disclosure of that information to private registration system" under Section 213.11(H) is empirically sound because "there's zero evidence that [public notification] has any positive effect,"[166] while there is evidence that a

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[162] R.574a-R.579a (Prescott) (discussing Draft No. 5, Model Penal Code: Sexual Assault and Related Offenses (2021)). (https://mitchellhamline.edu/sex-offense-litigation-policy/wp-content/uploads/sites/61/2021/06/Key-portions-of-Tentative-Draft-No.-5-May-2021.pdf). In June of 2022, the council adopted Tentative draft number 6, which makes some revisions and adds back in several sexual offenses, but maintains nearly all of the primary features addressed by Dr. Prescott. *See* Reporter's Memorandum for Model Penal Code: Sexual Assault and Related Offenses Tentative Draft No. 6, May 4, 2022, at https://www.thealiadviser.org/sexual-assault/reporters-memorandum-for-model-penal-code-sexual-assault-and-related-offenses-tentative-draft-no-6/.

[163] R.575a-R.577a (Prescott) (discussing § 213.11(f), P. 634).

[164] R.575a-R.576a

[165] R.575a-R.578a (Prescott)

[166] R.578a-R.580a (Prescott).

small risk-based-targeted-law-enforcement-only registry may prevent some recidivism.[167]

In reviewing the MPC proposed policy, Dr. Hanson declared that it was a "reasonable model" based on the empirical evidence because it "considers individualized risk assessment and how that risk changes over time is beneficial and has been widely implemented in a number of jurisdictions. And it is a more efficient way of protecting the public than treating all individuals as high risk in perpetuity."[168]

Another more effective option is treatment. "Modern treatment methods reduce recidivism,"[169] including some "specialized treatment programs [that] have shown effectiveness in reducing recidivism for sexual offenders."[170] Specifically, "modern treatment" means "a talking treatment by trained therapists who are able to engage and address relevant risk propensities and it is delivered in connection with criminal justice intervention that involves supervision and surveillance."[171]

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167 *See, e.g.*, R.393a-R.394a, R.427a (Letourneau); Prescot Rep. Appendix A, at 27 ("while there is some tentative evidence that registration alone might reduce sex offense recidivism, there is almost no evidence that notification laws (of various sorts, online registries, active notification, etc.) reduce recidivism, despite many attempts to find support for the proposition.").

168 R.254a (Hanson) (discussing the MPC draft).

169 Hanson Dec. ¶67.

170 Levenson Dec. P.6 (citing numerous studies); Letourneau Aff. ¶15 (the same).

171 R.336a-R.337a (Hanson).

"There are a number of studies confirming this," even as recently as 2021.[172]

Dr. McCleary generally criticized the methodology used in some of the studies cited by Dr. Letourneau regarding the effectiveness of treatment,[173] but he neither showed familiarity with the current literature in the aggregate nor did he discuss or even address the kind of specialized modern risk/needs models that Dr. Letourneau and others consider.[174] Dr. Letourneau explained:

> [T]he strongest evidence for treatment is when … it matches an individual's risk. So the research that supports treatment effectiveness is research that shows treatment with higher risk individuals.… [T]here's something called the Risk-Needs-Responsivity principles. And when we match risk and need and we match responsivity of the individual to that evidence based intervention … then we do see good results.[175]

Indeed, "[t]here have been at least three meta-analyses in high quality journals since" the one criticized by Dr. McCleary.[176]

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172 R.337a (Hanson).

173 R.687a-R.689a (McCleary).

174 R.424a-R.425a; R.429a (Letourneau); R.337a-340a (Hanson).

175 R.429a (Letourneau).

176 R.687a-R.688a (McCleary); R.337-339a (Hanson) (discussing Dr. McCleary's misunderstanding of various aspects of treatment including chemical castration).

Treatment and probation can also keep victims informed and employ effective policies "more aligned with our understanding of basic human needs and motivation, … and the risk-needs-responsivity principles of effective correctional rehabilitation."[177] These effective policies "promote the social re-integration of individuals with a history of sexual crime [and] are more likely to reduce their recidivism risk than policies that focus on identifying sex-offenders to the general public."[178]

VII. SUMMARY OF ARGUMENT

Act 29 is overbroad, includes likely thousands of people who pose no elevated risk to the public, fails to prevent repeat sexual violence, and jeopardizes public safety. It is an ineffective response to a socially constructed fear that "brand[s] all as evil for the actions of the most perverse few."[179] Act 29 presumes (wrongly) that every person convicted of a sexual crime poses a stable and long-term "high risk" for committing future sexual violence. Despite a now-proven consensus to the contrary, Act 29 nonetheless broadcasts that message to the public. The result is to brand

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177 Levenson Dec. P.7.
178 Hanson Dec. ¶68.
179 R.105a (Reproduced Record).

tens of thousands of individuals, like Appellee, with a modern scarlet letter, despite posing no identifiable risk of harm to the public.

While public protection from repeat sexual crimes is a compelling goal, when the means chosen deprives thousands of their fundamental rights, the legislature's choice of solutions cannot be arbitrary, based on false facts, unduly restrictive, or irrational. Whether evaluated under the procedural and substantive due process tests, or the irrebuttable presumption doctrine, Act 29 cannot pass muster.

The Commonwealth does not directly address Appellee's claims. It neither meaningfully attacks the facts found by the trial court nor the law applicable to each raised claim. Instead, the Commonwealth essentially argues that the facts and law over which the parties have spent nearly five years litigating don't matter. It tries to reframe the case around four wrong, misleading, or irrelevant propositions: first, that a court cannot declare a legislative act unconstitutional even when the academic consensus demonstrates the policy is a failure and unreasonably infringes the fundamental rights of thousands of people (it can and must); second, that SORNA's "high risk" presumption is only concerned with reoffense rates as a group average (it's not and it wouldn't matter if it

were); third, that SORNA's purpose is not to prevent reoffending by those subject to it (it absolutely is and this Court has repeatedly said so); and fourth, that less restrictive and more accurate alternatives to reduce sexual offending by those subject to Act 29 have no bearing on the case (they certainly do as they are portions of the tests employed under some of Appellee's legal claims).

In the following pages, Mr. Torsilieri shows the trial court's conclusions on the facts are right and that it applied them correctly to Pennsylvania law. He further demonstrates the uniformity, strength, and legal relevance of the evidence he presented. And he demonstrates that the Commonwealth's assertions in its Brief stem from either a fundamental misreading of the law (which it barely addresses) or, more likely, are an intentional effort to shift focus away from the accepted empirical facts. Its attempts should not sway this Court.

For example, in addressing Appellee's due process claims and the trial court's specific legal rulings, the Commonwealth commits only 12 pages to all of the Appellee's due process arguments.[180] In those pages, it cites almost no law other than *Torsilieri I*, and doesn't even mention the

[180] Commonwealth's Brief at 23-35.

words "due process," "reputation," "procedural," or "substantive." It barely mentions the irrebuttable presumption doctrine or the cases addressing it and does not even acknowledge that Appellee raises a substantive reputational claim.

But the substantive law matters. It defines which facts are relevant and material. Illustrating the point, one need look no further than the law applicable to Appellee's first claim—which requires a means-ends review to determine if Act 29 deprives Mr. Torsilieri of his right to reputation. When the legislature restricts a fundamental right in pursuit of a public end, when challenged, a court must determine whether the legislature's goal is compelling and whether its chosen means are narrowly tailored to meet that goal.

Here, the legislature's goal of reducing sexual offending is compelling, but its chosen means are wildly overbroad and ineffective. It chose a fact, prior convictions for sex crimes, as a proxy to identify a broad class of people it presumed were all likely to engage in future sexual offending. It then decided to deprive that entire class of people of their fundamental

right to reputation based primarily upon that proxy fact (prior conviction), regardless of their individually identifiable risk or whether the chosen method of deprivation would reduce sexual reoffending.

Although the use of a proxy classification is not unusual, what the Commonwealth either fails to see or refuses to acknowledge, is that identifying group classifications is merely the beginning, not the end, of the analysis.[181] Once the group classification is identified, courts ask whether it is more over-inclusive than necessary, which it is if people in the class don't possess the characteristic targeted (risk of danger) or if the means used (conviction-based registration and notification) cannot achieve the goal, and other less restrictive means are readily available. Act 29 does this precisely.

This sort of legal aversion and relevance revisioning exists throughout the Commonwealth's Brief. Mr. Torsilieri responds to the Commonwealth's distortions and reframing attempts when appropriate and then

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[181] 24 P.S. § 1-111 (imposing 5 or 10 year bars on employment depending on the offense in order to avoid constitutional challenge), *see, e.g Shoul v. Commonwealth, Dep't of Transportation, Bureau of Driver Licensing*, 173 A.3d 669, 678 (2017) (finding overinclusive and irrational the legislature's choice of "operators of large [commercial motor vehicles who] exercise poor judgment and risky behavior" by using the vehicle in a drug crime, as a proxy for those who would also be reasonably likely to engage in future dangerous driving.); *Peake v. Commonwealth*, 132 A.3d 506, 516–22 (Pa. Cmwlth. 2015).

carefully, accurately, and properly addresses both the law and the relevant facts as presented to and found by the trial court in reference to each of his claims. When doing so, the law and evidence are clear. Act 29 violates due process by failing to meet strict scrutiny under a direct reputational impairment challenge and by creating an impermissible irrebuttable presumption where the presumption of danger is false and easily refuted by many, if not most, registrants.

Act 29 is also punitive, although this Court does not need to reach that issue if it violates due process. But if it does reach the question, Act 29 is identical to the law declared punitive in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017) (OAJC) in every way that matters. That determination has numerous consequences, all of which result in constitutional violations. This Court should affirm and hold that Subchapter H, plainly, and palpably facially violates Pennsylvania law.

VIII. ARGUMENT

A. Act 29 Violates Due Process Under The Pennsylvania Constitution.

1. Act 29 violates Appellee's right to reputation under the Pennsylvania Constitution.

This Court has been correct for almost a decade that registration and notification affect the right to reputation by "improperly brand[ing] all ... offenders' reputations with an indelible mark of a dangerous recidivist." *In re J.B.*, 107 A.3d 1, 19 (Pa. 2014). "[O]ur society's perception of Megan's Law registrants would lead an average person of reasonable intelligence to conclude that there is something dangerous about the registrant." *Id.* (quotation omitted).[182] Its stigmatizing potential and effect are widely accepted in the academic community.[183] Appellant does not seriously contest this conclusion.

"The Pennsylvania Constitution specifically protects the right to reputation as a fundamental right in Article I, Section 1." *Torsilieri I*, 232 A.3d at 585; *In re J.B.*, 107 A.3d at 16 (citing *R. v. Com., Dept. of Welfare*,

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[182] *See also* Section VI.E.4, *supra* pp.31-37 (discussing stigma and effects of the label).

[183] *See, e.g.*, R.543a (Prescott) (there "is a lot of evidence" in this space).

636 A.2d 142, 149 (Pa. 1994)); Pa. Const. Art. I, §1. "[R]eputational interests [are] on the highest plane, that is, on the same level as those pertaining to life, liberty, and property." *In re: 40th Investigating Grand Jury*, 190 A.3d 560, 573 (Pa. 2018) (quotation omitted). It cannot be abridged without compliance with state constitutional due process standards. *Id.* at 572-73., Pa. Const. Art. 1, § 11,[184] *In re J.B.*, 107 A.3d at 15-16.

Harm to reputation occurs when information is defamatory and publicly communicated; it does not require proof of actual injury. *See* 42 Pa.C.S. § 8343; *Maier v. Maretti*, 671 A.2d 701, 704 (Pa. Super. 1995). The "existence of government records containing information that might subject a party to negative stigmatization is a 'threat' to that party's reputation." *Fraternal Order of Police Lodge No. 5 by McNesby v. City of Philadelphia*, 267 A.3d 531, 552 (Pa. Cmwlth, 2021) (citing *Wolfe v. Beal*, 384 A.2d 1187, 1189 (Pa. 1978)); *Carlacci v. Mazaleski,* 798 A.2d 186, 188 (Pa. 2002). It also includes what the public may reasonably *understand* the communication to mean—"the impression it would naturally engender, in the minds of the average persons among whom it is intended to

[184] [E]very man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law [... .]" Pa. Const. Art. 1, § 11.

circulate." *Thomas Merton Center v. Rockwell International Corp.,* 442 A.2d 213, 215 (Pa. 1981) (citation omitted).

Relying on Appellee's experts, the trial court found that Act 29 "stigmatizes persons convicted of committing sexual offenses," which not only threatens registrants' reputations, it causes actual and identifiable harm.[185] Act 29 sends the express message that all registrants "pose a high risk of committing additional sexual offenses." 42 Pa.C.S. § 9799.11(a)(4). "A primary purpose of [Act 29] is to inform and warn law enforcement and the public of the *potential danger* of those registered as sexual offenders." *In re J.B.*, 107 A.3d at 16; 42 Pa.C.S. § 9799.11(a)(7) (emphasis added). "Moreover, even without this language, the common view of registered sexual offenders is that they are particularly dangerous and more likely to reoffend than other criminals." *Id.*

The Commonwealth never really questions this conclusion. Rather, it raises a claim already rejected by this Court, that Appellee has not proven that Act 29 shames people.[186] *See Torsilieri I*, 232 A.3d at 591 (citing *Muniz*, 164 A.3d at 1213) (rejecting the claim). But Appellee *does*

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185 *See* Tr. Ct. Opinion at 3-5; Section VI.E.4. *supra* pp.31-37 (demonstrating in detail how Act 29 not only stigmatizes those subject to the registry, but causes real palpable harms to employment, housing, and pro-social relationships).

186 Brief for Appellant at 40-48.

prove this, and the trial court accepted it.[187] The evidence is compelling, and there is uniform agreement on this point.[188] Nonetheless, as the Superior Court has declared, "[i]t is beyond serious dispute that registration as a sex offender creates a presumption—indeed, a stigma—that Appellant is a dangerous adult who is likely to commit further sexual offenses." *Commonwealth v. Muhammad*, 241 A.3d 1149, 1158 (Pa. Super. 2020).

a. Strict scrutiny applies.[189]

Act 29 broadcasts a presumed and usually false propensity about *each and every* person on the registry—that they are a high-risk danger to "oneself and one's family." 42 Pa.C.S. § 9799.11(a)(7). It breaches the core of Pennsylvania's fundamental right to reputation and should receive strict scrutiny. *See Taylor v. Pa. State Police*, 132 A.3d 590, 609 (Pa. Cmwlth 2016).

A violation of the right to reputation is a stand-alone challenge, separate from Appellee's irrebuttable presumption claim. Pa. Const. Art. I,

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187 *See* Section VI.E.4 *supra* pp.31-37.

188 *See* Section VI.E.4 *supra* pp.31-37.

189 The Commonwealth appears to abandon any claim that strict scrutiny doesn't apply, although it raised such an argument in *Torsilieri I*, and Appellee addressed it in his briefing below. *See* Petitioner's Proposed Findings of Fact and Conclusions of Law, at p.54 n.245. Therefore, Appellee does not address the other standards of review.

§ 1. The Commonwealth ignores the claim, as it did in *Torsilieri I*, and suggests it wins because the lower court "substitute[d]" its policy choice to "declare[] a law unconstitutional simply because the court disagrees with the legislature's policy judgment."[190]

This is patently wrong—legally and logically—and this Court has already said so. "[O]ur deference to legislative determination is not boundless. Indeed even in the cases relied upon by the Commonwealth, the limits are clear.... substantial policy considerations are generally reserved, in the first instance, to the General Assembly, but ... nonetheless subject to the limits of the Constitution." *Torsilieri I*, 583 A.3d at 585 (internal quotations omitted). It then provided the example of *In re J.B.*, which did just that and relied upon expert consensus to overcome an incorrect legislative judgment. *Id.*

"While the General Assembly may, under its police power, limit those [constitutional] rights by enacting laws to protect the public health, safety, and welfare, any such laws are subject to judicial review and a constitutional analysis." *Nixon v. Commonwealth, Dep't of Pub. Welfare*, 839 A.2d 277, 286 (Pa. 2003). Courts must weigh the rights infringed

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[190] Appellant's Brief at 33-35.

upon by the law against the interest sought to be achieved by it and scrutinize the relationship between the law and that interest. *Id.* at 286-87." Because it is a fundamental right, strict scrutiny requires narrow tailoring to a compelling state interest. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010); *Nixon*, 839 A.2d at 287; *James v. Southeastern Pennsylvania Transp. Authority*, 477 A.2d 1302, 1306 (Pa. 1984) (discussing when to apply strict scrutiny).[191]

b. Act 29 is not narrowly tailored to its purported ends under strict scrutiny.

Appellee agrees that protecting the public from high-risk repeat sexual offenders is a compelling state interest. *See Commonwealth v. Lee*, 935 A.2d 865, 883 (Pa. 2007); *Commonwealth v. Williams*, 832 A.2d 962, 973 (Pa. 2003). But the means taken to reach that end are not just insufficiently tailored; it is wildly off the mark.[192]

i. The purpose is to reduce recidivism.

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[191] See *also Commonwealth v. Morgan*, 258 A.3d 1147,1153-54 (Pa. Super. 2021) (holding that strict scrutiny applied to a reputational challenge to Subchapter I's sexually violent predator (SVP) classification).

[192] Pennsylvania courts have found that conviction-based presumptions can even fail rational-basis review. In *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Cmwlth. 2012) (holding that a lifetime ban on employment was not rationally related to a legitimate government interest because a person's risk to the public diminishes over time); *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015) (the same).

The Commonwealth all but accepts the proposition that Act 29 does not reduce sexual offending, let alone reoffending—which should end the debate. Appellee should win. Instead, the Commonwealth attempts to re-frame SORNA's primary purpose to be about information sharing, not preventing or reducing re-offending.[193] This reframing is decidedly wrong.

Like all SORN laws, the primary purpose of Act 29 (the underpinnings of the law) is "to reduce sexual reoffending by convicted sex offenders."[194] This Court has repeatedly said so. *See Torsilieri I*, 263 A.3d at 593 (quoting the trial court) (SORNA's "assigned purpose [is] protecting the public from sexual offenders."); *Muniz*, 164 A.3d at 1202 (citing *Commonwealth v. Williams*, 832 A.2d 962, 971-72 (Pa. 2003)) (stating the purpose of Megan's Law II "was to identify potential recidivists and avoid recidivism …"). The Commonwealth even conceded this point in its briefing in *Muniz*: "the General Assembly's aim [was] to address the 'major public concern' of recidivism among adult sex offenders and indicates SORNA's terms are not excessive given this legislative purpose." *Muniz*, 164 A.3d

193 Appellant's Brief at 29-33.

194 Letourneau Aff. ¶7.

at 1194-95 (quoting Brief for Appellant, Commonwealth of Pennsylvania) (emphasis added).

It now incredibly claims that the purpose of Act 29 is not "recidivism reduction" but merely "to provide concerned citizens with information to change their own behavior … in order to avoid dangers they could not otherwise control."[195] Appellee struggles to understand the Commonwealth's attempted parry. The purpose of avoidance is not an end in itself. It is a method (or means) employed to prevent harm. Just like the purpose of a falling rocks sign on the side of the road is to inform the public that falling rocks could harm them, the *reason* or *ultimate purpose* of posting the sign is to reduce injuries from falling rocks. In other words, the point of the sign is to reduce harm.

Repeated offending is the *harm* the legislature intends to be avoided by imposing registration and notification. The *means* employed to avoid that harm is unnecessarily publicly labeling thousands of people as recidivist dangers when they are not. The Commonwealth's entire argument is that the *means* are, in fact, the end goal. That's just not so. The goal is plain and simple: to protect the public from recidivism by people

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[195] Appellant's Brief at 31.

on the registry. This purpose cannot be more clearly articulated than by the legislature itself: identifying registrants "could be a significant factor in protecting oneself and one's family members *from recidivist acts by such offenders.*" 42 Pa.C.S. 9799.11(a)(7) (emphasis added). It informs the public (a means) to protect the public from recidivism (the purpose).

The Commonwealth also tangentially suggests that Act 29 survives because its purpose is to allow citizens to "maintain a sense of security in an otherwise violent world."[196] Creating a "sense of security" is not stated as the legislature's intent, even if it may be an effect.[197] But even if Act 29 creates a "sense of security," which no evidence demonstrates it does, any "sense" that is created is a *false* one.[198] The public is not safer because Act 29 exists.

Fundamental rights cannot be denied based on an exclusively erroneous perception as opposed to fact. Due process cannot condone factually unsupported "conclusive presumptions" because they are merely an "attempt, by legislative fiat, to enact into existence a fact which here does

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196 Appellant's Brief at 32.

197 *See* 42 Pa.C.S. § 9799.11 (articulating the goal of public protection and public safety, not simply feeling safe).

198 *See* Section VI.E.1-2 *supra* pp.10-30 (most people not dangerous and Act 29 doesn't reduce offending).

not, and cannot be made to, exist in actuality." *Heiner v. Donnan*, 285 U.S. 312, 329 (1932). The government should not be permitted to send false information to artificially create the end it purportedly desires.

Moreover, the Commonwealth's "sense of security" argument is premised on three mistaken assumptions. First, that registered individuals remain dangerous, which most do not;[199] second, that Appellee has the burden of showing Act 29 does not create a public sense of security, which he does not under strict scrutiny, *see S.B.*, 243 A.3d at 105; and three, that Act 29's sweeping public notification system is necessary to notify specific victims of a person's whereabouts. Not only could a non-public registry of limited duration accomplish the same end—like probation and parole services which often perform these tasks—publicly posting a person's address does nothing to inform a victim where that person is at any given time.

At its essence, the Commonwealth argues that Act 29 is good because it allows victims to heal by empowering them over their assailants. While a victim's emotional well-being is an important goal, it is not a policy end directed at ensuring future public safety. It is an argument for

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[199] *See* Section VI.E.1-2 *supra* pp.10-30.

punishment.[200] It seeks to compensate and heal the victim by imposing retribution and restrictions on the defendant commensurate with the harm caused by the past offense. Accepting this premise as a primary purpose would confirm Appellee's position that Act 29 is punitive. Therefore, it cannot be sustained as a civil law directed at public safety under this principle.

ii. The means are not narrowly drawn.

Accepting the reduction of recidivist sexual offending as the obvious and clearly intended "end," this Court must still determine whether the "means" taken to achieve it are narrowly drawn. *See Boos v. Barry*, 485 U.S. 312, 329 (1988). A statute is not narrowly tailored when a "less restrictive alternative [to accomplish the legislative goal] is readily available," *Boos*, 485 U.S. at 329, or if it sweeps within its reach classes of people or situations not pertinent to the legislative goal. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 118 (1991).

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[200] Punitive measures like vengeance, restitution, and "[d]eterrence ha[ve] not been officially advanced as a policy rationale for registration laws, [because] to do so would undermine [] the argument that these collateral consequences are nonpunitive." MPC Sexual Offenses, at 528.

The Commonwealth "must draw the class so that only those are affected whose exclusion is consistent with the governmental purpose of exclusion," or in other words, "whether the classification at issue affects only those persons intended to be affected." *James*, 477 A.2d at 1307. Most importantly, under strict scrutiny, *it is the Commonwealth's burden* to prove there are no less restrictive means available to accomplish the purported end. *See, e.g.*, *S.B. v. S.S.*, 243 A.3d 90, 105 (Pa. 2020), *cert. denied*, 142 S. Ct. 313 (2021).

There are numerous less restrictive means which could reduce sexual reoffending, especially considering Act 29 fails to achieve the intended goal at all. First, the legislature could easily draw the class more narrowly. Because Act 29 intends to burden those who pose a "high risk" to sexually recidivate, to survive a facial challenge, the law must affect only those targeted by the law—actually "high risk" people. *See cf., Smith v. City of Philadelphia*, 516 A.3d 306 (Pa. 1986) (upholding a law intended to prevent excessive municipal tort liability, and which limited tort recovery against a political subdivision to $500,000 because only those seeking excessive damages were affected).

There is consensus that Act 29 sweeps into its reach many people who have no more likelihood to reoffend than the general population or others convicted of non-sexual crimes.[201] Appellee's experts, the trial court, and even Dr. McCleary accepted that we could reasonably identify those convicted of past sexual crimes with no elevated risk of future danger beyond that extant in all prior offenders.[202]

The legislature could also stop registering people based entirely upon a past conviction and instead use individual assessments, as the evidence demonstrates that past conviction has no rational connection to future risk, especially years after the offense, punishment, and reintegration into the community.[203] Act 29 could also remove registration for people convicted of crimes with no sexual component. *See Torsilieri I*, 232 A.3d at 581 n.17 (identifying all of the non-sexual offenses Act 29 still includes).

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[201] *See* Section VI.E.1.a-b *supra* pp.10-19; Hanson Dec. ¶¶10; 61 ("most individuals with a history of sexual offending will no longer present any significant risk of sexual recidivism after 10 years.").

[202] *See* Section VI.E.5, *supra* pp.37-44 (discussing risk tools, the SOAB, and SVP assessments); R.786a (McCleary) (concluding that using tools, plus individual assessments would better target the appropriate people).

[203] *See* Section VI.E.1.a-b, *supra* pp.10-19; VI.E.3 *supra* pp.30-31 (discussing the disconnect between offense-based registration and actual empirical risk).

Other states have recently held their similar SORN laws violate due process because of insufficient tailoring. In *Doe v. Department of Public Safety*, 444 P.3d 116 (Alaska 2019), Alaska's highest court found its SORN law failed strict scrutiny because "ASORA's coverage is excessive to the extent it applies to sex offenders who do not present a danger of committing new sex offenses." *Id.* at 132. *See also Powell v. Keel*, 860 S.E.2d 344, 348 (S.C. 2021), *reh'g denied* (Aug. 4, 2021) ("we hold SORA's lifetime registration requirement without any opportunity for judicial review to assess the risk of re-offending is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending.").

The Commonwealth, however, like it tried to redefine the purpose of the law, also attempts to redefine the relevant constitutional inquiry. It argues that Act 29 is narrowly tailored because the presumed fact regarding "high risk" danger is not about individuals but the group as a whole, which poses a risk "three times" higher than others.[204] This argument is specious for three reasons. First, that "three times" number is the difference between a 2% and 6% risk—neither of which the public

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[204] Appellant's brief at 25-29.

would consider "high risk."[205] Second, "sexual offender" is defined and labeled on an individual level, 42 Pa.C.S. § 9799.12 (definitions). The message, as indicated by each person's individualized report on the state's Megan's Law website, is that the public should avoid the *person* identified because they pose a "high risk" danger.

Third, and most importantly, the legislature cannot deprive large numbers of people of their rights when only a small identifiable number of them represent those with who we are concerned. As Justice Murphy once wrote in his dissent in *Korematsu v. United States*, 323 U.S. 214 (1944), "(T)o justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for the deprivation of rights." *Id.* at 240 (Murphy J., dissenting).

It is impermissible to deprive thousands of people of their fundamental rights because of the possible harm posed by just a few. It is even worse when we can identify those specific people who risk harm and those who pose no risk beyond that of the tens of thousands of other people with prior records who are not forced to spend decades labeled as continuous and ongoing threats. It is "gravely wrong" and "'has no place in law under

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[205] *See* Section VI.E.1.a-b *supra* pp.10-19.

the Constitution.'" *Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018) (quoting and abrogating *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).

We also know that more narrowly tailored, well-accepted, and more effective alternatives to registration exist, which can reduce sexual reoffending. Those include more limited and targeted law-enforcement-only registries like the one proposed by the American Law Institute's Model Penal Code (MPC)[206] and other methods like effective and accepted treatment and supervision options.[207] The trial court accepted most of these alternatives.[208]

The MPC's proposal, for example, aligns more closely with the expert consensus[209] and is supported by a detailed report citing the work of all of Appellee's experts.[210] Creating a small private registry that limits the number of people subject to it and permits removal after much shorter periods is well within the legislature's power.

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206 *See* Draft No. 5, Model Penal Code: Sexual Assault and Related Offenses (2021) ("MPC Sexual Offenses"); Section VI.E.5 *supra* pp.37-44 (alternatives). *See, e.g. Commonwealth v. Roebuck*, 32 A.3d 613, 648-55 (Pa. 2011) (citing and relying on extensive portions of the MPC).

207 *See* Section VI.E.3 *supra* pp.30-31 (risk assessments); VI.E.5 *supra* pp.37-44 (other alternatives).

208 Tr. Ct. Opinion at 11.

209 R.574a-R.579a (Prescott); *See* Section VI.E.5 *supra* pp.37-44.

210 *See* MPC Sexual Offenses; Section VI.E.5 *supra* pp.37-44.

Because Act 29 does not accomplish the end of identifying risk or increasing public safety, and because much more effective means are available to achieve these tasks, Act 29 is facially unconstitutional.

2. Act 29 Creates A Flawed Irrebuttable Presumption In Violation Of The Pennsylvania Constitution.

"[T]he test for an unconstitutional irrebuttable presumption requires three factors: (1) the existence of a presumption that impacts an interest protected by the due process clause; (2) a presumption that is not universally true; and (3) the existence of reasonable alternatives to ascertain the presumed fact." *Torsilieri I*, 232 A.3d at 586 (internal quotations omitted). Act 29 utterly fails this test.

First, Act 29 undermines the fundamental right to reputation by falsely branding thousands of people as "high risk" danger when many, if not most, are not.[211] "There is no serious doubt" that the first element is met. *Muhammad*, 241 A.3d at 1158. This case is no different than *In re J.B.* The law is clear.

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[211] *See* Section VI.E.1.*supra,* pp.10-19; VI.E.4 *supra* pp.31-37 (showing the effects on reputation).

Second, Appellee proved that the presumption underlying Act 29 is not "universally true."[212] *In re J.B.*, 107 A.3d at 14-16; *Department of Transp., Bureau of Driver Licensing v. Clayton*, 684 A.2d 1060, 1063 (Pa. 1996). With respect to "universality," the initial inquiry is to identify the presumption "underpinning" Act 29. *Torsilieri I*, 232 A.3d at 596; *In re J.B.*, 107 A.3d at 16-17. The test necessarily looks behind the text of the law to the law's "substance." *Clayton*, 684 A.2d at 1064. The substantive presumption at issue is Act 29's conclusion that "[s]exual offenders pose a high risk of committing additional sexual offenses." 42 Pa.C.S. § 9799.11(a)(4); (a)(7); *In re J.B.*, 107 A.3d at 14-15; *Torsilieri I*, 232 A.3d at 587, 596 (accepting this presumption for purposes of framing the remand).[213]

Additionally, the inclusion of the removal provision after twenty-five years expressly recognizes that an individual's dangerousness is the guiding fact triggering registration. 42 Pa.C.S. § 9799.15(a.2). The provision permits removal only if the applicant can prove he is "not likely to

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[212] *See* Section VI.E.1.*supra,* pp.10-19 (registrants are not alike and most pose little risk); VI.E.3 *supra* pp.30-31 (risk tool accuracy).

[213] The Commonwealth has rightly abandoned a claim it raised in *Torsilieri I* that any analysis is precluded by *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003). Brief for Intervenor in *Torsilieri I*, at 37-39. Appellee does not repeat its arguments made there.

pose a threat to the safety of any other person." 42 Pa.C.S. § 9799.15(a.2)(5) (emphasis added). If future dangerousness were irrelevant to inclusion in the registry, the legislature would not require the demonstration of its absence before granting relief. Not only is the fact of dangerousness relevant, but it is also the *only* fact that matters.

a. Registrants are not universally "high risk."

The trial court found that the presumption that all registrants pose a "high risk" to reoffend sexually is not "universally true."[214] The Commonwealth disputes the conclusion by arguing that only one statistic matters—the average group rate of reoffending.[215] That's because, as a group, people convicted of prior sexual offenses are "three or more times" as likely to commit future sexual offenses as those without past sexual convictions.[216] This argument, however, is unmoored from the law. It ignores Act 29's underlying substantive presumption, which the universality component addresses.

The legislative presumption at issue—dangerousness—is, and is intended to be, categorically applicable, meaning it applies to *each and*

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214 *See* Section VI.E.1.a-b *supra* pp.10-19 (discussing the low relative risk of most people on the registry).

215 Appellant's brief at 25-29.

216 Appellant's brief at 25-29.

every person subject to Act 29. The "universality" component does, of course, grant some leeway because the existence of the rare or unique exception would not necessarily undermine the presumption's validity. *See Torsilieri I,* 232 A.3d at 604 (Donahue, J. dissenting). But, where the evidence is clear that many or most people within the identified group lack the substantive characteristic, the presumption cannot be "universally true."

Even the U.S. Supreme Court has said so. In *Stanley v. Illinois,* relied upon in *Clayton*, the High Court found that a law removing children from unwed fathers' custody violated the irrebuttable presumption doctrine because not *all* unwed fathers were unsuitable parents, even if, as a group, they might be. It declared "that it may be ... that most unmarried fathers are unsuitable and neglectful parents[, but] all unmarried fathers are not in this category; some are wholly suited to have custody of their children." *Stanley v. Illinois*, 405 U.S. 645, 654 (1972).

Clayton applied the same logic. No court doubted the general presumption that, on average, people with recent epileptic seizures posed a greater risk of danger if allowed to drive than the general public. *Clayton*, 684 A.2d at 1062, 1065. But "'there appeared to be no basis for the view

that one epileptic seizure renders all persons unsafe to operate a motor vehicle for a period of at least one year.'" *Id.* at 1062 (citing the trial court). So too, did the Commonwealth Court in *D.C. v. School District of Philadelphia*, 879 A.2d 408 (Pa. Cmwlth. 2005), where it held unconstitutional a statute barring students from attending standard public schools when returning from delinquency placement regardless of whether any particular student "does not pose a threat to the regular classroom setting." *Id.* at 418.

As *Clayton, D.C.*, and *Stanley* exhibit, the fact that a law might target a large group due to an average presumption doesn't matter. What matters, and is determinative, is whether *each* group member uniformly represents the presumption. If they do not, like Mr. Torsilieri and many others on the registry, a right may not be deprived before allowing each person to challenge the presumptive characteristic.

The consensus evidence proves that most people currently included in Pennsylvania's registry are no more likely to sexually offend in the future than others with non-sexual criminal records.[217] Act 29 also con-

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[217] *See* Section VI.E.1.a-b *supra* pp.10-19; Hanson Dec. ¶¶ 54-64; 56 (chart); Appendices. *see also Muhammad*, 241 A.3d at 1150 (finding the presumption is "plainly

centrates most people into the highest tiers, even though those registrants empirically deemed the highest risk are "concentrated among a much smaller group of offenders."[218] Despite this widespread factual agreement, Act 29 brands every registrant, regardless of real risk, with the "indelible mark of dangerousness." *In re J.B.*, 107 A.3d at 19.[219] Adults, like juveniles, are not all alike and are capable of changing behavior and desisting from sexual offending, especially over even relatively short periods of time.[220] Adults, like juveniles, can and do amend their behavior when proven, cost-effective interventions other than registration are employed.[221] Act 29, however, declares that a single past offense dictates a static lifetime high risk of future sexual offending. This is not true, let alone universally so.

The Commonwealth does not contest these facts either. It again parries and briefly asserts that the trial court wrongly discounted the

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not" true with respect to *Muhammad* because she had never been convicted of a sex crime).

[218] Levenson Dec. P.2; *see also* Section VI.E.1.a-b *supra* pp.10-19; Section VI.E.3 *supra* pp.30-31.

[219] *See* Sections VI.E.1 *supra* pp.10-23 (demonstrating that Act 29 is based upon provenly flawed presumptions); VI.E.4 *supra* pp.31-37 (stigma).

[220] *See supra* Sections *supra* pp.15-28; VI.E.3 *supra* pp.30-31.

[221] *See* Section VI.E.5 *supra* pp.37-44 (demonstrating other effective intervention strategies).

"dark figure" of sexual crime.[222] Appellee's experts explained in detail, which was accepted by the court, that the general underreporting of sex crimes has no bearing on the issue of relative risk between people on the registry and the much larger number of people with criminal convictions who are not.[223] Dr. McCleary, who is correct that we should be generally concerned with underreporting, did not address the question of relative rates. When asked about that specifically, he agreed that the relative "dark figure" of sexual offending is likely uniform across both groups.[224]

This recognition is fundamental because this Court should not compare the relative risk of one registered person to another but to those, not on the registry, of which both categories suffer from underreporting. When looking at risk rates in a relative context, after ten years of offense-free living in the community, a majority of registrants pose *less of a risk (under 2% chance)* of reoffending than non-registered people with criminal convictions.[225]

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222 Appellant's Brief at 28.

223 *See* Section VI.E.1.c-d *supra* pp.19-23 (discussing the consensus in this area, including the Commonwealth expert's agreement).

224 *See* R.774a (McCleary); *see also* Section VI.E.1 c-d *supra* pp.19-23.

225 Hanson Dec. ¶54-64.

The Commonwealth also asserts, incorrectly, that Appellee did not disprove the high rate of unreported offending.[226] He did.[227] As the record reflects, the few people who make the "implication that the recidivism rates are very, very high … would not be generally accepted in the professional community"[228] and "are at odds with the much more common scholarly view on sex offense recidivism … [that it] is very low relative to other crimes, and that the risk is not notably higher than that posed by many others who have a criminal record."[229]

The trial court was correct; the presumption is false. All registrants do not pose a "high risk" of danger to the public.

b. Reasonable alternative means exist to identify and manage offender risk.

Two alternative means exist to identify those at risk to reoffend: (1) empirical risk-based assessments; and (2) SVP assessments. A consensus exists that "[t]he risk of sexual recidivism can be reliably predicted by widely-used risk assessment tools, such as the Static-99R."[230] Experts

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226 Appellant's Brief at 28.

227 *See* Section VI.E.1.d *supra* pp.21-23 (discussing accepted rates of unreported offending).

228 R.237a (Hanson).

229 Prescott Rep. P.17.

230 Hanson Dec. ¶1.e.; Section VI.E.3 *supra.* pp.30-31.; VI.E.5 *supra* pp.437-44; Tr. Ct. Opinion at 11.

have identified risk factors that correlate well with observed recidivism levels, which are incorporated into these tools.[231] Although no tool is foolproof, validated actuarial tools can effectively "screen individuals into relative risk categories and provide data to inform one's expectations regarding the likelihood of reoffending."[232]

Pennsylvania's SOAB, the body charged by the legislature to perform the SVP assessments, 42 Pa.C.S. §§ 9799.24, 9799.35, has declared almost twenty years ago that "actuarially derived" assessments are available and preferable to determine risk for monitoring those convicted of sexual crimes.[233] In no uncertain terms, the SOAB demanded that "[s]tructured, actuarial instruments should be routinely used."[234]

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231 *See* Hanson Dec. ¶23-37; Section VI.E.5, *supra* pp.37-44.

232 Levenson Dec. P. *See also* Section VI.E.3 *supra* pp.30-31 (discussing procedures to more reliably screen people into risk categories)

233 Pennsylvania's Sexual Offender Assessment Board, Sex Offender Containment Model, 207 (2006), https://www.soab.pa.gov/AboutSOAB/ResourcesandStatistics/Sex%20Offender%20Containment%20Model/Documents/pa%20sex%20offender%20containment%20model.pdf

234 *Id.*, *see also* Section VI.E.5 *supra* pp.37-44 (discussing and referencing the record regarding ease of use).

Even the federal office overseeing the AWA states, "using science-based, actuarial methods to assess sex offender risk is highly advisable."[235] "[M]any of the purely actuarial tools in wide use today can be completed quickly and easily by a variety of trained personnel," and using multiple tools can provide a more complete and reliable assessment than relying on one tool alone.[236] And when combined with the clinical judgments of trained personnel and more comprehensive data, these efforts are much more reliable in identifying risk and managing sexual reoffending.[237] The SOAB is perfectly capable of performing this task.

Once those posing elevated risks are identified, we can target monitoring measures (even including non-public registration) and/or treatment to the populations actually posing a risk and reduce the collateral costs and harms associated with unwarranted labeling.[238]

Another "reasonable alternative is already in use in Pennsylvania under SORNA"—the SVP assessment. *In re J.B.,* 107 A.3d at 19. *See also Commonwealth v. Lacombe*, 234 A.3d 602 (Pa. 2020) (upholding SORNA's

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235 Kevin Baldwin, *Sex Offender Risk Assessment*, U.S. Dep't of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, 4 (July 2015).

236 *Id.*

237 *See* Section VI.E.3 *supra* pp.30-31; VI.E.5 *supra* pp.37-44; R.785a (McCleary).

238 *See* Section VI.E.5 *supra* pp.37-44.

SVP scheme as non-punitive). The SVP assessment is supposed to determine which offenders will be "likely to engage in predatory sexually violent offenses." 42 Pa.C.S. §§ 9799.12; 9799.24. While Appellee believes this is the worst of the possible options as it is neither empirical nor validated, it nonetheless at least *attempts* to address risk and is a narrower alternative than SORNA. Ironically, although most registrants assessed by the SOAB are found *not* to satisfy the SVP risk criteria, everyone is registered.[239]

Finally, as discussed in the previous section, measures such as treatment and targeted supervision of high-risk groups by law enforcement are more effective in actually reducing repeat offending.[240]

These alternative means are easy to employ, do not impose unnecessary harm, and are much more likely to achieve the desired ends—identifying risk and reducing offending.[241]

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[239] *See* PSP, Megan's Law Activity Report, last visited 2/10/2023 (Only 11.5% of all registrants are deemed SVPs)

[240] *See* Section VIII.A.1.b.ii *supra* pp.60-66 (addressing more effective means); VI.E.5 *supra* pp.37-44.

[241] *See* Section VI.E.2 *supra* pp.23-30 (demonstrating the failure of SORNA to reduce offending).

c. There is no meaningful opportunity to challenge the presumption of dangerousness.

Even though the presumption of dangerousness is not universally true and can be overcome—often at or near the time of registration—Act 29 provides no opportunity for a person to do so "'at a meaningful time and in a meaningful manner.'" *Commonwealth v. Maldonado*, 838 A.2d 710, 715 (Pa. 2003) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). The degree of restraint imposed by similar laws demands meaningful pre-deprivation hearings because "[t]he opportunity to be heard means little unless it occurs in an orderly, regular proceeding appropriate to the nature of the case." *Fiore v. Com. of Pa., Board of Finance and Revenue*, 633 A.2d 1111, 1114 (Pa. 1993) (citations omitted); *In re: 40th Investigating Grand Jury*, 190 A.3d at 572-73 (barring pre-deprivation restrictions to reputation without proper due process).

Maldonado, for example, held that SVP status cannot be imposed without a hearing because of the "substantial imposition upon [] liberty interests." *Maldonado*, 838 A.2d at 714-18. Because "the registration distinctions between sexual offenders and sexually violent predators have become less apparent," at least the same protections should be afforded

to all registrants. *Commonwealth v. Perez*, 97 A.3d 747, 761-62 (Pa. Super. 2014) (Donohue, J., concurring).

The PSP argues in its *Amicus* Brief that to affirm will "encourage offenders to move to Pennsylvania, thereby ... making the Commonwealth a haven for sexual offenders."[242] This is a scare tactic and is based on mere speculation. As explained, less restrictive alternatives could include pre-registration hearings, which simply means there would need to be a determination of dangerousness before registration. Many states, like Vermont (the state hypothesized by the PSP) and New Jersey, empirically assess all registrants[243] because "using crime of conviction as the primary method of determining offender risk is a far less reliable predictor of reoffense than is the use of actuarial tools."[244] Indeed, in states like New Jersey, when assessed low risk, like Mr. Torsilieri, people are not subjected to public notification, somewhat reducing the harm to reputation.[245] These states are not considered havens.

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242 Brief for PSP at 17-18.

243 13 V.S.A. § 5411b

244 2009 Vermont Laws No. 58 (S. 125) § 1(d) (enacting § 5411b to be in compliance with Adam Walsh).

245 *See, e.g.*, N.J.S.A. 2C:7-8

Also, many states have residency restrictions, which are even more harmful than registration and notification alone.[246] Yet, despite the fact that many individuals registered in states with such restrictions could move to Pennsylvania to increase their quality of life, no one has argued that Pennsylvania must enact residency restrictions to prevent us from becoming a "safe haven."

Most importantly, to uphold Act 29 based on the same unsubstantiated fears that triggered these laws in the first place should not be countenanced. If a person who has fully served their sentence but registered in another state moves to Pennsylvania and is assessed as having no enhanced risk of reoffense, Pennsylvanians have little to worry about as that person poses no enhanced risk to the public. As in *In re J.B.,* this Court should "conclude that individualized risk assessment [or other measures] provide[] a reasonable alternative means of determining which [] offenders pose a high risk of recidivating" such that Act 29 fails the irrebuttable presumption doctrine. *In re J.B.*, 103 A.3d at 19.

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[246] *See, e.g.*, Levenson Dec. pp.6-7; *See, also e.g.,* Okl. Stat. Tit. 57 § 590 (2000 foot residency restriction); Fl. Stat. § 775.215 (1000 foot).

B. Act 29 Is Punitive.

This Court does not need to decide whether Act 29 is punitive if it invalidates the law under the abovementioned principles. However, if SORNA pre-Act 29 was punitive under *Muniz*, it is difficult to see how Act 29 alters that conclusion, especially in light of the empirical consensus demonstrating the law's lack of any real connection to reducing reoffending. Subchapter H of Title 42 is in all material respects identical to SORNA and punitive in every way that Subchapter I and the SVP process are not. *Commonwealth v. Lacombe*, 234 A.3d 620 (Pa. 2020); *Commonwealth v. Butler* (*Butler* II), 226 A.3d 972 (Pa. 2020).

The parties do not dispute the applicability of the two-level inquiry outlined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963), and that the legislature intended to enact a non-punitive law. *Torsilieri I*, 232 A.3d at 588-89. However, Act 29's changes to SORNA do not materially alter the interpretation of the seven *Mendoza-Martinez* factors under *Muniz*.[247] The only difference is not with respect to Act 29 but with respect to the evidence Appellee presents.

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[247] Appellee assumes that the General Assembly's intent in enacting Act 29 was to try to address *Muniz*, and "'not to punish, but to promote public safety through a civil, regulatory scheme.'" *Id.* at 1210 (quoting *Williams II*, 832 A.2d at 972).

First, Subchapter H is much more like the affirmative disability imposed by SORNA in *Muniz* than it is in Subchapter I. *Muniz* found "in-person reporting requirements, for both verification and changes to an offender's registration, to be a direct restraint upon appellant …." *Muniz*, 164 A.3d at 1211 (OAJC). *Lacombe* concluded that Subchapter I's limitation to once-a-year in-person reporting, no requirement that a person updates information in-person, and the much shorter time most people will register (10 years) was sufficient to differentiate it from *Muniz*. *Lacombe*, 234 A.3d at 619-20. None of those limitations exist here.

Subchapter H requires quarterly or semi-annual in-person reporting for all but Tier I offenders. 42 Pa.C.S. § 9799.15(e). "[T]elephonic" verification allowance will not be available until after three years of in-person compliance with every required verification appointment. It will be unavailable if the person is ever non-compliant. Additionally, the PSP has not even followed the law. Despite five years since its enactment, no telephonic reporting system currently exists.[248]

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[248] *See, e.g.*, Pennsylvania State Police Megan's Law Section, Annual Report 2021, https://www.meganslaw.psp.pa.gov/Documents/2021%20Megans%20Law%20Annual%20Report.pdf, at 3, ("The MLS is actively working to establish the telephonic system required to allow this process to be implemented.").

Act 29 also *does nothing to alter the requirements imposed for updates and changes* or if one were to experience homelessness. 42 Pa.C.S. §§ 9799.15(g); 9799.25(a.1). Unlike Subchapter I, regular verification dates "do not account for the times he must appear due to his 'free' choices including "moving to a new address or changing his appearance[.]"' *Muniz*, 164 A.3d at 1211 (OAJC) (citations omitted). Subchapter H requires in-person updates on everything from a new car, telephone number, email address, internet username, 42 Pa.C.S. § 9799.15(e), and likely a "significant change in appearance." 42 Pa.C.S. § 9799.16(c)(4). This is not just paperwork. It is a required, in-person obligation. The number of these appearances is also compounded by the social instability the trial court found was associated with being labeled a sex offender.[249]

Additionally, a homeless registrant (about 300 people on any given day) must still "appear in person monthly, a minimum of 300 times over twenty-five years. *See* 42 Pa.C.S. § 9799.15(h)(1)." *Muniz*, 164 A.3d at 1211 (OAJC); *see also Piasecki v. Court of Common Pleas, Bucks County, PA.*, 917 F.3d 161, 164-65 (3d Cir. 2019) (listing SORNA's in-person requirements, most of which are unchanged).

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[249] *See* Section VI.E.4 *supra* pp. 31-37; Tr. Ct. Opinion at 4-5.

Further, *Lacombe* found that the Subchapter I reporting requirements were "minimal and clearly necessary." *Lacombe*, 234 A.3d at 620. But *Lacombe* did not have the benefit of the record found by the court below, which demonstrates that Subchapter H is anything but necessary.

Second, Act 29 does not alter SORNA's similarity to traditional punishments. Indeed, *Lacombe* found that even the lesser burden of Subchapter I remains similar to "shaming" and "probation" such that it "weighs in favor of finding SORNA's effect to be punitive." *Lacombe*, 234 A.3d at 622-23 (quoting *Muniz*, 164 A.3d at 1212-13). Subchapter H's much more onerous burdens also weigh in favor of a punitive finding.

The Commonwealth devotes eight pages of its brief to arguing, for the first time, that *Muniz* and *Lacombe* should be overruled.[250] This argument is not only waived, like many of the Commonwealth's other arguments but it is also based on specious logic and unsupported supposition. For example, it ignores any discussion of the parallel to probation and solely argues that the registry cannot shame because it does not "spread information to eyes around the world."[251]

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250 Appellant's Brief at 40-48.

251 Appellant's Brief at 42.

The argument is illogical because the entire purpose of the website is to spread information publicly. To claim that it does not fundamentally undermines the purpose the Commonwealth claims is served by the registry—to inform the public.[252] The PSP's own data also rejects the claim. In 2021, the state's ML website saw "approximately *33 million-page* hits [...and sent] approximately 2.6 million email notifications to individual user accounts."[253]

Still, the Commonwealth insists this information is no different than publicly releasing a criminal record and even alleges, incorrectly, that Dr. Letourneau acknowledged that "there is no research" showing the effects she describes are "from inclusion in the registry or, from the fact of the underlying conviction."[254] In fact, she explained that the research comes from surveys of registrants, their families, probation and parole officers, and even her own work comparing people with sexual convictions who are registered against those who are not.[255] The evidence, as

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[252] Appellant's Brief at 31 (stating providing information is the "premise underpinning all 'Megan's Laws'").

[253] Pennsylvania State Police Megan's Law Section, 2021 Annual Report at page 7. Available at https://www.meganslaw.psp.pa.gov/Documents/2021%20Megans%20Law%20Annual%20Report.pdf.

[254] Appellant's Brief at 47.

[255] R.453a-R.454a (Letourneau).

accepted in the court below, only strengthens this Court's conclusion in *J.B.*, *Muniz*, and *Lacombe*. The public registry imposes a label of high-risk danger and is similar to shaming and probation.

The third factor "carries little weight." *Id.*; *see also Torsilieri*, 232 A.3d at 589.

For the fourth factor, whether Act 29 promotes the traditional aims of punishment, even Subchapter I has been found to support a finding of punitiveness. *Lacombe*, 234 A.3d at 624. However, *Lacombe* concluded this determination carried "less weight" than the holding in *Muniz* because Subchapter I could only be intended to promote retribution, not deterrence, as it applies retroactively. *Id.* ("registrants cannot be deterred from committing the criminal activity for which they are required to register since those crimes have already occurred."). But Subchapter H, like SORNA in *Muniz*, applies prospectively, which can logically deter first-time offenders and is more onerous than Subchapter I. 42 Pa.C.S. § 9799.13 (applicability).

The Commonwealth not only ignores Act 29's retributive component, *see, e.g.*, *Muniz*, 164 A.3d at 1215-16 (holding retributive laws "affix culpability for prior criminal conduct") (quotation omitted), it argues that

because Appellee presented no clear evidence that Act 29 actually deters, this factor weighs against a punitive finding.[256] Appellee has never argued that SORNA is an effective deterrent. Rather, the issue is whether its intended effect promotes deterrence. *See Muniz*, 164 A.3d at 1215 (finding "the prospect" of being labeled a registrant for lengthy periods, especially for a misdemeanor or low-level felony offenses, "promotes" deterrence). Indeed, in *Muniz*, the Commonwealth conceded that SORNA had a deterrent purpose. *Id.* And, because, just like SORNA, Act 29 "still requires lengthy, often lifetime, registration" and other burdens for misdemeanor and other lower-level offenses, deterrence is still an intended goal. *Torsilieri I*, 232 A.3d at 591 (quotation omitted). For all the reasons stated in *Muniz* and *Lacombe*, and in light of the evidence regarding the law's significant retributive effect found by the trial court,[257] this factor also weighs in favor of finding Act 29 punitive.

The fifth factor, like factor three, does not factor into the analysis. *Torsilieri*, 232 A.3d at 589.

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256 Appellant's Brief at 50.

257 Tr. Ct. Opinion at 21; *see also* Section VI.E.4 *supra* pp.31-37 (demonstrating the harsh effects of registration).

With respect to factor six, the evidence demonstrates that Subchapter H is *not* rationally related to the intended goal of reducing recidivism. In *Lacombe*, the Court relied on *Muniz*, which demurred on whether SORNA was rationally related to the goal of "protecting the safety and general welfare of the citizen," 42 Pa.C.S. § 9799.11(b)(1), from "high risk" recidivists because it would not reject legislative policy preferences based upon "contrary scientific studies." *Lacombe*, 234 A.3d at 625 (quoting *Muniz*, 164 A.3d at 17). Because of this apparent conflict and that Lacombe did "not challenge" the legislative judgment, this Court stated, "we defer to the General Assembly's findings on this issue." *Id.* at 625 n.17.

Deference is no longer appropriate. Appellee presented robust evidence, it was tested and accepted by the trial court, and it is conclusive. There is no conflicting narrative. As the trial court stated, "based on the scientific and academic consensus presented, we find that SORNA laws do not have the effect on recidivism and public safety anticipated by the legislature and that they are not rationally related to the purposes for which they were enacted."[258] The consensus, after numerous studies,

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[258] Tr. Ct. Opinion at 26.

each evaluated by many experts, is that SORN laws like Act 29 do not reduce sexual violence and do not make the public safer.[259]

Smith's holding that an over-inclusive law may still be rational even if "it lacks a close or perfect fit with the nonpunitive aims it seeks to advance" does not save Act 29. *Smith*, 538 U.S. at 103. The evidence demonstrates *no* connection between Act 29's categorical registration and public safety.[260] Not only is there a consensus that most registrants will not sexually reoffend[261] and that Act 29 will not prevent those that will from doing so,[262] but there is also no rational reason to associate the crime charged with the length of registration nor any empirical connection between the two.[263] The law does not rationally reduce recidivism. All it does is punish.

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259 *See* Section VI.E.2 *supra* pp.23-30.

260 *See* Section VI.E.2 *supra* pp.23-30 (detailing the well-accepted body of evidence that SORN laws like Pennsylvania's do not reduce recidivism). Also, although this factor is not identical to rational basis review employed in a substantive due process analysis, there is some overlay. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) ("state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

261 *See* Section VI.E.1.a-b *supra* pp.10-19.

262 *See* Section VI.E.2 *supra* pp.23-30.

263 *See* Section VI.E.3 *supra* pp.30-31.

Finally, Act 29 remains excessive. Unlike Subchapter I, which "removed a plethora of previously qualifying offenses" and "lowered the registration term" and "reporting requirements" for many offenses, Subchapter H did none of those things. *Compare Lacombe*, 234 A.3d at 625-26 (discussing the alterations made by Subchapter I) *with Muniz*, 164 A.3d at 1219. Act 29 did not remove most non-sexual offenses from the registration requirement. *See* 42 Pa.C.S. § 9799.14 (listing non-sexual offenses). It still requires people whose cases indisputably involve no sexual component to register. *See*, *Muhammad*, 241 A.3d 1149 (registered because she was not the child's guardian). The Commonwealth's contrary argument that some non-sexual offenses might have sexual components is irrelevant as the law requires examining "the entire statutory scheme," *Muniz*, 164 A.3d at 1218. It is unassailable that many included offenses have no sexual component but nonetheless label people dangerous. This is excessive.

Beyond that, the law is excessive because the consensus establishes, and the trial court found, Act 29 unreasonably and unnecessarily registers thousands of easily identifiable individuals who pose a no

greater risk to public safety than any other person with a criminal record.[264] This is the definition of excessive.

Moreover, the 25-year removal mechanism is illusory at best. Section 9799.15(a.2) requires not only near-perfect compliance for 25 years of registration but allows for pure discretion even if its heavy burdens can be met. As *J.B.* stated, "we reject the suggestion that a Section 9799.17 hearing twenty-five years in the future, only upon perfect compliance with the registration requirements, provides an opportunity to be heard on the question of likelihood of recidivating." *In re J.B.,* 103 A.3d at 17. Some degree of pre-deprivation hearing must be available to avoid an excessiveness finding.

Accordingly, because Act 29 does nothing to alter *Muniz*'s punitive determination in any material way, and the evidence demonstrates the law fundamentally fails to achieve its intended ends, this Court should "consider the statute to have established criminal proceedings for constitutional purposes." *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

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[264] Letourneau Aff., ¶9; Section VI.E.1-2 *supra* pp.10-30.

C. Act 29 Is Unconstitutional As Punishment.

The Commonwealth essentially ignores all of Appellee's remaining claims and addresses them summarily.[265] All of the Commonwealth's summary arguments are weak or misguided. Presuming this Court finds that Act 29 as it relates to Subchapter H is punitive, it should conclude that the law is unconstitutional for all the following reasons.

1. Act 29 unconstitutionally usurps judicial power in violation of the separation of powers doctrine.

The Commonwealth simply asserts, without support, that "the only fact" that matters for registration is a conviction.[266] That is wrong.[267] A conviction for an enumerated offense is necessary but insufficient to trigger registration. The subchapter's applicability is governed by Section 9799.13, which requires at least three elements before triggering registration obligations: (1) the conviction for an enumerated offense; (2) a determination that the offense occurred on or after December 20, 2012; and

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265 Appellant's Brief at 60-62.

266 Appellant's Brief at 60.

267 Appellee agrees that the legislature is legally permitted to make registration a mandatory sentence, so even if Act 29 is punitive, the Constitution grants the Legislature the power to determine what penalties may be prescribed and the maximum terms thereof. *Commonwealth v. Eisenberg*, 98 A.3d 1268, 1283 (Pa. 2014); *Commonwealth v. Strafford*, 194 A.3d 168 (Pa. Super. 2018). But it has not done so and cannot grant an administrative agency the power to decide the elements of crimes or adjudicate a defendant's guilt.

(3) a determination that the person either resides, works, or goes to school in Pennsylvania or is an inmate or supervised by a county, state, or federal penal or probationary institution in the state. 42 Pa.C.S. § 9799.13.[268]

Act 29 unconstitutionally vests the PSP and other executive agencies, as opposed to courts, with the power to determine the facts necessary for the *application* of the law.[269] Only the element of conviction for an enumerated offense is court imposed. If Act 29 is a criminal penalty, its imposition is a sentence, an exclusively judicial role. No agency can constitutionally do it. Further, even if executive agencies were not undertaking judicial roles, because the legislature intended registration to be exclusively civil, it has not empowered courts to sentence a person to the punishment of registration, and this Court cannot rewrite the statute to contradict the Legislature's wishes. *See Commonwealth v. Eid*, 249 A.3d

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[268] More specifically, Section 9799.13 requires registration only if the defendant is "a sexual offender" who fits one of the enumerated job, school, or residence categories. 42 Pa.C.S. §§ 9799.13(1)-(8.2). A "sexual offender" is an "individual who has committed a sexually violent offense." 42 Pa.C.S. § 9799.12. A "sexually violent offense" is "[a]n offense specified in 9799.14 (relating to sexual offenses and a tier system) as a Tier I, Tier II or Tier III sexual offense *committed on or after December 20, 2012*, for which the individual was convicted." 42 Pa.C.S. § 9799.12 (emphasis added).

[269] "[a]n individual set forth in Section 9799.13 (relating to applicability) shall initially register with the Pennsylvania State Police ...." 42 Pa.C.S. § 9799.19(a)

1040 (Pa. 2021) ("It is neither the judiciary's role, nor within our constitutional authority, to fill gaps in sentencing statutes.").

"The power of sentencing is one of the most critical and important duties vested in the judiciary," *Commonwealth v. Sutley*, 378 A.2d 780, 784 n.7 (Pa. 1977), and is exclusively "vested in courts. Not a fragment of it belongs to the legislature [or executive]." *Commonwealth ex rel. Johnson v. Halloway*, 42 Pa. 446, 448 (1862); Pa. Const. Art. 1, Sec. 5. Although the legislature may limit a court's discretion by limiting the nature and types of sentences a court may impose, *Commonwealth v. Wright*, 494 A.2d 354, 361 (Pa. 1985), it cannot, consistent with due process, remove a court's power to determine whether a statutorily mandated sentence is applicable. *McCray v. Pa. Dept. of Corrections,* 872 A.2d 1127, 1133 (Pa. 2005); *Wright*, 494 A.2d at 359-60. It is the judicial branch that must adjudicate the applicability of a particular sentence. *Apprendi v. New Jersey*, 530 U.S. 466 (2000*); Alleyne v. United States*, 570 U.S. 99 (2013); *Commonwealth v. Hopkins*, 117 A.3d 247 (Pa. 2015).

For comparison, the Board of Probation and Parole is administrative. Although it may calculate how a sentence is structured under the statute, 61 Pa.C.S. § 6138(a) (relating to sentencing calculations), it only

"faithfully implements sentences imposed by the courts." *Comrie v. Pa. Dep't of Corrections*, 142 A.3d 995, 1001 (Pa. Cmwlth. 2016) (citing *Allen v. Commonwealth, Department of Corrections,* 103 A.3d 365, 369 (Pa. Cmwlth. 2014)). If the sentencing court does not find a particular sentence applicable, the agency cannot alter that judgment. *Id.* (citing *McCray,* 872 A.2d at 1133).

Act 29 does not comport with these principles. Act 29 vests, often by default and probably unintentionally, adjudicatory power to the PSP, 42 Pa.C.S. § 9799.19(i), (m), (n); a state or county probation and parole authority, § 9799.19(o)-(q); correctional institutions, § 9799.19(l); or merely imposes the registration penalty by legislative fiat, § 9799.19(i), (m)-(q). These agencies "lack[] the power to adjudicate the legality of a sentence or to add or delete sentencing conditions." *McCray*, 872 A.2d at 1133; *see also Commonwealth v. Mann*, 957 A.2d 746 (Pa. Super. 2006) (discussing the same).

Nowhere in the law is any judicial actor empowered to adjudicate all three elements necessary for registration. Deciding if registration is applicable is completed by agencies, often without much due process or accountability. *See M.S. v. Pennsylvania State Police*, 212 A.3d 1142,

1148 (Pa. Cmwlth. 2019) (finding due process violated because the PSP did not afford sufficient process to challenge its registration decisions).

Act 29 does not empower a court to determine the applicability of registration, nor is it available as a sentencing option under the Sentencing Code. 42 Pa.C.S. § 9721. It only authorizes a court to "inform" the defendant of various duties and to "classify" the defendant as an "individual convicted of a Tier 1 [II, or III] offense." 42 Pa.C.S. 9799.23. Informing a defendant is different from adjudicating facts or imposing a sentence. Indeed, "failure by the court to provide the information required in this section [...] shall not relieve a sexual offender from the duty to register under this subsection." 42 Pa.C.S. § 9799.23(b)(1). The obligation to register attaches even if the court does absolutely nothing. Second, "classifi[cation]" into a tier is not the same as imposing a sentence but merely a declaration that the defendant's conviction is enumerated within the offenses listed in 42 Pa.C.S. § 9799.14. 42 Pa.C.S. § 9799.12 (defining tier offenses).

It is agencies exclusively that impose or determine registration. 42 Pa.C.S. § 9799.19) ("[a]n individual set forth in Section 9799.13 (relating

to applicability) shall initially register with the Pennsylvania State Police ....”). The duty to register is on either the defendant to appear and comply without any factual findings or process to determine the applicability or on other non-judicial actors, like the PSP, to determine the applicability. 42 Pa.C.S. § 9799.19. The PSP’s own directives admit it alone decides who registers:

> The sexual offender shall NOT be turned away for any reason. *A determination regarding whether or not a sexual offender must actually be registered under Megan’s Law will be made at a later date by the Megan’s Law Section*.[270]

Enacted as a civil law intended to address future danger, it makes some sense to separate the applicability and administration of the program from the judicial determination of whether a criminal act occurred. But Act 29 cannot constitutionally operate in this fashion as a criminal sentence if the facts necessary to apply registration are never presented to the judiciary. It creates an automatic, non-judicial imposition of criminal punishment. The only entity not expressly delegated power under Act 29 is the only one that matters for criminal sentencing purposes – the judiciary.

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[270] Pennsylvania State Police Directives, AR9-30, 30.4 Note, https://bit.ly/2IrXKAk (emphasis added).

2. Mandatory lifetime sex offender registration is a cruel and disproportionate punishment under both the United States and Pennsylvania Constitutions.

The Commonwealth does not address this argument and fails to recognize that even if this Court agreed with it that Act 29 is not punitive under the *Mendoza-Martinez* framework, that doesn't resolve this issue. For purposes of the Eighth Amendment, "punishment" includes "all civil or criminal sanctions that serve retributive or deterrent purposes to any degree." *Shoul v. Dep't of Transportation*, 173 A.3d 669, 684 (Pa. 2017) (citing *Austin v. United States*, 509 U.S. 602 (1993)). Act 29 exacts retribution (even if the intended goal was to avoid doing just that) and is meant to deter the commission of sexual offenses (even though it does not). *See Lacombe*, 234 A.3d at 624 (finding even Subchapter I promotes retribution).

The Eighth Amendment's prohibition on cruel and unusual punishments "'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (quoting *Roper v. Simmons,* 543 U.S. 551, 560 (2005)). Pennsylvania's Constitution, Art. 1,

Sec. 13, is co-extensive. *Commonwealth v. Zettlemoyer,* 454 A.2d 937, 967 (Pa. 1982).

Cases addressing the proportionality of punishments fall within two general classifications: challenges to the length of term-of-years sentences given the circumstances in a particular case; and cases in which courts implement the proportionality standard by certain categorical restrictions. *Graham v. Florida*, 560 U.S. 48, 59 (2010). Categorical challenges involve a class of offenders "who have committed a range of crimes." *See e.g., id.* (holding life without parole sentences on juvenile offenders are impermissible for non-homicide crimes); *United States v. Williams*, 636 F.3d 1229, 1234 (9th Cir. 2011), *cert. denied* 565 U.S. 856 (2011) (supervised release sentence for child pornography conviction); *State v. Mossman*, 281 P.3d 153, 170-171 (Kan. 2012) (post-release supervision sentence for aggravated indecent liberties with a child); *State v. Blankenship*, 48 N.E. 3d 516, 521-523 (Ohio 2015) (25-year-long registration verification requirements for sex offenders). The appropriate analysis instantly is the categorical approach. *See Graham*, 560 U.S. at 61; *Blankenship*, 48 N.E. 3d at 521-523.

Categorically, the penalty of mandatory lifetime registration cannot apply to first-time offenders convicted of second-degree aggravated indecent assault. There are two steps in a categorical analysis: first, courts consider whether there is a national consensus against the sentencing practice at issue; and second, courts "must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Graham*, 560 U.S. at 61 (citing *Roper*, 543 U.S. at 572). Community consensus is not determinative of whether punishment is cruel and unusual, which is why "independent judgment" is necessary. *See id.* at 67.

a. National Consensus.

The categorical analysis begins with objective indicia of national consensus, including "measures of consensus other than legislation." *Id.* at 62 (quoting *Kennedy*, 551 U.S. at 433). Although most courts have found registration non-punitive, and, therefore not an Eighth Amendment violation,[271] that is beginning to change. *See People In Int. of T.B.,*

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[271] *See e.g.*, *Shaw v. Patton*, 823 F.3d 556 (10th Cir. 2016) (Oklahoma); *Doe v. Cuomo*, 755 F.3d 105 (2d Cir. 2014) (New York); *King v. McCraw*, 559 F. App'x 278 (5th Cir. 2014) (Texas); *United States v. Under Seal*, 709 F.3d 257 (4th Cir. 2013) (federal Sex Offender Registration); *ACLU v. Masto*, 670 F.3d 1046 (9th Cir. 2012) (Nevada).

489 P.3d 752 (Colo. 2021) (holding lifetime juvenile registration violates the Eighth Amendment); *People v. Lymon*, __N.W.2d__, 2022 WL 2182165 (Mich. Ct. App. June 16, 2022), *appeal granted*, 983 N.W.2d 82 (Mich. 2023). Moreover, there is a national consensus *against* imposing sex offender registration laws as *punishment* for criminal conduct. *No* state legislature has passed a registration statute intending a long period of registration to be imposed as part of a criminal sentence; they are uniformly intended as civil measures. *See, e.g., Does #1-5 v. Snyder*, 834 F.3d 696, 700 (6th Cir. 2016) (noting Michigan intended its law to be civil); *Doe v. State*, 111 A.3d 1077, 1090-91 (N.H. 2015) (finding New Hampshire intended to enact a civil law).

On the other hand, when states seek to impose lengthy punitive supervision, post-release supervision is the generally accepted method. *See Mossman*, 281 P.3d at 171. While most states employ lifetime registration, fewer than half of states provide for lifetime post-release supervision as punishment for sexual offenses, and several states have a mechanism for termination of post-release supervision under certain conditions. *Id.* at 165-66. Only three states – Kansas, Nebraska, and Okla-

homa – impose mandatory, non-removable lifetime post-release supervision for select offenses regardless of whether it is a first offense. *See* K.S.A. 22-3717(d)(1)(G); Neb.Rev.Stat. §83-174.03; Okla. Stat. Ann. Tit. 22 §991a(A)(13)). The few other states that also impose mandatory, non-removable, long or lifetime post-release supervision do so on recidivists or SVPs only. *See, e.g.,* Ind. Code Ann. § 35–50–6–1(e) (SVPs only); Minn. Stat. Ann. § 609.3455(7) (2023) (recidivists).

Registration under Act 29, however, is not the equivalent of post-release supervision. Long-term supervised release, as opposed to lifetime registration, is recognized as an acceptable form of punishment because (1) its purpose is different; and (2) in nearly every case, its minimum term is not mandatory but indeterminate, *See United States v. Johnson,* 529 U.S. 53, 59 (2000); *see* 18 U.S.C. § 3583(e);*United States v. Neal*, 810 F.3d 512, 519 (7th Cir. 2016).

Act 29 is not indeterminate. Even after the required 25 years, judicial authority is severely constrained when the possibility of removal arises. *See* 42 Pa.C.S. § 9799.15(a.2). Thus, there is a national consensus

against the practice of imposing mandatory minimum lifetime registration requirements *as punishment* upon first-time offenders convicted of a second-degree aggravated indecent assault.

b. An Independent Review.

The second step is the exercise of independent judgment. *Graham*, 560 U.S. at 61. As part of this review, a court considers (1) the culpability of the offenders at issue in light of their crime and characteristics, (2) the severity of the punishment in question, and (3) "whether the challenged sentencing practice serves legitimate penological goals." *Graham*, 560 U.S. at 67-68 (internal citations omitted).

Appellee's conviction for second-degree aggravated indecent assault subjects him to lifetime registration. 42 Pa.C.S. § 9799.55(b). The legislature has determined the proper retribution for this crime, including a probation term, is normally ten years, 18 Pa.C.S. § 1103(2); 42 Pa.C.S. § 9754(a) (maximum period of probation), and at most thirteen. 42 Pa.C.S. § 9718.5 (requiring the imposition of a mandatory consecutive three-year probation term). Even for a first-degree conviction, the legislature set a maximum penalty far below life. 18 Pa.C.S. § 1103(1) (20-

year maximum penalty). Yet, a life-term penalty is exactly what Act 29 imposes.

The severe length of the sanction is compounded by the impact that sex offender registration has on a person's life.[272] Registrants also suffer particularly egregious reputational harm because of the false messages conveyed by the registry. [273]

Further, Act 29 allows no discretion on the part of the sentencing judge. Instead, all similarly situated offenders are punished according to a "one-size-fits-all standard." *Blankenship*, 48 N.E.3d at 533 (Pfeifer, J., dissenting). First-time offenders have the same reporting requirements as a recidivist offenders. Offenders assessed with a low probability of reoffending have the same reporting requirements as those assessed with a high probability. *Id.* "This lack of proportionality is constitutionally flawed." *Id.*

Finally, although plausible, there are no penological justifications—retribution, incapacitation, deterrence or rehabilitation—to justify imposing mandatory, lifetime sex offender registration. The record

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272 *See* Section VI.E.4, *supra* pp.31-37 (discussing barriers and effects).

273 *See* Sections VI.E.1 *supra* pp.10-23 ("high risk" is false); VI.E.4 *supra* pp.31-37 (discussing reputational harm).

here clearly reveals that the perception regarding the link between the severity of the underlying crime and the probability of reoffending, and the supposed positive effect of the registry on recidivism, has no basis in truth. *See* Sections VI.E.1-2., *supra* pp.10-30. The lifetime registration requirements of Act 29, when imposed upon first-time offenders convicted of second-degree aggravated indecent assault, constitute cruel and unusual punishment.

3. Act 29 violates *Alleyne,* and this Court may not rewrite the statute to conform with due process.

If Act 29 is punitive, it creates a mandatory minimum sentence, the elements of which are not found by a court consistent with due process. Moreover, this Court cannot rewrite the law to fix this deficiency contrary to the legislative determination that Act 29 "shall not be construed as punitive." 42 Pa.C.S. § 9799.11(b)(3).

Act 29 requires findings of fact that are not elements of a crime, are not submitted to a judge or jury, and do not have to be proven beyond a reasonable doubt. The question is not one of severability but whether this Court may make registration a crime where the legislature has expressly declared that it is not. *Cali v. Philadelphia*, 177 A.2d 824, 835 (Pa. 1962) (A court's role is interpretive, not legislative).

If registration is a mandatory punishment, however, any fact that increases the punishment imposed on the underlying crime is an element of the offense and must be found beyond a reasonable doubt. *Apprendi*, 530 U.S. 466 (2000); *Alleyne*, 570 U.S. 99 (2013); *Hopkins*, 117 A.3d 247 (Pa. 2015). As discussed above, Act 29 does not impose registration based on the conviction alone. 42 Pa.C.S. 9799.13. The factual perquisites to registration regarding the date and state contact are additional facts, must be treated as elements, and must be found beyond a reasonable doubt. *Alleyne*, 570 U.S. at 109 ("[i]f a fact was by law essential to the penalty, it was an element of the offense.").

Subchapter H only applies to crimes "committed on or after December 20, 2012." 42 Pa.C.S. § 9799.12. Although the date of the charged offense must be averred with sufficient particularity to provide adequate notice in a given case, it is not an element. *See Commonwealth v. Devlin*, 333 A.2d 888 (Pa. 1975) ("Certainly the Commonwealth need not always prove a single specific date of the crime."); *Commonwealth v. Wolfe*, 140 A.3d 651 (Pa. 2016) (holding that despite the overlap between an element of the crime, and the fact necessary to be proven to trigger a mandatory sentence, a court may not substitute its judgment for the Legislature's

determination that such a fact does not become an element). The question of whether the offense occurred before or after December 20, 2012, must be submitted to a jury.

Act 29 also requires that the convicted individual is under supervision pursuant to a sentence imposed by a state court, subject to registration in another jurisdiction, or has a residence, school, or job within Pennsylvania. 42 Pa.C.S. § 9799.13. Act 29 does not provide for a mechanism to ensure these facts are properly submitted to a factfinder before trial.

Similarly, the only notice of Act 29's requirements is provided at the time of sentencing. 42 Pa.C.S. § 9799.23(a). And, the notice provided is not the applicability of registration, but merely what is required once registration attaches. § 9799.23(a). Nor may the defendant challenge these additional elements under the statute nor offer evidence to rebut the Commonwealth's showing. Everything conducted at sentencing is pro-forma. 42 Pa.C.S. § 9799.23.

Act 29 does not create a single process by which any entity is authorized to find these facts. It instead imposes the duty automatically or requires administrative agencies to make the decision. *See* Section VIII.C.1, *supra* pp.91-96 (discussing separation of powers). To resolve the

problem, a Court would be forced to impose its own procedures or require special interrogatories to ensure that the Commonwealth proves the elements of mandatory registration. Not only is this practice disfavored, *Hopkins*, 117 A.3d at 260-61, but it would also nullify 9799.23(b) because the Legislature has said failure of the court to act does not prevent the duty to register. 42 Pa.C.S. § 9799.23(b).

Most importantly, a court cannot create new crimes or rewrite the law when the Legislature clearly declared Act 29 to be non-punitive. *Hopkins,* 117 A.3d at 261; 42 Pa.C.S. § 9799.11.

IX. CONCLUSION

WHEREFORE, for the foregoing reasons, Mr. Torsilieri respectfully requests this Court to accept the facts as found by the trial court, affirm the holding below that Subchapter H is facially unconstitutional on any of Appellee's grounds, and declare that Mr. Torsilieri is not required to register under the Act.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 2135

I do hereby certify on this 23rd day of February, 2023, that the Brief For Appellee filed in the above captioned case on this day does not exceed 21,500 words which is the word limit allowed by this Court pursuant to its grant on February 17, 2023, from Appellee's Application To Exceed Word Count. Using the word processor used to prepare this document, the word count is 21,154 as counted by Microsoft Word.

Respectfully submitted,

/S/

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CERTIFICATION OF COMPLIANCE WITH RULE 127, PA.R.A.P.

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/S/

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KEISHA HUDSON, Chief Defender

EXHIBIT A

COMMONWEALTH OF PENNSYLVANIA	**: IN THE COURT OF COMMON PLEAS**
vs.	**: CHESTER COUNTY, PENNSYLVANIA**
GEORGE TORSILIERI	**: NO. 15-CR-0001570-2016**
	: CRIMINAL ACTION—LAW

Tracy S. Piatkowski, Esquire, Deputy Attorney General, Leslie S. Pike, Esquire, Assistant District Attorney, and Erin P. O'Brien, Esquire, Assistant District Attorney, for the Commonwealth
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OPINION

On June 16, 2020 the Honorable Supreme Court of Pennsylvania directed this Court to analyze whether SORNA's irrebuttable presumption that all sex offenders pose a high risk of reoffending sexually is constitutional and to analyze whether Act 29 of SORNA, which is the version in place at this time as well as the time when the trial court issued its Opinion on direct appeal, although not at the time the Defendant committed and was tried and sentenced for the underlying crimes, constitutes criminal punishment by examining five (5) of the seven (7) factors set forth in *Kennedy v. Mendoza-Martinez*, 83 S.Ct. 554 (U.S. D.C./Cal. 1963) governing that determination.[1]

The factual and procedural history of this litigation, as well as the standard of review and applicable law, have been addressed in great detail in the Opinion *Sur* Rule 1925(a) issued by the Honorable Anthony A. Sarcione on August 30, 2018 and the Honorable Pennsylvania Supreme Court's Opinion issued on June 16, 2020 remanding the

[1] The Pennsylvania Supreme Court determined that the last two *Mendoza-Martinez* factors had no bearing on the question of whether SORNA was punitive and therefore did not require that we examine them.

case to the undersigned for the purposes described above. Consequently, we will not reiterate all of the factual, procedural, and legal principles again here but simply refer the reader to those two (2) documents for an understanding of the manner of this case's evolution and the legal standards governing the issues to be considered at present.

Our first task is to evaluate the constitutionality of SORNA's irrebuttable presumption that all sex offenders, regardless of their personal characteristics and circumstances, have a high risk of reoffending sexually. The presumption is found at 42 Pa. C.S.A. § 9799.11(a)(4), entitled "Legislative findings, declaration of policy and scope", which provides, "Sexual offenders pose a high risk of committing additional sexual offenses and protection of the public from this type of offender is a paramount governmental interest." 42 Pa. C.S.A. § 9799.11(a)(4).

Whether an irrebuttable presumption is constitutional involves a three-part test. An irrebuttable presumption is unconstitutional where (a) it encroaches on an interest protected by the due process clause; (2) the presumption is not universally true; and (3) reasonable alternative means exist for ascertaining the presumed fact. *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015). Our analysis of these three factors leads us to conclude that SORNA's irrebuttable presumption does not pass constitutional muster.

Article I, Section 1 of the Pennsylvania Constitution provides, in pertinent part, "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Pa. Const., Art. I, § 1; *Pennsylvania Bar Association v. Commonwealth*, 607

A.2d 850 (Pa. Cmwlth. 1992)(*quoting* Pa. Const., Art. I, § 1). The right to reputation is a fundamental right guaranteed under the Pennsylvania Constitution, entitled to the protection of due process. *Pennsylvania Bar Association v. Commonwealth*, 607 A.2d 850 (Pa. Cmwlth. 1992). *See also Taylor v. Pennsylvania State Police of Commonwealth*, 132 A.3d 590 (Pa. Cmwlth. 2016)(a person's reputation is among the fundamental rights that cannot be abridged without compliance with the State constitutional standards of due process). The existence of government records containing information that might subject a party to negative stigmatization is a threat to that party's reputation. *In re R.M.*, 2015 WL 7587203 (Pa. Super. 2015)(*citing Pennsylvania Bar Association v. Commonwealth*, 607 A.2d 850, 853 (Pa. Cmwlth. 1992)(*citing Wolfe v. Beal*, 384 A.2d 1187, 1189 (Pa. 1978))). The Federal Constitution does not recognize reputation, standing alone, as a fundamental constitutional right. *In re J.B.*, 107 A.3d 1 (Pa. 2014).

SORNA's irrebuttable presumption concerning sex offenders' heightened future dangerousness as a cohort indisputably encroaches upon a person's fundamental right to reputation under Article I, Section 1 of the Pennsylvania Constitution. SORNA's irrebuttable presumption unduly stigmatizes persons convicted of committing sexual offenses, a class of crimes that covers a wide spectrum of conduct, and does so without any consideration of individual characteristics and circumstances. A person convicted of a sex offense subject to SORNA will likely experience difficulty in finding housing, employment/education, and establishing pro-social relationships with others, three (3) factors described by experts as the "most important" factors contributing to an offender's successful re-entry into society and maintenance of a law-abiding lifestyle. (6/29/21, Ex. D-7; Affid. of Professor Elizabeth J. Letourneau, Ph.D., at 10, para. 13 (*citing* research by

the National Institute of Justice)). The Commonwealth suggests that offenders would experience these stigmas anyway by virtue of their public record convictions for sex offenses alone. The Commonwealth also suggests that every offender, whether guilty of committing a sexual offense or some other type of offense, experiences the same stigmas as a result of their convictions. However, non-sexual offenders are not placed on a public registry or subject to public notification about almost every aspect of their personal lives, even if their offense were a serious violent crime. We do not place murderers on a registry, nor do we place offenders such as those convicted of Aggravated Assault or other violent crimes on a registry, regardless of how many times or how egregiously they offend. No matter what their propensity for violence may be, we do not label them or publish to the world that they are at "high risk" of committing additional violent offenses. The special stigma associated with the registry requirement is the express accusation in the legislative findings that everyone convicted of a sexual offense presents a "high risk" of sexually reoffending. This strongly implies that even though one has been convicted and served his or her sentence, one remains a serious threat to society. Virtually all aspects of his or her personal life must be reported to the State and much of it publicized to the entire world, who can access this information without knowing or caring about any specific offender in particular. It is this designation, this "scarlet letter" of "high risk", that distinguishes the heightened stigma sexual offenders experience, and hence their greater marginalization, from that stigma merely associated with the fact of conviction that would otherwise be present in the absence of a registry and from that which is arguably experienced by non-sexually offending populations. *See In re J.B.*, 107 A.3d 1, 16 (Pa. 2014)("[T]he common view of registered sex offenders is that they are particularly dangerous and more likely to

reoffend than other criminals."). The public declaration based on the faulty premise that all sexual offenders are dangerous high-risk recidivists compounds the isolation and ostracism experienced by this demographic and sorely diminishes their chances of productively reintegrating into society.

Not only does this label ruin the chances for sex offenders to successfully rehabilitate under Pennsylvania law, rehabilitation being another indisputable aim of penal legislation and an equally compelling interest and policy of the Commonwealth, *see Fross v. County of Allegheny*, 20 A.3d 1193 (Pa. 2011), *aff'd*, 438 Fed. Appx. 99 (3rd Cir. Pa. 2011)(purpose of Sentencing and Parole Codes includes the rehabilitation, reintegration, and diversion from prison of appropriate offenders); *Secretary of Revenue v. John's Vending Corp.*, 309 A.2d 358 (Pa. 1973)(it is a deeply ingrained public policy of this State to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders), it catches within its overbroad suffocating net persons whose crimes may have no sexual component to them whatsoever, crimes such as the offense of Unlawful Restraint (18 Pa. C.S. § 2902(b)), which is a Tier I offense and subject to fifteen (15) years of registration and public infamy,[2] *see* 42 Pa. C.S.A. §§ 9799.14(b)(1), 9799.15(a)(1); the offense of False Imprisonment (18 Pa. C.S. § 2903(b)), *see* 42 Pa. C.S. §§ 9799.14(b)(2), 9799.15(a)(1); the offense of Interference with Custody of Children (18 Pa. C.S. § 2904),[3]

[2] This Honorable reviewing Court noted that SORNA's inclusion of "relatively minor offenses within its net" was "troubling" and "actually cast doubt" on the stated non-punitive legislative intent of the statute. *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), *cert. denied*, *Pennsylvania v. Muniz*, 138 S.Ct. 925 (U.S. Pa. 2018), *abrogated on other grounds by Commonwealth v. Santana*, 266 A.3d 528 (Pa. 2021), *superseded by statute on other grounds*, *Commonwealth v. Lacombe*, 234 A.3d 602 (Pa. 2020), *superseded by statute on other grounds*, *In re H.R.*, 227 A.3d 316 (Pa. 2020).

[3] Even though Act 29 removes parents, guardians, and other "lawful custodian[s]" from the ambit of the registry, the offense itself still does not require that the offender commit a sexual crime in order to be convicted.

see 42 Pa. C.S. §§ 9799.14(b)(3), 9799.15(a)(1); and the offense of Kidnapping (18 Pa. C.S. § 2901(a.1))(a Tier III, Lifetime Registration offense), *see* 42 Pa. C.S. §§ 9799.14(d)(1), 9799.15(a)(3), characterizing these offenders and subjecting them to global public shaming as incorrigible sexual recidivists regardless of the circumstances of their crime and the fact that these crimes do not require sexual offending for culpability. For all of the above reasons, we find that SORNA's irrebuttable presumption that all sex offenders pose a high risk of reoffending sexually encroaches on an interest protected by the Due Process Clause, namely, the constitutional right to reputation in Pennsylvania.

Moving onto the second prong of the test for the constitutionality of irrebuttable presumptions, whether the presumption is universally true, the evidence presented to this Court demonstrates that it is not. Of the two experts retained by the defense to opine on the issue (the third, James J. Prescott, J.D., Ph.D., was retained to discuss the efficacy of SORNA's registration and notification provisions on sexual recidivism), Dr. R. Karl Hanson (6/28/21, Ex. D-2, at 6, para. 10; Declaration of R. Karl Hanson at 6, para. 10) asserted that research has shown that 80% to 85% of sexual offenders do not reoffend sexually and Dr. Letourneau asserted that "methodologically rigorous research studies" indicate that 80% to 95% of sex offenders will not reoffend sexually. (6/29/21, Ex. D-7 at 7, para. 9 [Affid. of Prof. Elizabeth J. Letourneau, Ph.D., at 7, para. 9). Further, both Dr. Letourneau and Dr. Prescott cited to New York research showing that 95% of all sexual offenses are committed by first-time offenders not recidivists. (6/29/21, Ex. D-7 at 2-3, para. d [Affid. of Prof. Elizabeth J. Letourneau, Ph.D., at 2-3, para. d; 6/29/21; 6/29/21, Ex. D-9, Appx. A, at 15).

In response to the defense experts, the Commonwealth presented the expert report and testimony of Dr. Richard McCleary, Ph.D. (*See* 6/30/21, Ex. C-9). Dr. McCleary's report in large part attacked the methodology of all of the research showing a low rate of sexual reoffending by sex offenders or otherwise showing the inefficacy of SORNA's registration and notification requirements. In other words, Dr. McCleary opined that all research yielding an outcome different from that of the Commonwealth's position was fatally methodologically flawed and unreliable. Dr. McCleary's blanket denunciation of all research contrary to the Commonwealth's position in this case, in our opinion, materially detracts from his credibility. The research discussed by Drs. Hanson, Letourneau, and Prescott was conducted by well-respected experts in the field, including, but not limited to, Drs. Hanson, Letourneau, and Prescott's own research. As Dr. Hanson noted, "There is no study that is perfect. Studies are not like that. . . . Almost all studies can be improved in particular ways." (Remand Hearing Transcript, 6/28/21, N.T. 32). This is why studies are peer-reviewed and subject to the efforts of other researchers to replicate their results. As all studies have flaws that can be improved upon by further research, Dr. McCleary's criticism of the science opposing the Commonwealth's position can be applied with equal fervor to the studies cited by the Commonwealth in support of its position, suggesting *de facto* that we can rely on none of the scholarship in this area of the law, a proposition that is inimical to both common sense and the obligations of the judiciary. We are not persuaded by Dr. McCleary's opinion that the pitfalls endemic to the human component of science render all of the research critical of SORNA unreliable and untrustworthy.

The Commonwealth's main opposition to the defense experts' opinions regarding sexual offenders' low rate of sexual recidivism is the "dark figure" of sexual crimes. The "dark figure" of sexual offending refers to the difference between the number of sexual offenses that occur but are never reported and those that are known to the authorities. (Remand Hearing Transcript, 6/28/21, N.T. 96). The Commonwealth argues that if the "dark figure" of sexual recidivism is considered, the amount of reoffending by sexual offenders is much higher than that which is observed and leaves the defense's conclusions regarding the low rate of recidivism among sexual offenders unacceptably downwardly skewed.

Both parties discussed a report by researchers Nicholas Scurich and Richard S. John entitled *The Dark Figure of Sexual Recidivism*, in which Scurich and John tried to develop a statistical model to determine the magnitude of the underreporting of sex offenses. In attempting to create this model, Scurich and John presumed that recidivism risk is a constant that does not change over time. In his expert report and testimony, Dr. Hanson demonstrated that this assumption is not supported by the data. (*See* 6/28/21, Ex D-2). Dr. Prescott echoed Dr. Hanson's assertion. (*See* Remand Hearing Transcript, 6/29/21, N.T. 216). Dr. Prescott testified that Scurich and John used a set of hypotheticals based on only four (4) studies and made assumptions with respect to the values of the variables used to measure the data from these four (4) studies, thereby allowing differing results based upon the assumptions employed. (Remand Hearing Transcript, 6/29/21, N.T. 203-06). As Dr. Hanson testified,

> There are no findings in that study. It is a statistical model based on certain assumptions. If you follow those assumptions, you get that result. I do not agree with the

assumptions. They [sic] are two fundamental areas of disagreement.

Their model assumes recidivism risk is a constant that does not change over time. This assumption is not supported by the data. Recidivism does change over time.

They also assume that most individuals who do reoffend do so rarely, once in a while. They also have no category for no recidivism. So they don't create a category of people who do not reoffend, so to speak.

So if you look at the undetected rates, think about three groups. So going forward—you can have three behaviors:

One, you cannot reoffend. That's one. You can just not reoffend and you wouldn't influence the recidivism statistics because you are not reoffending.

If you offend a lot, if you do it again and again and again, even if the detection rate for offense is low eventually you will get caught. You will just keep going. If you offend once in a while, like once every 5 years or once every 10 years or just once, you may or may not get caught. And it's that group that is moving that undetected figure.

So if that group of low rate offenders is large, most of them, then you will get numbers like the ones Scurich and John have. If that group is small, you will get numbers that are very close to the observed number.

We don't know how big that is. It could be middle, small, or big. And because we don't know that number we do know that the observed rates underestimate the true rates, but we don't know how much. We don't know by how much.

. . .

Scurich and John make an implication. They do not directly state it and they do not support in that their assumptions are correct, but they make the implication that the recidivism rates are very, very high. That would not be generally accepted in the professional community, scientific community.

(Remand Hearing Transcript, 6/28/21, N.T. 98-99).

There is a "dark figure" of unreported offenses applicable to all crimes. (Remand Hearing Transcript, 6/28/21, N.T. 96). The scope of that "dark figure" as it concerns sexual crimes is speculative. There is no hard data demonstrating the rate of unreported sexual offenses. There is no hard data demonstrating that the rate of unreported sexual offenses is significantly higher than that regarding unreported crimes in general. As Dr. Hanson testified, we simply do not know; the data is not there and therefore measurements cannot be made with any certainty. Finally, we do not invade the liberties of citizens based on crimes for which there is no proof. Similarly, we do not restrain people's liberties based on future conduct that has not yet occurred. SORNA, as written, does both of these things.

The bottom line, as the defense experts have demonstrated, is that 80% to 95% of all sex offenders will not reoffend. Consequently, we find that SORNA's irrebuttable presumption that all sex offenders pose a high risk of sexual recidivism is not universally true. Thus, SORNA violates the second prong of the test for determining the constitutional validity of an irrebuttable presumption.[4]

Moving onto the third prong of the test for determining the constitutional validity of an irrebuttable presumption, namely, whether reasonable alternatives exist for

[4] In a different context, in *Commonwealth, Department of Transportation, Bureau of Driver Licensing v. Clayton*, 684 A.2d 1060 (Pa. 1996), the Pennsylvania Supreme Court determined that a regulation that provided for the suspension of one's operating privileges for a period of one year based on a single epileptic episode without affording the licensee the opportunity to present medical evidence to prove his or her competency to drive violated due process because it utilized an unconstitutional irrebuttable presumption that one epileptic seizure rendered all persons unsafe to operate a motor vehicle for one year. The Court thus determined that applying the presumption to epileptics as a cohort was improper because the symptoms of epilepsy varied among people. *Id.* Similarly to *Clayton, supra*, one's risk of reoffending is not the same as another's because every person is an individual with individual characteristics and circumstances that affect their probability of committing another crime. Accordingly, the presumption of future dangerousness should not be applied to sex offenders as a cohort, because the individual members of the cohort do not share the same propensity for recidivism.

determining the presumed fact, it is beyond peradventure that the answer is in the affirmative. The defense Exhibits identify several risk assessment tools, including Dr. Hanson's Static-99 and Static-99R, that have been developed over the last few decades to identify individuals who have a greater likelihood of reoffending sexually than the general population of sex offenders and do so with greater accuracy than the Tier system promulgated under SORNA and the Adam Walsh Act. (6/28/21, Ex. D-2, Declaration of R. Karl Hanson; 6/29/21, Ex. D-7, Affid. of Professor Elizabeth J. Letourneau, Ph.D.; 6/29/21, Ex. D-9, Expert Report of James J. Prescott, J.D., Ph.D.). These reports, articles and studies also demonstrate that there are other more effective means available, such as specialized treatment programs and coordinated professional support systems, to accomplish the SORNA aim of reducing sexual recidivism.[5] (*Id.*). The experts suggest that by using the blanket label of dangerous sexual recidivist for all sex offenders, the State is diverting vital resources from treatment of the small percentage of this population who actually post a risk of sexual recidivism, where such resources are most needed and would be most effective in promoting the goals of public protection ad safety as well as rehabilitation.

We need not rely only upon Defendant's experts, however. In the case of *In re J.B.*, 107 A.3d 1 (Pa. 2014), the Pennsylvania Supreme Court found that the reasonable alternative of individualized risk assessment was available, and indeed in use in SORNA with respect to sexually violent predator assessments and assessments for committed

[5] This aim may be reasonably inferred from SORNA's stated purpose of protection of the community from sexual victimization. *See also Taylor v. Pennsylvania State Police*, 132 A.3d 590 (Pa. Cmwlth. 2016)("[A] primary purpose of SORNA is to inform and warn law enforcement and the public of the potential danger of those registered as sexual offenders.").

adjudicated juveniles, juveniles being a population whose character traits have been recognized as changeable and not fully ingrained (logically making the prediction of risk, we suggest, more difficult than that which can be expected with respect to adults, whose character traits, it has been noted, are supposedly more fixed), who are nearing their twentieth birthdays, to ascertain whether continued involuntary civil commitment is necessary. *In re J.B.*, 107 A.3d at 19. Indeed, Act 29, promulgated after *J.B., supra*, provides for an individualized risk assessment for adult sexual offenders, albeit only twenty-five (25) years after the deprivation, a period frequently, perhaps closer to always, representing the most productive years of one's life; this "opportunity" for exemption thus is illusory and offers no real relief to an offender. Still, this provision demonstrates that the Legislature recognizes that individualized risk assessments are available and viable for determining which sexual offenders pose a high risk of sexual recidivism for SORNA purposes.[6] It is no great leap from the application of alternative risk assessment tools to the populations and under the circumstances described above to conclude that the application of individualized risk assessments via a pre-deprivation hearing for all sexual offenders is not only possible, but is also actually available to the criminal justice system, and constitutes a reasonable, more effective alternative for identifying high-risk recidivists

[6] It is of no moment that all sexual offenders undergo a sexually violent predator assessment to determine whether they must register for life as SVP's even if their particular offense(s) does/do not call for lifetime registration; to the extent that these individualized assessments address the question of future dangerousness, unless an offender has a mental abnormality or personality disorder making him or her likely to engage in subsequent predatory sexual offenses, the question of future dangerousness has no impact on the average offender with respect to whether he or she must register and/or for how long. The bulk of the population of sexual offenders have no way to effectively contest pre-deprivation the assumption that they are high-risk dangerous recidivists and to have evidence to the contrary of this assumption impact the decision of whether and for how long they must register. The deprivation occurs and they have no opportunity for relief for at least twenty-five (25) years, based on an irrebuttable presumption that is not universally applicable. It is a due process violation.

and reducing sexual reoffending than the draconian public shaming/warning procedures, currently in place for all adult sexual offenders subject to Subchapter H regardless of risk.

SORNA's irrebuttable presumption that all sex offenders are high-risk dangerous recidivists does not survive scrutiny under the three-prong test for constitutionality set forth in *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015). The presumption negatively impacts one's right to reputation, which, as we noted above, is a fundamental right under the Pennsylvania Constitution. The presumed fact is not universally true, and there are indisputably reasonable and even more effective alternatives for accomplishing the aims of SORNA both to identify for safety purposes those offenders who do pose a risk to society and to reduce the amount of sexual reoffending generally. Finally, SORNA encompasses offenders whose crime(s) may lack any sexual component to them whatsoever and who, *ipso facto*, may be unlikely to commit an actual sexual offense at any time in the future, again making the irrebuttable presumption not universally applicable. For all of these reasons, we conclude that SORNA's registration and notification provisions, which directly derive from the application of its unconstitutional irrebuttable presumption to all sex offenders and even those whose offenses cannot be considered "sexual", are constitutionally infirm.

The Commonwealth has argued that the fact that the amendments to SORNA include an opportunity for some offenders to petition to the court to be removed from SORNA's registration and notification provisions after twenty-five (25) years means that SORNA's presumption as to future dangerousness is not irrebuttable. This is illusory. As we discussed above, a post-deprivation process that provides for a hearing concerning the deprivation of a fundamental right that occurs twenty-five (25) years after the injury is akin

to the provision of no process at all. Unlike juveniles, as to whom the Pennsylvania Superior Court has already acknowledged a twenty-five (25) year waiting period is meaningless, *see In re R.M.*, 2015 WL 7587203 (Pa. Super. 2015), adults will be effectively placed out of the job market, ostracized from pro-social resources, and stigmatized for the majority of their most productive years. The opportunity to be heard at a meaningful time and in a meaningful manner is recognized by the United States Supreme Court as a fundamental requirement of procedural due process. *Pennsylvania Bar Association v. Commonwealth*, 607 A.2d 850 (Pa. Cmwlth. 1992). SORNA does not provide it. Because SORNA's post-deprivation process is inadequate and illusory, we conclude that SORNA's presumption that all sex offenders are high-risk dangerous recidivists is, for all practical intents and purposes, properly characterized as irrebuttable in fact.

The Commonwealth has also suggested that because convicted offenders have had a trial, they have been given ample notice that they face being labeled as a dangerous recidivist. This argument ignores the fact that individuals are presumed innocent until they are found guilty by proof beyond a reasonable doubt. In certain sexual offense trials, facts can be murky and most often there are no independent eyewitnesses. The trial itself gives a criminal defendant no effective opportunity to contest future dangerousness; that is not at issue in the guilt determination phase. There exists no pre-deprivation procedure, but instead an automatic public proclamation that this person is now and forever (or its functional equivalent) to be the worst of the worst, a high risk dangerous and incorrigible likely recidivist sexual predator who must be relegated to the margins of society. The accused may sincerely and strongly embrace the notion of his or her innocence throughout the trial, which may yet result in an acquittal. If he or she is acquitted,

the skewed label is not applied, and the attendant reflexive consequences of that label will not be experienced. It is only once a guilty verdict as to a past offense or offenses is entered that the stigma of the State's flawed irrebuttable presumption comes into play, and there is no opportunity to avert its application or to meaningfully challenge its reactionary prejudice either during or after the trial. Neither prosecutors nor judges are able to forestall its application based on the facts of the case, the individual characteristics of the defendant, or for any reason.

For all of the foregoing reasons, we conclude that SORNA's irrebuttable presumption of future dangerousness is constitutionally infirm. Accordingly, the registration and notification provisions attendant to the presumption are fatally flawed, as they are directly premised on this unconstitutional presumption.

The second and last subject we were directed by the Pennsylvania Supreme Court to examine is whether SORNA's registration and notification requirements constitute criminal punishment notwithstanding the Legislature's stated purpose of enacting a non-punitive civil regulatory scheme. In order to accomplish this, we must, per the High Court, evaluate five (5) of the seven (7) *Mendoza-Martinez*[7] factors governing the determination as to whether SORNA's registration and notification requirements constitute punishment. The five (5) factors we must evaluate are (a) whether the requirements involve an affirmative disability or restraint; (b) whether they have been historically regarded as punishment; (c) whether their operation will promote the traditional aims of punishment—retribution and deterrence; (d) whether an alternative purpose to which they may be

[7] *Kennedy v. Mendoza-Martinez*, 83 S.Ct. 554 (U.S. D.C./Cal. 1963).

rationally connected is assignable for them; and (e) whether the requirements appear excessive in relation to the alternative purpose assigned.

We will proceed to analyze whether Act 29's registration and notification provisions involve an affirmative disability or restraint. We note that in *Commonwealth v. Lacombe*, 234 A.3d 602 (Pa. 2020), the Pennsylvania Supreme Court held that Subchapter of SORNA did not impose any direct affirmative disability or restraint but only minor and indirect restraints and disabilities because the Subchapter only required non-SVP offenders to report in person annually to maintain an updated photograph, rather than quarterly; offenders were no longer required to appear in person to report changes to information; and the majority of offenders were only subject to a ten (10) year reporting requirement. Based on these changes in Subchapter I, the *Lacombe, supra* Court determined that analysis of this first factor weighed in favor of a finding that the registration and notification provisions of SORNA, as they relate to Subchapter I, were non-punitive. Ultimately, the Pennsylvania Supreme Court upheld the constitutionality of SORNA with respect to Subchapter I. *Id.* However, the requirements of Subchapter I are somewhat less onerous than those in Subchapter H. *Commonwealth v. Elliott*, 249 A.3d 1190 (Pa. Super. 2021), *appeal denied*, 263 A.3d 241 (Pa. 2021). Consequently, an analysis of whether the registration and notification requirements of Subchapter H impose an affirmative disability or restraint has not been foreclosed by *Lacombe, supra*. Neither has the question of whether Subchapter H of SORNA is constitutional.

We further note that in *Commonwealth v. Butler*, 226 A.3d 972 (Pa. 2020), the Pennsylvania Supreme Court found that the registration, notification and counseling requirements applicable to sexually violent predators involved an affirmative disability or

restraint and thus weighed in favor of a finding that SORNA constituted criminal punishment, because sexually violent predators were required to report to the Pennsylvania State Police quarterly and to report changes in their registration information. The Pennsylvania Supreme Court though ultimately held that the reporting, notification and counseling requirements with respect to sexually violent predators did not constitute punishment. *Id.* Although Subchapter H is more burdensome when compared to Subchapter I, as far as Subchapter H concerns offenders who do not qualify as sexually violent predators it is somewhat less burdensome in terms of registration and notification provisions than it is with respect to sexually violent predators, as non-SVP offenders need only report in person annually after three (3) years of quarterly in-person reporting if they meet certain conditions while SVPs must report in person four times per year for the rest of their lives, the reduction in the burden lessens but does not remove the punitive effect of registration and notification upon non-SVP offenders. Most notably, SVPs are provided with an effective pre-deprivation procedure before they are declared sexually violent predators who must register for life regardless of the title of their offense.

Subchapter H of Act 29 retains the obligation of Tier III registrants to appear in person before the Pennsylvania State Police quarterly each year for verification purposes as well as to appear in person to update his or her registration information whenever any changes are made, such as to residence, employment, vehicle owned, appearance, etc. 42 Pa. C.S.A. §§ 9799.15(e), (g); 9799.16(c)(4). Under the Act 29 amendments, the registrant's number of in-person appearances may be reduced to once per year after three (3) years of quarterly reporting if certain conditions are met. 42 Pa.

C.S.A. § 9799.25(a.1). If the registrant qualifies for the reduced in-person reporting, the remaining three (3) quarterly reports per year may be made telephonically. 42 Pa. C.S.A. § 9799.25(a.1). However, whether in-person or otherwise, a Tier III registrant must report to the Pennsylvania State Police and surrender a significant amount of personal information for the registry, much of which will be published on the Internet, for the rest of his or her life. Depending on the offense committed, the minimum amount of time a defendant must be on the registry, determined by the title of the offense and not any of the offender's personal characteristics or circumstances, is fifteen (15) years, as opposed to the ten (10) year maximum for most of the offenders under Subchapter I.

A Tier III offender, such as the Defendant *sub judice*, must report to the Pennsylvania State Police four (4) times per year for the rest of his or her life, whether in-person or telephonically. He or she will have to continue to verify his or her personal information and life circumstances with the Pennsylvania State Police every three (3) months and will have to update his or her registration information, whether in-person or telephonically during that period every time a change in his or her life circumstances occur, including residence, employment, education, vehicle used, and appearance. The onus under Act 29 is reduced, but the reduction is largely cosmetic. Registrants are on *de facto* probation for the entirety of their lives, with the regulation, control and sundering of privacy that such status entails. They cannot change addresses without reporting it to the police. They cannot begin school or switch schools without notifying the police. They cannot buy a new car without informing the police. They cannot change their appearance in any way without telling the police. Nor can they take a new job without reporting it to the police.

This data, along with the rest of the personal aspects of their lives, is disseminated to the world via the Internet, accessible to anyone by plugging a geographic area into the registry; no knowledge of the Defendant's name is necessary. The burden on all registrants is still oppressive, notwithstanding that, after three (3) years of compliance, the in-person aspect of the reporting requirements for Tier II and III offenders may be somewhat reduced if certain conditions are met. Similarly, as we discussed earlier, the post-deprivation procedure that requires registrants to wait twenty-five (25) years before the opportunity to ever contest the fact of future dangerousness that may be availed by some is illusory and akin to no post-deprivation process at all. Tier I offenders, who are required to register for fifteen (15) years, will never be able to challenge their status as high-risk dangerous offenders. Likewise, Tier II offenders who must register for twenty-five (25) years, will find this provision useless. For Tier III offenders, they will have to bear the added stigma of the label high-risk dangerous offender during the most productive years of their lives with no opportunity to avoid the prejudice that comes with this distinction and no opportunity to address it before the deprivation of their constitutional right to reputation for a time period that could easily extend beyond the maximum sentence for a given offense.

The Act 29 amendments to SORNA do not meaningfully reduce the palpable onus to any offender under Subchapter H and thus we find that the first factor of the *Mendoza-Martinez* inquiry imposes affirmative disabilities and restraints on offenders that weigh in favor of a finding that SORNA's registration and notification requirements are punitive in effect, despite the Legislature's intent to create with SORNA a non-punitive regulatory scheme to protect the public and reduce the number of sex offenses committed.

Turning to the second factor we have been directed to examine, whether the registration and notification policies of SORNA have historically been regarded as punishment. In *Lacombe*, *supra* the Pennsylvania Supreme Court held that the registration and notification provisions of SORNA have historically been regarded as punishment, a finding that the Court recognized weighs in favor of a determination that SORNA's registration and notification provisions are punitive, notwithstanding the Legislature's intent to effectuate a civil regulatory scheme. We are bound by this determination.[8]

Moving on to the third factor we are required to examine, specifically, whether the operation of SORNA's registration and notification provisions will promote the traditional aims of punishment—retribution and deterrence, we find that this factor weighs in favor of the conclusion that SORNA is punitive. Unlike Subchapter I in *Lacombe*, *supra*, where the Pennsylvania Supreme Court determined that deterrence was not affected by the registration and notification provisions of SORNA because the crimes for which the offenders had to register already occurred, i.e., Subchapter I looks backward instead of forward, Subchapter H of SORNA does have a deterrent effect because the registration and notification provisions of SORNA are not incurred until a crime has been committed. Persons who are considering whether to commit a sexual offense may be deterred from doing so by the obligations to register and the knowledge that one's personal information will be broadcast to the world via the Internet, thereby working a significant detriment to the individual's reputation and privacy by the resultant additional stigma associated with

[8] In addition, we note that the provisions of SORNA are located in the Crimes Code and there are serious criminal penalties associated with one's failure to comply. These facts support the conclusion that the second factor weighs in favor of a determination that SORNA is punitive.

being placed on the sex offender registry. Thus, while *Lacombe, supra* concluded that this factor was not entitled to much weight in the punitive analysis because it did not promote deterrence, the *Lacombe, supra* Court's reasoning and decision in this respect is distinguishable and therefore not controlling as to Subchapter H.

Retribution is promoted by the imposition of additional and in some cases lifelong burdens of registration and notification, resulting in the additional stigma of being considered a high-risk, dangerous, incorrigible sex offender of whom citizens must always be wary. Marking someone as a dangerous recidivist has the retributive effects of built-in public shaming and marginalization. They are comparable to a long probationary tail, an extended period of supervision and government control over one's personal life which is a component of criminal punishment and, like a sentence, carries a degree of retribution. The difference, of course, is that probationary tails have end dates for compliant offenders.

Thus, while *Lacombe, supra* determined that this factor was not entitled to much weight with respect to Subchapter I because the registration and notification provisions of Subchapter I did not provide a deterrent effect, we find that the registration and notification provisions of Subchapter H provide both retributive and deterrent effects that warrant a different conclusion from that espoused in *Lacombe, supra.* Based on our analysis of this third factor, we find that SORNA's registration and notification procedures do promote the twin aims of criminal punishment, that is, retribution and deterrence, and therefore weigh, in equal importance with the other factors we are required to consider, in favor of the conclusion that SORNA is punitive.

The fourth factor we are required to examine is whether an alternative purpose to which registration and notification provisions may be rationally connected is assignable for them. The Pennsylvania Supreme Court has determined, going back to *Muniz*, *supra*, that SORNA's registration and notification requirements are rationally connected to a purpose independent of public shaming and deterrence, namely, the purpose of promoting public safety and health. *See Lacombe*, *supra* (regarding Subchapter I); *Butler*, *supra* (regarding registration, notification and counseling provisions applicable to SVP's); *Muniz*, *supra* (regarding Subchapter H). The High Court concluded that this factor weighs in favor of a determination that SORNA's registration and notification requirements were non-punitive.

While there is unquestionably a valid purpose to SORNA that is unrelated to its punitive effects, the defense provided evidence indicating that the relationship between SORNA's registration and notification requirements and the public protection aspect of SORNA are not rationally related. Dr. Letourneau discussed multiple studies demonstrating that the registration and notification procedures of SORNA do not appreciably reduce the rate of recidivism, hinder rehabilitation by impairing housing, employment, and pro-social relationship prospects, divert community resources from the offenders who could most benefit, i.e., those who have a high likelihood of reoffending, are very costly to maintain, and result in the bargaining down of registrable offenses to non-registrable ones, all of which jeopardize the public safety and welfare purpose espoused by the Legislature. (6/29/21, Ex. D-7, Affid. of Professor Elizabeth J. Letourneau, Ph.D.). Dr. Prescott reinforced Dr. Letourneau's conclusions with research demonstrating that the

community notification procedures of SORNA do not aid the protection of the public because their detrimental effects, as enhanced by the denotation that registrants are all incorrigible, highly dangerous sexual recidivists, impair offenders' abilities to successfully reintegrate into society. (6/29/21, Ex. D-9, Expert Report of James J. Prescott, J.D., Ph.D.). Dr. Hanson, whose Declaration was largely directed towards the question of the recidivism rate of sexual offenders, reinforced the conclusions of Drs. Letourneau and Prescott in his opinion that SORNA's failure to discriminate between the risk levels of sex offenders wastes resources that could more effectively be applied to reduce the recidivism risk of offenders who are actually at high risk of committing subsequent sex offenses, imposes unnecessary burdens on individuals who are already unlikely to reoffend, and thereby impedes the public safety portion of the purposes of SORNA as set forth in the legislative preamble. (6/28/21, Ex. D-2, Declaration of R. Karl Hanson). While the Commonwealth's expert, as we mentioned earlier, criticized as incompetent the procedures by which all studies yielding conclusions contrary to the Commonwealth's position were conducted, particularly objecting to the defense's alleged use of "null findings", or results that do not carry statistical significance, to support its conclusions that registration and notification policies do not improve recidivism rates or public safety, the defense experts credibly explained that null findings are valid bases for interpretation when a researcher is looking to determine whether a particular study group is similar or different from another, particularly when multiple studies on the same subject repeatedly show the same null finding. (*See* Remand Hearing Transcript, 6/28/21, N.T. 196 [Testimony of Dr. Hanson; "Null findings make sense if you have a clear expectation of one group is supposed to be different than another group."]). As Dr. Letourneau testified in response to the question of

whether she agreed with Dr. McCleary's statement that no conclusions may be drawn from null findings,

> A. I disagree. As I said earlier, I would never rely on a single study or even two or three studies to form a strong opinion. All studies have their limitations. When you get to the body of research that now fails to find any impact of registration on sexual recidivism, I find that many of my—all of my peers that I'm aware of find that convincing. This is a policy that simply fails to achieve its meaning.
>
> Q. He says that it is more realistic and reasonable to attribute the null finding to a flawed and weak design. Do you agree with that statement and why?
>
> A. I disagree with that statement. The point of science is to build a body of evidence around a specific question. And if you have something that is supposed to reduce sexual recidivism and most of the research fails to find that it reduces sexual recidivism, then that is a body of evidence. It is not nothing, which I think is what Dr. McCleary is arguing.
>
> Again, if it was a single study or two or even a small handful that found null results, we might be able to argue, well, maybe a different kind of schema would have a different effect. But we've seen multiple studies from multiple states with different policies come up with the same finding, which is that it's not related to sexual recidivism.
>
> Q. And if you decided to now look more into this particular research, meaning the effectiveness of SORN laws, would you expect to find different results?
>
> A. I mean, you expect to find—in any body of research you expect to find a smattering of different results, but as the number of studies accrue and the number of publications accrue, you know, the best case scenario is you start to see a coherent message. And the message here is that this is a policy that does not result in reducing sexual recidivism.

(Remand Hearing Transcript, 6/29/21, N.T. 66-67). Dr. Prescott reinforced Drs. Hanson and Letourneau's opinions regarding the significance of null findings when asked to respond to Dr. McCleary's criticism on direct examination.

> Q. I wanted to ask you about his null finding critique. On page 37 he says that although the defendant's experts habitually interpret null findings as evidence—I'm sorry. I'll go slower, your Honor.
>
> Although the defendant's experts habitually interpret null findings as evidence that SORN laws do not work, their interpretations violate widely accepted methodological rules. What do you take that to mean?
>
> A. I mean, traditional statistical inference or hypothesis testing is trying to essentially determine whether an estimate of an effect or a relationship differs from zero. And sometimes the relationship is so close to zero that it's difficult to know whether or not it's zero or maybe just very close to zero. And in any particular study his point is well taken.
>
> And you can often find studies out there where people say it's not that I'm showing you evidence of no effect. It's that there is no evidence of any effect. If we're given the setup of this study I was able to test this and I cannot say whether or not there is an effect that is different from zero or not. That said, it is not the case that a null finding teaches us nothing.
>
> Q. What can it teach us?
>
> A. Well, you know, realize that when you have a null finding what you have is an estimate that's essentially pretty close to zero. And it's so close to zero that you can't rule out that it is zero. So in economics we oftentimes call this a tightly bound zero. We can't say it's zero but we can say statistically that it can't be far away from zero. And once you have multiple studies that consistently find that you start to have more and more statistical power, more and more observations, more and more attempts to see whether it's different from zero and never being able to find that it is not zero. Slowly with the accretion of evidence you can feel more and more confidant.

(Remand Hearing Transcript, 6/29/21, N.T. 194-96).

We find these testimonies concerning the utility of null findings credible and logical. If numerous studies on the same subject yield the conclusion that the comparison of the subject groups shows no difference between them, then it may reasonably be inferred that there is no measurable or statistically significant difference between them. As the defense experts testified, the confidence level increases with the accrual of more studies showing the same result.

Accordingly, based on the evidence of scientific and academic consensus presented, we find that SORN laws do not have the effect on recidivism and public safety anticipated by the Legislature, and that they are not rationally related to the purposes for which they were enacted. Thus the fourth factor we have been directed to analyze weighs in favor of a determination that SORNA is punitive.

The fifth and final factor this Court is required to consider is whether the requirements appear excessive in relation to the alternative purpose assigned. Our analysis of this factor yields the same conclusion reached with respect to the preceding four factors: SORNA's registration and notification requirements are excessive in relation to its non-punitive purpose of protecting public safety. SORNA's registration and notification policies are based on the title of the offense, not the personal characteristics and circumstances of the offender. They do not take into consideration the actual risk of any particular defendant to reoffend in the future. The title of the offense bears little relationship to the question of whether a person subject to registration will recidivate. (*See* 6/28/21, Ex. D-2, Declaration of R. Karl Hanson, at 12-13 ["Although there are clear differences in the moral seriousness of sexual crimes, the seriousness of the offense is

largely unrelated to the likelihood of recidivism."]). As we have discussed above, SORNA does not function as intended and is not effective at promoting public safety. It diverts resources away from offenders who could most benefit from them. Finally, SORNA catches in its net offenders who have committed crimes with no sexual component to them. It is unconstitutionally overbroad and excessive. For all of these reasons, we find that the fifth factor, whether SORNA is excessive in relation to its alternative, non-punitive purpose, weighs in favor of a finding in the affirmative and the conclusion that SORNA's registration and notification provisions are punitive in effect, overriding the Legislature's attempted creation of a civil regulatory scheme.

As all of the factors we have been asked to review weigh in favor of the conclusion that SORNA, as amended by Act 29, remains punitive, we find that SORNA is unconstitutional. Because SORNA constitutes punishment, it violates *Alleyne*[9] and *Apprendi;*[10] results in a criminal sentence in excess of the statutory maximums; offends Federal and State proscriptions against cruel and unusual punishment; and breaches the separation of powers doctrine, as discussed in Judge Sarcione's August 30, 2018 Opinion *Sur* Rule 1925(a).

Because we find that SORNA is unconstitutional as a legislative scheme in both its use of a constitutionally infirm irrebuttable presumption and the punitive effects of its registration and notification provisions, as well as in its application to this Defendant, who has a strong support structure, is educated, is working, is an excellent candidate for

[9] *Alleyne v. United States*, 133 S.Ct. 2151 (U.S. Va. 2013).
[10] *Apprendi v. New Jersey*, 120 S.Ct. 2348 (U.S. N.J. 2000).

rehabilitation, and is highly unlikely to reoffend, as we also discussed in Judge Sarcione's August 30, 2018 Opinion *Sur* Rule 1925(a), to the extent that it needs to be reiterated here, Defendant's Supplemental Post Sentence Moton Filed Nunc Pro Tunc, filed February 27, 2018, is, and/or remains, granted.[11]

[11] The Adam Walsh Child Protection and Safety Act provides that each State may evaluate the constitutionality of its State enactments and if it finds a provision unconstitutional, the provision can be stricken without the loss of Federal funds. *In re J.B.*, 107 A.3d 1 (Pa. 2014). The Act imposes general registry requirements but does not mandate enactment of any particular statutory scheme by a State. *Bill v. Noonan*, 2019 WL 2400676 (Pa. Cmwlth. 2019).

COMMONWEALTH OF PENNSYLVANIA	**: IN THE COURT OF COMMON PLEAS**
vs.	**: CHESTER COUNTY, PENNSYLVANIA**
GEORGE TORSILIERI	**: NO. 15-CR-0001570-2016**
	: CRIMINAL ACTION—LAW

Tracy S. Piatkowski, Esquire, Deputy Attorney General, Leslie S. Pike, Esquire, Assistant District Attorney, and Erin P. O'Brien, Esquire, Assistant District Attorney, for the Commonwealth

Aaron Marcus, Chief, Appeals Division, Defender Association of Philadelphia, Marni Snyder, Esquire, and Emily Mirsky, Esquire, Assistant Public Defender, Delaware County Public Defender's Office, for the Defendant

ORDER

AND NOW, this 22nd day of August 2022, in response to the June 16, 2020 directive of the Pennsylvania Supreme Court, after reviewing the record established June 28, 29, and 30 of 2021, and post-hearing submissions of the Commonwealth and the Defendant, it is hereby **ORDERED AND DECREED** that Defendant's Supplemental Post Sentence Motion Filed Nunc Pro Tunc, filed February 27, 2018, is and/or remains **GRANTED** on the grounds that SORNA is unconstitutional both facially and as applied to this Defendant on the bases that it employs an irrebuttable presumption that is not universally applicable and because its punitive nature offends *Alleyne* and *Apprendi*; results in a criminal sentence in excess of the statutory maximums; violates Federal and State proscriptions against cruel and unusual punishment; and breaches the separation of powers doctrine.

BY THE COURT:

Allison Bell Royer, J.