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COMMONWEALTH OF PENNSYLVANIA, Appellant
v.
GEORGE J. TORSILIERI, Appellee

No. 97 MAP 2022

No. J-25-2023

Supreme Court of Pennsylvania

May 31, 2024

ARGUED: May 23, 2023

Appeal from the Order of the Chester County Court of Common Pleas, Criminal Division, dated August 22, 2022 (filed on August 23, 2022) at No. CP-15-CR-1570-2016.

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.

OPINION

TODD CHIEF JUSTICE.

In this direct appeal following a remand, we consider whether the General Assembly's determination, in Pennsylvania's Sexual Offender Registration and Notification Act ("SORNA")[1], that individuals who commit sexual offenses pose a high risk of committing additional sexual offenses constitutes an unconstitutional irrebuttable presumption violative of due process, because it impairs the right to reputation under the Pennsylvania Constitution.[2] In addition, we are asked to determine whether the registration and notification requirements in Subchapter H of SORNA constitute criminal punishment, which serves as the predicate for various constitutional challenges to the

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legislation. For the reasons that follow, we conclude that SORNA withstands these challenges, and, thus, reverse the order of the Chester County Court of Common Pleas.

I. Background

By way of brief background, to contextualize the factual and procedural history of this appeal as well as the parties' arguments, the first issue before us concerns a presumption which largely undergirds the criminal justice system's treatment of sex offenders: that those who commit sexual offenses pose a high risk to reoffend. The General Assembly has memorialized this presumption in its legislative findings: "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. § 9799.11(a)(4). To challenge such assumptions under the irrebuttable presumption doctrine, a challenging party must demonstrate: (1) an interest protected by the due process clause; (2) utilization of a presumption that is not universally true; and (3) the existence of a reasonable alternative means to ascertain the presumed fact. *In re J.B.*, 107 A.3d 1, 15-16 (Pa. 2014). In *In re J.B.*, our Court considered the irrebuttable presumption that juvenile offenders pose a high risk of committing additional sexual offenses; we found such presumption denied juveniles due process because it impaired their right to reputation protected by Article I, Section 1 of the Pennsylvania Constitution. We now address this same issue with respect to adult sexual offenders.

The second issue we will consider involves whether Subchapter H constitutes criminal punishment. Whether a statute is punitive in nature is a threshold question for determining the viability of the various constitutional challenges brought in this matter, including whether the legislation unconstitutionally usurps judicial power over sentencing

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in violation of the separation of powers doctrine,[3] violates the United States Constitution's prohibition on cruel and unusual punishment,[4] and infringes upon the right to a

trial by jury by failing to require that facts that increase the punishment imposed on the underlying crime be found by a reasonable doubt.[5] It is a gateway inquiry, as legislation must be deemed to be in the nature of criminal punishment to invoke the protections of these constitutional provisions. Our Court has considered the punitive nature of various Pennsylvania sex offender statutes, including Megan's Law and its progeny. *See Commonwealth v. Gaffney*, 733 A.2d 616 (Pa. 1999) (concluding the notification requirements of Megan's Law I were not punitive, and, therefore, did not violate *ex post facto* protections); *Commonwealth v. Williams*, 733 A.2d 593 (Pa. 1999) ("*Williams I*") (striking Megan's Law I sexually violent predator provisions as imposing criminal punishment and violating due process guarantees); *Commonwealth v. Williams*, 832 A.2d 962 (Pa. 2003) ("*Williams II*") (upholding Megan's Law II's provisions as not constituting criminal punishment); *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017) (plurality) (finding SORNA's provisions to be punitive, and retroactive application to violate federal *ex post facto* protections); *Commonwealth v. LaCombe*, 234 A.3d 602 (Pa. 2020) (holding retroactive application of Subchapter I of SORNA was not punitive or an unconstitutional *ex post facto* violation). We now address this same issue with respect to Subchapter H of SORNA.

II. Facts

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With this context in hand, we turn to the facts and procedural history underlying this appeal. In 2017, after a six-day trial, a jury convicted Appellee, George Torsilieri, of one count each of aggravated indecent assault, 18 Pa.C.S. § 3125(a)(1), and indecent assault, *id*. § 3126(a)(1), for an attack on a woman in the early morning hours of November 14, 2015. The jury, however, acquitted him of sexual assault, *id*. § 3124.1.

Prior to sentencing, the Sex Offenders Assessment Board ("SOAB") conducted an evaluation and determined Appellee did not meet the criteria to be designated as a sexually violent predator. On November 27, 2017, Judge Anthony A. Scarcione of the Chester County Court of Common Pleas sentenced Appellee to a term of incarceration of 1 to 2 years imprisonment (minus one day on each end), followed by three years of probation.

As a result of his conviction for aggravated indecent assault, Appellee was automatically categorized under Subchapter H of SORNA as a Tier III sexual offender. This designation subjected him to lifetime registration and notification regarding a panoply of changes in his personal life, which we will discuss more fully below, including his address, employment status, and significant change in physical appearance, with the Pennsylvania State Police ("PSP"). 42 Pa.C.S. § 9799.14(d)(7); *id*. § 9799.16(c)(4).

On February 21, 2018, the General Assembly enacted Act 10 of 2018, which amended SORNA to address the constitutional shortcomings found by our Court in *Muniz*, *supra*. In doing so, the legislature divided the registration statute into two chapters. Subchapter H, at issue in this appeal, was applied to sexual offenders who committed their offenses on or after December 20, 2012, and, thus, to whom *Muniz*'s prohibition against retroactive application of SORNA did not apply. *See* 42 Pa.C.S. §§ 9799.10-9799.42. Subchapter I, an entirely new subchapter, was applied to sexual offenders who committed their offenses prior to December 20, 2012, and whose registration obligations

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were potentially affected by *Muniz*. *See id*. §§ 9799.51-9799.75. As his assault took place in 2015, and, thus, after December 20, 2012, Appellee was subjected to the requirements of Subchapter H, and so our Court's decision in *Muniz*, rendered two weeks after Appellee's conviction, did not impact him.

Seemingly addressing assertions that the prior registration and notification requirements were punitive, the General Assembly modified

some of SORNA's provisions, creating a procedure by which a Tier II or III offender's in-person semi-annual or quarterly registrations could be reduced after three years and replaced with annual in-person and semi-annual or quarterly telephone registrations, if the offender complied with all registration requirements for the first three years and had not been convicted of another offense punishable by more than a year of incarceration. *Id*. § 9799.25(a.1). It additionally limited the non-sexual offenses triggering SORNA registration and provided a process for sexual offenders to petition for removal from the registry after 25 years, if they have not been convicted of an offense punishable by more than a year of incarceration, and if they prove by "clear and convincing evidence that exempting the sexual offender . . . is not likely to pose a threat to the safety of any other person." *Id*. § 9799.15(a.2)(5).

Relevant to this matter, on May 18, 2018, Appellee filed a post-sentence motion in which he alleged that the registration and notification provisions of Subchapter H violated his due process rights under the Pennsylvania Constitution, including the contention that the legislative underpinnings of Subchapter H were empirically false. In support thereof, he cited and attached reports and sworn affidavits from experts who had performed studies on the recidivism potential of sex offenders, certain of which are summarized below, which he claimed supported the conclusion that the application of these registration and notification provisions was unconstitutional. According to Appellee, the

registration and notification provisions rested on SORNA's stated presumption that sexual offenders are, as a class of individuals, dangerous and pose a high risk of recidivism, justifying the registration and notification provisions so as to protect the public. Additionally, Appellee asserted that the statute was punitive, and unconstitutional, as it was violative of the separation of powers doctrine, constituted a criminal sentence in excess of statutory maximums which was not found beyond a reasonable doubt, and was inconsistent with the prohibition on cruel and unusual punishment. The Commonwealth opposed the motion.[6]

On August 30, 2018, Judge Scarcione, based on the empirical evidence Appellee provided, declared Subchapter H unconstitutional as violative of Appellee's substantive due process rights by, *inter alia*, infringing on his right to reputation through an improper use of an irrebuttable presumption. The trial court also determined that the registration and notification provisions constituted punishment, and, thus, violated the separation of powers doctrine by removing the trial court's ability to fashion an individualized sentence. Additionally, the court found that Subchapter H violated the requirements of *Alleyne* and *Apprendi*, as the registration and notification requirements constituted an enhanced criminal punishment based upon a factual finding which was not made by the factfinder beyond a reasonable doubt. Finally, the court concluded that Subchapter H violated the federal and state proscriptions against cruel and unusual punishment. Thus, the trial

court vacated Appellee's registration requirements. The Commonwealth appealed to our Court.[7]

III. *Torsilieri I*

In a divided decision, a majority of our Court vacated the portion of the trial court's order declaring the registration and notification requirements of Subchapter H unconstitutional, and remanded for further proceedings. *Commonwealth v. Torsilieri*, 232 A.3d 567 (Pa. 2020) ("*Torsilieri I*"). Specifically, after surveying the history of sexual offender registration in Pennsylvania, we noted that we have refused to "pigeonhole" the irrebuttable presumption doctrine into either procedural or substantive due process categories, and, rather, have addressed such challenges "simply as an irrebuttable presumption challenge." *Id*. at 581. In addressing Appellee's challenge, we recognized the significant deference to be

accorded to legislative determinations, but noted such deference is not without limits, and we refused to accept the Commonwealth's argument that this was, fundamentally, a question of policy to which we were categorically mandated to defer to the General Assembly's judgment. *Id*. at 583-84. We observed that "a viable challenge to legislative findings and related policy determinations can be established by demonstrating a consensus of scientific evidence where the underlying legislative policy infringes constitutional rights. In such cases, it is the responsibility of the court system to protect the rights of the public." *Id*. at 584. Distinguishing *In re J.B.*, we noted that, unlike in that case, "the evidence of record does not demonstrate a consensus of scientific evidence as was present [in *In re J.B.*] to find a presumption not universally true . . . nor the 'clearest proof' needed to overturn the General Assembly's

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statements that the provisions are not punitive, which we have noted 'requires more than merely showing disagreement among relevant authorities.'" *Id*. at 594.

However, while we found Appellee's evidence raised a "colorable argument to debunk the settled view of sexual offender recidivation rates and the effectiveness of tier-based sexual offender registration systems underlying the General Assembly's findings as well as various decisions of this Court and the United States Supreme Court," *id*. at 596, we noted the lack of opposing science in the record, as well as the fact that the record did not, at that time, provide a sufficient basis to overturn the legislative presumption. *Id*. Hence, we remanded the matter to the trial court for further evidentiary proceedings.

As a predicate to Appellant's other constitutional challenges, we also directed the trial court on remand to consider whether the registration and notification requirements applicable to sexual offenders constituted criminal punishment, and in doing so, to address five of the seven factors,[8] discussed more fully below, as set forth by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), to determine the punitive nature of legislation: (1) whether the requirements involve an affirmative disability or restraint; (2) whether they have been historically regarded as punishment; (3) whether their operation will promote the traditional aims of punishment-retribution and deterrence; (4) whether they may be rationally connected to an alternate purpose; and (5) whether they are excessive in relation to the alternative purpose.

Justice Donohue dissented. She believed that the evidence contained in the record was sufficient to decide the matter and would have found that due process

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precluded the General Assembly from presuming that all persons convicted of one of the enumerated crimes posed a high risk of committing additional sexual offenses. Thus, Justice Donohue would have held that SORNA's revisions created an unconstitutional irrebuttable presumption. Finally, Justice Donohue noted that, as SORNA already required individualized assessment to determine whether an offender was a sexually violent predator, the existing procedure demonstrated that a reasonable alternative existed to ascertain an individual's specific risk of reoffending. Justice Mundy also dissented, joined by former Chief Justice Saylor, and would have found that Appellee failed to establish that the legislative underpinnings of Subchapter H were unconstitutional, emphasizing the deference to be given the legislature's findings as the policymaking branch of government.

IV. Trial Court's Remand Determination

Upon return to the Chester County Court of Common Pleas, the matter was assigned to Judge Allison Bell Royer due to Judge Scarcione's retirement. The court conducted three days of evidentiary hearings and heard testimony from three experts for Appellee: Dr. Karl Hanson, a Canadian psychologist and adjunct research professor in the Psychology

Department of Carleton University, Ottawa, Canada, President of the Society for the Advancement for Actuarial Risk Need Assessment, and a preeminent expert on sex offender recidivism and risk assessments; Dr. Elizabeth Letourneau, the Director of the Moore Center for Prevention of Child Abuse at Johns Hopkins; and James Prescott, J.D., Ph.D., a law professor who has published numerous law review articles on the efficacy of SORNA's registration and notification provisions on recidivism. In response, the Commonwealth presented the testimony of Dr. Richard McCleary, a statistician and professor at the University of California in Irvine.

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The trial court applied the three-prong test described in *In re J.B.*>, *supra, to determine the constitutionality of an irrebuttable presumption. First, the court determined that the irrebuttable presumption concerning sex offenders' heightened future dangerousness encroached upon a person's right to reputation under Article I, Section I of the Pennsylvania Constitution, and, thus, implicated a fundamental interest protected by the due process clause, satisfying the first prong. Specifically, the court found that the presumption stigmatizes individuals convicted of committing sexual offenses, resulting in difficulty in finding housing, employment, and establishing social relationships with others. Noting that other criminal offenders are not placed on a registry, the court opined that the stigma associated with the registry requirement is evident in the legislative finding that everyone convicted of a sex offense poses a high risk of reoffending.*

Next, the court considered whether Appellee had established that the irrebuttable presumption created by Section 9799.11(a)(4) — that sexual offenders pose a high risk of committing additional sexual offenses — was not universally true. The court noted that Dr. Hanson related research showing that 80-85% of sex offenders do not reoffend sexually, and Dr. Letourneau, based on her review of published studies, estimated that figure to be 80-95%. Both Dr. Letourneau and Dr. Prescott also cited studies done in New York which showed that 95% of all sexual offenses are committed by first time offenders. The court observed that the Commonwealth's expert, Dr. McCleary, in response, first attacked the methodology of the research showing these low rates of reoffense, and he opined that, because of these methodological flaws, they were unreliable. Specifically, Dr. McCleary testified that results of comparison studies in this area did not yield data which led to easy comparisons, given the differences in registration laws by jurisdiction, the length of the follow-up period, how the results are validated, and

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the heterogenicity of the samples used. In the court's view, this blanket denunciation of the studies offered by Appellee detracted from Dr. McCleary's credibility.

The trial court recounted that Dr. McCleary also testified as to the so-called "dark figure" of sexual offenses: the phenomenon that more sex offenses occur than are reported. In his view, this underreporting renders the alleged low recidivism rate cited by Appellee's experts unreliable because it does not account for these unreported crimes. Dr. McCleary found support for quantifying the exact degree of underreporting from a report by researchers Nicholas Scurich and Richard St. John called "The Dark Figure of Sexual Recidivism," which is a statistical model they developed to estimate the degree of underreporting ("Dark Figure model"). The Dark Figure model proceeds from an assumption that recidivism rates are a static quantity that does not change over time, and that most sex offenders, who reoffend, do so occasionally, every 5-10 years. These so called "low-rate offenders" alter their offending behavior to escape detection. Dr. Hanson attacked the reliability of this purely mathematical model because he noted that its assumptions are not supported by hard data which, in fact, shows that recidivism rates for individuals do change over time, but in a downwards direction, and that they are not notably higher than other offenders with a criminal record. Moreover, the court embraced

the view that the exact number of "low-rate offenders" is unknown.

Ultimately, the trial court credited the testimony of Appellee's experts and specifically rejected the Dark Figure model. The court accepted Appellee's experts' conclusion that 80%-95% of all sex offenders will not reoffend, and, thus, concluded that SORNA's irrebuttable presumption was not universally true.

Finally, as to the last prong of the irrebuttable presumption test, the trial court considered whether reasonable alternatives exist to the current registration and notification provisions to protect the public. In this regard, the court pointed out that

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Appellee's experts had identified several efficacious risk assessment tools which have been developed in the last 20 years to identify those with a high likelihood of reoffense. Moreover, the court found persuasive the fact that Appellee's experts had provided evidence from published studies that demonstrated that there were more effective treatment methods available, such as specialized treatment programs and coordinated multidisciplinary support services, which have proven effective in reducing recidivism and the public harm by convicted sex offenders. The trial court noted that our Court found in In re J.B. that the existence of individualized risk assessment was an appropriate alternative to SORNA's lifetime registration and notification requirements for juveniles, and observed also that Appellee's experts had furnished evidence that applying the blanket label of "dangerous sex offender recidivist" to all sex offenders diverted resources away from treatment and supervision of that small subset of offenders that pose the greatest risk of harm to society.

Accordingly, the trial court concluded that SORNA's irrebuttable presumption unconstitutionally impacted an individual's right to reputation under Article I, § 1 of the Pennsylvania Constitution. Because the lifetime registration and notification provisions were, in the court's view, directly premised on this unconstitutional assumption, it found those provisions unconstitutional as well.

The trial court went on to consider the five Mendoza-Martinez factors in determining whether Subchapter H or SORNA was punitive, which we discuss in detail below. In short, the court concluded that all five factors weighed in favor of finding the statute to be punitive, and, as a result, determined that the statute violated the separation of powers doctrine, the prohibition on cruel and unusual punishment, and the right to a jury determination of facts leading to the imposition of Subchapter H's registration and

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notification provisions. Thus, for these reasons, the trial court struck Subchapter H as unconstitutional. The Commonwealth again appealed directly to our Court.

V. Issue I

The first issue before us is whether the trial court erred by determining that the presumption contained in Section 9799.11(4) of SORNA — that individuals convicted of sexual offenses pose a high risk of committing additional sexual offenses — was an unconstitutional irrebuttable presumption.

Generally, the constitutionality of legislation is a pure question of law for which the scope of review is plenary, and the standard of review is de novo. LaCombe, 234 A.3d at 608. Here, however, we remanded the matter for additional evidence regarding whether there was a consensus as to the continued validity of the statutory presumption that sex offenders pose a high risk for reoffending. Thus, because the inquiry contains a factual component, this somewhat unique constitutional inquiry constitutes a mixed question of fact and law, with emphasis on the ultimate legal conclusion of whether the irrebuttable presumption is unconstitutional. See generally Commonwealth v. Crawley, 924 A.2d 612, 615 (Pa. 2007) ("The standard for reviewing mixed questions of law

and fact is not settled in Pennsylvania and the question presented is what level of deference the determination by the PCRA court should be given. . . . The answer to this question must be evaluated on an issue-by-issue basis, since some mixed questions are more heavily weighted toward fact, while others are more heavily weighted towards law."); see also Warehime v. Warehime, 761 A.2d 1138, 1146 n.4 (Pa. 2000) (Saylor, J., concurring) ("[M]ixed questions differ in terms of the degree to which the legal versus the factual aspects predominate."); see generally Commonwealth v. Santiago, 654 A.2d 1062, 1072 (Pa. Super. 1994) (describing federal courts' approach to review of mixed questions, which varies according to the predominance of legal over factual aspects).

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Furthermore, legislation carries with it a strong presumption of constitutionality, which will not be overcome unless the legislation is "clearly, palpably and plainly" in violation of the Constitution. Commonwealth v. McMullen, 961 A.2d 842, 846 (Pa. 2008). Indeed, a party challenging legislation as unconstitutional bears a heavy burden, and all doubts are to be concluded in favor of a finding of constitutionality. Commonwealth v. Mayfield, 832 A.2d 418, 421 (Pa. 2003).

A. Parties' Arguments

The Commonwealth asserts that Appellee's heavy burden on remand to the trial court was clear: to demonstrate that a scientific consensus has developed to refute SORNA's presumption that convicted sex offenders pose a higher risk of committing additional sex crimes after release than non-sex offenders. The Commonwealth submits that Appellee failed to meet that burden, by presenting only a counter-narrative to the evidence that the General Assembly relied upon in formulating the statute — that is, the Commonwealth insists that Appellee offered merely a "battle of experts." Commonwealth's Brief at 24. Furthermore, the Commonwealth maintains that the trial court, rather than finding that Appellee's experts had demonstrated a scientific consensus, concluded merely that Appellee's evidence was more persuasive and demonstrated that sex offenders do not reoffend very often, and that there were reasonable and more effective alternatives to the statutory tier-based registration. The Commonwealth emphasizes that what constitutes a low or high rate of recidivism is ultimately a value judgment regarding the degree of sexual reoffending society wishes to tolerate, and, as such, a matter of public policy which is reserved for the legislature. The Commonwealth contends that, not only did the trial court's ruling exceed the scope of our Court's mandate on remand, but that Appellee's evidence showed that convicted sex offenders commit new sex crimes at a rate three to four times higher than those who are

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convicted of non-sexual offenses who then commit future sex crimes, a fact on which the Commonwealth contends all three of Appellee's experts agreed.

In support of its position, the Commonwealth highlights that Justice Donohue recognized in her Torsilieri I dissent that the operative inquiry was whether sex offenders commit new sex crimes at a higher rate than those who commit non-sexual offenses and then commit a second offense that is a sex crime, thereby justifying the legislature's differential treatment. 232 A.3d at 606 (Donohue, J., dissenting). Indeed, the Commonwealth offers that this was the same approach taken by our Court in In re J.B., 107 A.3d at 17 (finding a scientific consensus had been established that juveniles convicted of sexual crimes commit new sexual crimes at a rate "indistinguishable" from juvenile non-sexual offenders). In contrast, the Commonwealth underscores that Appellee, by his own evidence, established that adult sexual offenders reoffend at a rate of three to four times higher than individuals convicted of non-sexual offenses, thus, validating the policy underpinnings of Subchapter H.

Further, even assuming "low" recidivism rates were relevant, the Commonwealth stresses that it was Appellee's burden to show, by the

clearest proof, a scientific consensus that recidivism rates were low, which he was unable to do. This is because, as the Commonwealth notes, the trial court's estimate does not, by Appellees' experts' own admissions, fully account for the "dark figure" - the amount of unreported sex offenses - which they admit is unknowable; hence, the Commonwealth contends the actual rate of new sex crimes committed by those previously convicted of sexual offenses is in all likelihood even higher than the three-to-four-times-higher figure Appellee's experts estimated. According to the Commonwealth, the General Assembly was entitled to make reasonable assumptions that, because of shame and revictimization, sex crimes are significantly underreported, and at rates significantly greater than those of other violent

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offenses such as murder and armed robbery. Thus, the Commonwealth concludes Appellee did not meet his burden of demonstrating a scientific consensus exists to overturn the legislative policy determinations that give rise to the irrebuttable presumption.

The Commonwealth further asserts that Appellee failed to establish a scientific consensus that shows that the public protection purpose of the registration and notification requirements is not being fulfilled. The Commonwealth stresses that deterrence of sex offenders was not the primary purpose of these requirements, but, rather, that they were intended to give the public sufficient information so that they could avoid unsafe interactions with convicted sex offenders, and, thus, reduce the risk of becoming victims of such offenders.

Instead of demonstrating a scientific consensus that the registration and notification provisions failed that purpose, the Commonwealth contends that Appellee's experts focused on only the efficacy of the registration and notification provisions as a deterrent for sex offenders which, in its view, was not the legislative purpose of SORNA. As evidence of this legislative purpose of public awareness, the Commonwealth cites to 42 Pa.C.S. § 9799.11(a)(3), (7), and (8), in which the legislature declares that the information furnished to the community through registration and notification was necessary so that community members could take precautionary measures.[9] Thus,

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according to the Commonwealth, the trial court and Appellee failed to distinguish between the concepts of deterrence and avoidance - the latter being the main purpose of SORNA. Indeed, the Commonwealth stresses that the goal of recidivism reduction is nowhere in the statute and that there are other laws which speak to deterrence through the imposition of imprisonment and fines. The Commonwealth asserts that the trial court improperly disregarded this purpose and focused instead on the effects the registration and notification requirements had on recidivism. Moreover, the Commonwealth avers that Appellee presented no research or evidence, much less proof of a scientific consensus, that the registry failed to offer concerned citizens information they could use to avoid sexual offenders.

Finally, the Commonwealth argues that the trial court misunderstood its role when it offered its views on "reasonable alternatives" to registration. As emphasized by the Commonwealth, the factual determinations made by the trial court were not part of a public policy debate, and evaluations of reasonable alternatives in solving societal problems are for the General Assembly.[10]

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In response, Appellee initially highlights the evidence presented at the hearing to argue that comparisons of the average recidivism rate is not the operative consideration in determining whether the irrebuttable presumption is universally true. Importantly, Appellee does not dispute that registrants are three times more likely to commit future sexual offenses compared to non-sex offenders, Appellee's Brief at 13, a statistic cited by the Commonwealth. However,

Appellee contends that this statistic is not only deceiving but is not relevant, as it speaks to sexual offenders as a whole. Id. According to Appellee, the recidivism rate of most of the individuals on the registry is no greater than the rate for non-sex offenders. Stated another way, Appellee emphasizes that not all of those convicted of a sex crime are "equally likely to reoffend." Id. at 12. Rather, while every person convicted of a crime poses some risk of committing a future sexual crime, Appellee stresses that "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

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offender is to commit an 'out of the blue' sexual offense," what Dr. Hanson termed "the 'desistance' point." Id. at 15. More specifically, Appellee posits that, when comparing individuals who have been convicted of a sex crime with non-sexual offenders, the time to desistance varies, but that most individuals cross that point 10-15 years after release from incarceration. Id.

Appellee, while acknowledging that his proffered relatively low rates of reoffending do not reflect the absolute rate of sexual offending, as not all post-conviction sexual offending is reported or detected, he dismisses a "dark figure" of sexual offending as irrelevant when comparing those who are registered and those who are not, claiming that undetected rates are equivalent for individuals with or without a sexual offense history. Regardless, Appellee contends that the recidivism rate, even adjusted for the underreporting of sexual offending, is likely not significantly higher than the reported rate.

Appellee continues by observing that the trial court found that there was no relationship between registration and sexual recidivism, with a few minor exceptions, and Dr. Letourneau echoed the sentiment that registration is an ineffective strategy to prevent subsequent sex crimes. Appellee maintains that there is no "counter-narrative" to his expert's view that SORNA does not prevent recidivism. Indeed, Appellee proffers that SORNA's anti-re-entry policies render it impossible for a sex offender to return to normal life, which in turn increases the recidivism risk of such individuals. Id. at 31-33. In contrast, Appellee insists that there are more effective means by which to manage the risk of sexual reoffense, such as classifying individuals according to risk, private registration, and the early termination of registration.

Appellee then turns to what he deems to be an independent argument regarding the constitutionality of Subchapter H, separate from his irrebuttable presumption claim. Specifically, Appellee asserts that the Pennsylvania Constitution protects the right of

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reputation as a fundamental right pursuant to Article I, Section 1, and that registration as a sex offender stigmatizes persons committing sexual offenses, threatening their reputations. Accordingly, Appellee maintains that strict scrutiny applies in analyzing whether Subchapter H violates one's right to reputation. In that regard, Appellee argues that Subchapter H is not narrowly tailored to meet its ends, and in support thereof, claims that the purpose of Subchapter H is to reduce sexual reoffending, rejecting the Commonwealth's assertion that its purpose is to provide citizens with information so as to avoid the dangers posed by sexual offenders reoffending. Accordingly, if the reduction of recidivist offending is the purpose, Appellee submits the means are not narrowly tailored. In that regard, Appellee insists that it is the Commonwealth's burden to establish that there are no less restrictive means available to accomplish the same ends. Appellee points out that the General Assembly could have, inter alia, drawn more narrow classes, eschewed a conviction-based system, or engaged in individual assessments.

Appellee then pivots back to his irrebuttable presumption challenge, by reiterating that, to satisfy the test for an unconstitutional irrebuttable presumption, an individual must establish 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. Contending that there is no dispute regarding the first factor, Appellee turns to whether the presumption is universally true, and offers that, in this determination, one must examine whether "many or most people within the identified group lack the substantive characteristic." Appellee's Brief at 69 (quoting Torsilieri I, 232 A.3d at 604 (Donohue, J., dissenting)). Appellee points to cases where universal presumptions have been stricken — such as laws removing children from the custody of unwed fathers because of the irrebuttable presumption that all unwed fathers were bad parents, see Stanley v. Illinois,

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405 U.S. 645 (1972), or barring individuals from driving for a year if they have one epileptic seizure, see Bureau of Drivers' Licensing v. Clayton, 684 A.2d 1060 (Pa. 1996). He asserts that, in those cases, no one questioned the proposition that the percentage of unwed fathers who were bad parents was likely to be higher than other parents, or the percentage of those who had one epileptic seizure having another accident caused by a seizure were likely to be higher than that of drivers who did not have a prior seizure, as those were not the dispositive inquiries. Rather, Appellee claims the inquiry in such cases focused on whether each group member uniformly reflected the presumption, and the courts in those cases concluded that the presumption was not true because many members of both groups were unlikely to exhibit these behaviors; thus, the courts invalidated the presumption.

Hence, in Appellee's view, his evidence showing that "most" people on the sex offender registry in Pennsylvania are no more likely to sexually reoffend than those with non-sexual criminal records demonstrates that the presumption is false as to most sex offenders who are required to register, even when one accounts for any underreporting of sexual crimes. That is, the presumption is not, in his view, universally true for all members of the group of sex offenders required to register.

Appellee further maintains that his evidence established that reasonable alternative means exist to better identify and manage offender risk, such as the predictive assessments recommended by his experts, or evaluation by the SOAB as is done for sexually violent predators. Finally, Appellee contends that there is no meaningful opportunity to challenge the presumption of dangerousness.[11]

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B. Analysis

This issue challenges the constitutionality of Subchapter H of SORNA on the basis that it relies on an unfounded irrebuttable presumption that sex offenders pose a high risk of committing additional sexual offenses. 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 at 14.

Initially, we note that this is a somewhat unique constitutional challenge. Appellee's irrebuttable presumption argument contests the underpinnings on which the legislature based its enactment. In essence, Appellee claims that the General Assembly's policy choices violate our organic charter. To successfully bring such a constitutional challenge is a tall order, and rightfully so, as generally "policy-based arguments are for the policy-making branches. They are not for the judiciary." Keystone RX LLC v. Bureau of Workers' Compensation Fee Review Hearing Office, 265 A.3d 322, 334 (Pa. 2021) (Wecht, J., concurring). Sharpening the point, courts must be mindful that "the wisdom of a public policy is one for the legislature, and the General Assembly's enactments are

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entitled to a strong presumption of constitutionality rebuttable only by a demonstration that they clearly, plainly, and palpably violate constitutional requirements." Shoul v. Department of Transportation, 173 A.3d 669, 678 (Pa. 2017); see also Torsilieri I, 232 A.3d at 596. Stated another way, "the power of judicial review must not be used as a means by which the courts might substitute [their] judgment as to the public policy for that of the legislature." Parker v. Children's Hospital of Philadelphia, 394 A.2d 932, 937 (Pa. 1978). Because of this, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." Vance v. Bradley, 440 U.S. 93, 111 (1979). Indeed, "it will be the rare situation where a court will reevaluate a legislative policy determination, and doing so can only be justified in a case involving the infringement of constitutional rights and a consensus of scientific evidence undermining the legislative determination." Torsilieri I, 232 A.3d at 596.

With this overview of the relevant standards and presumptions firmly in hand, we turn to a threshold matter. As part of his challenge to Subchapter H, Appellee first raises what he claims to be an argument "independent" of the irrebuttable presumption doctrine regarding the constitutionality of Subchapter H. In sum, Appellee contends that, as Subchapter H impacts one's right to reputation, a strict scrutiny analysis applies, and, under that construct, the statute is not narrowly tailored to support its ends. While not labeling it so, Appellee's argument is akin to a substantive due process challenge.

However, Appellee's broadside challenge to SORNA is inextricably intertwined with the similar claim of harm to reputation caused by SORNA's allegedly erroneous presumption that sexual offenders pose a high risk of reoffense. For example, Appellee offers that SORNA sends the express message that all registrants pose a high risk of committing additional sexual offenses, citing 42 Pa.C.S. § 9799.11(a)(4), and asserts that,

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even without this statutory declaration, "the common view of registered sexual offenders is that they are particularly dangerous and more likely to reoffend than other criminals." Appellee's Brief at 52 (citation omitted). Indeed, Appellee submits that Subchapter H "broadcasts a presumed and usually false propensity" about sexual offenders, which he believes breaches his right to reputation. Id. at 53.

A similar substantive due process argument was raised in In re J.B., wherein the appellees argued that SORNA was not the least restrictive means to meet the state's compelling interest of protecting the public from high-risk juvenile sexual offenders, "because the overwhelming majority of juvenile offenders are not 'high risk'." Appellees' Brief in In re J.B., at 28. Appellee's argument here, as in In re J.B., is predicated on an alleged erroneous presumption that sex offenders pose a high risk of reoffense, and because all the tribunals who have spoken to the issues in this case, including our Court in Torsilieri I and the trial court's opinion upon remand, addressed the irrebuttable presumption doctrine, we consider Appellee's "independent" argument to be synonymous with the irrebuttable presumption challenge, and analyze it solely as such.[12]

Thus, we turn to the irrebuttable presumption inquiry. Statutes creating irrebuttable presumptions are not per se violative of the constitution. See Weinberger v. Salfi, 422 U.S. 749 (1975). Indeed, legislatures enact statutes which make a myriad of distinctions based upon narrowly distinguishable, similarly-situated entities. Age classifications, including minimum ages to engage in a wide range of conduct, and mandatory retirement ages or ineligibilities for appointment, are typical examples. Other presumptions are

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based upon acts, such as the prohibition on those who have been convicted of various offenses from possessing or using firearms. 18 Pa.C.S. § 6105.

From the late 1960s to the mid-1970s, the United States Supreme Court applied the irrebuttable presumption doctrine when faced with legislation containing rules denying a benefit or placing a burden on all individuals with certain characteristics. Writ large, an irrebuttable presumption doctrine claim may arise whenever "a provision states or implies that one fact (the basic fact) is conclusive evidence of another fact (the presumed fact) that provides the ostensible rationale for the classification established by the provision." John M. Phillips, Irrebuttable Presumptions: An Illusory Analysis, 27 Stan. L. Rev. 449, 451 (1975). In this way, "[t]he characteristic is seen as the 'basic fact,' from which the 'presumed fact'--possession of whatever quality is relevant to the postulated ultimate purpose--is inferred." Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534, 1534 (1974). When a legislative scheme employs presumptions that are overinclusive, the irrebuttable presumption doctrine requires that an individual have the opportunity to rebut that presumption.

More specifically, the irrebuttable presumption doctrine derives from a series of United States Supreme Court cases involving statutes that infringed upon protected interests or denied benefits by utilizing presumptions that the existence of one fact was statutorily conclusive of the truth of another fact. The high Court concluded that, absent a meaningful opportunity to contest the validity of the second fact, the statutory irrebuttable presumptions deprived the citizenry of due process of law. See, e.g., Vlandis v. Kline, 412 U.S. 441 (1973) (holding statute unconstitutional for employing irrebuttable presumption that those who lived out-of-state when they applied to a state university should be forever deemed out-of-state residents for purposes of tuition calculation, even if they later become bona fide residents); Stanley v. Illinois, supra (holding

unconstitutional statute providing for children to be declared dependent and removed from their unwed fathers' custody based on the presumption that unwed fathers are unfit parents); Bell v. Burson, 402 U.S. 535 (1971) (concluding that due process was violated by statute requiring the suspension of a driver's operating privileges following an accident, if the driver did not carry insurance or post security, without providing a pre-suspension forum for determining whether the driver was likely to be held at fault); see generally In re J.B., supra (discussing this history).

However, in the late 1970s and 1980s, the high Court brought the continued viability and utility of the irrebuttable presumption doctrine into question. Grave concerns were voiced by certain members of the Court that the breadth of the doctrine would undermine the prior well-established substantive due process analysis. Vlandis, 412 U.S. at 459-69 (Burger, C.J., dissenting). Indeed, the doctrine was described as "a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with . . . the Constitution." Weinberger, 422 U.S. at 772. The Weinberger decision marked the trend to limit the irrebuttable presumption doctrine, and, 12 years later, the Court was unable to agree on its applicability in Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) (plurality) (rejecting the application of the doctrine and using the rational basis test in a paternity contest between natural father and husband of mother, wherein four Justices, inter alia, focused on the fit between the classification and the policy that the classification served).

More recent federal decisions have been critical of the doctrine's value as a jurisprudential construct and have signaled the de facto end to the use of the irrebuttable presumption doctrine. See Catlin v. Sobol, 93 F.3d 1112, 1118 (2d Cir. 1996) ("Irrebuttable presumption analysis allowed the Court to overturn legislative decisions without having to justify the use of judicial power as would an open use of substantive

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due process or equal protection analysis. The use of irrebuttable presumption language was a conceptually confused, if not dishonest, method of justifying independent judicial review of legislative classifications."). Indeed, certain courts have questioned whether the irrebuttable presumption doctrine is obsolete. See Black v. Snow, 272 F.Supp.2d 21, 30 (D.D.C. 2003) (opining that "the irrebuttable presumption analysis has simply collapsed into the ordinary equal protection/due process analysis" except in cases involving fundamental interests), aff'd Black v. Ashcroft, 110 Fed.Appx. 130 (D.C. Cir. 2004) (affirming per curiam in an unpublished decision, specifically not addressing the due process claim); see also In re J.B., 107 A.3d at 12 n.22, 14 n.24 (questioning the viability of the irrebuttable presumption doctrine). Academic commentators have been critical of the doctrine as well. See generally Randall Bezanson, Some Thoughts on the Emerging Irrebuttable Presumption Doctrine, 7 Ind. L. Rev. 644, 654 (1974) (warning that the irrebuttable presumption doctrine "could invalidate all [over broad] classifications and require that opportunity always be provided for individualized exemptions from the statute"); but see Catherine Carpenter, Panicked Legislation, 49 JLEGIS 1, 44-51 (2022) (urging use of the irrebuttable presumption doctrine in the wake of hastily crafted legislation to appease a fearful public); Jonathon Chase, The Premature Demise of Irrebuttable Presumptions, 47 U. Colo. L. Rev. 653, 705 (1976) (suggesting the irrebuttable presumption doctrine provided a valuable addition to the evolution of substantive due process).

Nevertheless, our Court has continued to employ the doctrine. See, e.g., In re J.B., supra; Clayton, supra. Moreover, the parties do not contest its continued vitality in this appeal. Thus, we will address the irrebuttable presumption doctrine issue as presented and await another day to explore the doctrine's continued viability in Pennsylvania.

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In adopting SORNA, the General Assembly set forth legislative findings and a declaration of policy in which it explained that compliance with the federal Adam Walsh Child Protection and Safety Act, and the increased regulation of sex offenders in nonpunitive fashion, would provide increased protection to the citizens of the Commonwealth. Specifically, Subchapter H provides:

> ***(a) Legislative findings.--****The General Assembly finds as follows:*
>
> *(1) In 1995 the General Assembly enacted the act of October 24, 1995 (1st Sp.Sess. P.L. 1079, No. 24), commonly referred to as Megan's Law. Through this enactment, the General Assembly intended to comply with legislation enacted by Congress requiring that states provide for the registration of sexual offenders. The Federal statute, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Public Law 103-322, 42 U.S.C. 14071 et seq.), has been superseded by the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 109-248, 120 Stat. 587).*
>
> *(2) This Commonwealth's laws regarding registration of sexual offenders need to be strengthened. The Adam Walsh Child Protection and Safety Act of 2006 provides a mechanism for the Commonwealth to increase its regulation of sexual offenders in a manner which is nonpunitive but offers an increased measure of protection to the citizens of this Commonwealth.*
>
> *(3) If the public is provided adequate notice and information about sexual offenders, the community can develop constructive plans to prepare for the presence of sexual offenders in the community. This allows communities to meet with law*

enforcement to prepare and obtain information about the rights and responsibilities of the community and to provide education and counseling to residents, particularly children.

(4) 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.

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(5) Sexual offenders have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government.

(6) Release of information about sexual offenders to public agencies and the general public will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to the furtherance of those goals.

(7) Knowledge of whether a person is a sexual offender could be a significant factor in protecting oneself and one's family members, or those in care of a group or community organization, from recidivist acts by such offenders.

(8) The technology afforded by the Internet and other modern electronic communication methods makes this information readily accessible to parents, minors and private entities, enabling them to undertake appropriate remedial precautions to prevent or avoid placing potential victims at risk.

42 Pa.C.S. § 9799.11(a) (emphasis added and footnote omitted). Moreover, the General Assembly set forth the following declaration of policy:

***(b) Declaration of policy.--**The General Assembly declares as follows:*

(1) It is the intention of the General Assembly to substantially comply with the Adam Walsh Child Protection and Safety Act of 2006 and to further protect the safety and general welfare of the citizens of this Commonwealth by providing for increased regulation of sexual offenders, specifically as that regulation relates to registration of sexual offenders and community notification about sexual offenders.

(2) It is the policy of the Commonwealth to require the exchange of relevant information about sexual offenders among public agencies and officials and to authorize the release of necessary and relevant information about sexual offenders to members of the general public as a means of assuring public protection and shall not be construed as punitive.

(3) It is the intention of the General Assembly to address the Pennsylvania Supreme Court's decision in Commonwealth v.

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Neiman, No. 74 MAP 2011 (Pa. 2013), by amending this subchapter in the act of March 14, 2014 (P.L. 41, No. 19).

(4) It is the intention of the General Assembly to address the Pennsylvania Supreme Court's decision in Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017) and the Pennsylvania Superior Court's decision in Commonwealth v. Butler

(2017 WL 4914155).

> ***(c) Scope.--****This subchapter shall apply to individuals who committed a sexually violent offense on or after December 20, 2012, for which the individual was convicted.*

Id. § 9799.11(b), (c).

In line with the federal mandate, the Act created a three-tier registration system based upon the underlying criminal offense, with Tier III applying to the most severe sexual offenses. Id. § 9799.14. The duration and frequency of the periodic reporting requirements vary across the tiers, with Tier 1 offenders required to report annually for 15 years, Tier II offenders reporting semiannually for 25 years, and Tier III offenders reporting quarterly for their lifetimes. Id. § 9799.15(a). This provision also dictates various events necessitating in-person reporting, such as a change in name, address, employment, telephone number, email address, or significant change in physical appearance. Id. § 9799.15(g); id. § 9799.16(c)(4). An offender that is required to register is subject to criminal prosecution for failure to do so under 18 Pa.C.S. § 4915.1.

Of particular focus herein, the General Assembly additionally declared, as discussed above, "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. § 9799.11(a)(4). In furtherance of this purpose, SORNA establishes that a state-wide registry of sexual offenders is to be maintained by the PSP and dictates a substantial list of information regarding the offender to be included on the registry. Id. § 9799.16. Significantly, the Act requires that the PSP develop a system that disseminates the registrants' information to the public through a website and

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allows the public to search that information by "any given zip code or geographic radius set by the user." Id. § 9799.28. This information must be connected with registries maintained by the Department of Justice as well as other jurisdictions. Id. § 9799.16(a). The PSP is obligated to make the information available to the jurisdiction where the individual resides, is employed, or is enrolled as a student, and any jurisdiction where the individual has terminated residence, employment, or enrollment. Id. § 9799.18(a)(1)-(2). Furthermore, the PSP is also required to provide the information to the United States Attorney General, the Department of Justice, and the United States Marshals Service for inclusion in federal databases. Id. § 9799.18(a)(3). Additionally, information is provided to the relevant district attorney, the chief law enforcement officer, and the probation and parole office where the individual resides, is employed, or is enrolled as a student. Id. § 9799.18(a)(4)-(6). Information gained through the registry is not posted by the PSP on a public internet website; nevertheless, there is no prohibition against public distribution of the information by any entity to which the PSP is required to provide the information.

Of direct relevance to this appeal, in In re J.B., our Court addressed the question of whether the irrebuttable presumption that juvenile offenders "pose a high risk of committing additional sexual offenses," thereby subjecting them to lifetime registration, denied them due process because it impaired their right to reputation protected by Article I, Section 1 of the Pennsylvania Constitution. We opined that, to establish a violation of the doctrine, a challenging party must satisfy the three-prong test of demonstrating: (1) a protected interest, (2) a presumption that is not universally true, and (3) reasonable alternative means to ascertain the presumed fact. 107 A.3d at 15-16. Applying the first element of this test, this Court first concluded that the juveniles in In re J.B. had demonstrated a protected interest in their right to reputation, which is protected as a fundamental right under the Pennsylvania Constitution. Id. at 16. We additionally opined

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that their right to reputation had been infringed by the statutory declaration "that sexual

offenders, including juvenile 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.'" Id. (citing 42 Pa.C.S. § 9799.11(a)(4)).

This Court next considered whether the presumption of a high risk of recidivism was universally true when applied to juveniles convicted of sexual offenses. We observed that the trial court credited research which indicated that juveniles offend as a result of impulsivity and curiosity, both of which diminish with rehabilitation and maturation. Comparing juveniles to adults, we found that, "[w]hile adult sexual offenders have a high likelihood of reoffense," juvenile sex offenders exhibited low levels of recidivism "which are indistinguishable from the recidivism rates for non-sexual juvenile offenders, who are not subject to SORNA registration." Id. at 17. Importantly, our Court's decision was informed by support from then-recent United States Supreme Court decisions recognizing the fundamental differences between juveniles and adults, including greater impulsivity due to lack of maturity, increased vulnerability to negative influences, and malleability of character. Id. at 18-19. We explained that the trial court opined that "these distinctions between adults and juveniles are particularly relevant in the area of sexual offenses, where many acts of delinquency involve immaturity, impulsivity, and sexual curiosity rather than hardened criminality." Id. at 19. Given this overwhelming consensus of corroborated research, our Court determined the statutory presumption that juvenile sexual offenders were at high risk of recidivating was not universally true.

Finally, we evaluated whether reasonable alternative means existed to ascertain whether a juvenile offender was at high risk of recidivism. The Court explained that SORNA already provided for individualized assessment of adult sexual offenders as sexually violent predators and juvenile offenders as sexually violent delinquent children.

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Therefore, our Court found the juveniles satisfied the three-prong irrebuttable presumption test. Id. at 19-20.

In Torsilieri I, our Court first considered this same irrebuttable presumption analysis as applied to adults. The trial court, as noted above, found all three prongs of the doctrine to have been satisfied, and concluded that SORNA's registration and notification provisions involved an unconstitutional irrebuttable presumption, relying heavily on the scientific evidence proffered by Appellee. Our Court declined to render a legal conclusion at that juncture, believing we were unable to analyze Appellee's challenge based upon the record currently before us, and, specifically, whether Appellee had sufficiently undermined the validity of the legislative findings supporting Subchapter H's registration and notification provisions and the effectiveness of a tier-based registration system, especially in light of contradictory scientific evidence cited by the Commonwealth on appeal which facially refuted the Appellee's evidence. Torsilieri I, 232 A.3d at 587-88. Thus, our Court remanded the matter to allow the parties to develop arguments and present additional evidence. Id. at 596. As set forth in detail above, on remand the trial court found that the presumption violated the Constitution.

Thus, with our Court's prior opinion and the trial court's determination after remand in hand, we turn to an analysis of the three-prong construct for considering the constitutionality of Subchapter H's irrebuttable presumption. For purposes of this appeal, we need focus only on the second prong — whether the presumption is universally true.[13]

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The second prong has been subjected to scant analysis. The United States Supreme Court employed the "necessarily or universally true, in fact" standard in Vlandis v. Kline, supra. In Vlandis, the Supreme Court held that a state could not irrebuttably presume that a person, who had lived outside of the state for any part of the year preceding his application to a state college, was a non-resident student for purposes

of fixing his tuition rate. The Vlandis Court concluded:

> *[Connecticut] is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true, in fact, and when the State has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates.*

412 U.S. at 452 (emphasis added).

It is not lost on our Court that the "necessarily or universally true, in fact" standard seemingly demands that the presumption be true throughout a class, without exception. Perhaps recognizing the practical reality of virtually no presumption being always true, the United States Supreme Court, in at least one case, has suggested a less demanding standard. See U.S. Department of Agriculture v. Murry, 413 U.S. 508, 514 (1973) ("We conclude that the deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives and rests on an irrebuttable presumption often contrary to fact." (emphasis added)).

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Our Court also has seemingly recognized the impracticality of such an understanding of this second prong. As noted above, In re J.B. focused on whether there was a consensus regarding the potential recidivism of juvenile sex offenders. Similarly, in this matter, our Court explained that, for Appellee to satisfy this second element, he must establish a consensus of scientific evidence rebutting the presumption as to the class of adult sex offenders (that they are at high risk of reoffending). Torsilieri I, 232 A.3d at 583.

In explaining this "consensus" burden, our Court in Torsilieri I was specific and clear regarding the relevant question to be answered on remand: "whether sexual offenders commit more sexual crimes than other groups not subject to similar registration laws." Id. at 594 n.22; see also id. at 606 (Donohue, J., dissenting) (agreeing that the operative inquiry was whether sex offenders are committing new sex crimes at a higher rate than those who are convicted of non-sexual offenses, thereby justifying the legislature's differential treatment). Indeed, this was the same discrete inquiry undertaken by our Court in In re J.B. See 107 A.3d at 17 (finding a scientific consensus that juveniles convicted of sexual crimes commit new sexual crimes at a rate "indistinguishable" from juvenile non-sexual offenders).

Thus, to meet his heavy burden of establishing that the General Assembly's presumption was not universally true, Appellee was required to establish that there exists a scientific consensus that sexual offenders pose no greater risk of committing additional sexual crimes than other groups not subject to similar registration laws. Informing our understanding of our Court's mandate and this prong of the irrebuttable presumption doctrine, we simply add that a "consensus" is a generally accepted opinion or general agreement regarding a proposition. See Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/consensus; Dictionary.com

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https://www.dictionary.com/browse/consensus; The Britannica Dictionary, https://www.britannica.com/dictionary/consensus.

Appellee, however, as discussed, rejects our framing of the question at issue as whether sexual offenders are more likely to commit additional sexual crimes than non-sex offenders, and instead urges a focus on individual variation

within those convicted of sexual offenses and submits that Subchapter H is unconstitutional because it fails to take into account individualized recidivism risk. In support thereof, he presented expert testimony which focused upon recidivism rates within the sex offender community, offering that only 5% to 20% of sex offenders were arrested for a subsequent sex offense.

However, we remanded for evidence and argumentation regarding the issue as we framed it. This is because the General Assembly deemed sexual offenders to be a special class that presented unique risks, justifying different treatment than non-sexual offenders. To overturn the legislative presumption that sex offenders are more likely as a group to commit new sex offenses, we must conclude there is a universal consensus that this presumption is wrong. There cannot be a mere disagreement among experts; there must be clear and indisputable evidence for us to take this extraordinary step, as the General Assembly made a considered policy choice that sex crimes were uniquely abhorrent to the victims and society, and relying on the presumption that, as a group, those who commit such crimes are more likely to commit another crime of a sexual nature.

Again, the meaningful statistical measure is whether the percentage of those who have committed a sexual offense and go on to commit a second sexual offense — the group SORNA targets — is higher than the percentage of those who first commit a non-sexual offense followed by a second, sexual offense. It is this presumed difference in the rates of commission of sexual offenses, as recidivist offenses, between the two groups of offenders on which the legislature rested SORNA's registration and notification scheme.

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Here, Appellee's own experts concede that adult sexual offenders reoffend at a rate of at least three times higher than other individuals convicted of non-sexual offenses. See Hanson Testimony, N.T. 6/28/21, at 217; LeTourneau Testimony, N.T. 6/29/21, at 83; Prescott Testimony, N.T. 6/29/21, at 274. Accordingly, rather than refuting it, the evidence supports the legislative presumption; the evidence validates the statutory underpinnings of Subchapter H.[14] *We need go no further. Having reviewed the arguments and the evidence presented below, we find that the evidence does not demonstrate a consensus that the presumption at issue is not universally true. Thus, we hold that Appellee has failed to meet his heavy burden to demonstrate that the irrebuttable presumption at issue was constitutionally infirm.*

VI. Issue II

We now turn to the second issue before our Court: whether the trial court erred in determining that the registration and notification requirements of Subchapter H are punitive. Importantly, Appellee's other constitutional challenges — regarding the separation of powers doctrine, the United States Constitution's prohibition on cruel and unusual punishment, and the right to a trial by jury — depend upon a determination that Subchapter H is punitive legislation.[15] *This question presents a pure question of law for which our scope of review is plenary, and our standard of review is de novo. LaCombe, 234 A.3d at 608.*

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A. Mendoza-Martinez Factors

We first note that the long history of Pennsylvania's sexual offender regulatory statutes and this Court's interpretations of those statutes as being punitive, or not, has been fully and ably recounted in numerous decisions. See, e.g., Torsilieri I, 232 A.3d at 575-79; LaCombe, 234 A.3d at 608-13; id. at 629-41 (Wecht, J., dissenting). Thus, we need not repeat that legacy here, but advance to consideration of whether the requirements of Subchapter H constitute criminal punishment under the test set forth in Mendoza-Martinez. The two-part test consists of first determining whether the expressed statutory purpose is to impose punishment, and if not, whether the statutory scheme is so punitive in effect as to negate the

legislature's stated non-punitive intent, as assessed by the seven Mendoza-Martinez factors. LaCombe, 234 A.3d at 614. Because the first part of this test is largely undisputed, our focus is on these factors.

Initially, it is instructive to review Muniz and LaCombe, the two most recent decisions by our Court in which we considered whether certain iterations of SORNA were punitive in nature. In Muniz, a plurality of our Court was faced with an ex post facto challenge to SORNA and concluded that the registration provisions constituted punishment. 164 A.3d at 1218. After first observing that the legislature's expressed intent was not to impose punishment, the OAJC proceeded to consider its punitive effect by analyzing the Mendoza-Martinez factors. The Court found that the statute imposed an affirmative disability or restraint upon offenders due to the onerous in-person reporting requirements for both initial verification and changes to an offender's registration, stressing that a Tier III offender would be required to report in person a minimum of 100 times over a 25-year period. The OAJC determined that SORNA's requirements were analogous to historical forms of punishment, specifically finding the statute's "publication provisions - when viewed in the context of our current internet-based world - to be

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comparable to shaming punishments" and the mandatory notification conditions placed on registrants to be akin to probation. Id. at 1213. Furthermore, the OAJC developed that SORNA promotes the traditional aims of punishment as "the prospect of being labeled a sex offender accompanied by registration requirements and the public dissemination of an offender's personal information over the internet has a deterrent effect." Id. at 1215. The OAJC found that the General Assembly increased the retributive effect of SORNA as compared to Megan's Law II by "increas[ing] the length of registration, [adding] mandatory in-person reporting requirements, and allow[ing] for more private information to be displayed online." Id. at 1216 (citation omitted).

In deferring to the General Assembly, however, the OAJC also concluded the protection of the public from sex offenders "is a purpose other than punishment to which the statute may be rationally connected and that this factor weighs in favor of finding SORNA to be nonpunitive." Id. at 1217.

Finally, the OAJC determined that SORNA's registration requirements were excessive and over-inclusive in relation to the statute's intended purpose of protecting the public, as it "categorize[d] a broad range of individuals as sex offenders subject to its provisions, including those convicted of offenses that do not specifically relate to a sexual act." Id. at 1218. Therefore, the plurality concluded that SORNA's registration requirements constituted criminal punishment and that their retroactive application constituted a violation of the constitutional prohibition against ex post facto laws. Id.

In response to Muniz, as noted above, the General Assembly enacted Subchapter I, and amended Subchapter H. In this amended statutory scheme, the General Assembly, inter alia, eliminated a number of crimes that previously triggered application of SORNA's registration and notification requirements, and reduced the frequency with which an offender must report in person to the PSP.

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In LaCombe, we considered the constitutionality of Subchapter I, and again, after first finding the General Assembly's expressed intent was not to punish registrants, we analyzed the punitive nature of the statute by assessing the Mendoza-Martinez factors. 234 A.3d 618. As to the first factor, we emphasized Subchapter I's significant decrease in the number of in-person visits. Coupled with our view that the remaining requirements were minimal and necessary, we found Subchapter I did not impose an affirmative disability or restraint upon the registrant, id. at 617-18, and, thus, that this factor weighed in favor of finding the statute to be nonpunitive. On the second factor, we concluded there was no reason to

depart from Muniz's determination that the requirements were akin to public shaming, due to the publicity and resulting stigma caused by registration information being posted on the internet, and similar to probation, in light of the onerous notification requirements and the criminal penalties for violation of the reporting requirements.[16]

We then turned to the fourth factor: whether Subchapter I promoted the traditional aims of punishment — retribution and deterrence. While determining that Subchapter I promoted retribution, we explained that Subchapter I applied solely to offenders who had already committed crimes — those committed prior to December 20, 2021 — thus, registrants could not be deterred by the registration requirements from committing crimes, as those crimes had already occurred. Id. at 624. Accordingly, weighing this factor in favor of finding Subchapter I to be punitive, we gave it little weight, as the statute was not aimed at deterrence. We then proceeded to factor 6, finding an alternative purpose other than punishment to which Subchapter I was connected: protecting and informing the public regarding sexual offenders the legislature believed to be dangerous. Thus, this

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factor weighed in favor of finding Subchapter I to be nonpunitive. Finally, the LaCombe Court considered factor 7, whether Subchapter I was excessive in relation to this alternative purpose. We relied upon the General Assembly's removal of certain previously qualifying offenses, its lowering of the registration term for various offenses, and its providing of a removal mechanism for lifetime registrants. Based on these considerations, we opined that this factor weighed heavily in favor of finding Subchapter I to be nonpunitive. Balancing the Mendoza-Martinez factors, we concluded that Subchapter I was nonpunitive.

With this background in hand, we turn to the first part of the Mendoza-Martinez two-part inquiry, which first asks whether the General Assembly, by enacting SORNA, intended to impose punishment — that is, to punish sexual offenders — and, if not, asks whether the legislative construct is nevertheless so punitive as assessed by the Mendoza-Martinez factors, either in purpose or effect, so as to vitiate the legislature's intent. Torsilieri I, 232 A.3d at 588; Lacombe, 234 A.3d at 618.

Here, the clearly expressed legislative purpose, findings, and declaration of policy all establish that, rather than intending to punish, the General Assembly desired to enact a civil, regulatory scheme. The parties do not disagree. Specifically, the General Assembly's purpose in enacting Subchapter H can be discerned through its unambiguous statement that the provisions of Subchapter H "shall not be construed as punitive." 42 Pa.C.S. § 9799.11(b)(2). Moreover, the legislature offers that "[i]t is the intention of the General Assembly to substantially comply with the Adam Walsh Child Protection and Safety Act of 2006 and to further protect the safety and general welfare of the citizens of this Commonwealth by providing for increased regulation of sexual offenders, specifically as that regulation relates to registration of sexual offenders and community notification about sexual offenders." Id. § 9799.11(b)(1). Significantly, the General Assembly

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clarified that, in enacting Subchapter H and Subchapter I, its intent was "to address the Pennsylvania Supreme Court's decision in Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017) and the Pennsylvania Superior Court's decision in Commonwealth v. Butler [173 A.3d 1212 (Pa. Super. 2017)]," which both found the prior iteration of SORNA to be unconstitutional based upon a determination that it was punitive. 42 Pa.C.S. § 9799.11(b)(4). Thus, manifestly, the General Assembly's intent in revising Subchapter H was non-punitive.

Accordingly, we turn to the second part of the analysis: application of the Mendoza-Martinez factors designed to aid a court in analyzing whether a "statutory scheme is nonetheless so punitive either in purpose or

effect as to negate the legislature's non-punitive intent." Williams II, 832 A.2d at 971. Only the "clearest proof" of the punitive effect of a law will overcome its expressed non-punitive intent, and we must examine the entirety of the statutory scheme in order to make this assessment. Muniz, 164 A.3d at 1208. For each factor, we will set forth the trial court's findings, as well as the arguments by the Commonwealth and Appellee. As we found in Torsilieri I, factors 3 and 5 are of little significance to our inquiry, and, thus, we assign these factors little weight and do not further analyze them below. 232 A.3d at 589.

Factor 1: Whether Subchapter H involves an affirmative disability or restraint

The first Mendoza-Martinez factor contemplates whether the challenged statute imposes an affirmative disability or restraint upon a sexual offender. The trial court noted the Subchapter H provisions require Tier III registrants to appear before the PSP quarterly each year for verification purposes and to appear in person to update his or her registration information as to residence, employment, vehicle ownership, and significant change in physical appearance. After three years of compliance, the number of in-person appearances is reduced to one per year, if the person has not been convicted of an

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offense with a term of imprisonment of one year or more, but the offender must still report telephonically three other times during the year. The court found that the cumulative effect of these reporting requirements is to put the registrant on de facto probation for the rest of his or her life. As explained by the trial court, the registrant must report every change in employment, residence, appearance, etc., to the PSP for the rest of their lives, and this information, along with their residence, is disseminated to the world via the internet. The trial court found these burdens oppressive. It was not persuaded that the mere fact that a registrant could challenge his or her future dangerousness after 25 years, and potentially be relieved of this burden, operated to meaningfully alleviate it. The court characterized this avenue of prospective relief as illusory, given that the 25-year period would likely stigmatize the offender during the most productive years of his life. Thus, the trial court concluded that this factor weighed in favor of finding the registration and notification provisions to be punitive.

Initially, the Commonwealth contends that Appellee failed to demonstrate a punitive nature by the "clearest proof," and stresses that, in analyzing this factor, both the trial court and Appellee failed to appreciate that the purpose of the statute is to protect the public through information sharing, not by reducing recidivism. With respect to this Mendoza-Martinez factor, the Commonwealth maintains that Subchapter H does not impose an affirmative disability or restraint upon a sexual offender. The Commonwealth points to Williams II, where our Court held that, if the disability or restraint is minor, its effects are unlikely to be punitive. In that vein, the Commonwealth reminds that, in Lacombe, which addressed the punitive nature of Subchapter I, our Court placed great weight on the fact that the number of in-person registration visits to the PSP had been reduced, relative to the first incarnation of SORNA, from a minimum of 100 visits over 25 years to 25 visits over 25 years, i.e., one per year. The Commonwealth offers that, for

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this 25-year period, Subchapter H drastically reduces the minimum number of in-person visits for Tier III registrants to 34, compared to the original version of SORNA, and to 28 visits for Tier II registrants.[17] *Thus, the Commonwealth maintains that the in-person visits under Subchapter H are virtually the same as those under Subchapter I. Related thereto, the Commonwealth posits that the addition of a removal provision invocable after 25 years, which we found significant in LaCombe in finding that Subchapter I was non-punitive, should equally apply here. The Commonwealth disputes the trial court's conclusion that the*

requirement that offenders appear in person whenever they have significant life changes is oppressive. The Commonwealth submits that such information is necessary to ensure that the registry is current, and that in-person visits are no more oppressive than similar tasks that one would normally have to perform in life — regardless of registration — such as completing legal documents, transferring money, and notifying insurance companies.

Appellee counters by asserting, broadly, that the purpose of the registration and notification provisions is punitive because, in his view, the empirical evidence shows no real relationship between these provisions and the reduction of recidivism, which, again, he contends is SORNA's primary purpose. Appellee argues that the reporting requirements of Subchapter H are more akin to the affirmative disability imposed by SORNA in Muniz than in Subchapter I, and points out that, under Subchapter H, in-person appearances are still required quarterly or semi-annually. Appellee adds that the telephonic registration and notification option to reduce in-person visits is not available until after three years of compliance, and, in any event, is currently not operational,

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despite Subchapter H being enacted over five years ago. Moreover, Appellee highlights that the law does not make allowances for homeless registrants.

We find persuasive the fact that Subchapter H reduces, for the first 25-year period, the minimum number of in-person visits for Tier III registrants to 34 from the original version of SORNA, and to 28 visits for Tier II registrants. 42 Pa.C.S. § 9799.15(e).[18] *While not as low as the annual in-person visitation requirement in Subchapter I before the Court in LaCombe, which led our Court to find those provisions to be non-punitive, we nevertheless find that this reduced number of visits does not impose an affirmative disability or restraint upon a sexual offender so as to be punitive. Moreover, we find significant the addition of the 25-year removal provision to Subchapter H. Id. § 9799.15(a.2). We relied upon such a removal provision in LaCombe in concluding that Subchapter I was non-punitive, and do the same here. Thus, as in LaCombe, we similarly find this first factor weighs in favor of finding Subchapter H to be nonpunitive in nature.*

Factor 2: Whether Subchapter H's requirements have historically been regarded as punishment

The second Mendoza-Martinez factor assesses whether the sanction at issue traditionally has been regarded as punishment. In making this assessment with respect to SORNA, our Court has historically focused on two aspects: (1) whether the scheme at issue mimicked historical forms of public shaming; and (2) whether the scheme significantly resembled probationary sentences.

The trial court noted that, in Lacombe, our Court concluded that SORNA's publication provisions, in light of the widespread reach of the internet, were comparable to shaming and were similar to probation, and that the registration and notification requirements of SORNA have historically been regarded as punishment. That, coupled

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with the fact that penalties for violating these provisions are located in the Crimes Code, compelled the trial court to conclude that this second factor weighed in favor of finding that Subchapter H's registration and notification requirements were punitive in nature.

The Commonwealth acknowledges that, in LaCombe, our Court recognized that the registry was akin to a form of public shaming. It asserts, however, that we should revisit that conclusion. Specifically, the Commonwealth recognizes our Court's concern regarding the registry's availability on the internet, but contends that the registry is not a search engine, that offenders' names do not appear in search engines, and that the registry is not accessible to search engines. Rather, the Commonwealth insists that the only

way to obtain information from the registry is to learn of the registry's existence and search the website. The Commonwealth adds that, if one accesses the sex offender database, one must agree that they will not use this information to harass or engage in other unlawful conduct towards the offender. The Commonwealth asserts that Appellee's experts offered no evidence to support the assertion that the registry spreads information on the internet.

Using an analogy, the Commonwealth points to the Pennsylvania Disciplinary Board website which provides information to the public regarding attorneys who have been subject to disciplinary action, and allows the public to search the website by name, attorney registration number, or geographic location, or, in the alternative, to view all recent disciplinary actions. The Commonwealth proffers that the Disciplinary Board website does not constitute punishment, but instead, like SORNA, provides a benefit to the public by offering information. While a disciplined attorney or sex offender registrant's presence on a website may be "shameful," the Commonwealth avers that it is not because of the presence on the website, but because of the underlying misconduct. Finally, the Commonwealth rejects the trial court's assertion that offenders are subject to increased

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incidents of harassment or discrimination, and argues that Appellee failed to provide any data regarding how many individuals visit the website or, of those that visit the website, how many have used it to discriminate against sex offenders. Even if sex offenders experience such ostracism, the Commonwealth claims that it is not the fault of the registry, but a direct consequence of their sexual crimes.

Appellee takes issue with the Commonwealth's suggestion that we should revisit our most recent reaffirmation in Lacombe that the registration and notification requirements constitute a form of public shaming and were akin to probation. Appellee points out that even the less onerous requirements of Subchapter I were found to be punitive in this regard. Moreover, Appellee stresses that the purpose of the PSP website is to spread information publicly, which undermines the Commonwealth's argument that access to it is limited. Thus, Appellee maintains that the registry is similar to shaming and probation.

Given the continued widespread dissemination of registry information to the public through the internet, which we deemed to be comparable to shaming punishments in LaCombe, and Subchapter H's continued requirements for registration and notification regarding, for example, changes in a registrant's residence and employment, and given its probation-like criminal penalties for noncompliance, we see no reason to deviate from our recent determination in LaCombe that this factor weighs in favor of finding Subchapter H's effect to be punitive.

Factor 4: Whether the operation of Subchapter H promotes the traditional aims of punishment

The fourth Mendoza-Martinez factor asks whether the challenged statute operates in a manner that promotes the traditional aims of punishment. The trial court concluded that the registration and notification requirements promoted the traditional aims of punishment - retribution and deterrence. The court emphasized that our Court in

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LaCombe gave little weight to this factor, as Subchapter I applied to crimes for which the offenders already had to register. As the crimes had already occurred, there was little deterrent effect to the requirements of Subchapter I. In comparison, the court explained that Subchapter H has a deterrent effect, as registration and notice do not occur until a crime has been committed. Moreover, the court reasoned the requirements for a Tier III registrant promotes retribution because the designation as a lifetime registrant brands the person a "high-risk, dangerous and incorrigible sex offender of whom citizens must always be wary." Trial Court

Opinion, 8/22/22, at 21. According to the trial court, this subjects the person to public shaming and marginalization for life, which is unquestionably retributive.

The Commonwealth argues that the registration and notification requirements do not promote the traditional aims of punishment, retribution, and deterrence. Specifically, the Commonwealth submits that future notification requirements are unlikely to deter one from committing a sex crime. It notes that the underlying offenses which require Tier II and III registration are serious criminal offenses with long jail terms, and posits that the registration and notification requirements are not likely to achieve the objective of deterrence and retribution to nearly the same degree as the penalties and public opprobrium attendant to the commission of the underlying Tier II and III offenses. In any event, the Commonwealth suggests that this factor, even if promoting deterrence, should be given little weight in the overall punitive analysis.

Appellee argues that we should find that the registration and notification requirements have a significant deterrent effect given their prospective application and lifetime nature, which will logically serve as a deterrent, thus, weighing heavily in favor of finding them to be of a punitive nature.

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In LaCombe, our Court found that SORNA's provisions promoted retribution. LaCombe, 234 A.3d at 624. As noted in that decision, however, Subchapter I's provisions were retroactive, and, thus, the deterrent effect was diminished because the registrant had already committed the criminal offenses. Nevertheless, our Court found this factor to weigh in favor of finding Subchapter I to be punitive, albeit giving it less weight. By contrast, Subchapter H is prospective in its application. While we question the strength of the deterrence effect of registration requirements compared to the criminal conviction and sentence for the underlying sex offense, nevertheless, we find Subchapter H promotes retribution and has a deterrence component. Thus, we conclude that this factor weighs in favor of finding Subchapter H to be punitive.

Factor 6: Whether there is an alternative purpose to which Subchapter H may be rationally connected

The sixth factor considers whether there exists a nonpunitive alternative purpose to which the statute rationally may be connected. It is plain that Subchapter H was enacted to protect the public from sexual offenders, and, thus, was rationally connected to public health and safety. The trial court, however, analyzed whether there was a rational relationship between the registration and notification requirements and the public protection aspects of SORNA through a reduction in recidivism. Specifically, the court relied on the testimony of Dr. Letourneau and Professor Prescott who testified that registration and notification provisions do not reduce the rate of recidivism, but, to the contrary, because of stigma and diminished employment and housing prospects, hinder the offender's reintegration into society because they are branded as essentially irredeemable sex offenders. The trial court concluded that Appellees' experts had established that the reduction in recidivism and the public safety benefits the legislature claimed SORNA would provide were not rationally related to the purpose for which they were enacted.

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The Commonwealth argues that, as the trial court found, the registration and notification provisions have a valid non-punitive purpose — protecting public safety. The Commonwealth rejects the trial court's conclusion that Subchapter H was not rationally related to its non-punitive purpose because the registry does not have the effect on recidivism anticipated by the legislature. The Commonwealth again stresses that the statute was not intended to impact recidivism; thus, it did not matter whether Appellees' experts demonstrated that recidivism rates of sexual offenders and non-sexual offenders are the

same, as the goal of the statute was not reducing recidivism, but promoting public safety. As Appellee did not present any evidence that the statute did not protect the community in the manner designed, the Commonwealth maintains that this factor weighs in favor of finding the statute to be non-punitive.

Appellee, like the trial court, focuses upon whether the registry is rationally related to the intended goal of reducing recidivism. According to Appellee, his evidence, as credited by the trial court, established that SORNA did not have the effect on recidivism and public safety he envisions was intended by the General Assembly and, thus, was not rationally related to the purpose of reducing recidivism. As the law does not reduce recidivism, Appellee maintains that it constitutes punishment.

In LaCombe, we noted that the General Assembly declared that the purpose of Subchapter I was to protect public safety through registration and community access to information regarding sexually violent predators. We found that this purpose was based on the General Assembly's finding that "sexually violent predators and offenders pose a high risk of engaging in further offenses even after being released from incarceration or commitments, and protection of the public from this type of offender is a paramount government interest." LaCombe, 234 A.3d at 625 (citing 42 Pa.C.S. § 9799.51(a)(2)). We deferred to the General Assembly's findings in this regard, as we did in Muniz,

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concluding that there was an alternative purpose other than punishment - informing and protecting the public regarding sexual offenders the General Assembly considers dangerous - weighing in favor of finding Subchapter I to be nonpunitive. Id.

Having found above that Appellee has not met his high burden of establishing that the presumption that sex offenders pose a high risk of reoffense is not true, and accepting that this presumption serves as the basis for the legislature's desire to protect the public from sexual offenders, as in LaCombe, we conclude that there is a purpose other than punishment to which Subchapter H is rationally connected: informing and protecting the citizenry regarding sexual offenders the legislature has found to pose a high risk of reoffense. Thus, we believe that this factor heavily weighs in favor of finding Subchapter H to be nonpunitive.

Factor 7: Whether Subchapter H is excessive in relation to the alternative purpose

Having discerned an alternative statutory purpose — informing and protecting the public — we proceed to the final Mendoza-Martinez factor, which requires us to ascertain whether Subchapter H was nonetheless excessive in relation to the statute's non-criminal objective. In Williams II, in assessing Megan's Law II, our Court noted that, if the statute "is likely to result in individuals being deemed sexually violent predators who in fact do not pose the type of risk to the community that the General Assembly sought to guard against, then the Act's provisions could be demonstrated to be excessive." Williams II, 832 A.2d at 983.

The trial court concluded that the registration and notification requirements were excessive in relation to their proffered purpose. It noted that these requirements are based solely on the title of the offense, not the circumstances and personal characteristics of the offender. The court pointed to testimony from Dr. Hanson that the title of the offense bore no relationship to the question of whether the offender was likely to recidivate as the

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seriousness of the offense did not correlate with a likelihood of recommission. The court asserted that Subchapter H did not "function as intended and is not effective at promoting public safety" and "diverts resources away from offenders who could most benefit from them." Trial Court Opinion, 8/22/22, at 27. The court also observed that Subchapter H encompasses crimes which have no sexual component to them.

The Commonwealth avers that Subchapter H is not excessively punitive in relationship to its protective purpose. Initially, the Commonwealth offers that this factor "is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy;" rather, the inquiry is only to determine whether the regulatory means are "reasonable in light of [the legislature's] nonpunitive objective." Smith v. Doe, 538 U.S. 84, 105 (2003). In this regard, the Commonwealth stresses that the failure of the statute to require individualized assessment of a particular offender's propensity to reoffend does not render it excessively punitive, as the trial court concluded, given that it functions in the same manner as all statutes: it reflects a legislative policy determination that a particular group should abide by certain rules, and, in this case, the registration and notification rules sex offenders must abide by are reasonable. Here, the General Assembly organized its tier-based classification system around the perceived seriousness of the sexual offense which, in turn, is tied to the harm caused by the offense. While the trial court may disagree with this policy choice, the Commonwealth asserts that this does not make the statute unconstitutional. Furthermore, the Commonwealth rejects the trial court's assertion that Subchapter H is overbroad because it includes offenders who have committed crimes with no sexual component to them, explaining that simply because a crime does not contain a sex element does not mean it lacks a close association with sexual assault, such as kidnapping and child luring.

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Appellee responds that the lifetime registration and notification requirements are excessive, as Subchapter H did not remove most non-sexual offenses from the registration requirements and still requires certain individuals whose offense involved no sexual component to register. Furthermore, Appellee offers his evidence that Subchapter H will require registration and notification of many individuals for life, even though statistically those individuals are unlikely to reoffend.

The General Assembly has created and maintained a tier-based classification system distinguishing classes based upon (1) the seriousness of the offense which, in turn, is based upon the harm caused by the sexual offense, and (2) the underlying presumption that sexual offenders pose a high risk of reoffense. A tier-based construct is a policy decision for the legislature, and it is based on a presumption — the high risk of a sex offender recidivism — that we have upheld. That being the case, the lack of an individualized assessment does not render Subchapter H's requirements excessive. Moreover, Appellee's emphasis on recidivism, or lack thereof, is misplaced, as the non-punitive purpose of the statute is informing and protecting the public. Concerning Appellee's contention that Subchapter H is too broad because it covers certain crimes without a direct sexual component, as in LaCombe, we are substantially aligned with the Commonwealth on this factor. As noted above, the General Assembly has removed certain qualifying offenses, lowered the registration periods for many offenses, and reduced in-person reporting requirements. As for the continued requirement of in-person visits, we find them to be a requisite for maintaining an accurate registry, which is necessary for public protection. Moreover, Subchapter H includes removal procedures for lifetime registrants, which the absence of in the prior version of SORNA had troubled our Court. See LaCombe, 234 A.3d 626. We believe that these provisions in Subchapter

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H substantially diminish any charge of excessiveness and find that this factor weighs to a great degree in favor of finding Subchapter H to be nonpunitive.

B. Balancing the Factors

All that remains for purposes of the Mendoza-Martinez analysis is the balancing of relevant factors. The trial court concluded that all of these factors uniformly weighed in favor of concluding that Subchapter H was punitive.

We initially note that the Mendoza-Martinez factors provide a "useful framework," and are "useful guideposts," but are "neither exhaustive nor dispositive." Smith, 538 U.S. at 97. That said, our Court has considered these factors, and their relative weight, in determining whether legislation constitutes criminal punishment. Of the five factors to which we assigned weight in this case, we find that two weighed in favor of finding Subchapter H to be punitive in effect, and three weighed in favor of finding the legislation to be nonpunitive, with the sixth and seventh factors being given the greatest weight.

In our view, weighing the Mendoza-Martinez factors does not compel the conclusion that Subchapter H is punitive. Here, the General Assembly created a tier-based classification system organized by seriousness of the offense, which, in turn, is tied to the degree of harm caused by the crime. This is a policy-based decision vested in the legislature. Like Subchapter I, we find that Subchapter H significantly changed the original version of SORNA with the apparent goal of ensuring that the legislation was not punitive in nature. Indeed, Subchapter H has a significantly less burdensome impact on the life of the offender than its predecessor. Moreover, we find compelling the Commonwealth's argument that not only does Subchapter H offer a valid non-punitive purpose of informing and protecting the public, but that Appellee failed to present compelling evidence establishing that its registration and notification requirements were excessive, i.e., not rationally or reasonably related to this legislative purpose. As with

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Appellee's irrebuttable presumption challenge, it was incumbent upon him to show that these requirements have no rational relationship to the stated goal of promoting community safety. Appellee produced evidence only of varying recidivism rates for sex offenses within the class of sex offenders, as a whole, and we find this is insufficient to show that the goal of community protection is not achieved, to some extent, by the registration and notification requirements. Thus, we conclude that Appellee did not meet his heavy burden, by the clearest of evidence, to rebut the General Assembly's stated non-punitive purpose. This being the case, we also conclude that, because a finding that Subchapter H constitutes criminal punishment is a threshold factor in determining the viability of Appellee's derivative constitutional challenges — that the legislation unconstitutionally usurps judicial power over sentencing in violation of the separation of powers doctrine, constitutes cruel and unusual punishment under the Eighth Amendment, and infringes upon the right to a trial by jury by failing to require that facts which increase the punishment imposed for the underlying crime be found by a reasonable doubt — these constitutional claims fail.[19]

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VII. Conclusion

We hold that Appellee failed to meet his burden to establish that Subchapter H's irrebuttable presumption, that sex offenders pose a high risk of reoffense, is constitutionally infirm. Furthermore, we conclude that Appellee failed to meet his burden in demonstrating that Subchapter H constitutes criminal punishment. Accordingly, we reject his subsidiary constitutional challenges. Thus, for the above stated reasons, we reverse the Chester County Court of Common Pleas' order finding Subchapter H unconstitutional and relieving Appellee of his duty to comply with Subchapter H.[20]

Jurisdiction relinquished.

Justices Dougherty, Mundy and Brobson join the opinion.

Justice Mundy files a concurring opinion.

Justice Wecht files a concurring and dissenting opinion.

Justice Donohue files a dissenting opinion.

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CONCURRING OPINION

MUNDY JUSTICE.

I join the Majority opinion, except for its conclusion that the online registration requirements provided in Subchapter H of the Sexual Offender Registration Act (SORNA), 42 Pa.C.S. §§ 9799.10 - 9799.42, resemble colonial era shaming punishments under the second factor of the test set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). I do so for the same reasons detailed in my concurring opinion in Commonwealth v. Lacombe, 234 A.3d 602 (Pa. 2020) (Mundy, J., Concurring).

As noted by the Majority, this Court has traditionally considered the following with respect to the second factor of the Mendoza-Martinez test: "(1) whether the scheme at issue mimick[s] historical forms of public shaming; and (2) whether the scheme significantly resemble[s] probationary sentences." Majority Op. at 45. Relying on Lacombe, the Majority concludes that the "widespread dissemination of registry information to the public through the internet[,]" the "continued requirements for registration and notification[,]" and the "probation-like criminal penalties for

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noncompliance" weigh in favor of finding the effect of Subchapter H punitive under this factor. Id. at 47. I disagree. As I explained in Lacombe:

> *The purpose of the online registry is to provide the public with information necessary for its safety. It appears illogical to therefore conclude that accessibility to this information weighs in favor of finding the statute punitive. The internet aspect of sex offender registries is also a federally mandated feature. See 34 U.S.C. § 20920 ("Except as provided in this section, each jurisdiction shall make available on the Internet, in a manner that is readily accessible to the public, all information about each sex offender in the registry."). This requirement was deemed essential with the understanding that such information would be widely accessible to the public.*

Lacombe, 234 A.3d 627. In light of the foregoing, I do not believe the second factor weighs in favor of finding Subchapter H punitive, despite the probation-like penalties for noncompliance. As such, I would conclude that four of the five of the relevant factors, as opposed to three of the five factors, weigh in favor of finding Subchapter H nonpunitive. I nevertheless concur, as I agree with the Majority's ultimate conclusion that these factors, on balance, weigh in favor of finding Subchapter H nonpunitive.

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CONCURRING AND DISSENTING OPINION

WECHT JUSTICE.

This is the latest in a long line of cases weighing constitutional challenges to statutes that impose registration and notification obligations upon convicted sexual offenders.[1] George Torsilieri,[2] who must comply with these requirements for the rest of

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his life,[3] attacks Subchapter H of SORNA II[4] on two fronts. First, he argues that the legislative premise upon which SORNA II is grounded-that sexual offenders pose a higher risk of recidivism than other types of convicted offenders-amounts to an unconstitutional irrebuttable presumption, which, in turn, violates his state constitutional right to reputation.[5] Second, he argues that SORNA II is punitive in nature and, thus, violates the Sixth Amendment's right to trial by jury,[6] the Eighth Amendment's prohibition of cruel and unusual punishments,[7] and the foundational principle of separation of powers.

Today's Majority concludes that Torsilieri has not carried his "heavy burden"[8] of demonstrating that SORNA's legislative policy

choices have created an unconstitutional, irrebuttable presumption. The Majority acknowledges the deficiencies inherent in the irrebuttable presumption doctrine, the broad criticisms that it has engendered, and the fact that federal courts no longer apply it.[9] The Majority nonetheless allows that doctrine

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to persist in Pennsylvania, albeit for no better reason than inertia. That this Court has "continued to employ"[10] this defunct doctrine is not a sufficient reason for us to perpetuate it in our law, especially when it has been widely rejected or abandoned almost since its inception. I would follow the path paved for us by the Supreme Court of the United States and by numerous federal courts, and would bury the doctrine once and for all. Thus, I concur only in the result reached by the Majority on this issue.

Next, after balancing the various aspects of SORNA II using the Martinez-Mendoza[11] model and finding that Subchapter H is not punitive, the Majority rejects Torsilieri's remaining constitutional challenges. I disagree. As I concluded previously with regard to Subchapter I, because Subchapter H "restrains the offender's liberty, resembles punishment, and is aimed at deterrence and retribution," it is punitive in nature.[12] Thus, I respectfully dissent from this aspect of the Majority Opinion.

I. The Irrebuttable Presumption Doctrine

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The origin of the irrebuttable presumption doctrine often is traced to the United States Supreme Court's 1971 decision in Bell v. Burson.[13] But the doctrine actually is of older vintage. It set down its roots decades earlier in a series of decisions in which the Supreme Court invalidated several tax laws, beginning with Schlesinger v. Wisconsin.[14]That case involved a Wisconsin statute which required gifts made within six years before death to be considered part of the donor's taxable estate.[15] The Wisconsin law "plainly [undertook] to raise a conclusive presumption" that all such gifts "were made in anticipation of" death.[16] This presumption, the Court opined, was "declared to be conclusive and cannot be overcome by evidence. It is no mere prima facie presumption of fact."[17] The Court invalidated the provision, ruling that the legislative judgment upon which it was predicated created arbitrary distinctions between gifts transferred before and after six years "without regard to actualities," and which were "in plain conflict with the Fourteenth Amendment."[18] The Court rejected the argument that a state's policy determination to minimize inheritance tax avoidance could allow that state to impose consequences on citizens who exercise their right to distribute property. To uphold such a law, the Court determined, would be to subordinate the rights of the individual to the purported needs of the state: "Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is forbidden

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to deny due process of law or the equal protection of the laws for any purpose whatsoever."[19]

The United States Supreme Court used similar reasoning in two subsequent tax cases, Hoeper v. Tax Commission[20] and Heiner v. Donnan.[21] In Hoeper, the Court reviewed a tax statute which provided that, in computing the aggregate amount of income tax payable by a family, a wife's income was added to the husband's, and then assessed to, and payable by, the husband. The Court held that, "since in law and in fact the wife's income was her separate property, the state was without power to measure his tax in part by the income of his wife."[22] The Court had "no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary

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to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income."[23]

The federal tax provision at issue in Heiner treated all gifts or transfers of value made within two years of death as part of the gross taxable estate of the decedent.[24] *The validity of the provision, the Court explained, hinged upon whether Congress has "the constitutional power to deny" the decedent's heirs the opportunity to demonstrate that the inter vivos gift was not made in contemplation of death in order to decrease the gross amount of a soon-to-be taxable estate.*[25] *The Court had "no doubt" that Congress has the authority to require that gifts made for such purpose be included in the estate, and that it could create a "rebuttable presumption" that gifts made during a prescribed period before death are made in contemplation thereof.*[26] *However, that is not what Congress did. The provision flowed from an irrebuttable presumption, one that is "made definitively conclusive-incapable of being overcome by proof of the most positive character."*[27]*Although legislatures enjoy vast policymaking discretion, "a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment."*[28]

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After Heiner and Hoeper, the irrebuttable presumption doctrine lay dormant for decades until Bell revived it in 1971. There, the Court reviewed a Georgia statute that required "the motor vehicle registration and driver's license of an uninsured motorist involved in an accident . . . be suspended unless he posts security to cover the amount of damages claimed by aggrieved parties in reports of the accident."[29] *Under the Georgia law, the driver was afforded an administrative hearing before the suspension, but was precluded from introducing evidence at that hearing to show that he was not at fault for the accident.*[30]

The Court noted that a driver's license, once issued, "may become essential in the pursuit of a livelihood."[31] *Thus, a state may not deprive an individual of such property interest "without that procedural due process required by the Fourteenth Amendment."*[32]*The Georgia statute before the Court created the irrebuttable presumption that an uninsured driver in an accident was at fault for the accident. Such a statute failed to afford adequate procedural due process. The Court explained that, "[s]ince the statutory scheme makes liability an important factor in the [s]tate's determination to deprive an individual of his licenses, the [s]tate may not, consistently with due process, eliminate consideration of that factor in its prior hearing."*[33] *A hearing must be "meaningful" and "appropriate to the nature of the case," one in which a person has a fair opportunity to*

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rebut the central factor being used to deprive him of a protected interest.[34] *The hearing afforded by the Georgia statute did "not meet this standard."*[35]

Notably, however, the Bell decision did not rest entirely or even principally upon procedural due process. The Court premised its ruling more directly upon the substantive inadequacies it discerned in the statute's legislatively-drawn classifications. The Court took pains to explain what the Georgia legislature could have done under the Fourteenth Amendment, to expound upon why the policy underlying the law was insufficient, and to offer constitutionally acceptable alternatives.[36] *The Court did not invoke the term "irrebuttable presumption," but, by delving so deeply into the legislative policy-making, it set the stage for the decisions to come. And it set the stage for criticisms that would follow as well.*

One year after Bell, the Court returned to the irrebuttable presumption doctrine. Stanley v. Illinois[37] concerned an Illinois law that designated both the mother and father of children born in wedlock as "parents" but included only the mother when the child was born out of wedlock.[38] An unwed father was not a "parent." When the State of Illinois

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sought to declare a child to be a ward of the state due to allegations of neglect, only a "parent" could object. An unwed father, not legally a "parent," was "presumed at law" to be unfit, and was precluded from objecting to the state's attempt to take custody of his child.[39] For "parents," the law provided notice, a hearing, and proof of unfitness before the child could be removed. For non-"parents" (including unwed fathers) the law created an irrebuttable presumption of non-fitness, such that no hearing was required.[40]

The Stanley Court stressed that a father's interest in retaining custody of his child is a "cognizable and substantial" right subject to the dictates of equal protection.[41] And, the Court recognized, a state has a legitimate interest in protecting children from abuse. The Constitution, the Court explained, is not concerned with the legitimacy of legislative ends, but instead with "whether the means used to achieve these ends are constitutionally defensible."[42] The problem was that the state sought to achieve its ends without affording the unwed father a hearing to prove that he was a fit parent. The state had no interest in separating children from fit parents, yet its statute failed even to attempt to separate the fit from the unfit. The Illinois law simply presumed that all unwed fathers were unfit.

As it did in Bell, the Stanley Court considered the legislative policy underpinning the law. For instance, the Illinois law assumed that most unmarried fathers were neglectful. That may be true, the Court said; but it also may be true that some such fathers are "wholly suited to have custody of their children."[43] Under the Illinois law, every unwed father is denied the chance to prove his fitness. The Court acknowledged that, for

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practical purposes, "prompt efficacious procedures" are a "state interest worthy of cognizance" and that "[p]rocedure by presumption is always cheaper and easier than individualized determination."[44] But, the Court opined, the Constitution "recognizes higher values than speed and efficiency."[45] Indeed, the Court emphasized, "one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."[46] The Court held that a law predicated upon an irrebuttable presumption-one which the impacted party has no opportunity to overcome-"needlessly risks running roughshod over the important interests" affected by the law.[47] Due process requires at least a hearing at which a father can attempt to rebut the presumption upon which the law is based. This right must prevail over any convenience that results from recourse to presumptions.

The Court continued its development of the irrebuttable presumption doctrine the next year in Vlandis v. Kline.[48] Connecticut (like many or most states) allowed in-state residents who attend state-owned colleges and universities to pay less in tuition than non-residents.[49] Connecticut law deemed u[nmarried students to

be non-residents if their primary address was located outside Connecticut at any point in the year prior to admission. By contrast, married students were classified as non-residents only if their

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legal address was outside the state at the time of application to the school. These classifications were permanent and irrebuttable throughout the student's enrollment.[50]

The Court invalidated this statutory distinction. The Court acknowledged that most who apply to an institution of higher education from outside a state have no intention to be, and will never become, permanent residents of that state. However, the premise was not universally true. Not every out-of-state applicant fell within this category. Thus, relying upon Bell and Stanley, and summarizing the modern irrebuttable presumption doctrine, the Court held that it is "forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true, in fact, and when the State has reasonable alternative means of making the crucial determination."[51] Due process, the Court explained, "require[s] that the State allow such an individual the opportunity to present evidence" to rebut the presumption.[52]

Chief Justice Burger and Justice Rehnquist dissented. Chief Justice Burger accused the Court of applying strict scrutiny to the Connecticut statutory scheme, but without ever identifying how the law "impairs a genuine constitutional interest truly worthy of the standard of close judicial scrutiny."[53] To strike down the scheme, Chief Justice Burger asserted, the Court had to recast the "compelling state interest" prong of strict scrutiny into a search for a "permanent and irrebuttable presumption."[54] In his view, the Court sidestepped the correct inquiry in favor of applying a more "dubious" doctrine in

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order to achieve a "just result in a particular case."[55] Chief Justice Burger saw the irrebuttable presumption analysis as fundamentally flawed, because it had no discernible boundaries and likely exceeded the Court's authority. "The real issue here is not whether holes can be picked in the Connecticut scheme; of course, that is readily done with this bad statute."[56] Regardless of whether a law is enacted by a state legislature or by Congress, the Court "can find flaws, gaps, and hard and unseemly results at times. But our function in constitutional adjudication is not to see whether there is some conceivably less restrictive alternative to the statutory classifications under review."[57] Rather, the Court's task, as invoked in Bell and Stanley, is to identify essential, core constitutionally protected rights and then determine if the State is justified in infringing upon that right. Applying the irrebuttable presumption doctrine instead of strict scrutiny, Chief Justice Burger feared, would put the Court in the untenable position of invalidating statutes based upon the Court's personal preferences concerning the wisdom of the particular statutory classification. The Chief Justice suggested that, instead of attempting to implement "unrealistic" and "unexplained" standards, "when we examine a statute of a State we should lay aside preferences for or against what the State does in a few particular or isolated cases and look only to what the Constitution forbids a State to do, so as to avoid putting pressure on the States to engage in legislative devices to escape from the hobbles

we place on them on matters of purely state concern."[58]

Justice Rehnquist would have found Connecticut's statutory solution to a complicated problem to be constitutional, despite the "rough edges around its

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perimeter."[59] The doctrine applied by the Court, Justice Rehnquist explained, was based upon a distorted notion of substantive due process-one in which courts substituted their "social and economic beliefs for the judgment of legislative bodies"-that "has long since been discarded."[60] The Court should not be "concerned . . . with the wisdom, need, or appropriateness of the legislation."[61]

Despite the criticism levied by the dissenting Justices, the irrebuttable presumption doctrine lived on, and the Court continued to apply it. Shortly after Vlandis, the Court used the doctrine to strike down public-school regulations that required pregnant teachers to take mandatory maternity leave without compensation five months before their expected delivery dates. In that case, Cleveland Bd. Of Educ. v. LaFleur,[62] Justice Rehnquist again dissented, finding "no judicial standard of measurement" that would prohibit the line-drawing that occurred in the case.[63] After all, the act of legislating "involves the drawing of lines, and the drawing of lines necessarily results in particular individuals who are disadvantaged by the line drawn being virtually indistinguishable for many purposes from those individuals who benefit from the legislative classification."[64]Justice Rehnquist asserted that the Court's "disenchantment with irrebuttable presumptions," and its "preference for individualized determination," were "nothing less than an attack upon the very notion of lawmaking itself."[65]

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Justice Powell concurred in the result but was "troubled" by the Court's invocation of the irrebuttable presumption doctrine, one that he had previously supported but now felt warranted reexamination.[66] He found merit in Justice Rehnquist's argument that the doctrine necessarily encroaches upon "the traditional legislative power to operate by classification."[67] "As a matter of logic, it is difficult to see the terminus of the road upon which the Court has embarked under the banner of irrebuttable presumptions."[68] In Justice Powell's view, the better avenue for challenges to legislative classifications lies under the Equal Protection Clause.

Then, in 1975, the irrebuttable presumption doctrine unraveled, as the views of the dissenting Justices emerged as the majority view. In an opinion authored by Justice Rehnquist in Weinberger v. Salfi,[69] the Court significantly circumscribed the doctrine. Before the Salfi Court was a social security eligibility provision that automatically deemed a marriage to be fraudulent if it had not been entered into at least nine months before death.[70] The lower court had concluded that the presumption of fraud was "conclusive, because applicants were not afforded an opportunity to disprove the [presumed] presence of [an] illicit purpose" behind the marriage,[71] and that the statute "presumed a fact which

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was not necessarily or universally true."[72] The Supreme Court held that the lower court erred in finding the provision unconstitutional upon these bases.[73]

The Court acknowledged that its prior cases, including Stanley, Vlandis, and LeFleur, "do not all sound precisely the same note" as the

Court was now sounding.[FN94">74]Those prior cases, however, were distinguishable. At issue was a statutory social welfare program of the type that the Court historically upheld so long as the statute did not "manifest a patently arbitrary classification, utterly lacking in rational justification."[75] Such a social welfare provision will be deemed consistent with due process, even if it is predicated upon a conclusive presumption, provided that it is "rationally related to a legitimate legislative objective."[76] Unlike the Court's earlier irrebuttable presumption doctrine cases, in which the interests impacted by the classifications garnered heightened constitutional protection, the welfare provision was "a noncontractual claim to receive funds from the public treasury," a claim that "enjoys no constitutionally protected status."[77]The Court warned that extending the irrebuttable presumption doctrine to social welfare statutes would "turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution."[78]

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Although the Salfi Court did not expressly overrule the irrebuttable presumption precedents, that decision "severely hamper[ed] the applicability of the doctrine,"[79] and may well have become its obituary. In Trafalet v. Thompson, the United States Court of Appeals for the Seventh Circuit noted that, since Salfi, the Supreme Court has not invoked the doctrine in any other case, despite having the opportunity to do so.[80] The United States Court of Appeals for the Fifth Circuit thereafter referred to the doctrine as "a strange hybrid of procedural due process and equal protection invented by the Supreme Court in the early 1970s, and laid to rest soon after."[81] The effective abandonment persists to this day. The Supreme Court has never again invalidated a law on the basis of the irrebuttable presumption doctrine.

Instead, the Supreme Court has funneled challenges to statutory or regulatory classifications where they belong: under the Equal Protection Clause. In Michael H. v. Gerald D.,[82] for instance, Justice Scalia explained why such arguments do not arise from an inchoate notion of procedural due process, but instead from the Fourteenth Amendment's guarantee of equal protection of the law:

> This Court has struck down as illegitimate certain "irrebuttable presumptions." Those holdings did not, however, rest upon procedural due process. A conclusive presumption does, of course, foreclose the person against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will in fact not further the lawful governmental policy the presumption is designed to effectuate. But

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> the same can be said of any legal rule that establishes general classifications, whether framed in terms of a presumption or not. In this respect there is no difference between a rule which says that the marital husband shall be irrebuttably presumed to be the father, and a rule which says that the adulterous natural father shall not be recognized as the legal father. Both rules deny someone in [that] situation a hearing on whether, in the particular circumstances of his

> case, [the state's] policies would best be served by giving him parental rights. Thus, as many commentators have observed, our "irrebuttable presumption" cases must ultimately be analyzed as calling into question not the adequacy of procedures but-like our cases involving classifications framed in other terms, the adequacy of the "fit" between the classification and the policy that the classification serves. We therefore reject [the father's] procedural due process challenge and proceed to his substantive claim.[83]

The Supreme Court has not been the doctrine's only critic. The doctrine has been widely panned by courts and scholars alike. The United States Court of Appeals for the Seventh Circuit called it "unworkable regardless of the interest which might have invoked it."[84] The United States Court of Appeals for the Second Circuit criticized it as a "potentially circular doctrine" that can be used to recharacterize every rebuttable presumption as an irrebuttable one "by redefining the relevant class."[85] The United States Court of Appeals for the Fifth Circuit decried the doctrine because it "forced the government to grant hearings to persons who claimed to have been wrongly trapped inside overinclusive classifications."[86] Along these lines, two prominent scholars criticized the foundation and application of the doctrine, as follows:

> By masking substantive decisions in procedural language, the Supreme Court, in the irrebuttable presumption cases, confused due process and equal protection analysis. Irrebuttable presumption analysis allowed the Court to overturn legislative decisions without having to justify the use of judicial power as would an open use of substantive due process or equal

> protection analysis. The use of irrebuttable presumption language was a conceptually confused, if not dishonest, method of justifying independent judicial review of legislative classifications. The declining use of irrebuttable presumption analysis may evidence increasing willingness of justices to address directly the judicial role in reviewing legislatively created classifications.[87]

Another scholar characterized the Supreme Court's initial approach to irrebuttable presumption claims as "fundamentally misconceived,"[88] while yet another noted that federal courts have "uniformly abandoned" the doctrine in favor of assessing the validity of statutory classifications under an equal protection framework.[89]

The point is that, despite its auspicious start, the irrebuttable presumption doctrine has not endured. Instead, it has succumbed. The Supreme Court of the United States has abandoned it, and the federal judiciary refuses to apply it. Nonetheless, this Court- perhaps one of the last to do so-continues to apply the long-defunct doctrine. There is no good reason for persisting in this error.

As we have applied it, the current iteration of the irrebuttable presumption doctrine requires courts evaluating statutory classifications to assess first whether there is a constitutionally protected interest at stake that is burdened by an irrebuttable presumption. Then, the court must determine whether the

premise underlying the classification-the presumption-is universally true. If it is not, the court must decide

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whether a reasonable alternative means exists for ascertaining the presumed fact.[90] Besides encroaching on the legislature's prerogative to make policy choices, the doctrine is, among its other defects, an illusory exercise, as courts are not equipped to analyze the questions that this test poses. No statutory classification is always going to be universally true. Thus, in cases like today's, courts are left to analyze "meaningful statistical measure[s]"[91] in a futile and misplaced effort to ascertain whether (or not) the policy decision rendered by the legislature supports the particular legislative presumption. In this case, the doctrine forces us to examine complicated statistical data generated by experts and decide whether there is a consensus in the field that would undermine the premise underlying the sexual offender law at issue. Second guessing the wisdom of legislation based on a judicial attempt at data-crunching is not in our wheelhouse. More importantly, it is not within our constitutional authority. Yet, this is the fool's errand upon which the irrebuttable presumption doctrine invites us to embark.

The doctrine is incomprehensible. It forces jurists to become pseudo-legislators. The test compels judges not to consider whether a recognized right is being burdened beyond permissible constitutional limits, but instead whether the statutory classification was a wise choice. At best, the doctrine compels courts to question the policy decisions of the legislative branch, and, at worst, to substitute the court's judgment for that of the legislature elected to make those policy decisions. As Justice Rehnquist opined in Vlandis, courts should not be "concerned . . . with the wisdom, need, or appropriateness of legislation."[92] Because it not only allows, but encourages, such second-guessing of policy, the irrebuttable presumption doctrine is "nothing less than an attack upon the very

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notion of lawmaking itself."[93] This is not to say that no avenue is available for challenges to statutory classifications that burden a protected right or that lack any rational basis. As Justice Powell and Justice Scalia explained, that avenue is the Equal Protection Clause, not some amorphous doctrine derived vaguely from references to due process.[94]

Despite these criticisms, and despite the fact that both the United States Supreme Court (the doctrine's creator) and the rest of the federal judiciary have long since buried the doctrine, this Court stubbornly perpetuates it. The Majority's justification for continuing to apply the doctrine is simply that we have done so in the past.[95] Precedential inertia is no reason to apply a long abandoned and constitutionally indefensible doctrine.[96] This path encourages parties to continue to raise non-viable claims, and it discourages them from seeking relief under the Equal Protection Clause, an approach that would be constitutionally sound and justiciable without treading upon the role of the legislative branch. That this Court applied the irrebuttable presumption doctrine in J.B. is no justification either. The right answer is not to perpetuate the error and prolong this misadventure, but rather to admit that the Court erred when it used the doctrine in J.B. as well, and then to move on.

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The irrebuttable presumption doctrine is a jurisprudential corpse. For whatever reason, this

Court insists on pretending it remains alive. The time has come to bury it.[97]

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Nonetheless, because the Majority ultimately denies relief on Torsilieri's irrebuttable presumption claim, I concur in the result on this issue.

II. Analysis of Subchapter H Using the Mendoza-Martinez Factors

In Muniz, we held that SORNA I, when applied retroactively, was punitive in effect, and, thus, constituted an unconstitutional ex post facto law.[98] The General Assembly responded by enacting a new version of the regulatory scheme. This time, the General Assembly split the law in two. Subchapter I applies to those convicted sexual offenders whose crime occurred before December 20, 2012. Subchapter H applies to offenses that were committed after that date. In Lacombe, I explained that, in enacting Subchapter I, the General Assembly moved the needle "incrementally in a constitutional direction."[99] But the new law did not "go far enough to transform the punitive scheme into a regulatory one."[100] The law remained punitive in effect and, because it applied retroactively, should have been stricken as an unconstitutional ex post facto law.[101]

Subchapter H-the half of SORNA II that applies prospectively-does not differ significantly from Subchapter I. If anything, Subchapter H is, in effect, even more punitive than Subchapter I. Starting in Lacombe, and continuing today, the Majority misconstrues the nature of this regulatory scheme, and ignores the long-lasting punitive impact which that scheme imposes on a person's life. Because the Majority finds Subchapter H to be constitutional when it clearly is not, I respectfully dissent.

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Subchapter H applies to those convicted of a "sexually violent offense" that occurred on, or after, December 20, 2012,[102] and creates a statewide registry of those who are subject to the subchapter's many regulatory provisions.[103] A "sexual offender"[104]-a person who has been convicted of a Tier I, Tier II, or Tier III offense[105]- must register as such under Subchapter H for fifteen years (Tier I sexual offenders),[106] for twenty-five years (Tier II sexual offenders),[107] or for life (Tier III sexual offenders or "sexually violent predators"[108]).[109] A sexual offender must register immediately upon release from confinement in a correctional facility, or release from probation, parole, or a state intermediate punishment program.[110] Subchapter H requires every sexual offender to make a number of in-person appearances at certain approved locations throughout

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each year. A Tier I sexual offender must appear in person one time per year,[111] while a Tier II sexual offender must report in person semiannually.[112] Tier III sexual offenders and "sexually violent predators" must register in-person four times per year.[113] However, if a Tier II or Tier III sexual offender complies with his or her registration obligations for a period of three years, and has not been convicted of any new crimes, he or she only needs to make one in person appearance per year. The remaining appearances may be made by telephone.[114] In addition to these personal appearances, a sexual offender is subject to other restrictions that require in-person compliance. For instance, a sexual offender must appear in person at least twenty-one days before traveling abroad, and must provide the Pennsylvania State Police with his or her departure and return dates, destination, and lodging arrangements.[115]

At the initial registration appearance, each offender must be photographed and fingerprinted,[116] and must "provide or verify" the following: (1) name, alias, nickname, pseudonym, or ethnic or tribal name; (2) any name or designation used for purposes of internet communications or postings; (3) telephone number; (4) social security number; (5) addresses for every residence (or intended residence) within, or outside, Pennsylvania, even if temporary, if the offender has an established home; (6) temporary habitat, abode, dwelling, homeless shelter, or park, if the sexual offender does not have an established home, as well as the places that such transient frequents to eat or engage

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in leisure activities; (7) passport and documents establishing immigration status; (8) employment status, including the address for each place of employment; (9) the status of any professional license held; (10) the name and address for any institution at which the offender is a student; (11) information related to any motor vehicles owned or operated by the offender, including a description of such vehicle and its license plate number; (12) date of birth; and (13) proof of the offender's knowledge and understanding of his or her registration obligations.[117] At each subsequent in-person appearance, the sexual offender must verify that all of the above information is correct and up-to-date.[118] In addition to these annual obligations, a sexual offender also must appear in person within three business days to report a change, inter alia, to his or her name, address, employment status, student status, email address or instant messenger moniker, or professional licensing status.[119] A transient must make monthly appearances if he or she "adds or changes" where he or she camps, eats, or engages in leisure activities.[120] Registration is mandatory, and without exception. Not even a tornado or hurricane will excuse a sexual offender from his or her in-person registration requirements.[121]

Subchapter H also requires the Pennsylvania State Police to ensure that the electronic registry makes the following information public:

(1) Physical description of the individual, including a general physical description and tattoos, scars and other identifying marks.

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(2) Text of the statute defining the criminal offense for which the individual is registered.

(3) Criminal history record information of the individual, including:

(i) Dates of arrests and convictions.

(ii) Status of probation, parole or supervised release.

(iii) Whether the individual is in compliance with requirements regarding this subchapter or has absconded.

(iv) Existence of any outstanding warrants.

(4) Current photograph of the individual. In order to fulfill the

requirements of this paragraph, in addition to the taking of photographs pursuant to section 9799.15(e), the Pennsylvania State Police shall ensure that additional photographs are taken as needed when there is a significant change in appearance of the individual, including the taking of a current photograph before the individual is released from a State or county correctional institution or an institution or facility set forth in section 6352(a)(3) (relating to disposition of delinquent child) or discharged from the State-owned facility or unit set forth in Chapter 64 (relating to court-ordered involuntary treatment of certain sexually violent persons) due to:

(i) the expiration of sentence, period of commitment or involuntary treatment;

(ii) parole or other supervised release, including release to a community corrections center or a community contract facility;

(iii) commencement of a sentence of intermediate punishment; or

(iv) any other form of supervised release.

(5) Set of fingerprints and palm prints of the individual. In order to fulfill the requirements of this paragraph, the palm prints shall be taken for the purpose of submission to the Federal Bureau of Investigation Central Database. The palm prints shall be submitted for entry into the database.

(6) DNA sample of the individual. In order to fulfill the requirements of this paragraph, the sample shall be taken for the purpose of analysis and entry into the Combined DNA Index System (CODIS). In addition, the sample shall be analyzed and submitted for entry into CODIS.

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(7) Photocopy of valid driver's license or identification card issued to the individual by the Commonwealth, another jurisdiction or a foreign country.[122]

The Pennsylvania State Police is tasked with managing all aspects of the registry, including its enforcement provisions.[123] *Subchapter H also requires that the registry be maintained as a searchable electronic database,*[124] *which the Pennsylvania State Police must incorporate into a publicly accessible website.*[125] *That website must allow a user to obtain information about sexual offenders or "sexually violent predators" by searching for such individuals using various criteria.*[126] *The website also must allow the user to receive a notification when a sexual offender registers in accordance with the terms set forth above, or when a sexual offender moves into, or out of, a geographic area selected by the user.*[127] *When a user locates a sexual offender or sexual violent predator on the site, the user can obtain the following information about that offender:*

(1) Name and aliases.

(2)Year of birth.

(3) Street address, municipality, county, State and zip code of residences and intended residences. In the case of an individual convicted of a sexually violent offense, a

sexually violent predator or a sexually violent delinquent child who fails to establish a residence and is therefore a transient, the Internet website shall contain information about the transient's temporary habitat or other temporary place of abode or dwelling, including, but not limited to, a homeless shelter or park. In addition, the Internet

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website shall contain a list of places the transient eats, frequents and engages in leisure activities.

(4) Street address, municipality, county, State and zip code of any location at which an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is enrolled as a student.

(5) Street address, municipality, county, State and zip code of a fixed location where an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is employed. If an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is not employed at a fixed address, the information shall include general areas of work.

(6) Current facial photograph of an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child. This paragraph requires, if available, the last eight facial photographs taken of the individual and the date each photograph was entered into the registry.

(7) Physical description of an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child.

(8) License plate number and a description of a vehicle owned or operated by an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child.

(9) Offense for which an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is registered under this subchapter and other sexually violent offenses for which the individual was convicted.

(10) A statement whether an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is in compliance with registration.

(11) A statement whether the victim is a minor.

(12) Date on which the individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is made active within the registry and date when the individual most recently updated registration information.

(13) Indication as to whether the individual is a sexually violent predator, sexually violent delinquent child or convicted of a Tier I, Tier II or Tier III sexual offense.

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(14) If applicable, indication that an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is incarcerated or committed or is a transient.[128]

The user cannot obtain any information about the victim of the offender's crimes, the offender's social security number, any information pertaining to arrests that did not result in convictions, or any travel or immigration documentation.[129] The site provides instructions, as well as a warning stating that the website should not be used to harass, intimidate, or embarrass anyone.[130]

There is a mechanism by which a Tier III "sexual offender," such as Torsilieri, or a sexual violent predator can be excused from the demands of Subchapter H, but such offender may not petition for such relief until a quarter century has passed. Specifically, such an offender may request that a court remove him or her after twenty-five years of being listed on the registry, if, during that period, the individual has not been convicted of a crime for which the penalty exceeds one year.[131] Upon such a petition, the Sexual Offenders Assessment Board must review the individual's petition and determine whether he or she poses a threat to another person.[132] If not, the trial court may, in its discretion and after an evidentiary hearing, exempt the offender from any or all of Subchapter H's requirements, if the court is satisfied by clear and convincing evidence that doing so would not endanger any other person.[133]

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The consequence of failing to comply with any of Subchapter H's commands is severe. If a sexual offender fails to register as detailed above, verify the information as ordered, be photographed at each in-person appearance, or provide accurate information at all times, that individual will be charged with a new and separate criminal offense.[134] That crime, entitled "Failure to comply with registration requirements," is a felony.[135] This is not Subchapter H's only cross-over into the criminal process. If an offender is on probation and parole, Subchapter H authorizes a parole or probation agent to track the sexual offender using global positioning technology.[136]

Subchapter H creates a comprehensive statutory scheme that imposes significant burdens upon a sexual offender for a lengthy period of time. For some, like Torsilieri, those burdens remain for the remainder of the offender's life. And the law's insistence on compliance is unyielding: one misstep is a felony. It is not my role to opine "in any way upon the propriety or wisdom of the obligations imposed upon sexual offenders."[137] My task is to determine whether the scheme, as enacted, is punitive in its effect. For the reasons that follow, it is.

A. Legislative Intent

The determination of whether a regulatory or statutory scheme is punitive entails a two-part inquiry. A reviewing court first must decide whether the legislature intended to levy a punishment. If so, the analysis ends. If, on the other hand, the legislature intended to enact a non-punitive scheme, then the court proceeds to

the second prong of the

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inquiry, and must determine whether the law is "so punitive either in purpose or effect as to negate [the state's] intention to deem it civil."[138]

For the initial inquiry, the only question is "whether the General Assembly's intent was to punish."[139] As with Subchapter I, the General Assembly did not intend to impose a punitive scheme when it enacted Subchapter H. The General Assembly expressly instructed courts that Subchapter H "shall not be construed as punitive."[140] The legislature declared that the purpose of Subchapter H was not to punish, but rather to "further protect the safety and general welfare of the citizens of this Commonwealth by providing for increased regulation of sexual offenders, specifically as that regulation relates to registration of sexual offenders and community notification about sexual offenders."[141] It is undeniable that the General Assembly intended to enact a civil regulatory scheme.

B. The Mendoza-Martinez Factors

That the legislature disclaimed any intent to create a punitive statutory scheme only resolves the first prong of the inquiry at hand. The court still must determine whether the scheme is punitive in effect, legislative intent notwithstanding. In Mendoza-Martinez, the United States Supreme Court identified seven factors for use in assisting courts to determine whether a particular statutory scheme is, in effect, punitive.[142] Those factors are as follows:

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> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[143]

I take up each of these factors in turn.

i. Whether Subchapter H Imposes an Affirmative Disability or Restraint

In Muniz, wherein this Court invalidated the initial version of SORNA, the OAJC determined that this factor weighed in favor of deeming SORNA I punitive. In the main, this was due to the impact that the in-person registration requirements had on the offender's life. The Muniz OAJC specifically noted that, extrapolated over a twenty-five year period, a Tier III offender would have to make at least one hundred in-person appearances, constituting a significant restraint upon a person's life.[144] Following Muniz, the General Assembly reduced the number of in-person visits. In Lacombe, this reduction meant that an offender was required to make twenty-five in-person visits over a twenty-five year period, instead of the one hundred deemed punitive in effect in Muniz. Apparently, for the Lacombe Majority, there was a point at which a requirement for in-person visits comes to constitute an affirmative disability or restraint. We still do not know where that line is. All we know is that, for the Lacombe Majority, a requirement of one hundred such visits fell on one side of that line, while a twenty-five visit rule fell on the other.[145]

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Today's Majority makes the same error as it made in Lacombe. At a minimum, for Tier III offenders, Subchapter H requires thirty-four in-person visits over a twenty-five year period.[146] *Apparently, thirty-four falls on the non-punitive side of this Court's invisible line. Like the Lacombe Majority, today's Majority declines to reveal where that line is, or how to find it. We simply must take the Majority's word for the proposition that thirty-four does not rise above its hidden line in the sand.*

Rather than treat this factor as some unnecessary and arbitrary counting exercise, we should recognize that "the simple legislative command to appear and report in person to the PSP suffices to establish a disability or restraint."[147] *The question is not "how much" does the law restrain or disable a person's freedom. The question is "does it do so?" The answer is yes. As I explained in Lacombe, the "sheer number of appearances" is not the "defining criterion" for this factor.*[148] *"The disability or restraint is the obligation to remove oneself from one's daily life and to report to the governmental authority. A law that requires a person to take such action necessarily imposes a disability or restraint upon the person."*[149] *The frequency of the in-person visits is only relevant to the final balancing of all of the factors. It is not determinative of whether the statute imposes a disability or restraint in the first instance.*

Even if the factor could be resolved by merely counting the in-person visits, the Majority does not account for the additional reporting requirement that compels a Tier III offender like Torsilieri to appear in person within three days each time he changes his

name, address, employment status, etc.[150] *Minor changes such as adding a digit to an email address or changing one's preferred name from "Bob" to "Bobby" necessitate an in-person visit. These mandatory in-person updates can add numerous in-person visits to one's yearly obligation. The Majority ignores these in-person visits entirely, and chooses not to explain why they are not included in its tally. This is particularly troublesome here, where the Majority operates using an unknown and unknowable line. Since we do not know where the line is, we cannot know whether any additional in-person update visits would push the total over that line. The Majority's method for reviewing this factor is not an accurate tool for measuring its punitive effect.*

The Majority also finds that the punitive nature of Subchapter H is lessened by the removal provision. The Majority does not explain how a mechanism allowing a person to seek, but not necessarily obtain, removal from the statutory obligations after twenty-five years of compliance means that the offender was not subjected to an affirmative disability or restraint during the twenty-five years of compliance. Presumably, the Majority would not say that a person imprisoned for twenty-five years was not subjected to an affirmative restraint during that time simply because he eventually was released. Yet, that is how the Majority interprets the effect of the removal provision. Regardless, as I stated in Lacombe, little weight should be afforded to this device:

> *[T]he mechanism provides only an opportunity to seek relief; such relief is far from a guarantee. The*

petitioner must make a compelling showing- indeed, by clear and convincing evidence-that, after a lengthy period of time, he or she is not likely to pose a threat to anyone. In this regard, the trial court still retains discretion to deny the petition. Additionally, the requirement is not limited to the threat that the offender will commit additional sexual offenses, nor is the potential threat limited to his or her original victim or to a similar person or age group. The court can exercise its discretion to deny the petition if it concludes that the offender may pose any threat to any person, in any circumstances, even if entirely unrelated to

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the goals articulated by the General Assembly in enacting this statutory scheme. I do not find the mechanism to be illusory . . . but I nonetheless am unable to ignore the high bar that it sets. The standard of proof, the court's discretion, and the broad showing of non-dangerousness required of the offender-the proof of a negative-make achieving relief exceedingly difficult. . . .[151]

Like Subchapter I, Subchapter H imposes "the obligation to remove oneself from one's daily life and to report to the governmental authority."[152] *It imposes an affirmative disability or restraint, and accordingly weighs in favor of it being punitive.*

ii. Whether the Operation of Subchapter H is Consistent With What Historically Has Been Regarded as Punishment

As this Court has repeatedly held,[153] *and as today's Majority holds,*[154] *Subchapter H is "akin to probation,"*[155] *and this factor clearly weighs in favor of finding the statute to be punitive. Our prior analyses of this factor largely are predicated upon a concurring opinion that then-Judge (now Justice) Donohue wrote in Commonwealth v. Perez,*[156] *wherein she examined the parallels between the conditions imposed upon a sexual offender by Subchapter H and those imposed upon a probationer.*[157] *As Justice Donohue explained, the in-person visits required of sexual offenders are no different than a probationer's regular visits with his or her probation officer. Like probation and parole, Subchapter H requires that sexual offenders inform the authorities of any changes in*

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residency and employment, imposes limits on travel and movement, and imposes punishment for non-compliance.

As I outlined in Lacombe, there are some differences as well. When a probationer violates the conditions of probation, he or she can only be sentenced to the penalty that the trial court could have imposed in the first instance. A parolee who fails to comply with the conditions of release will be remanded to prison to serve the remainder of his or her original sentence.[158] *A sexual offender who violates the terms of Subchapter H, on the other hand, will be charged with a felony, which "could result in a penalty much more severe than that attendant to a violation of probation."*[159] *And, unlike probation, the term of which cannot exceed the statutory maximum of the crime, a sexual offender like Torsilieri must comply with Subchapter H for the rest of his life. "Because the ultimate objective presently is to ascertain whether Subchapter [H] is punitive, the fact that the requirements of Subchapter [H] not only closely resemble probation but actually expose*

the offender to additional, and in many instances more severe, criminal punishment weighs heavily in favor of a finding of punitiveness."[160]

Subchapter H brings to mind some forms of colonial shaming. As detailed above, Subchapter H requires the Pennsylvania State Police to create and maintain a website. Anyone with internet access-which, by now, is nearly every person in the United States of America, twenty-four hours a day-can readily access that website, see the offender's photograph, and learn where the offender lives, the nature of his crime, his license plate number, etc.[161] *"With a few quick clicks, nearly anyone can access the sexual offender*

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website and obtain no fewer than fourteen different pieces of personal or identifying information on any offender."[162] *An interested member of the public does not even need to sit down at the computer and search for this information. The website automatically will send information to any interested person any time a sexual offender moves into or out of an area.*[163] *It is difficult to distinguish the exposure of photographs and personal information, all framed within the context of a sexually-related crime, on a publicly available website, from colonial face-to-face shaming punishments. What I said in Lacombe still holds true: the "avenues available for harassment and ostracism of [] offenders that most commonly are associated with public shaming are ever-present and immediately available in a substantial majority of American homes."*[164]

This factor weighs in favor of finding the statute to be punitive.

iii. Whether the Statute Comes into Play Only on a Finding of Scienter

As was true in Muniz and Lacombe, "this factor is of little significance in our inquiry."[165] *As we explained in Muniz, because it is clear that sexual offender statutes are aimed at protecting the public from recidivism, "past criminal conduct is 'a necessary beginning point.'"*[166]

iv. Whether Subchapter H's Operation Will Promote the Traditional Aims of Punishment-Deterrence and Retribution

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In Lacombe, the Majority held that, while Subchapter I promoted traditional notions of retribution, it did not promote any type of deterrence, because Subchapter I applied retroactively, not prospectively.[167] *Today's Majority finds that Subchapter H-which, unlike Subchapter I, applies prospectively-promotes both of these traditional aims of punishment. The Majority nonetheless "question[s] the strength of the [deterrent] effect of registration requirements compared to the criminal conviction and sentence for the underlying sex offense."*[168] *I agree that the statutory scheme advances both retribution and deterrence. However, I disagree with the insignificance that the Majority attributes to the deterrent effect.*

That such statutory schemes promote retribution is now well-established. Like SORNA I and Subchapter I, Subchapter H is triggered upon a criminal conviction, mandates a significant number of in-person visits to the Pennsylvania State Police, requires registration for at least fifteen years and in many cases as long as one's lifetime, and directs that extensive personal and identifying information be posted on the internet for public consumption. There is no reason to deviate from our previous decisions which held that these statutory imperatives are

retributive in nature.

Subchapter H also has a significant deterrent effect. The Majority does not elaborate on why it "question[s] the strength of the [deterrent] effect" of Subchapter H. The Majority's minimization of the deterrent aspect of this factor contrasts starkly with this Court's statement in Muniz that "the prospect of being labeled a sex offender accompanied by registration requirements and the public dissemination of an offender's personal information over the internet has a deterrent effect."[169] Moreover, in

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downplaying the subchapter's deterrent effect, the Majority's position ignores "the General Assembly's obvious desire to deter offenders from flouting the terms and obligations imposed upon them, a failure which would constitute a new criminal offense, a patent indicator of deterrent effect."[170] Subchapter H's lengthy periods of registration require vigilant compliance with numerous, onerous obligations and limitations. A single failure results in the registrant being charged, convicted, and sentenced for at least a third-degree felony, and possibly a first-degree felony. In many cases, the offense and punishment for failing to comply with Subchapter H is more severe than the crime that subjected the offender to its terms in the first place. Subchapter H's requirements, including up to a lifetime of registration and being labeled a sexual offender on a publicly-accessible website, along with the prospect of a first-degree felony conviction and sentence, have a strong deterrent effect on future criminal behavior. There is nothing "questionable" about it.

v. Whether the Behavior to Which Subchapter H Applies Already is a Crime

As with the third factor, and consistent with Muniz, this factor "carries little weight in the balance."[171]

vi. Whether an Alternative Purpose to Which Subchapter H May Rationally Be Connected is Assignable for It

This factor weighs in favor of finding the statutory scheme to be non-punitive. In Subchapter H, the General Assembly declared that its purpose was not to punish, but "to further protect the safety and general welfare of the citizens of this Commonwealth by providing for increased regulation of sexual offenders, specifically as that regulation

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relates to registration of sexual offenders and community notification about sexual offenders."[172] The General Assembly also enacted the subchapter in order to facilitate the "exchange of relevant information about sexual offenders among public agencies and officials and to authorize the release of necessary and relevant information about sexual offenders to members of the general public as a means of assuring public protection."[173] These policy-based judgments plainly serve "a purpose other than punishment to which the statute reasonably can be connected: to protect and inform the public regarding dangers ascertained by the General Assembly."[174]

vii. Whether Subchapter H Appears Excessive in Relation to the Alternative Purpose Assigned

The final factor requires consideration of whether the effect of the statutory scheme is excessive in relation to its non-punitive purpose. In Lacombe, I explained why Subchapter I was excessive when compared to the goals of the legislation:

Subchapter I still governs an array of offenses, ranging from misdemeanors to first-degree felonies. Once an offender is subject to the subchapter's governance, the obligations and impact upon him or her are onerous and undeniable. For a [sexual offender], [at least one] annual in-person report to the PSP is required for completion of registration paperwork and for photography. The offender promptly must report changes to the same authorities, and extensive information is posted online concerning the offender's likeness, vehicle, residence, etc. The threat of a separate felony prosecution (accompanied by likely imprisonment) for failure to comply looms over the offender for the duration of his or her registration period, and possibly for a lifetime. The duration of the obligations ranges from ten years to a lifetime, and, as I explained above, can exceed the punishments meted out for the actual crime that the offender committed. All told, Subchapter I creates a formidable web of restraints and obligations, erects hurdles in an

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offender's path to seeking and holding gainful employment, and exposes the offender to harassment and ostracism.

I do not for a moment disregard or demean the General Assembly's non-punitive goals. Nonetheless, this close call must fall in favor of finding the statutory scheme to be excessive. The entirety of the subchapter's obligations functionally dominate the offender's existence, and surpass that which is necessary to achieve the non-punitive legislative aims.[175]

The core components and long-term burdens of Subchapter H are the same, if not more onerous, than Subchapter I. Thus, I am compelled to reach the same conclusion that I reached in Lacombe. Subsection H goes further than is necessary to achieve its legislative goals.

The Majority reaches the opposite conclusion, in no small part because of the statute's removal mechanism.[176] *I addressed the effect of this provision on the excessiveness inquiry in Lacombe. While the removal route may offer a "meaningful device for courts and offenders,"*[177] *it cannot be considered standing alone. For purposes of this factor, we are required to consider the "entire statutory scheme,"*[178] *not just one facet of it. Viewed accordingly, it is clear that the mechanism does not carry the vast impact that the Majority assigns to it. It does not even apply to all sexual offenders. The removal mechanism is available only after twenty-five years of continuous and unbroken compliance.*[179] *Some offenders only must comply with Subchapter H for fifteen years.*[180] *The removal mechanism is unavailable to those offenders. The mechanism hardly can*

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be said to mitigate the statute's excessiveness when it does not even apply to all those subject to its terms and conditions.

Moreover, the mechanism provides no

guarantee of removal. It offers but a chance to ask to be removed. And that opportunity becomes available only after twenty-five years of perfect compliance and proof by clear and convincing evidence that the offender no longer poses a risk to anyone. Even then, a court may "exercise its discretion to deny the petition if it concludes that the offender may pose any threat to any person, in any circumstances, even if entirely unrelated to the goals articulated by the General Assembly in enacting this statutory scheme."[181] "The standard of proof, the court's discretion, and the broad showing of non-dangerousness required of the offender-the proof of a negative-make achieving relief exceedingly difficult, such that the mere potential for such relief does not mitigate the other aspects of Subchapter [H] that are excessive."[182]

This factor also weighs in favor of a finding that Subchapter H is punitive.

viii. Balancing of the Factors; Conclusion

The Majority correctly notes that the Mendoza-Martinez factors are "guideposts" that are neither "exhaustive nor dispositive."[183] This final examination is "not a linear or formulaic exercise."[184] Nor is it a "mere mathematical comparison of how many factors

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fall on each side of the equation."[185] The "assessment of the factors must be flexible i order to account for the particular constitutional challenge asserted."[186]

The Majority decides that only two of the five factors that it considered weigh i favor of finding the statute punitive in effect. In one of those two factors, the consideratio of the traditional aims of punishment, the Majority significantly undervalues Subchapte H's deterrent effect. The Majority concludes that the other three factors militate in favo of finding Subchapter H non-punitive.

My analysis differs. As shown above, four of the five relevant factors weigh in favo of finding that the statutory scheme is punitive in effect. Moreover, unlike the Majority, find the statute's deterrent effect to be a significant consideration in the overa assessment. Overall, Subchapter H: (1) imposes affirmative disabilities or restraint upon the "sexual offenders;" (2) resembles sanctions that historically have bee considered punishment; (3) promotes the traditional punitive goals of deterrence an retribution; and (4) is excessive in relation to its stated purpose. Combined, these factor "paint a clear picture of punitive effect."[187] As I explained in Lacombe:

> *The impact that subjection to Subchapter I will have on an offender's life cannot be [overstated]. Compliance with the subchapter will be the defining feature of an offender's life for the duration of his or her statutory obligations, be it ten years or a lifetime. The offender must report yearly to an approved facility, differing little if at all from a probationer's visit with a probation officer. The offender is required to report to the PSP within three days any changes in the essential aspects of his or her existence. Although this obligation is less demanding than the more numerous in-person reporting requirements of earlier statutes, it nonetheless impacts the offender's life heavily, inasmuch as it creates a perpetual obligation that can never be neglected, lest severe penalties be inflicted for a single*

failure. At the same time, a significant amount of an offender's identifying information is posted

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online, and can be accessed readily or even automatically delivered to members of the public. This may impair an offender's ability to move into a community, to attend school, to find and keep gainful employment, and to remain crime-free without the threat of harassment or ostracism. Such control and monitoring differs little, if at all, from the situation of a convicted offender placed on probation. Indeed, as I explained above, it can result in penalties for non-compliance more severe than those a probationer would face for violating the terms and conditions of his or her sentence.

All told, the statutory enactment restrains the offender's liberty, resembles punishment, and is aimed at deterrence and retribution, resulting in a scheme that is excessive in relation to the lone factor weighing in the opposite direction, the existence of a rationally connected non-punitive purpose. I would deem this to be the "clearest proof" that is necessary to render the civil scheme punitive in effect.[188]

This holds true for the impact of Subchapter H as well. For all of these reasons, I would find that Subchapter H is punitive in effect. For a lifetime registrant like Torsilieri, Subchapter H imposes a mandatory punishment that far exceeds the statutory maximum for his offenses, in violation of Apprendi v. New Jersey.[189] Consequently, Subchapter H is unconstitutional. Because the Majority finds otherwise, I respectfully dissent.

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DISSENTING OPINION

DONOHUE JUSTICE.

I dissent from the Majority's application of the irrebuttable presumption doctrine in this challenge to Pennsylvania's Sexual Offender Registration and Notification Act.[1] To establish a violation of the irrebuttable presumption doctrine, "the challenging party must demonstrate (1) an interest protected by the due process clause, (2) utilization of a presumption that is not universally true, and (3) the existence of a reasonable alternative means to ascertain the presumed fact." Commonwealth v. Torsilieri, 232 A.3d 567, 579 (2020) (citing In re J.B., 107 A.3d 1 (Pa. 2014) ("J.B.")). Here, the Majority relies entirely on a single statistical fact[2] to refute the trial court's finding that Torsilieri disproved the General Assembly's presumption that sexual offenders "pose a high risk of committing

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additional sexual offenses[.]"[3] The legislative presumption speaks in absolute terms - sexual offenders pose a high risk of committing additional sexual offenses. Thus, the second prong of the test to determine the validity of the presumption asks whether, based on the evidence, sexual offenders pose a high risk of committing additional sexual offenses. As will be discussed, the scientific evidence in this case points consistently and overwhelmingly to the conclusion that the risk of sexual recidivism from an individual sex offender is not high, nor anything close to it.

Instead of analyzing the validity of the

legislative presumption that sexual offenders pose a high risk of committing additional sexual offenses, the Majority rephrased the question into one based on relativity: Do sex offenders reoffend at a rate ***higher than*** *those convicted of non-sexual offenses? But this question and its answer does not capture the General Assembly's ostensible point that sex offenders pose a high risk to members of the community in that community members will be targets of sex offenses perpetrated by sex offenders who are subject to SORNA. This is precisely the point that the scientific evidence refutes.*

The Majority's analysis of the question before this Court evokes the adage: "Some men use statistics as a drunken man uses lampposts. For support rather than illumination."[4] The Majority upends the irrebuttable presumption doctrine, preserving it in theory while effectively ending its application in practice, and it does so by permitting a marginally interesting statistic to replace the credible testimony of three experts on the invalidity of the challenged presumption. If the Majority seeks to kill the irrebuttable presumption doctrine's continued applicability in Pennsylvania as suggested by the

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Concurring and Dissenting Opinion,[5] it should do so without the dubious and illogical misuse of statistical evidence.

Also contrary to the Majority's decision today, like Justice Wecht, I would find that the lifetime registration and reporting requirements of Subchapter H of SORNA are punitive and, therefore, violate the constitutional standard set forth in Apprendi v. New Jersey, 530 U.S. 466, 489 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

I respectfully dissent.

Irrebuttable Presumption Doctrine

In Vlandis v. Kline, 412 U.S. 441 (1973), the United States Supreme Court recognized the doctrine by name, stating that "[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." Vlandis, 412 U.S. at 446.[6] In that case, nonresident

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applicants to the state university system in Connecticut, a status that carried higher tuition and fees than residents, were subject to an irrebuttable presumption that their nonresident status continued for the duration of their time at a Connecticut university. The Vlandis Court held that the irrebuttable presumption of nonresident status "is violative of the Due Process Clause, because it provides no opportunity for students who applied from out of State to demonstrate that they have become bona fide Connecticut residents." Vlandis, 412 U.S. at 453. The Vlandis decision followed application of the same principle in all but name in Bell v. Burson, 402 U.S. 535 (1971), and Stanley v. Illinois, 405 U.S. 645 (1972).[7]

The irrebuttable presumption doctrine was quickly refined in Weinberger v. Salfi, 422 U.S. 749 (1975), a case involving an irrebuttable presumption in the "distribution of social insurance benefits." Salfi, 422 U.S. at 785. Distinguishing such programs from the use of irrebuttable presumptions in criminal or custody matters, where the latter involve "affirmative Government action which seriously curtails important liberties[,]" the Salfi Court found "no

basis for our requiring individualized determinations" in cases involving social welfare programs. Id. Later, in Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality), the High Court signaled doubts about the continued application of the irrebuttable presumption doctrine. Yet this Court has twice applied the irrebuttable presumption doctrine since Michael H. v. Gerald D., and no party before us today has asked this Court to abandon it.

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Seven years after Michael H. v. Gerald D., this Court continued to recognize that "irrebuttable presumptions are violative of due process where the presumption is deemed not universally true and a reasonable alternative means of ascertaining that presumed fact are available." Bureau of Driver Licensing v. Clayton, 684 A.2d 1060, 1063 (Pa. 1996). The Clayton Court was well-aware of (yet undeterred by) the High Court's warning signs in Michael H. v. Gerald D. and forged ahead to apply the doctrine after rejecting the assertion that the various opinions in Michael H. v. Gerald D. could be synthesized into a de facto majority holding that "procedural due process analysis alone applies" when reviewing irrebuttable presumption claims. Clayton, 684 A.2d at 1063.

More recently, in a case also involving SORNA, this Court held "that the application of SORNA's current lifetime registration requirements upon adjudication of specified offenses violates juvenile offenders' due process rights by utilizing an irrebuttable presumption" where "juvenile offenders have a protected right to reputation encroached by SORNA's presumption of recidivism, where the presumption is not universally true, and where there is a reasonable alternative means for ascertaining the likelihood of recidivating." J.B., 107 A.3d at 19-20. The Majority in this case recounts several federal decisions since Michael H. v. Gerald D. that continue to criticize the irrebuttable presumption doctrine but, critically, neither Bell, Stanley, nor Vlandis have been overruled by the United States Supreme Court, and both Clayton and J.B. remain good law in Pennsylvania. Thus, reports of the death of the irrebuttable presumption doctrine in Pennsylvania are greatly exaggerated, at least until today.[8]

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To its credit, the Majority acknowledges the irrebuttable presumption doctrine's continued endurance in Pennsylvania in the thirty-five years since Michael H. v. Gerald D., but its application of the doctrine here guts it of any meaning. Before today, a solitary

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statistical fact about a group trait, devoid of the context in which it arises, would not have salvaged an irrebuttable presumption. Indeed, as demonstrated below, similar statistical facts supporting a contested legislative presumption were tacitly presumed in several cases that applied the irrebuttable presumption doctrine. Yet, the Majority decision rests entirely on the aggregate recidivism rate of sex offenders to defeat the assertion that SORNA's irrebuttable presumption is not universally true.

For instance, in Stanley, Illinois law provided that "the children of unwed fathers become wards of the State upon the death of the mother." Stanley, 405 U.S. at 646. That policy was premised on an irrebuttable presumption that unwed fathers were "presumed unfit to raise their children[,]" and it was deemed "unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents." Id. at 647. The United States Supreme Court decided to answer the question: "Is a presumption that distinguishes and

burdens all unwed fathers constitutionally repugnant?" Id. at 649. After recognizing "Stanley's interest in retaining custody of his children is cognizable and substantial[,]" and that Illinois had a legitimate interest in separating "neglectful parents ... from their children[,]" the High Court then considered "whether the means used to achieve these ends are constitutionally defensible." Id. at 652. They were not. Id. at 658 (holding that "Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody").

*In rejecting Illinois's irrebuttable presumption that unwed fathers were unfit parents, the United States Supreme Court noted that "[i]t may be, as the State insists, that **most** unmarried fathers are unsuitable and neglectful parents." Id. at 654 (emphasis added). It further observed that "it may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's." Id. at 656. Nevertheless, the Stanley Court determined that*

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> *the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.*
>
> *Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.*

Id. at 656-57 (footnote omitted).

*In Clayton, the Department of Transportation utilized an irrebuttable presumption that any person suffering an epileptic seizure was incompetent to drive for at least a year and could only regain their license by having a doctor certify that they had been seizure free for at least a year. Clayton, 684 A.2d at 1061. That presumption was not arbitrary; it was premised on the fact that a "Medical Advisory Board ha[d] deemed persons who have suffered even one epileptic seizure unsafe to drive," until it could be shown that they had remained seizure free for at least year. Id. at 1065. The Clayton Court further recognized that "precluding unsafe drivers, **even those who are potentially unsafe drivers**, from driving on our highways is an important interest." Id. (emphasis added). Nonetheless, the Clayton Court held that "revocation of one's operating privilege for a period of one year upon the occurrence of only a single epileptic seizure, without the licensee having an opportunity to present medical evidence in an effort to establish his or her competency to drive, violates due process." Id. at 1061. Although the Commonwealth had a legitimate interest in protecting the public from unsafe driving,*

> *it is not an interest which outweighs a person's interest in retaining his or her license so as to justify the recall of that license without first affording*

the licensee the process to which he is due. Indeed, since competency to drive is the

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paramount factor behind the instant regulations, any hearing which eliminates consideration of that very factor is violative of procedural due process.

Id. at 1065.

Thus, the Clayton Court was not concerned with statistical evidence that might demonstrate that epileptic seizure sufferers were, collectively, more likely to be unsafe or incompetent drivers in the year following a seizure than other drivers. Rather, the Court found a due process violation from the fact that individuals who had suffered a seizure had no opportunity to contest a presumption about their competency to drive-a presumption based on a rational and legitimate concern for an elevated group risk to public safety on Pennsylvania roadways presented by those who suffer from seizures.[9] It is also notable that the Clayton Court was unconcerned that the presumption was only irrebuttable for one year following a seizure, and that due process was provided to the extent that it permitted an individual to contest whether they had suffered a seizure.[10]

In J.B., this Court considered the same protected interest at stake in this case, the "right to reputation under the Pennsylvania Constitution." J.B., 107 A.3d at 16. Likewise, we considered exactly the same irrebuttable presumption, that being SORNA's declaration "that sexual offenders, including juvenile offenders, 'pose a high risk of

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committing additional sexual offenses and protection of the public from this type of offender is a paramount governmental interest.' 42 Pa.C.S. § 9799.11(a)(4)." Id. We further recognized that, "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. In J.B., however, we were concerned with a large subset class of sexual offenders, juveniles, rather than an individual sexual offender. Thus, in addressing the second irrebuttable presumption doctrine factor in J.B.-utilization of a presumption that is not universally true-we narrowed the universe governed by the irrebuttable presumption to encompass only juvenile offenders, despite the fact that SORNA's irrebuttable presumption only speaks to sex offenders generally. The J.B. Court agreed with the trial court's holding that SORNA's irrebuttable presumption "that sexual offenders pose a high risk of recidivating is not universally true when applied to juvenile offenders." Id. at 17. This was because, as a class, "juvenile sexual offenders exhibit low levels of recidivism (between 2-7%), which are indistinguishable from the recidivism rates for non-sexual juvenile offenders, who are not subject to SORNA registration." Id. Moreover, the J.B. Court identified several ways in which juvenile sexual offenders were categorically different from adult sexual offenders, adopting the United States Supreme Court recognition of such differences in a line of cases that curtailed application of the most extreme criminal punishments imposed on juvenile offenders. Id. at 18-19.[11]

Torsilieri I

When this case was first before us, the Majority recognized that, in J.B., we had "concluded that the scientific consensus relating to adolescent development, as

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recognized through the United States Supreme Court's jurisprudence, refuted the legislative presumption that all juvenile offenders were at high risk of recidivation." Commonwealth v. Torsilieri, 232 A.3d 567, 584 (Pa. 2020) ("Torsilieri I"). J.B. showed that "a viable challenge to legislative findings and related policy determinations can be established by demonstrating a consensus of scientific evidence where the underlying legislative policy infringes constitutional rights." Id. Thus, we rejected the Commonwealth's "categorical contention that the trial court lacked the authority to consider [Torsilieri]'s scientific evidence and to question the validity of the General Assembly's findings and policy determinations." Id. Furthermore, we observed that, based on "the evidence relied upon by the trial court," Torsilieri presented "colorable constitutional challenges" to, inter alia, SORNA's irrebuttable presumption. Id.

Regarding the second irrebuttable presumption factor concerning universality, the trial court had found that SORNA's irrebuttable presumption was not universally true after Torsilieri demonstrated

> that the research indicated that eighty to ninety percent of all sexual offenders are never reconvicted for a sexual crime. Moreover, the trial court opined that [Torsilieri] fell into a subgroup of offenders without criminal backgrounds, significant life problems, or the prognosis typical of offenders. The research reviewed by the trial court revealed that this subgroup has even lower recidivism rates.

Id. at 586.

Despite having the opportunity to do so, the Commonwealth simply refused to offer any evidence to the contrary. Nonetheless, over this author's dissent, this Court afforded the Commonwealth a second bite at the apple, reasoning:

> A review of the court's conclusions clearly reveals that the court's analysis of each of the three prongs of the irrebuttable presumption doctrine relies heavily upon the scientific evidence presented by [Torsilieri]. As noted, the Commonwealth parties awaited this appeal to proffer evidence to rebut [Torsilieri]'s experts. Given the procedures

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> leading to this point, the importance of the underlying issue, and our deference to legislative policy determinations, we decline to render a conclusion on the basis of the record before us. Instead, we conclude that remand is necessary to allow the parties to present additional argument and evidence to address whether a scientific consensus has developed to overturn [SORNA's irrebuttable presumption].

Id. at 587. Apart from this vague appeal to the importance of this case, the Majority offered no obvious legal justification to remand for additional factfinding. As I noted at the time, the Commonwealth failed to offer anything to counter Torsilieri's scientific evidence "[d]espite having months to prepare for an evidentiary hearing on that point[.]" Id. at 596 (Donohue, J., dissenting).

On appeal from the trial court's ruling, however, the Commonwealth presented

evidence it had not proffered in the trial court that sex offender recidivism was not the proper metric for our legal analysis. Id. at 597. The Commonwealth shifted "to a different argument to justify [SORNA's irrebuttable presumption], that sex crimes are underreported and therefore the true recidivism rate is unknown." Id. Writing in dissent, I found no reason for a remand to permit the Commonwealth to substantiate those claims, and "that due process precludes the General Assembly from presuming that ***all persons*** *convicted of one of the approximately thirty crimes mandating registration* ***pose a high risk*** *of committing additional sexual offenses." Id. at 597 (emphasis added).*

I further acknowledged that in considering whether a "presumption is universally true, we have not applied this requirement literally; the existence of even one exception to the presumed fact would definitionally establish a lack of universality." Id. at 604. In this context, that would mean that the existence of a single sex offender who never recidivated would definitionally prove the universal presumption invalid. I continue to believe now that such an impossible standard is simply unworkable and would hamstring the legislature in addressing sexual recidivism. As I stated then, "the General Assembly

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must be given some leeway in this arena given the public interest involved in protecting the community from sexual offenders." Id. at 605.

However, I further opined that "the time has come for this Court to recognize that a consensus will never exist on the question of whether sexual offenders pose a danger of recidivism ***because different types of offenders pose different types of risks****." Id. at 605-06 (emphasis added). It is precisely because risk across the class of sexual offenders is not remotely uniform that I rejected "a legal conclusion that the General Assembly can simply treat all offenders as if they are highly likely to recidivate despite evidence to the contrary." Id. at 606.*

In specifically addressing the issue of the Commonwealth's "shift[ing] the goalposts" from recidivism rates of sexual offenders to the unknown number of unreported sexual crimes, I remarked, "the relevant question should not be whether convicted sexual offenders are committing unreported sexual crimes, but rather whether sexual offenders commit more sexual crimes than other groups not subject to similar registration laws." Id. at 606. This statement was presented in the context of my view that the reality of unreported offenses "cuts both ways" because "the specter of underreported crimes means that offenders convicted of non-sexual offenses also pose a threat of committing sexual offenses." Id. Additionally, although Torsilieri proffered ample evidence to contest SORNA's irrebuttable presumption, I observed (among other shortcomings) that the Commonwealth failed "to establish that the population of offenders who are convicted of sexual crimes requiring registration are any more likely to recidivate than any other population of offenders." Id. Although this observation of the type of evidence the Commonwealth could have but failed to produce during the first post-sentence motion hearing was one of many failings discussed, it now defines the low burden set by the

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Majority today for what constitutes a scientific consensus that refutes SORNA's irrebuttable presumption.

Torsilieri II

On remand, the trial court received

testimony from Torsilieri's three experts, Dr. Karl Hanson, Dr. Elizabeth Letourneau, and Professor James Prescott.[12] The Commonwealth presented only one witness, Dr. Richard McCleary. Dr. Karl Hanson and Dr. Letourneau provided copious testimony on sex offender recidivism research that was pertinent to whether SORNA's irrebuttable presumption was universally true.[13] As a baseline, Dr. Letourneau's testimony established that approximately "95% of all sexual offenses are committed by first-time offenders[,] not recidivists." Trial Court Opinion, 8/23/22, at 6. Dr. Hanson and Dr. Letourneau agreed that research shows that ***at least*** 80% of sex offenders "will not reoffend sexually."[14] Id. Based on this evidence, the trial court determined that SORNA's irrebuttable presumption was not universally true. Id.

In reaching that conclusion, the trial court considered but ultimately rejected Dr. McCleary's testimony. Dr. McCleary "opined that all research yielding an outcome different from the Commonwealth's position was fatally ... flawed" methodologically "and unreliable." Id. at 7. The trial court determined that Dr. McCleary's "blanket denunciation

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of all research contrary to the Commonwealth's position ... materially detract[ed] from his credibility[,]" in contrast to Torsilieri's experts who had explained at length the research that demonstrated that sex offenders do not universally exhibit high recidivism, and who are themselves "well-respected experts in the field[.]" Id. Furthermore, the trial court found that 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." Id.

The trial court also specifically considered the Commonwealth's citation of the so-called "dark figure" of sexual recidivism,[15] which suggests (based on a single research paper) that because many sexual offenses go unreported, the recidivism rates cited by Torsilieri's experts-rates that had been confirmed over numerous studies over several decades-have been cast into doubt. Id. at 8. The trial court accepted Dr. Hanson's explanation that, although the implication of that single study might suggest that sex offender recidivism rates are high, that conclusion is not generally accepted in the scientific community. Id. at 8-10.[16] Moreover, for comparative purposes, the trial court observed that all categories of crimes have a dark figure, and that there is "no hard data demonstrating the rate of unreported sexual offenses is significantly higher than that regarding unreported crimes in general." Trial Court Opinion, 8/23/22, at 10.

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"The bottom line," the trial court found, "is that 80% to 95% of all sex offenders" will not recidivate sexually. Id. Thus, the trial court concluded that "SORNA's irrebuttable presumption that all sex offenders pose a high risk of sexual recidivism is not universally true." Id.

Majority Opinion

The Majority correctly observes that, when addressing the second irrebuttable presumption prong, it is simply impractical to expect that the at-issue presumption is universally "true throughout a class, without exception." Majority Op. at 34. Thus, in setting the burden to demonstrate that an irrebuttable presumption is not universally true, this Court has spurned a literal focus on whether exceptions to the presumption exist, and instead refined the test to a consideration of whether there is a scientific consensus that rebuts the presumption. Id. at

35. Here, that means whether there exists "a consensus of scientific evidence rebutting the presumption as to the class of adult sex offenders (that they are at high risk of reoffending)." Id. To this point, I fully agree with the Majority. However, the Majority's analysis quickly goes awry.

The Majority then explains that Torsilieri I "was specific and clear regarding the relevant question to be answered on remand." Id. That question, the Majority now proclaims, is "whether sexual offenders commit more sexual crimes than other groups not subject to similar registration laws." Id. The Majority believes Torsilieri I was specific and clear, citing a sliver of my dissent in Torsilieri I and footnote 22 of the Majority Opinion in Torsilieri I.[17] After narrowly framing the question in this manner, the Majority quickly disposes of Torsilieri's irrebuttable presumption claim because his "own experts concede

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that adult sexual offenders reoffend at a rate of at least three times higher than other individuals convicted of non-sexual offenses." Id. at 37.

Addressing the second issue before this Court, the Majority then tackles whether the trial court erred in holding that that "the registration and notification requirements of Subchapter H are punitive." Id. Applying the well-established test for punitiveness established in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) ("Mendoza-Martinez"),[18] id. at 42-55, the Majority then concludes that a balancing of the Mendoza-Martinez factors does "not compel the conclusion that Subchapter H is punitive." Majority Op. at 54.

Analysis

Irrebuttable Presumption

To begin, I disagree with the Majority that Torsilieri I was "specific and clear" that the sole question for remand was to be "whether sexual offenders commit more sexual crimes than other groups not subject to similar registration laws." Majority Op. at 35. That language was not found in this Court's mandate, which was much broader:

> As is apparent from the trial court findings, the evidence presented by [Torsilieri] provides a colorable argument to debunk the settled view of sexual offender recidivation rates and the effectiveness of tier-based sexual offender registration systems underlying the General Assembly's

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> findings as well as various decisions of this Court and the United States Supreme Court. Nevertheless, as the trial court did not have the benefit of the opposing science, if any, the evidence currently in the record does not provide a sufficient basis to overturn the legislative determination. Accordingly, we conclude that the proper remedy is to remand to the trial court to provide both parties an opportunity to develop arguments and present additional evidence and to allow the trial court to weigh that evidence in determining whether [Torsilieri] has refuted the relevant legislative findings supporting the challenged registration and notification provisions of Revised Subchapter H.
>
> Accordingly, we vacate that portion of the trial court's order declaring the registration requirements of Revised Subchapter H of SORNA

> *unconstitutional and remand for further proceedings in accordance with this opinion.*

Torsilieri I, 232 A.3d at 596.

The narrower question cited by the Majority today does not appear in that passage. Rather, it is buried in footnote 22, hardly the appropriate place to issue a "specific and clear" mandate to the lower court. It is further obscured because footnote 22 in Torsilieri I addressed my criticism that the Majority had effectively excused the Commonwealth's strategic choice to refuse to proffer any evidence and rejected my determination to address the irrebuttable presumption on that record. Id. at 594 n.22. Nonetheless, footnote 22 ended with the Majority deeming "it prudent to remand for further hearing to allow the parties to proffer evidence and argument regarding whether [Torsilieri]'s scientific evidence sufficiently undermines the fact-finding foundation of the legislative policy determinations[,]" again presenting the pertinent question on remand with far less specificity and much more breadth than is suggested by the Majority today. Id.

Having retroactively reframed the inquiry below, the Majority's entire analysis of the irrebuttable presumption question before us hinges upon its citation of that aggregate recidivism rate. Majority Opinion at 37 (stating Torsilieri's "own experts concede that ***adult*** *sexual offenders reoffend at a rate of at least three times higher than other*

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individuals *convicted of non-sexual offenses.... We need go no further") (emphasis added).*[19] *But, the record in this case, and the underlying study from which this ostensibly damning statistic derives, clearly show that the Majority's conclusion-that the experts' concession of the aggregate recidivism rate single-handedly defeats Torsilieri's irrebuttable presumption claim-is unfounded.*

First, the Majority cannot rely on the Commonwealth's expert, Dr. McCleary, as his testimony as found by the trial court was not credible, and the substance of his testimony was a broad attack on the usefulness of any recidivism statistics, which necessarily includes the aggregate recidivism rate now relied upon by the Majority.[20] *Instead, to find this critical evidence, the Majority relies upon the fact that the aggregate recidivism rate is not in dispute, citing several instances when its validity was conceded during the*

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Commonwealth's cross-examination of Torsilieri's experts. Majority Opinion at 37. The Commonwealth repeatedly asked those experts about a 2019 study published by the Federal Bureau of Justice Statistics.[21] *The experts were aware of the study and conceded the aggregate recidivism rate. Torsilieri also concedes the validity of the statistic before this Court. Torsilieri's Brief at 13. Thus, the Majority is correct that the record establishes that the aggregate recidivism rate is true.*

However, the irrebuttable presumption doctrine asks not whether the presumption associated with a classification is ***generally*** *true compared to some other group, but whether the presumption is* ***universally*** *true. Under the irrebuttable presumption test applicable here, we are concerned with the right to reputation of an individual, not the reputation of the group. Even relaxing the universality metric to proof of a consensus that the irrebuttable presumption is rejected in the scientific community, the validity of the aggregate recidivism rate does not, as the Commonwealth argues and the Majority accepts, demonstrate a lack of consensus on the critical*

issue of whether sex offenders "pose a high risk of committing additional sexual offenses[.]" 42 Pa.C.S. § 9799.11(a)(4). By reframing the issue into one that is based on relativity, the Majority ignores that SORNA's irrebuttable presumption states an absolute: that sexual offenders "pose a ***high risk*** of committing additional sexual offenses[.]" Id. (emphasis added). The scientific consensus is that sex offenders do not pose such a risk, a fact unaltered by the aggregate recidivism rate.

There are two reasons why this is the case. First, the aggregate recidivism rate does not even answer the question of whether the risk from an individual sex offender to

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recidivate is high. In this regard, the Majority conflates "higher" with "high."[22] Likewise, a higher relative risk of sexual recidivism between two groups cannot stand in for what constitutes a high risk from an individual without more information.[23] A ***high*** risk of sexual recidivism means far more than a ***higher*** risk of sexual recidivism than non-sexual offenders. It means there is a high risk to members of the community that they will be the targets of sexual offenses from sex offenders who are subject to SORNA. But that is precisely what the scientific consensus refutes.

Second, the aggregate recidivism rate does not tell us anything about individuals, it tells us only about the group, and it is now beyond doubt that those persons who are subject to SORNA are not homogeneous in terms of individuals' risk of reoffense. To the contrary, as I suggested might be the case in my dissent in Torsilieri I, a small subset of sex offenders accounts for a shockingly disproportionate amount of sex offender recidivism that is reflected in the aggregate recidivism rate.

Torsilieri's credible experts clearly demonstrated a scientific consensus that refutes SORNA's irrebuttable presumption, and, in doing so, explained why the aggregate

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recidivism rate does not seriously challenge that consensus. Dr. Letourneau credibly testified that it is a "myth that all sex offenders represent a high risk of recidivism and that they are impervious to change." N.T., 6/29/2021, at 34. She acknowledged there are "high risk offenders who remain high risk and who will go on to reoffend," but she emphasized that "the ***majority*** of people with sex crimes convictions will not go on to reoffend sexually." Id. (emphasis added).

How big is that majority? Dr. Letourneau testified that "rigorous research studies find 80 to 95 percent of adult male sex offenders are never reconvicted of a sex crime." Id. at 55. This fact was consistent across multiple studies at both the state and national level, including studies from the Justice Department Recidivism Study from which the aggregate recidivism statistic originates. Id. The aggregate recidivism rate simply does not speak to the real risk of reoffense presented by an individual sex offender like Torsilieri. The aggregate recidivism rate was calculated by comparing the sexual recidivism rate of non-sex offenders to the sexual recidivism rate of sex offenders.[24] As

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Dr. Letourneau explained, this is not a surprising result nor is it exceptional with respect to sex offenders, as "we always expect to see-in a large group of data[-]offending at the same type at a higher rate than offending at a different type."

Id. at 132. The aggregate recidivism rate, however, "did not discuss anything about risk[,]" because it combined "the majority of lower risk offenders" with "the small percentage of the highest risk and you're putting them all together." Id. at 132.

As Dr. Letourneau clarified, the "failure to discriminate between the small group of people who may be at higher risk to reoffend sexually from the majority who are at low risk to reoffend sexually ... leads to a failure of the SORNA laws to protect the community." Id. at 59. Additionally, Dr. Letourneau stated that "about 95 percent of all sex crimes are committed by people who are not previously known to the law for sex offending," implying that one is about twenty times more likely to be the victim of a sexual offense from a first-time offender than from a repeat offender. Id. at 50.

Professor James Prescott's testimony dovetailed with Dr. Letourneau's. He rejected SORNA's irrebuttable presumption, stating that "the consensus about sexual recidivism in particular is that it's fairly low relative to criminal recidivism as it's generally viewed. ...[T]here are lots of categories of crime where recidivism is quite high. Sex offending is not one of them." Id. at 178-79. Indeed, it is so low that Professor Prescott observed that "the only other crime that has a lower recidivism rate is homicide." Id. at 179.

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The scientific evidence points consistently and overwhelmingly to the conclusion that the risk of sexual recidivism from an individual sexual offender is not high, nor anything close to it. Using the statistic most favorable to the Commonwealth, four out of five of sexual offenders will never recidivate sexually.[25] Thus, SORNA's irrebuttable presumption does not present a close case where an irrebuttable presumption falls just short of universality. Sexual offenders do not recidivate sexually 99% of the time, or even 90% of the time. They recidivate sexually no more than 20% of the time. That is to say, the vast majority-at least 80%-will never recidivate sexually. On these facts, Torsilieri easily proved that a scientific consensus exists that refutes SORNA's irrebuttable presumption. The Majority's reliance on the aggregate recidivism rate to deny this reality is illogical and unsupported by the record before this Court.[26]

Although not reached by the Majority, the third element of the irrebuttable presumption doctrine asks whether a reasonable alternative exists to ascertain the presumed fact.[27] Given that the recidivism risk of individuals subject to SORNA is so varied, the third element essentially asks whether alternative means exist to SORNA's three-tiered system to distinguish between the small subset of high-risk offenders and the comparatively large subset of low-risk offenders who are needlessly subject to up to a lifetime of onerous registration and reporting requirements. Here, the trial court found

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that "it is beyond peradventure that the answer is in the affirmative." Trial Court Opinion, 8/23/22, at 6.

As I indicated in my dissent in Torsilieri I, because "there is an alternative means to ascertain whether a particular offender is likely to reoffend, a conviction alone cannot support the infringement" of their constitutional right to reputation. Torsilieri I, 232 A.3d at 606 (Donohue, J., dissenting). In J.B., this Court recognized that such an alternative is "already in use in Pennsylvania under SORNA" in the form of the Sexually Violent Predator ("SVP") assessment process conducted by the Sexual Offender Assessment Board ("SOAB").[28] J.B.,

107 A.3d at 19. "As in J.B., I would hold that the individualized SVP assessment procedure can be expanded to include consideration of the likelihood of re-offense." Torsilieri, 232 A.3d at 606 (Donohue, J., dissenting). The Commonwealth already knows how to conduct individualized assessments of risk in an SVP assessment

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process crafted by the legislature.[29] Thus, Torsilieri also satisfied the third prong of the irrebuttable presumption test.[30]

In sum, I would hold that the trial court did not err in finding that Torsilieri met his burden to demonstrate that SORNA's irrebuttable presumption is unconstitutional.

Punitiveness under Mendoza-Martinez

I join Justice Wecht's analysis in which he balances the Mendoza-Martinez factors to conclude that "Subchapter H is punitive in effect." See Concurring & Dissenting Opinion at 21-43 (Wecht, J., concurring and dissenting).[31] Specifically, I agree that Subchapter H imposes affirmative disabilities or restraints upon sex offenders (factor 1), resembles historical forms of punishment (factor 2), promotes both punitive goals of deterrence and retribution (factor 4); and is excessive in relation to its purpose (factor 7).[32] Id. at 43. Consequently, because Subchapter H imposes a mandatory punishment for lifetime SORNA registrants in excess of the statutory maximum criminal penalty, it is unconstitutional under Apprendi, 530 U.S. at 489 ("Other than the fact of a prior

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conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

I expand on Justice Wecht's criticisms of the Majority's rationale in one respect regarding the first Mendoza-Martinez factor. As Justice Wecht correctly observes, in Muniz, the plurality opinion deemed significant, for purposes of whether SORNA imposed a direct restraint on registrants, that a Tier III offender "would have to make at least one hundred in-person appearances" over a twenty-five-year period, "constituting a significant restraint upon a person's life." Concurring & Dissenting Opinion at 31 (citing Commonwealth v. Muniz, 164 A.3d 1189, 1210 (Pa. 2017)). Justice Wecht also appropriately expresses exasperation over the Majority's determination that thirty-four such visits over the same period does not constitute an affirmative disability or restraint without any guidance as to where, exactly, that line from punitive to non-punitive was crossed. Id. at 31-32 (citing Majority Op. at 45). The lack of analysis justifying that transition is perplexing and leaves the impression that it is arbitrary.

However, I add that the calculation of thirty-four in-person visits over twenty-five years is merely hypothetical, representing only the bare minimum number of in-person visits that Torsilieri or other Tier III offenders face. The Majority arrived at its calculation of thirty-four in-person visits by assuming that the actual requirement of one-hundred visits over twenty-five years (the quarterly in-person requirement)[33] will be reduced by sixty-six visits by operation of 42 Pa.C.S. § 9799.25(a.1)(1). That provision permits individuals who have been

> in compliance with the requirements of this subchapter for the first three years of the individual's period of

registration and,

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during the same three-year period, the individual has not been convicted in this Commonwealth or any other jurisdiction or foreign country of an offense punishable by imprisonment of more than one year, the individual shall appear at an approved registration site annually.

42 Pa.C.S. § 9799.25 (a.1)(1).

Why the Majority assumes for purposes of calculating the total number of visits that all Tier III offenders will be compliant with the requirements of Section 9799.25 (a.1)(1) is left completely unaddressed. Thirty-four in-person visits is the absolute best-case scenario for Tier III offenders, not an average. We have no information before this Court that would suggest that a significant number of Tier III offenders will satisfy those requirements. Section 9799.25(a.1)(3) also provides that any conviction for failure to comply with reporting requirements voids "any relief granted under this subsection." 42 Pa.C.S. § 9799.25 (a.1)(3). We can reasonably guess, therefore, that the number of Tier III offenders who will be required to report in person more than thirty-four times will be significantly larger than zero.

Moreover, to take advantage of the reduction in visits, Tier III offenders must substitute telephonic reporting for the other three yearly in-person visits. 42 Pa.C.S. § 9799.25(a.1)(2). But, "[n]o individual may utilize the telephonic verification system until the Pennsylvania State Police publishes notice in the Pennsylvania Bulletin that the system is operational." 42 Pa.C.S. § 9799.25(a.2). The Majority acknowledges but does nothing to resolve Torsilieri's contention that this telephonic reporting system has not yet been instituted despite the clear mandate in Section 9799.25(a.2).[34] 42 Pa.C.S. § 9799.25(a.2) ("The Pennsylvania State Police shall develop a mechanism to permit individuals to utilize the telephonic verification system established in this section."). Thus,

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at the present time, it could be the case that no Tier III offenders can utilize telephonic reporting and, thus, that no current Tier III offenders will be subject to the bare minimum of thirty-four in person visits. Consequently, the thirty-four in-person visits figure relied upon by the Majority is pure fantasy that simply does not represent the number of in-person reporting visits that will actually be required of a typical Tier III offender.

Conclusion

For the reasons set for above, I would conclude that Torsilieri met his high burden of proving that SORNA's irrebuttable presumption is unconstitutional. Additionally, I would find that Subchapter H's registration and reporting requirements for Tier III offenders are punitive and, therefore, unconstitutional under Apprendi. Thus, I would affirm the decision of the trial court.

Notes:

[1] 42 Pa.C.S. §§ 9799.10 - 9799.42.

[2] Pa. Const. art. 1, § 1.

[3] Pa. Const. art. II, § 1; id. art. IV, § 2; id. art. V, § 1; see also Renner v. Court of Common Pleas of Lehigh County, 234 A.3d 411, 419 (Pa. 2020).

[4] U.S. Const. amend. 8.

[5] U.S. Const. amend. 6; Alleyne v. United States,

570 U.S. 99 (2013); Apprendi v. New Jersey, 530 U.S. 466 (2000).

[6] While this motion was pending in the trial court, the General Assembly enacted and the Governor signed an amended version of SORNA through Act 29 of 2018, Act of June 12, 2018, P.L. 140, No. 29, effective on June 12, 2018 ("Act 29"). The parties do not suggest that the Act 29 amendments alter the provisions of Subchapter H relevant to the issues before us.

[7] See 42 Pa.C.S. § 722(7) (providing for exclusive jurisdiction in the Pennsylvania Supreme Court over final orders in which the court of common pleas declares a statute unconstitutional).

[8] The Court found, consistent with prior case law, that Mendoza-Martinez factor 3, a finding of scienter, and factor 5, past criminal misconduct, provide little guidance in determining whether Subchapter H is punitive, and, thus, did not discuss or remand for further analysis of these factors. Torsilieri I, 232 A.3d at 589.

[9] See 42 Pa.C.S. § 9799.11, which provides in relevant part:

> (a) Legislative findings.--The General Assembly finds as follows:
>
> * * *
>
> (3) If the public is provided adequate notice and information about sexual offenders, the community can develop constructive plans to prepare for the presence of sexual offenders in the community. This allows communities to meet with law enforcement to prepare and obtain information about (continued…) the rights and responsibilities of the community and to provide education and counseling to residents, particularly children.
>
> * * *
>
> (7) Knowledge of whether a person is a sexual offender could be a significant factor in protecting oneself and one's family members, or those in care of a group or community organization, from recidivist acts by such offenders.
>
> (8) The technology afforded by the Internet and other modern electronic communication methods makes this information readily accessible to parents, minors and private entities, enabling them to undertake appropriate remedial precautions to prevent or avoid placing potential victims at risk.

[10] The Pennsylvania Coalition Against Rape, as amicus, stresses the importance of the registry, asserting it provides a layer of safety and protection for survivors and for (continued…) community members who care about the safety of others, including children, by warning the public about sexual offenders so that they can act to protect themselves. In doing so, amicus emphasizes that recidivism rates do not reflect the vast number of unreported acts of sexual violence and assault, or those reported and not prosecuted. Amicus Pennsylvania District Attorneys Association proffers that value judgments are within the purview of the legislature, and that courts should not substitute their policy judgments for those of the General Assembly. Amicus Office of the Victim Advocate adds that deference is to be accorded to the legislature's policy judgments, and so our Court must respect SORNA's provision of relevant, timely, and current information to victims about their attackers so that informed decisions can be

made regarding their personal safety. Finally, amicus PSP warns that affirmance of the trial court's decision would likely result in the removal of 9,649 sexual offenders from the registry, and endorses the Commonwealth's position that Appellee failed to demonstrate a universal consensus that the irrebuttable presumption undergirding SORNA - that those adults convicted of a sexual offense are more likely to commit another sexual offense than those adults convicted of non-sexual offenses — is false. PSP adds that, as a practical matter, striking Subchapter H as unconstitutional would not only result in the removal of over 9,000 sexual offenders from the registry, but would, in turn, result in offenders from another state not being required to register, even if that state notifies the PSP, encouraging sexual offenders to move to Pennsylvania.

[11] Amici Assessment and Treatment Alternatives and the Joseph J. Peters Institute, consistent with Appellee's position, argue that SORNA's registration requirements do not further the statute's purpose of preventing offender recidivism. Amici claim that the likelihood of offenders recidivating is low and substantially decreases over time. Additionally, amici assert that the notification and registration requirements, which place (continued…) offenders at risk for unemployment, homelessness, physical and verbal harassment, and property damage, paradoxically, actually increase the risk of recidivism and inhibit sex offenders' successful reintegration and rehabilitation, diluting the purpose and power of the registry. Additionally, Amici Sixteen Legal Scholars focus on research which, like that presented by Appellee's experts, shows that most individuals convicted of sexual offenses are not likely to commit additional sexual offenses, particularly as time passes. They rely on evidence that shows that, after ten years, the rates of new sexual offenses committed by those who are convicted of sex crimes is approximately the same as those who have committed non-sexual offenses. Amici also stress that research demonstrates that evaluation tools and individualized treatment plans are a superior means of protecting the public from victimization by sex offenders than registration and notification requirements.

[12] As we do not address Appellee's challenge under substantive due process principles, but, rather, do so under the irrebuttable presumption doctrine, we need not address Appellee's assertion that our Court should apply strict scrutiny in analyzing Subchapter H.

[13] As to the first prong, the parties do not meaningfully dispute that the right to reputation is protected by the due process clause and that the designation as a sexual offender, based upon a presumption of posing a high risk of recidivism, impacts one's right to reputation. See In re J.B., 107 A.3d at 16 (making this finding with respect to juvenile offenders). Additionally, while we need not reach the third prong of the analysis based upon our resolution of the second prong, we note that, in In re J.B., we found the third prong satisfied, as SORNA already provided for individualized assessment of adult sexual offenders as sexually violent predators and juvenile offenders as sexually violent delinquent children. Id. at 19.

[14] By contrast, in In re J.B. where we engaged in a similar analysis, we came to a contrary conclusion. Therein, the statistical evidence showed that juvenile sex offenders were no more likely to commit subsequent sexual offenses than

juveniles who committed non-sexual offenses. In that case, the evidence was clear, based upon a demonstrated consensus, that the presumption was not justified.

[15] As we discuss below, Appellee also contends that, independent of whether Subchapter H is deemed to be punitive, SORNA's mandatory lifetime sex offender registration constitutes cruel and disproportionate punishment under the Eighth Amendment to the United States Constitution. See infra note 18.

[16] As we discuss below regarding Torsilieri I, in LaCombe, we found that factors 3 and 5 were of little significance to the inquiry in this context, and, thus, we assigned these factors little weight. LaCombe, 234 A.3d at 603-04, 606.

[17] This reduction in the minimum number of in-person visits resulted from appearances being permitted by telephone. Telephonic visits may occur after three years for registrants qualified for reduced in-person reporting. 42 Pa.C.S. § 9799.25(a.1).

[18] At a minimum, a Tier I registrant still must appear annually. 42 Pa.C.S. § 9799.15(e).

[19] Regarding his claim that Subchapter H is violative of the Eighth Amendment's prohibition on cruel and unusual punishment, Appellee further contends that this claim persists even if we find Subchapter H to be non-punitive. Appellee's Brief at 97 ("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."). However, in his brief, Appellee fails to explain in any meaningful fashion how a civil provision that is deemed to be non-punitive, which we have found today, may still serve as the basis for the finding of an Eighth Amendment violation. Rather, he posits only that "punishment" may include "all civil or criminal sanctions that serve retributive or deterrent purposes to any degree," citing our decision in Shoul. Id. (citing Shoul, 173 A.3d at 684). Indeed, the only cases that Appellee cites in favor of his position that Subchapter H constitutes cruel and unusual punishment both found their respective SORNA corollaries to be punitive under the Mendoza-Martinez factors. See People In the Interest of T.B., 489 P.3d 752 (Colo. 2021) (finding Colorado's CSORA legislation imposing lifetime registration on juvenile sex offenders to constitute punishment under Mendoza-Martinez factors, then proceeding to conclude statute constituted cruel and unusual punishment under Eighth Amendment); People v. Lymon, 993 N.W.2d 24 (Mich. Ct. App. 2022) (determining that Michigan's SORA statute constituted punishment under the Mendoza-Martinez factors, and that it also constituted cruel and unusual punishment under the Michigan and federal Constitutions), appeal granted, 983 N.W.2d 82 (Mich. 2023). Thus, we reject Appellee's underdeveloped argument in this regard.

[20] Appellee's "Application for Leave to File a Post-Submission Communication" forwarding for the Court's information a recent decision by the Supreme Court of Montana is granted.

[1] See, e.g., Commonwealth v. Gaffney, 733 A.2d 616 (Pa. 1999) (Megan's Law I); Commonwealth v. Williams, 733 A.2d 593 (Pa. 1999) ("Williams I") (Megan's Law I); Commonwealth v. Williams, 832 A.2d 962 (Pa. 2003) ("Williams II") (Megan's Law II); Commonwealth v. Killinger, 888 A.2d 592 (Pa. 2005) (Megan's Law II); Commonwealth v. Wilson; 910 A.2d 10 (Pa. 2006) (Megan's Law II); Commonwealth v. Neiman, 84 A.3d 603 (Pa. 2013) (Megan's Law III); Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017) (SORNA I); Commonwealth v. Lacombe, 234 A.3d 602 (Pa. 2020) (SORNA II).

[2] Torsilieri is a convicted sexual offender. Following a jury trial, Torsilieri was convicted of aggravated indecent assault, 18 Pa.C.S. § 3125, and simple assault, 18 Pa.C.S. § 2701. He was evaluated by a member of the Sexual Offenders Assessment Board, see 42 Pa.C.S. § 9799.24(b), which determined that Torsilieri was not a sexually violent predator. See 42 Pa.C.S. § 9799.12 (defining the term "sexually violent predator"). Thereafter, the trial court sentenced Torsilieri to one year less one day to two years less two days in jail. On the same day, the trial court directed him to comply with all applicable SORNA requirements.

[3] SORNA II categorizes aggravated indecent assault as a Tier III offense. See 42 Pa.C.S. § 9799.14(d). Therefore, Torsilieri must comply with Subchapter H of SORNA II for life. See 42 Pa.C.S. § 9799.15(a)(3).

[4] SORNA is the acronym for the "Sexual Offender Registration and Notification Act," 42 Pa.C.S. §§ 9799.11-9799.75. Following our decision in Muniz invalidating the then-applicable SORNA I, the General Assembly enacted a new statutory scheme, SORNA II. The new scheme bifurcated the law into two distinct subchapters: Subchapter H, which governs offenders whose triggering offenses occurred on or after December 20, 2012, see 42 Pa.C.S. § 9799.12 (defining a "sexually violent offense" for purposes of Subchapter H), and Subchapter I, which governs those offenders whose sexual offenses were committed prior to that date, see 42 Pa.C.S. § 9799.53 (defining "sexually violent offense" for purposes of Subchapter I).

[5] Pa. Const. art. 1, § 1.

[6] U.S. Const. amend VI.

[7] U.S. Const. amend VIII.

[8] Maj. Op. at 37.

[9] Id. at 26-27.

[10] Id. at 27. The Majority also justifies its continued recognition and application of the irrebuttable presumption doctrine by noting that neither party here challenges the "continued vitality" of the doctrine in Pennsylvania. Id. The fact that a party has not requested the overruling of a precedent is no categorical impediment to such overruling, inasmuch as this would at times render us helpless to abrogate indefensible, unsustainable, or conflicting case law. See Commonwealth v. Jackson, 302 A.3d 737, 773 n.38 (Pa. 2023) (Wecht, J., Opinion in Support of Reversal); Commonwealth v. Ortiz, 197 A.3d 256, 262 n.1 (Pa. 2018) (Wecht, J., dissenting); Cagey v. Commonwealth, 179 A.3d 458, 473 n.7 (Pa. 2018) (Wecht, J., concurring); William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 446 n.49 (Pa. 2017) ("We would encourage the perpetuation of poorly reasoned precedent were we to permit ourselves to revisit the soundness of our case law only when expressly invited to do so based upon a given party's tactical decision of whether to attack adverse case law frontally . . . or to attempt more finely to distinguish the adverse decisions. The scope of our review is not so circumscribed.").

[11] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). In Mendoza-Martinez, the United States Supreme Court identified seven factors to help guide courts in determining whether a statutory scheme is punitive. Id. at 168-69. I discuss those factors in more detail below.

[12] See Lacombe, 234 A.3d at 659-60 (Wecht, J., concurring and dissenting).

[13] 402 U.S. 535 (1971). See James M. Binnall, Sixteen Million Angry Men: Reviving a Dead Doctrine to Challenge the Constitutionality of

Excluding Felons from Jury Service, 17 Va. J. Soc. Pol'y & L. 1, 5 (2009); Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534, 1540-41 (1974).

[14] 270 U.S. 230 (1926).

[15] Id. at 236, 240.

[16] Id. at 239.

[17] Id.

[18] Id. at 240.

[19] Id. Even then, in the full bloom of the Lochner Era, this expansive use of the Fourteenth Amendment's Due Process Clause did not sit well with some. In a dissent that foreshadowed some of the criticisms that would follow, Justice Holmes opined that the Court should be more deferential to the policy choices that legislators make:

> I am not prepared to say that the legislature of Wisconsin, which is better able to judge than I am, might not believe, as the Supreme Court of the State confidently affirms, that by far the larger proportion of the gifts coming under the statute actually were made in contemplation of death. I am not prepared to say that if the legislature held that belief, it might not extend the tax to gifts made within six years of death in order to make sure that its policy of taxation should not be escaped. I think that with the States as with Congress when the means are not prohibited and are calculated to effect the object we ought not to inquire into the degree of the nevessity [sic] for resorting to them.

Id. at 242 (Holmes, J., dissenting). Justices Brandeis and Stone joined Justice Holmes' dissent.

[20] 284 U.S. 206 (1931).

[21] 285 U.S. 312 (1932).

[22] Id. at 326.

[23] Hoeper, 284 U.S. at 215. In dissent, Justice Holmes, joined by Justices Brandeis and Stone, discerned no constitutional defect in a law built upon an irrebuttable premise that "might reach innocent people." Id. at 220 (Holmes, J., dissenting). "It has been decided too often to be open to question that administrative necessity may justify the inclusion of innocent objects or transactions within a prohibited class." Id. at 220-21.

[24] Heiner, 285 U.S. at 320.

[25] Id. at 322.

[26] Id. at 324.

[27] Id.

[28] Id. at 325.

[29] Bell, 402 U.S. at 535-36 (footnote omitted).

[30] Id. at 536.

[31] Id. at 539.

[32] Id. (citations omitted).

[33] Id. at 541.

[34] See id. at 541-42.

[35] Id. at 542.

[36] See id. at 539 (explaining that the statute could "[bar] the issuance of licenses to all motorists who did not carry liability insurance or

who did not post security"); id. at 540 (finding that "Georgia's interest in protecting a claimant from the possibility of an unrecoverable judgment is not, within the context of the State's fault-oriented scheme, a justification for denying the process due its citizens"); and id. at 542-43 (noting that there are "several" methods that would comply with due process: "Georgia may decide to withhold suspension until adjudication of an action for damages brought by the injured party. Indeed, Georgia may elect to abandon its present scheme completely and pursue one of the various alternatives in force in other States. Finally, Georgia may reject all of the above and devise an entirely new regulatory scheme." (footnote omitted)).

[37] *405 U.S. 645 (1972).*

[38] *Id. at 649-50.*

[39] *Id. at 650.*

[40] *See id.*

[41] *Id. at 652.*

[42] *Id.*

[43] *Id. at 654 (footnote omitted).*

[44] *Id. at 656-57.*

[45] *Id. at 656 (footnote omitted).*

[46] *Id.*

[47] *Id. at 657.*

[48] *412 U.S. 441 (1973).*

[49] *Id. at 442.*

[50] *Id. at 443.*

[51] *Id. at 452.*

[52] *Id.*

[53] *Id. at 460 (Burger, C.J., dissenting).*

[54] *Id. (internal quotation marks omitted).*

[55] *Id. at 459.*

[56] *Id. at 460 (internal quotation marks omitted).*

[57] *Id. (internal quotation marks omitted).*

[58] *Id. at 463.*

[59] *Id. at 466 (Rehnquist, J., dissenting).*

[60] *Id. at 468.*

[61] *Id. (internal quotation marks omitted).*

[62] *414 U.S. 632, 634-36, 651 (1974).*

[63] *Id. at 660 (Rehnquist, J., dissenting). Chief Justice Burger joined the dissent.*

[64] *Id. (quoting Williamson v. Lee Optical Co., 348 U.S. 483 (1955)).*

[65] *Id. (quotation marks omitted).*

[66] *Id. at 652 (Powell, J., concurring) (citing his joinder in Vlandis).*

[67] *Id.*

[68] *Id. (internal quotation marks omitted).*

[69] *422 U.S. 749 (1975).*

[70] *See id. at 753.*

[71] *Id. at 768.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id. (internal quotation marks and citation omitted).*

[76] Id. at 772.

[77] Id.

[78] Id. at 773.

[79] Binnall, supra n.13, at 14; see also DeLaurier v. San Diego Unified Sch. Dist., 588 F.2d 674, 683 n.16 (9th Cir. 1978) (noting that, although no court has expressly overruled the doctrine, "it is apparent that the use of that doctrine has been severely limited").

[80] 594 F.2d 623, 629 (7th Cir. 1979); see also Schanuel v Anderson, 708 F.2d 316, 319 (7th Cir. 1983) (declining to "revive" the doctrine after the Supreme Court effectively killed it in Salfi).

[81] Brennan v. Stewart, 834 F.2d 1248, 1258 (5th Cir. 1988) (internal quotation marks omitted).

[82] 491 U.S. 110 (1989).

[83] Id. at 120-21 (citations omitted).

[84] Schanuel, 708 F.2d at 319.

[85] Catlin v. Sobol, 93 F.3d 1112, 1118 (2d Cir. 1996).

[86] Brennan, 834 F.2d at 1258.

[87] 3 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law, § 17.6 (5th ed. 2012); see also Deborah Dinner, Recovering the LaFleur Doctrine, 22 Yale J.L. & Feminism 343, 387-88 (2010) (describing irrebuttable presumption doctrine as widely criticized and no longer followed).

[88] John M. Phillips, Irrebuttable Presumptions: An Illusory Analysis, 27 Stan. L. Rev. 449, 462 (1975).

[89] Alan C. Green, Where Presumption Overshoots: The Foundation and Effects of Pennsylvania Department of Transportation v. Clayton, 116 Penn. St. L. Rev. 1181, 1182 (2012).

[90] In re J.B., 107 A.3d 1, 15-16 (Pa. 2014).

[91] Maj. Op. at 36.

[92] Vlandis, 412 U.S. at 468 (Rehnquist, J., dissenting) (citation omitted in original).

[93] LaFleur, 414 U.S. at 660 (Rehnquist, J., dissenting).

[94] See id. at 652 (Powell, J., concurring); Michael H., 491 U.S. at 120-21.

[95] See Maj. Op. at 27. The Majority also defends its application of the doctrine by noting that neither party challenges its validity in this appeal. As noted above, this is no categorical impediment. Here, as elsewhere, we are authorized to abrogate bad precedent and apply the correct decisional law. See supra n.10.

[96] This persistence in error is reminiscent, both jurisprudentially and methodologically, of this Court's odd and persisting obeisance to the long-disavowed Lochner doctrine and its unprincipled invocation of substantive due process. See Bert Co. v. Turk, 298 A.3d 44, 86, 93-94 (Pa. 2023) (Wecht, J., concurring); Yanakos v. UPMC, 218 A.3d 1214, 1243 (Pa. 2019) (Wecht, J., dissenting); and Shoul v. Com., Dept. of Trans., 173 A.3d 669, 690-93 (Pa. 2017) (Wecht, J., concurring).

[97] It has been nearly one hundred years since the United States Court first stumbled into the irrebuttable presumption doctrine. By the latter half of the last century, federal courts had all but deserted it. It has been fifty years since the United States Supreme Court invalidated a statute under the doctrine. See LaFleur, 414 U.S. at 634-36. The doctrine's abandonment did

not occur by happenstance or indifference. A fair reading of the Supreme Court's cases suggests that, due to its (at best) shaky tether to any federal constitutional provision, the doctrine was doomed from the get-go. "In fact, it is difficult to recall any doctrine utilized by the Court in the recent years which has been met with such a degree of antipathy as has the irrebuttable presumption/procedural due process analysis." The Premature Demise of Irrebuttable Presumptions, Jonathon B. Chase, 47 U. Colo. L. Rev. 653, 653 (1976). In the last five decades, federal courts have resisted resort to this "severely limited" doctrine, DeLaurrier, 588 F.2d at 683 n.16, have refused to "revive" this moribound doctrine, Schanuel, 708 F.2d at 319, or have pronounced the doctrine dead-on-arrival. See Black v. Snow, 272 F.Supp.2d 21, 30-31 (D.D.C. 2003) (opining that "the doctrine has now been abandoned as a generally accepted approach" and has instead "simply collapsed into the ordinary equal protection/due process analysis") (cleaned up; internal quotations and citation omitted). The unavoidable fact is that the irrebuttable presumption doctrine, undeniably a creature of federal caselaw, has been wholly forsaken by the federal courts that invented it.

Notwithstanding the overwhelming, consistent evidence that the doctrine has fallen into desuetude in federal law, and despite general scholarly agreement to this effect, Justice Donohue's dissent insists that the doctrine remains full of vigor, alive and well. Justice Donohue cites no recent (or even not so recent) federal cases to support her belief that the doctrine endures. Instead, she criticizes my suggestion that we too should lay the doctrine to rest. She asserts that, despite the abundant proof of the doctrine's demise, my "punchline" "fails to land." Diss. Op. at 5-6 n.8. That the Supreme Court has not expressly overruled the doctrine does not mean that it is somehow flourishing in the federal law. Nor does the fact that Justice Scalia failed to explicitly "kill the irrebuttable presumption doctrine" in Michael H. Id. Fifty years of dormancy, overwhelming and extensive criticism, and the belief by most, if not all, federal courts that the doctrine has, in fact, been abandoned is all the evidence one needs.

All that the dissent can rely on is the peculiar circumstance that this Court-a state tribunal-continues to use the doctrine. That does not prove the doctrine's "longevity." Diss. Op. at 5-6 n.8. Rather, it speaks instead to the fact that this Court is lagging behind, or willfully ignoring, the federal courts' abandonment of their own doctrine. If our federal courts no longer apply a federal doctrine, this Court should question why we stubbornly persist in doing so. All of the available evidence strongly suggests that the irrebuttable presumption doctrine is no longer alive and well. This Court's blind (if sparse) use of the doctrine cannot and does not change that, and certainly does not breathe new life into a defunct idea.

[98] Muniz, 164 A.3d at 1193 (OAJC).

[99] Lacombe, 234 A.3d at 629 (Wecht, J., concurring and dissenting).

[100] Id.

[101] Id.

[102] 42 Pa.C.S. § 9799.12 (defining "sexually violent offense" as one "specified in section

9799.14 (relating to sexual offenses and 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.").

[103] *Id. § 9799.16(a).*

[104] *Id. § 9799.12 (defining "sexual offender" as an "individual who has committed a sexually violent offense. The term includes a sexually violent predator.").*

[105] *Id. § 9799.14(b)-(d) (categorizing "sexually violent offenses" into three tiers, Tier I, Tier II, and Tier III).*

[106] *Id. § 9799.15(a)(1).*

[107] *Id. § 9799.15(a)(2).*

[108] *See id. § 9799.12 (defining "sexually violent predator" as an individual who has committed certain "sexually violent offenses" that "is determined to be a sexually violent predator under section 9799.24 (relating to assessments) due to a mental abnormality or personality disorder that makes the individual likely to engage in predatory sexually violent offenses.").*

[109] *Id. § 9799.15(a)(3), (6).*

[110] *Id. § 9799.15(b)(1)(i)(A)-(C).*

[111] *Id. § 9799.15(e)(1).*

[112] *Id. § 9799.15(e)(2).*

[113] *Id. §§ 9799.15(e)(3), (f)(2).*

[114] *Id. § 9799.25(a.1)(1)-(2).*

[115] *Id. § 9799.15(i).*

[116] *Id. § 9799.39.*

[117] *Id. § 9799.16(b).*

[118] *Id. § 9799.15(d), (e).*

[119] *Id. § 9799.15(g).*

[120] *Id. § 9799.16(b)(6).*

[121] *Id. § 9799.25(e).*

[122] *Id. § 9799.16(c)(1)-(7).*

[123] *Id. §§ 9799.16(a), 9799.22.*

[124] *Id. § 9799.16(a)(1).*

[125] *Id. § 9799.28(a).*

[126] *Id. § 9799.28(a)(1)(i).*

[127] *Id. § 9799.28(a)(1)(ii).*

[128] *Id. § 9799.28(b)(1)-(14).*

[129] *Id. § 9799.28(c)(1)-(4).*

[130] *Id. § 9799.28(a)(2).*

[131] *Id. § 9799.15(a.2)(1).*

[132] *Id. § 9799.15(a.2)(2).*

[133] *Id. § 9799.15(a.2)(5).*

[134] *Id. § 9799.21(a)(1)-(3).*

[135] *See 18 Pa.C.S. § 4915.1. Grading depends upon a number of factors, and ranges from a third-degree felony to a first-degree felony. See id.*

[136] *42 Pa.C.S. § 9799.30.*

[137] *Lacombe, 234 A.3d at 657 (Wecht, J., concurring and dissenting).*

[138] *up> See Smith v. Doe, 538 U.S. 84, 92 (2003) (internal quotation marks and citations omitted).*

[139] *Muniz, 164 A.3d at 1209 (OAJC) (quoting Williams II, 832 A.2d at 971).*

[140] 42 Pa.C.S. § 9799.11(b)(2).

[141] Id. § 9799.11(b)(1).

[142] Mendoza-Martinez, 372 U.S. at 168-69.

[143] Id. (footnotes omitted).

[144] Muniz, 164 A.3d at 1210 (OAJC).

[145] Lacombe, 234 A.3d at 619-20.

[146] See Maj. Op. at 45.

[147] Lacombe, 234 A.3d at 648 (Wecht, J., concurring and dissenting).

[148] Lacombe, 234 A.2d at 646-47 (Wecht, J., concurring and dissenting) (emphasis in original).

[149] Id. at 647.

[150] See 42 Pa.C.S. § 9799.15(g).

[151] Lacombe, 234 A.3d at 656 (Wecht, J., concurring and dissenting) (internal quotation marks omitted).

[152] Id. at 647.

[153] Muniz, 164 A.3d at 1213 (OAJC); Lacombe, 234 A.3d at 623.

[154] Maj. Op. at 47.

[155] Muniz, 164 A.3d at 1213 (OAJC).

[156] 97 A.3d 747 (Pa. Super. 2014) (Donohue, J., concurring).

[157] Id. at 763-64.

[158] See 42 Pa.C.S. § 9754(a) (providing that a term of probation "may not exceed the maximum term for which the defendant could be confined.").

[159] Lacombe, 234 A.3d at 649 (Wecht, J., concurring and dissenting).

[160] Id. at 650.

[161] 42 Pa.C.S. § 9799.28(b)(1)-(14).

[162] Lacombe, 234 A.3d at 649 (Wecht, J., concurring and dissenting).

[163] 42 Pa.C.S. § 9799.28(a)(1)(ii).

[164] Lacombe, 234 A.3d at 648-49 (Wecht, J., concurring and dissenting).

[165] Muniz, 164 A.3d at 1214 (OAJC); Lacombe, 234 A.3d at 623.

[166] Muniz, 164 A.3d at 1214 (OAJC) (quoting Smith, 538 U.S. at 105).

[167] Lacombe, 234 A.3d at 624.

[168] Maj. Op. at 49.

[169] Muniz, 164 A.3d at 1215 (OAJC).

[170] Lacombe, 234 A.3d at 651 (Wecht, J., concurring and dissenting).

[171] Muniz, 164 A.3d at 1216 (OAJC).

[172] 42 Pa.C.S. § 9799.11(b)(1).

[173] Id. § 9799.11(b)(2).

[174] Lacombe, 234 A.3d at 653 (Wecht, J., concurring and dissenting).

[175] Id. at 654.

[176] See Maj. Op. at 53.

[177] Lacombe, 234 A.3d at 655 (Wecht, J., concurring and dissenting).

[178] Muniz, 164 A.3d at 1218 (OAJC).

[179] See 42 Pa.C.S. § 9799.15(a.2).

[180] Id. § 9799.15(a)(1).

[181] Lacombe, 234 A.3d at 656 (Wecht, J., concurring and dissenting).

[182] Id.

[183] Maj. Op. at 54 (quoting Smith, 538 U.S. at 97).

[184] Lacombe, 234 A.3d at 656 (Wecht, J., concurring and dissenting).

[185] Id.

[186] Id.

[187] Id. at 657.

[188] Id. See Hudson v. United States, 522 U.S. 93, 100 (1997) (noting that only the "clearest proof" will suffice to prove that a civil regulatory scheme is punitive in its effect).

[189] 530 U.S. 466, 490 (2000).

[1] 42 Pa.C.S. §§ 9799.10-9799.42 ("SORNA").

[2] The Majority relies on an uncontroverted statistic that holds that sexual offenders "reoffend" at a rate of at least three times higher than those convicted of non-sexual offenses. Majority Op. at 37. For the sake of brevity and ease of discussion, I will refer to this statistic henceforth as the "aggregate recidivism rate."

[3] 42 Pa.C.S. § 9799.11(a)(4) (hereinafter "SORNA's irrebuttable presumption").

[4] Walter Winchell, Walter Winchell (Syndicated column), Daytona Beach Morning Journal, November 16, 1948, at 2, column 3.

[5] See Concurring & Dissenting Op. at 3-21 (Wecht, J., concurring and dissenting).

[6] The Vlandis Court cited numerous cases supporting this proposition going back to 1926, when the High Court determined that an inheritance tax statute violated due process because it utilized a "conclusive presumption that all material gifts within six years of death were made in anticipation of" that death "without regard to the actual intent." Schlesinger v. State of Wisconsin, 270 U.S. 230, 239 (1926). Thus, to the extent the Majority's summary suggests that the irrebuttable presumption doctrine was short lived in the federal courts, see Majority Op. at 25 (stating the United States Supreme Court applied the doctrine from "the late 1960s to the mid-1970s"), such a representation overlooks or undersells a deeper history.

Indeed, the Commonwealth's overarching concern here for judicial deference to legislative prerogatives echoes Justice Oliver Wendell Holmes, Jr.'s dissent in Schlesinger, 270 U.S. at 241 (Holmes, J., dissenting) (stating that "in dealing with state legislation upon matters of substantive law we should avoid with great caution attempts to substitute our judgment for that of the body whose business it is in the first place, with regard to questions of domestic policy that fairly are open to debate"). However, great caution should never require a rubber stamp in defiance of reason. The core function of the irrebuttable presumption doctrine is to provide a rare but essential judicial check on the legislative branch when the falsity of an irrebuttable presumption that adversely affects individual rights is not or is no longer "fairly ... open to debate." Id.

[7] In Bell, the United States Supreme Court held that the state of Georgia could not conclusively

presume fault merely because an uninsured motorist was involved in an accident without a hearing to contest that presumption. Bell, 402 U.S. at 542-43. A year later, applying similar rationale in Stanley, the High Court struck down an Illinois statute that presumed an unmarried father was unfit to be a parent, without providing individual fathers the opportunity to rebut that presumption, in determining custody following the death of a mother.

[8] The Concurring and Dissenting Opinion suggests that this Court should kill the irrebuttable presumption doctrine sua sponte. Concurring & Dissenting Opinion at 21 (Wecht, J., concurring and dissenting) ("The irrebuttable presumption doctrine is a jurisprudential corpse. For whatever reason, this Court insists on keeping it alive. It's time to bury it."). Despite its colorful mixing of life-and-death metaphors, the Concurring and Dissenting Opinion fails to land its intended punchline-that this Court alone supports the "jurisprudential corpse" of the irrebuttable presumption doctrine.

*Although the Concurring and Dissenting Opinion struggles to admit as much, the United States Supreme Court did not kill the irrebuttable presumption doctrine in Salfi. Id. at 16 ("Although the Salfi Court **did not** expressly overrule the irrebuttable presumption precedents, that decision severely hampered the applicability of the doctrine, and may well have become its obituary.") (footnote, quotation marks, and brackets omitted) (emphasis added). If it had died in Salfi, surely Justice Scalia's plurality would have noted that fact fourteen years later in Michael H. v. Gerald D., in which a divided court sparred around the margins of the irrebuttable presumption doctrine. Although we can debate whether Justice Scalia's plurality opinion in Michael H. v. Gerald D. was intended to kill the irrebuttable presumption doctrine, how that opinion is construed is irrelevant. Justice Scalia failed to garner a majority, and none of the justices who decided Michael H. v. Gerald D. sit on the United States Supreme Court today. Consequently, whatever predictive value scholars once deduced from the vote distribution Michael H. v. Gerald D. is now obsolete. Moreover, our application of the doctrine is well-suited to protect the right to reputation under Pa. Const. art. I, § 1, which is consistent with the limitation placed on the doctrine in Salfi.*

The Concurring and Dissenting Opinion lauds abandonment of the doctrine as an act of respect for the legislative authority, but that respect is already baked into the high burden required to make out a successful claim. Thus, I do not advocate to preserve the doctrine for precedent's sake alone. By preserving the doctrine, I believe we preserve a rare but vital check on legislative overreach.

No number of non-precedential opinions and law review articles can bury a constitutional doctrine merely because it has been subject to criticism. For nearly forty years after Salfi was decided, and for nearly twenty-five years after the stalemate in Michael H. v. Gerald D., the academic debate over the continued vitality of the irrebuttable presumption doctrine raged before we decided J.B., a 6-1 majority opinion. Notably, the dissent in J.B. found no fault in the durability of the irrebuttable presumption doctrine, and only challenged its application under the facts of that case. See J.B., 107 A.3d at 20-21 (Stevens, J., dissenting). That was ten years ago. So, in the five decades since Salfi, this Court has not repudiated the irrebuttable presumption doctrine and the United States Supreme Court has still not dispatched it nor overruled any precedent on which it continues to rest. That speaks far more to the doctrine's longevity than to its demise. While I do not rule out that there may be occasions where the abandonment of stale legal doctrines is justified without explicit advocacy to that effect, this is, in

my opinion, clearly not one.

[9] Justice Zappala misunderstood this distinction when he mistakenly reframed Clayton's argument as a pure equal protection claim: that Clayton was "treated differently from other drivers (is being denied equal protection) because of the occurrence of an epileptic seizure." Clayton, 684 A.2d at 1066 (Zappala, J., dissenting). To the contrary, the due process violation did not occur because Clayton was being treated differently as a member of group who had epileptic seizures from those who had not suffered epileptic seizures. The due process violation resulted from the denial of Clayton's individual right to a forum to contest the presumption that he presented the same or similar risk as the group in which he was categorized.

[10] "[G]iven the nature of the matter currently before the courts, it cannot be gainsaid that any 'meaningful' opportunity to be heard would here require that the licensee be permitted to present objections, not to the conclusion that he had suffered an epileptic seizure, but rather to the presumption of incompetency to drive." Clayton, 684 A.2d at 1065.

[11] See Miller v. Alabama, 567 U.S. 460 (2012) (declaring mandatory life without parole unconstitutional for any offense committed by juveniles); Graham v. Florida, 560 U.S. 48 (2010) (declaring life without parole unconstitutional for non-homicide crimes committed by juveniles); Roper v. Simmons, 543 U.S. 551 (2005) (declaring capital punishment unconstitutional for any offense committed by juveniles).

[12] Prior to remand, the Commonwealth had stipulated to the content but not the credibility of their affidavits.

[13] Dr. LeTourneau's and Professor Prescott's combined testimony on direct and cross examination on June 28, 2021, filled approximately 283 pages of transcripts. Dr. Hanson's testimony on direct and cross examination on June 29, 2021, alone filled approximately 196 pages of transcripts. Thus, although stated succinctly below, the testimony regarding sex offender recidivism research that was relied upon by the trial court was voluminous and subjected to rigorous examination by the parties.

[14] Dr. Hanson stated that studies show that 80% to 85% of sex offenders will not recidivate sexually, whereas Dr. Letourneau stated that her review of the research shows a range of 80% to 95%. Trial Court Opinion, 8/23/22, at 6. Thus, they agree that at least four out of five sex offenders will not recidivate sexually.

[15] "Dark figure" is a euphemism for the unknown number of unreported or undiscovered crimes generally; this concept is also sometimes identified as "latent criminality." Here, the term "dark figure" is specifically referring to a 2019 study called "The Dark Figure of Sexual Recidivism." See Nicholas Scurich & Richard S. John, The Dark Figure of Sexual Recidivism, UC Irvine School of Law Research Paper No. 2019-09 (Feb. 4, 2019).

[16] One of the more striking criticisms of that study offered by Dr. Hanson was that the statistical model used did not even allow for a category of sex offenders who did not recidivate sexually-i.e., the statistical model itself assumed that all sex offenders would periodically recidivate sexually. N.T., 6/28/2021, at 98. The model also assumed "recidivism risk is a constant that does not change over time[,]" an assumption "not supported by the data." Id.

[17] "We generally agree with the Dissent's

analysis that 'the relevant question should not be whether convicted sexual offenders are committing unreported sexual crimes, but rather whether sexual offenders commit more sexual crimes than other groups not subject to similar registration laws.' Dissenting Op. at 606 (Donohue, J., dissenting)." Torsilieri I, 232 A.3d at 594.

[18] In Torsilieri I, we succinctly summarized the Mendoza-Martinez factors as follows:

> (1) Whether the sanction involves an affirmative disability or restraint; (2) Whether it has historically been regarded as a punishment; (3) Whether it comes into play only on a finding of scienter; (4) Whether its operation will promote the traditional aims of punishment - retribution and deterrence; (5) Whether the behavior to which it applies is already a crime; (6) Whether an alternative purpose to which it may rationally be connected is assignable for it; [and] (7) Whether it appears excessive in relation to the alternative purpose assigned."

Torsilieri I, 232 A.3d at 588-89.

[19] The Majority does not cite the aggregate recidivism rate in the same manner that it was put to Torsilieri's experts, and the Commonwealth was not even consistent in its questions regarding that statistic. Torsilieri's experts were never asked about ***adult*** offenders at all. The statistics conceded by Torsilieri's experts concerned a comparison between the entire class of sexual offenders (necessarily including juveniles) and the entire class of non-sex offenders. See N.T., 6/28/2021, at 203 (asking Dr. Hanson if he agreed "that sexual offenders are three times as likely as non[-]sex offenders to be arrested for rape or sexual assault?"; N.T., 6/29/2021, at 83 (asking Dr. LeTourneau if "Dr. Hanson testified yesterday that sex offenders are three to four times more likely than any other criminal to commit a sex crime, would you agree with that?"); N.T., 6/28/2021, at 274 (asking Professor Prescott if "Dr. Hanson testified that sex offenders are three to four times more likely to commit sex crime than other offenders, would you agree with that?"). Strangely, the questions put to Dr. LeTourneau and Professor Prescott do not entirely align with the question put to Dr. Hanson. Yet, these are the "gotcha moments" upon which the entirety of the Majority's irrebuttable presumption analysis rests.

[20] The Commonwealth summarizes Dr. McCleary's testimony as being that "the empirical literature does not support a reasonable estimate of recidivism rates of registered sex offenders" and that sex offenders "recidivate at different rates and recidivism data is difficult to measure." Commonwealth's Brief at 17. The Commonwealth further summarized Dr. McCleary's testimony as showing that "any fair reading of the literature shows that recidivism rates vary widely" within the population of sexual offenders based on several variables. Id. at 18. The record supports the Commonwealth's summary of Dr. McCleary's testimony in this regard.

[21] See Mariel Alper & Matthew R. Durose, U.S. Dep't of Justice, Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-2014) (May 2019). https://bjs.ojp.gov/content/pub/pdf/rsorsp9yfu0514.pdf ("Justice Department Recidivism Study").

[22] It may be the case that my risk of being killed by a cow is substantially higher than my risk of being killed by a shark, but so what? Neither risk is fairly construed by any stretch of the imagination, as high. See Snopes, Are More

People Killed by Cows than Sharks?, https://www.snopes.com/fact-check/cows-kill-more-people-than-sharks/ (last visited Apr. 5, 2024) (showing that approximately 5 deaths nationally from shark attacks in 2022, whereas the average rate of national deaths from cows in a comparable time period was 22). Thus, my risk of death by cow as a resident of the United States may be more than four times greater than my risk of death by shark. This is analogous to the aggregate recidivism rate. It is absurd to conclude from those statistics that the risk of death by cow is high merely because it is higher than my risk of death by shark. To the contrary, the risk is extremely low for either threat by any objective measure.

[23] *For instance, if the risk of reoffense was uniform or nearly uniform across the class of sexual offenders, then the aggregate recidivism rate would speak far more to the risk of reoffense presented by an individual like Torsilieri. As discussed below, because the risk of reoffense is so heavily skewed by a small subset of sexual offenders, the aggregate recidivism rate is not a good indicator of individual risk.*

[24] *The Justice Department Recidivism Study compared the likelihood that persons convicted for rape or sexual assault would be arrested for rape or sexual assault in the nine years following their release (7.7%) to the likelihood that a person convicted of any offense would be arrested for rape or sexual assault (2.3%) in the nine years following their release. Justice Department Recidivism Study at 5. Thus, consistent with how the aggregate recidivism rate was expressed by the experts, the sexual offender group was about 3.35 times more likely to be* ***rearrested*** *for a sexual offense, although the Majority construes this as a "reoffense" rate. See Majority Op. at 37. But, the Justice Department Recidivism Study also states that because "not all arrests result in a conviction or reimprisonment, recidivism rates based on these measures are lower than those based on an arrest." Justice Department Recidivism Study at 3. Thus, if anything, the Justice Department Recidivism Study overstates recidivism if recidivism is understood to be based on new convictions rather than new arrests for sexual offenses.*

Notably, no distinction is made in the Justice Department Recidivism Study between adult and juvenile offenders for those calculations. In J.B., this Court compared multiple studies that collectively suggested an aggregate recidivism rate range of 2-7% for juvenile sexual offenders, the top end of which is not significantly different from the Justice Department Recidivism Study's sexual rearrest rate for all offenders. See J.B., 107 A.3d at 17. Although these studies involve different populations over different time periods, nothing about these numbers suggests a high rate of sexual recidivism for adult sexual offenders. The Justice Department Recidivism Study suggests that less than 8 in 100 of those convicted of rape and sexual assault will be rearrested for a similar offense in the nine years following their release. That means that at least 92 of 100 will not be rearrested for similar offenses.

[25] *Torsilieri's experts testified that studies consistently show that 80-95% of sex offenders will not recidivate sexually. See supra n.14.*

[26] *"Appellate courts are limited to determining 'whether there is evidence in the record to justify the trial court's findings.'" Commonwealth v. Cosby, 252 A.3d 1092, 1129 (Pa. 2021) (quoting O'Rourke v. Commonwealth, 778 A.2d 1194, 1199 n.6 (Pa. 2001)). When evidentiary support for factual findings can be discerned from the record, we are bound by them. Id.*

[27] *There is no debate in this case that the first element was satisfied because the presumption*

of a high rate of recidivism "impact's one's right to reputation." See Majority Op. at 33 n.13 (citing J.B., 107 A.3d at 16).

[28] All persons convicted of certain Tier I, Tier II, or Tier III offenses under 42 Pa.C.S. § 9799.14 (as limited by the SVP definition set forth in Section 9799.12), are subject to an SVP assessment by SOAB. 42 Pa.C.S. § 9799.24(a). That assessment includes consideration of a multitude of factors that go beyond the mere commission of an enumerated offense. See 42 Pa.C.S. § 9799.24(b)(1)-(4). After SOAB submits its report, the sentencing court conducts a hearing to determine "whether the Commonwealth has proved by clear and convincing evidence that the individual is" an SVP, that is, whether the person possesses "a mental abnormality or personality disorder that makes the individual likely to engage in predatory sexually violent offenses." 42 Pa.C.S. §§ 9799.24(e)(3); 9799.12.

[29] In addition to relying on this Court's identification of a superior alternative in J.B., the trial court also credited Torsilieri's experts' testimony that "several risk assessment tools, including Dr. Hanson's Static-99 and Static-99R," 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[.]" Trial Court Opinion, 8/23/2022 at 11-12. However, while it may be good policy to adopt those alternatives, to satisfy the third prong of the irrebuttable presumption test it is enough to know that the Commonwealth already employs a superior alternative that would better serve to protect individuals' constitutional rights to reputation.

[30] The Majority signaled that J.B. controls and would resolve the third prong in Torsilieri's favor, but that is dicta as the Majority does not reach the third prong under its analysis. See Majority Op. at 33 n.13.

[31] As explained above, I do not join the first part of Justice Wecht's opinion in which he would dispose of the irrebuttable presumption doctrine sua sponte. See supra note 7.

[32] The Majority in Torsilieri I determined that the third and fifth Mendoza-Martinez factors have little relevance here. I have no dispute with that determination.

[33] As a Tier III offender, Torsilieri is subject to lifetime registration. 42 Pa.C.S. § 9799.15(a)(3). Consequently, he must report in person on a quarterly basis. 42 Pa.C.S. § 9799.25(a)(3). Thus, over twenty-five years, Torsilieri must report in person one-hundred times.

[34] "Appellee adds that the telephonic registration and notification option to reduce in-person visits ... is currently not operational, despite Subchapter H being enacted over five years ago." Majority Op. at 44-45.
